



---

**Human Rights Thematic  
Review on the use of police  
powers to stop and search  
and stop and question  
under the Terrorism Act  
2000 and the Justice and  
Security (NI) Act 2007**

## **CONTENTS**

	<b><u>PAGE NO.</u></b>
INTRODUCTION.....	1
TERMS OF REFERENCE.....	4
BACKGROUND.....	5
EXTERNAL OVERSIGHT.....	13
THE THREAT LEVEL.....	15
LEGAL FRAMEWORK: POWERS AND DUTIES.....	21
- DUTIES OF POLICE: GENERAL.....	21
- POLICE POWERS: TERRORISM LEGISLATION.....	31
○ TERRORISM ACT 2000 (TACT) .....	31
○ JUSTICE AND SECURITY (NI) ACT 2007 (JSA) .....	52
CONDUCT OF SEARCHES.....	78
BRIEFING OF OFFICERS.....	81
MONITORING THE USE OF TACT AND JSA POWERS.....	83
MONITORING ETHNICITY AND COMMUNITY BACKGROUND.....	85
STATISTICAL ANALYSIS.....	88
PHOTOGRAPHY.....	95
RECORD KEEPING.....	95
YOUNG PEOPLE.....	97
COMMUNITY ENGAGEMENT.....	99
TRAINING.....	104
PSNI POLICY.....	108
CONCLUSION.....	110
RECOMMENDATIONS.....	113

## INTRODUCTION

There continues to be significant concern and public debate about the use of police powers to stop and search and stop and question, particularly those powers that may be exercised without an officer having a reasonable suspicion that the person has been involved in criminality. In other words, the powers contained within the Terrorism Act 2000 (TACT) and the Justice and Security (Northern Ireland) Act 2007 (JSA). Stakeholders brought a number of concerns to the Human Rights and Professional Standards Committee of the Policing Board. They considered, with some justification, that the exercise of powers to stop and search or question without suspicion is a significant intrusion into personal liberties and a potential infringement of rights guaranteed by the European Convention on Human Rights (the ECHR). Whether, however, the use of the powers is in accordance with law, necessary in a democratic society and proportionate requires more detailed analysis. That analysis was commenced and was largely carried out by the Human Rights and Professional Standards Committee on behalf of the Policing Board. Following a restructuring of its Committees, that analysis was concluded by the Performance Committee (the Committee), which has statutory responsibility to monitor the compliance of the PSNI with the Human Rights Act 1998.<sup>1</sup>

The Human Rights Advisor to the Policing Board, who has a high level of security clearance to enable her to access closed material, carried out a review of the policy, practice and application of the powers by the PSNI. She advised the Committee that at every stage of the process she was assisted by the PSNI in accessing documents, observing training, speaking with officers and observing the operational use of the powers. She was not denied access to any document (including closed material) or to any person with whom she wished to consult. The Human Rights Advisor requested and received specific briefings, where that was considered necessary. This thematic review report takes all of that information into account. In some instances, however, it has

---

<sup>1</sup> As per section 3(b)(ii) of the Police (Northern Ireland) Act 2000.

not been possible to detail information which was contained in closed material, due to its sensitivity. Where possible, reference is made to the source of the information even if it has not been possible to reproduce it. The aforementioned analysis has culminated in this thematic review. This review report is up to date as at June 2013. Given the time required by Members of the Committee and of the Board to consider the report and to receive a response to factual accuracy checking there has been some time lag in publication. A follow-up report will, however, be forthcoming in due course to deal with emerging issues and any new policy or practice since June 2013. This review has been adopted by both the Committee and the Board.

To put the findings and recommendations of the review in context, this report must be read as a whole. Extracts should not be relied upon out of context. Throughout this report, reference is made to good practice in addition to formal recommendations. The Committee expects the PSNI to consider and respond to the good practice guidance as well as to the recommendations.

The debate about the police use of powers to stop and search and stop and question can become clouded by many false assumptions. For example, that to undertake a critical analysis of the use of the powers is to condone or turn a blind eye to the threat of terrorism. Conversely it has been argued, and the Committee accepts, that to fail to scrutinise robustly the police use of such powers is to fail to ensure that the police service is accountable to all members of the community. Any suggestion that human rights protection is a mechanism to protect those who put the community in danger must be challenged.

In the words of David Anderson Q.C., the Independent Reviewer of Terrorism Legislation, which the Committee cannot improve upon “While most counter-terrorist powers seem set to persist for some time, it remains the position that these are extreme measures which are therefore deserving of searching inquiry and review. The values of a liberal democracy deserve support from

laws against terrorism, but the same values require that those laws be subject to strict scrutiny.”<sup>2</sup>

At the outset, the Committee wishes to record its gratitude to the Police Service of Northern Ireland (PSNI) and to Assistant Chief Constable G. Hamilton, Assistant Chief Constable Finlay, Assistant Chief Constable M. Hamilton and Inspector Jackson. They have given of their time over the course of this review and approached it with openness and integrity. Inspector Jackson in particular has dedicated a considerable amount of time and effort to assist in the process of review. When required, he also facilitated the Human Rights Advisor’s access to relevant information. Other key stakeholders and members of the community have provided enormous assistance to the Human Rights Advisor and to the Committee. They provided personal testimony and reasoned argument on the general and specific issues of concern. The Committee also wishes to record its gratitude to Lord Carlile CBE, Q.C., Robert Whalley CB and David Anderson Q.C., all of whom attended meetings with the Committee whenever invited and discussed the issues and their findings. Their input has been of enormous assistance to the Human Rights Advisor and to the Committee.

It has been necessary to prioritise those issues which are of most concern to stakeholders. Therefore, this thematic review report does not cover every issue or every power. This report does not, however, mark the end of the Committee’s process of review. There continue to be new developments which will have to be monitored and reported upon in due course. It is hoped this thematic report will assist the community by putting into the public domain as much information about the use of the powers as is possible and encourage further debate and engagement with the Committee the community and the police.

---

<sup>2</sup> *The Terrorism Acts in 2011 Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, David Anderson QC, June 2012, at paragraph 11.7.

## TERMS OF REFERENCE

The Human Rights and Professional Standards Committee agreed terms of reference for the review, the objective being to monitor and report upon PSNI compliance with the Human Rights Act 1998 in its exercise of the powers contained within the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 as follows:

The review will consider but will not be limited to:

- Whether the PSNI acts in accordance with the law.<sup>3</sup> The review will consider both the organisational framework and practice;
- Whether the operational exercise of the powers is in accordance with the law;
- Whether the powers are being used disproportionately;
- Whether PSNI training is appropriate to ensure officers understand the limit as well as the extent of the powers; and
- The impact on community confidence.

---

<sup>3</sup> Such an assessment is central to monitoring compliance with the Human Rights Act 1998, which requires as a first and fundamental step, that all police action is in accordance with the law.

## BACKGROUND

To put this review in context and to explain the significant measures implemented by the PSNI over the last two years, a brief history of the development of the powers to stop and search and to question is merited.

The concern and subsequent debate, which prompted this thematic review, about the use of powers to stop and search and question can be traced back to the use by police of the power under section 44 of the Terrorism Act 2000 (TACT). Section 44, which was available to all police services across the United Kingdom, did not require an individual police officer to have a reasonable suspicion that a person had committed any offence. All that was required was that a senior officer had authorised any constable in uniform to stop a pedestrian or a vehicle within a designated area. An authorisation could be given where the person giving it considered it “expedient” for the prevention of acts of terrorism. “Expedient” was held to mean something less than necessary.<sup>4</sup> The PSNI considered it to be an essential and effective tool to combat terrorism but the frequency and manner of its use caused resentment for some and appeared to risk undermining community confidence in policing.

Many, including Lord Carlile of Berriew CBE, Q.C. (the then Independent Reviewer of the Terrorism Act), questioned its efficacy. Reporting in 2008, Lord Carlile CBE, Q.C. said “I am sure beyond doubt that section 44 could be used less and expect it to be used less. There is little or no evidence that the use of section 44 has the potential to prevent an act of terrorism as compared with other statutory powers of stop and search.... Its utility has been questioned publicly by senior Metropolitan Police staff with wide experience of terrorism policing.”<sup>5</sup> Despite those serious reservations, he was of the view at that time that the powers *themselves* remained necessary and proportionate to the continuing and serious risk of terrorism but that their use must be

---

<sup>4</sup> *R (on the application of Gillan (FC) & another (FC) v Commissioner for Police for the Metropolis & another* [2006] UKHL 12.

<sup>5</sup> *Report on the Operation in 2007 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, Lord Carlile of Berriew CBE, Q.C., June 2008 at paragraph 130.

reduced and exercised only when necessary. It is important to record that Lord Carlile CBE, Q.C. was not directing those particular remarks to Northern Ireland. The general principles are, however, sound and apply with equal force to Northern Ireland.

The section 44 power was challenged in the UK courts and proceeded through to the UK House of Lords and thereafter to the European Court of Human Rights (ECtHR). To fully contextualise the significant changes that have been effected but also to reinforce the unequivocal guidance provided by the courts it is worth setting out in some detail the judicial commentary on the TACT without suspicion power.<sup>6</sup>

In 2006, the House of Lords considered both the use of the powers contained within TACT and the powers themselves (the *Gillan* case).<sup>7</sup> Their Lordships emphasised the importance of the issues and stressed “it is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence.”<sup>8</sup> The Committee wishes to stress its unequivocal acceptance of that founding principle, which was the starting point for consideration of the use of police powers in this thematic review. However, the Committee also understands and accepts that this is not an absolute rule: the European Convention on Human Rights (ECHR) expressly permits some exceptions to it. Furthermore, the Committee accepts, as the vast majority of stakeholders and contributors to this review also accepted, police powers directed at combating terrorism and protecting the public are an important tool to guarantee the protection of human rights such as the right to life guaranteed by Article 2 of the ECHR.

---

<sup>6</sup> JSA powers have not been subjected to the same degree of judicial scrutiny but given the similarity in the basis for the use of the powers the commentary and findings on TACT can be read across to JSA.

<sup>7</sup> *R (on the application of Gillan (FC) & another (FC) v Commissioner for Police for the Metropolis & another* [2006] UKHL 12, given on 8 March 2006.

<sup>8</sup> [2006] UKHL 12, Lord Bingham of Cornhill, at paragraph 1.



The House of Lords in the *Gillan* case held that while the section 44 power was extremely wide, Parliament had intended to permit police officers to stop and search where it was expedient rather than necessary so long as the power was subject to effective constraints; any departure from the ordinary rule, however, called for careful scrutiny. The constraints, which the House of Lords referred to, included the fact that the senior officer authorising the use of the power had to reasonably consider it expedient; the authorisation had to be communicated to the Secretary of State (who could cancel or restrict it); the authorisation had to be expedient for prevention of acts of terrorism and must be directed to that overriding objective; the authorisation could not extend beyond a police area;<sup>9</sup> the authorisation was limited in time; and the powers conferred on a constable could only be exercised to search for articles of a kind which may be used in connection with terrorism.

The House of Lords considered evidence submitted by the chief officer of the Metropolitan Police and the Secretary of State, both of whom averred that intelligence had directed the authorisation for the whole of London<sup>10</sup> and for the purposes not just of disrupting an actual attack but of disrupting terrorism at an early stage. Furthermore, the Secretary of State emphasised the importance of using the powers to gather intelligence either for the purpose of disrupting identified risks or as a means of obtaining information that could lead to the identification of potential risks. The House of Lords considered that an authorisation which went beyond what was reasonably expedient or which was renewed by way of bureaucratic exercise would be problematic. In the case under consideration, however, their Lordships were satisfied that the authorisations had been given and renewed in accordance with the strict terms of TACT.

---

<sup>9</sup> Note, however, in Northern Ireland the whole of Northern Ireland was (and is) one police area.

<sup>10</sup> The particular facts of the case related to the use of stop and search in London by the Metropolitan Police. The principles set out in the judgment, however, apply to all police services in the United Kingdom.

The House of Lords considered expressly whether the section 44 power itself or the actual use of the power contravened Articles 5, 8, 10 and 11 ECHR.<sup>11</sup> In respect of Article 5 their Lordships held that, viewed objectively and in the absence of special circumstances, the procedure involved only a temporary restriction of movement which could not be described as a deprivation of liberty. That was because “the procedure will ordinarily be relatively brief. The person will not be arrested, handcuffed, confined or removed to any different place.”<sup>12</sup> Lord Scott of Foscote said that the relative brevity of the search meant that any deprivation of liberty “would usually be no more than theoretical”.<sup>13</sup> That is an important constraint for the lawful exercise of the power.

In respect of Article 8, their Lordships found no infringement: the search, which was an ordinary superficial search, did not constitute a lack of respect for private life. It did not involve an intrusion of the level of seriousness to engage Article 8. For example, an opening of bags of the kind which passengers routinely submit to at airports was not incompatible with Article 8. It was, however, accepted that there may well be an interference with Article 8 if the officer perused an address book, diary or correspondence.

Pausing there, it can be noted that during the early stages of this thematic review, one example of a search during which a police officer studied personal documents was brought to the attention of the Human Rights Advisor to the Policing Board. She discussed that with the PSNI and was satisfied that instance was not representative of police policy but she was concerned that it could be resorted to in practice. It should, therefore, be made clear to all officers that interrogation of a person’s personal documents is not permitted.<sup>14</sup> This is considered further below.<sup>15</sup>

---

<sup>11</sup> Article 5 the right to liberty and security, Article 8 the right to respect for private and family life, Article 10 freedom of expression and Article 11 freedom of assembly and association.

<sup>12</sup> [2006] UKHL 12, Lord Bingham of Cornhill, at paragraph 25.

<sup>13</sup> [2006] UKHL 12, Lord Scott of Foscote, at paragraph 63.

<sup>14</sup> It may not be immediately apparent that a document is purely personal but as soon as the officer identifies it as a purely personal document, the officer should cease examining it.

<sup>15</sup> At page 95 below.

The House of Lords considered that whilst Articles 10 and 11 ECHR had not been infringed on the facts of the particular case, they may be infringed where, for example, the powers were used to silence a heckler at a political meeting. Their Lordships stressed that “the public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred.”<sup>16</sup> If the power was exercised in such a way it would be arbitrary and the antithesis of lawful. As *per* Lord Bingham of Cornhill “anyone stopped and searched must be told by the constable all he needs to know. In exercising the power the constable is not free to act arbitrarily, and will be open to civil suit if he does. It is true that he need have no suspicion before stopping and searching a member of the public. This cannot, realistically, be interpreted as a warrant to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting. It is to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion.”<sup>17</sup> A proper exercise of the power to stop and search can be better described as an “intuitive stop” rather than a random stop.<sup>18</sup>

Considering the exercise of the power by an individual officer, Lord Brown of Eaton-Under-Heywood said “... the real purpose and value of this power... is not to stop and search people who are obviously not terrorist suspects... It is hoped, first, that potential terrorists will be deterred (certainly from carrying the tools of their trade) by knowing of the risk they run... and, secondly, that by the exercise of this power police officers may on occasion (if only very rarely) find such materials and thereby disrupt or avert a proposed terrorist attack.”<sup>19</sup> Lord Brown made it absolutely clear that a selective use of the power is its *only* legitimate use. To stop and search those regarded as presenting no conceivable threat would constitute an arbitrary exercise of the power and therefore an abuse of the power.

---

<sup>16</sup> [2006] UKHL 12, Lord Bingham of Cornhill, at paragraph 34.

<sup>17</sup> [2006] UKHL 12, Lord Bingham of Cornhill, at paragraph 34-35.

<sup>18</sup> See for example, the review by John Rowe QC in 2001 of the Prevention of Terrorism (Temporary Provisions) Act 1989.

<sup>19</sup> [2006] UKHL 12, Lord Brown of Eaton-Under-Heywood, at paragraph 77.

Following the dismissal of their case by the House of Lords, the applicants in *Gillan* lodged an application with the European Court of Human Rights (the ECtHR). Judgment was given in January 2010.<sup>20</sup> The ECtHR disagreed with the UK House of Lords and held that the use by police of the section 44 TACT power was incompatible with Article 8 ECHR because it was “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.”<sup>21</sup> In other words, the safeguards provided by domestic law had not been demonstrated to constitute a real curb on the wide powers afforded to the police so as to offer the individual adequate protection against arbitrary interference. The ECtHR also observed, although it reached no finding on the point as it did not have to, “although the length of time during which each applicant was stopped and searched did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5.”<sup>22</sup>

The UK Government asked for the ECtHR decision to be referred to the Grand Chamber. That request was rejected by the Grand Chamber on 30 June 2010, which meant that the judgment of the ECtHR became final and binding on the United Kingdom Government. The UK Government was then obliged to take steps to amend or repeal section 44 TACT so as to give effect to the judgment. On 8 July 2010, the Home Secretary announced, pending a full review of TACT, that an authorisation for the use of section 44 TACT should not be given in respect of the stop and search of any person and that police should instead rely upon the section 43 TACT power which required individual officers to reasonably suspect a person to be a terrorist before stopping and searching him or her. In respect of vehicles, the Home Secretary announced that the section 44 TACT power could still be used but only if it

---

<sup>20</sup> *Gillan and Quinton v The United Kingdom* (Application No. 4158/05).

<sup>21</sup> *Gillan and Quinton v The United Kingdom* (Application No. 4158/05) at paragraph 57.

<sup>22</sup> *Ibid.* *Gillan* at paragraph 57. However, given the court’s primary finding it did not have to go on to consider whether Art. 5 had been infringed.

was considered necessary for the prevention of terrorism and the individual officers exercising the power held a reasonable suspicion that the vehicle to be stopped and searched was being used for the purposes of terrorism.<sup>23</sup> However whilst interim measures were introduced, the section 44 TACT power remained on the statute book until it was repealed in March 2011 by the Terrorism Act 2000 (Remedial) Order 2011 and replaced with a more tightly circumscribed power to stop and search without suspicion under section 47A TACT. The changes made by the remedial order were made permanent by the Protection of Freedoms Act 2012.<sup>24</sup>

During the intervening period, between the rejection of the UK Government's application to the Grand Chamber and the Home Secretary's announcement, the Human Rights and Professional Standards Committee expressed its concern about any continued use of section 44. Even the judgment of the UK House of Lords did not sanction the use of section 44 without specified safeguards. The Committee was satisfied that the rejection of the application to the Grand Chamber put beyond doubt any argument that the use of the power was compatible with the ECHR and that it was incumbent on the PSNI to re-consider its use of the power.<sup>25</sup> The PSNI suspended its use of section 44 on 8 July 2010.

While the use by the PSNI of TACT was significantly limited following the Home Secretary's announcement in July 2010, the powers available under the Justice and Security (Northern Ireland) Act 2007 (the JSA) were unaffected by the UK Government's review. It was therefore anticipated that there would be an increase in the use of those JSA powers which did not require reasonable suspicion. That subsequently proved to be the case albeit there was not a direct transfer of the use of powers: JSA powers did not increase to the level of TACT powers. The JSA powers were included within the review at a later

---

<sup>23</sup> The Home Secretary's statement to the House of Commons on 8 July 2010 is available at <https://www.gov.uk/government/speeches/stop-and-search-powers-under-the-terrorism-act-2000-section-44-home-secretarys-statement>

<sup>24</sup> The Protection of Freedoms Act 2012 received Royal Assent on 1 May 2012 and the provisions relating to stop and search under TACT came into force on 10 July 2012.

<sup>25</sup> Section 44 TACT remained on the statute book and was technically available to the PSNI but its use would have been incompatible with the ECHR.

date. Both TACT and JSA have now been amended by the Protection of Freedoms Act 2012 to more tightly circumscribe the exercise of the “without suspicion” powers and the procedure for authorising designated areas.

Despite the amendments, it is clear that the use of the powers prior to amendment raised significant and warranted concerns which have continued to undermine community confidence and has continued to influence community views of the use of the new powers. The powers as they now operate are analysed in detail below. Before turning to the specific powers, it is important to set this thematic review within its own context by considering external oversight and the security threat in Northern Ireland. Both must be taken into account in the analysis of the use of powers.

## EXTERNAL OVERSIGHT

Since 2001, the principal legislation on terrorism in the United Kingdom has been reviewed formally by an independent reviewer. Until 2011, the Independent Reviewer of Terrorism Legislation was Lord Carlile of Berriew CBE, Q.C. Since then, that responsibility has been assumed by David Anderson Q.C. The remit of the Independent Reviewer of Terrorism Legislation is to review annually the operation of the Terrorism Act 2000 (TACT) and Part 1 of the Terrorism Act 2006.<sup>26</sup>

Part VII of TACT applied to Northern Ireland alone. With its repeal, powers in relation to the police and the armed forces were effectively continued in the Justice and Security (Northern Ireland) Act 2007 (JSA). The JSA applies to Northern Ireland alone. The JSA is also reviewed by an independent reviewer. Robert Whalley CB was appointed, in May 2008, as the Independent Reviewer of the Justice and Security Act. His role is to review the operation of the powers contained in sections 21 to 32 JSA, and to review the procedures adopted by the General Officer Commanding Northern Ireland for receiving, investigating and responding to complaints.

The Northern Ireland Policing Board is under a duty to: secure the maintenance of the police in Northern Ireland; to ensure that the police are effective and efficient; and to hold the Chief Constable to account.<sup>27</sup> In carrying out those functions, the Policing Board is under a further duty to monitor the performance of the police in complying with the Human Rights Act 1998.<sup>28</sup> With the coming into force of the Human Rights Act in October 2000 all public authorities, including the PSNI and the Policing Board, are under a duty to act in a way which is compatible with the individual rights and freedoms contained within the ECHR.<sup>29</sup> The Policing Board must also monitor the performance of the PSNI in carrying out its functions with the aim of

---

<sup>26</sup> The work of the Independent Reviewer of Terrorism Legislation is accessible at <https://terrorismlegislationreviewer.independent.gov.uk/>.

<sup>27</sup> By sections 3(1), (2) and (3)(a) of the Police (Northern Ireland) Act 2000.

<sup>28</sup> By section (3)(b)(ii) of the Police (Northern Ireland) Act 2000.

<sup>29</sup> By virtue of section 6 of the Human Rights Act 1998.

securing the support of the community and in co-operation with the community.<sup>30</sup> The Policing Board must also make arrangements for obtaining the co-operation of the public with the police in the prevention of crime.<sup>31</sup> In respect of the use of powers to stop and search and question under TACT and JSA, the Policing Board has the specific responsibility to monitor and oversee the use and application of the powers.<sup>32</sup> The Policing Board, however, cannot investigate individual complaints about the use of stop and search and question powers, which is the role of the Police Ombudsman.

The Office of the Police Ombudsman for Northern Ireland was established in order to provide an independent system for investigating complaints against the police in Northern Ireland.<sup>33</sup> The Police Ombudsman will investigate individual complaints about PSNI use of stop and search and stop and question. The Committee receives relevant information from the Office of the Police Ombudsman on complaints and continues to monitor those complaints to discern any trends or patterns for which recommendations are required.

Despite the formal oversight structures in Northern Ireland, the PSNI is also accountable directly to the community it serves. That requires that PSNI senior commanders must take responsibility for all uses of the powers to stop and search and question. The PSNI must ensure its own internal accountability arrangements are capable of satisfying it that all officers exercise their powers in accordance with the law and so as to secure confidence in policing. If it is demonstrated that any officer, group of officers or the organisation is not using the powers appropriately the PSNI must have a mechanism for dealing robustly with that. Those mechanisms should be accessible to the community and subject to review and assessment by the statutory oversight bodies and relevant stakeholders. This is considered further below.

---

<sup>30</sup> By section 3(3)(b)(ia) of the Police (Northern Ireland) Act 2000.

<sup>31</sup> By section 3(3) of the Police (Northern Ireland) Act 2000.

<sup>32</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraph 13.1; *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, May 2013, at paragraph 5.14.

<sup>33</sup> By section 51 of the Police (Northern Ireland) Act 1998.



## THE THREAT LEVEL

Any analysis of counter-terrorism powers to stop and search and to question must take into account the incidence of threats to security. The Security Service has assessed the threat level in Northern Ireland from Northern Ireland related terrorism to be severe. “Severe” means that “a terrorist attack is highly likely.”<sup>34</sup> The Chief Constable has advised the Policing Board on a number of occasions that in Northern Ireland “the threat remains severe”. The threat level in Great Britain from Northern Ireland related terrorism is ‘moderate’, meaning an attack is possible but not likely. In respect of international terrorism, the threat level has been graded as ‘substantial’ across the United Kingdom, meaning an attack is a strong possibility.<sup>35</sup>

The Independent Monitoring Commission (IMC), which was founded on an International Agreement between the United Kingdom and Irish Governments, monitored and reported upon, amongst other things, the security normalisation measures taken by the UK Government in Northern Ireland and the activities of paramilitary groups.<sup>36</sup> The IMC reports subsequently recorded in some detail the activities of various paramilitary groups. In respect of dissident republican groups, the IMC’s focus (prior to its closing in July 2011) was on the Continuity IRA (CIRA), the Real IRA (RIRA), Republican Action Against Drugs (RAAD) and Oglagh na hEireann (ONH). In respect of loyalist groups the IMC focused upon the Loyalist Volunteer Force (LVF), the Ulster Defence Association, (UDA) the Ulster Volunteer Force (UVF) and the Red Hand Commando (RHC).

In its 22<sup>nd</sup> report, published in November 2009, the IMC recorded that the overall threat from dissident republican activity in the six months then under

---

<sup>34</sup> That is second highest in the potential threat levels. For further information see the Home Office website: <https://www.gov.uk/terrorism-national-emergency/terrorism-threat-levels>.

<sup>35</sup> The threat levels cited in this paragraph are correct as at 14 June 2013.

<sup>36</sup> The International Agreement upon which the IMC was founded was signed in November 2003. Thereafter the IMC published 26 reports: 20 reports were on paramilitary activity (of which 6 were ad hoc); 5 reports were on security normalisation; 1 report was a final ad hoc report following the closing of the IMC in July 2011 which analysed the changes, impacts and lessons learned between 2004 and 2011.

review had been higher than at any time since they first met in late 2003.<sup>37</sup> In its 23<sup>rd</sup> report, the IMC recorded that over the course of the next six months dissident republican groups remained “highly active and dangerous”. The IMC also stressed that was “not a reappearance of something comparable to the PIRA campaign”. The IMC recorded that it was “clear that while others are at risk the primary current strategic intent of dissidents is the murder of police officers and in addition making community policing more difficult”.<sup>38</sup> In its 25<sup>th</sup> report, published on 4 November 2010, the IMC recorded that various dissident groups “continued to pose a substantial and potentially lethal threat, particularly against members of the security forces... Dissident activities were a very serious matter by virtue of their range, their frequency and their nature.”<sup>39</sup>

However, the IMC remained of the view that the dissident republican campaign at that time “in no way matches the range and tempo of the PIRA campaign of the Troubles.”<sup>40</sup> The IMC went on to report that the activity “would undoubtedly have led to many more deaths, injuries and destruction had it not been for the operations of the law enforcement and security agencies North and South.”<sup>41</sup> Furthermore, that it had “not always been possible to ascribe some dissident activities to a particular group. In some cases... the dissidents responsible were not affiliated to any particular group.”<sup>42</sup> In respect of loyalist groups the IMC reported that there remained a level of serious criminality and paramilitary attacks.

In its 26<sup>th</sup> and final report, published on 4 July 2011, the IMC reported on the changes that had taken place between 2004 and 2011. It recorded major changes in paramilitary activity since 2004 but that “Dissident republicans are

---

<sup>37</sup> Twenty-second report of the Independent Monitoring Commission, November 2009.

<sup>38</sup> Twenty-third report of the Independent Monitoring Commission, May 2010, paragraph 2.6.

<sup>39</sup> Twenty-fifth report of the Independent Monitoring Commission, November 2010, paragraphs 2.2- 2.3.

<sup>40</sup> *Ibid*, paragraph 2.4.

<sup>41</sup> *Ibid*, paragraph 2.5.

<sup>42</sup> *Ibid*, paragraph 2.8.

brutally active, especially against members of the Police Service of Northern Ireland (PSNI) who are at greater threat than they were in 2004.”<sup>43</sup>

A PSNI statistical report records that “the security situation in Northern Ireland has improved significantly over the last decade with fewer security related deaths, shootings, bombings and paramilitary style shootings and assaults recorded in 2012/13 than ten years ago in 2003/04. However, a significant threat still remains as evidenced by the two security related deaths in 2012/13 and the numerous shooting and bombing incidents as well as the continued use of paramilitary style shootings and assaults.”<sup>44</sup> The statistical report sets out the number of security related deaths, shootings, bombing incidents, paramilitary style shootings and assaults and the number of firearms and explosives seized during the period 1 April 2012 to March 2013. The report provides some analysis as to how those figures compare to the previous ten years:

- During 2012/13 there were two security related deaths, one in October 2012 and one in November 2012. This is one more than in 2011/12 but is five fewer than the seven security related deaths recorded in 2003/04.
- In 2012/13 the police recorded 64 shooting incidents and 44 bombing incidents. This is three fewer shooting incidents and 12 fewer bombing incidents than in the previous year (2011/12). The combined numbers of shooting and bombing incidents have decreased in the last ten years with the lowest levels recorded during 2006/07 and 2007/08 before slightly increasing again in subsequent years.
- During 2012/13 there were 27 casualties resulting from paramilitary style shootings, six fewer than the previous year (2011/12) and 122 fewer than ten years ago in 2003/04. Of the 27 casualties resulting from paramilitary style shootings recorded in 2012/13, 26 were attributed to Republicans and one was attributed to Loyalists.

---

<sup>43</sup> *Ibid*, paragraph 5.6.

<sup>44</sup> *Police recorded security situation statistics, 1 April 2012 to 31 March 2013*, PSNI, May 2013, page 2.

- There were 36 casualties as a result of paramilitary style assaults in 2012/13; this is ten fewer than in 2011/12 and 113 fewer than the 149 recorded ten years ago in 2003/04. Of the 36 recorded in 2012/13, 27 were attributed to Loyalists and 9 were attributed to Republicans.
- There were 57 firearms seized by the PSNI during 2012/13 compared to 176 seized during the previous year. The number of firearms seized each year has fluctuated over the last ten years with a peak of 365 firearms in 2005/06.
- During 2012/13, 11.4kg of explosives was seized compared with 43.8kg in 2011/12.

Since 2011, when the IMC ceased its monitoring and reporting, there has been no similar source of public information about threat levels. That has, many feel, left a gap in the community's understanding of the threat and their understanding of the police response to it. Since then, the independent reviewers of TACT and JSA and the Policing Board have endeavoured to provide as much information to the community as possible within recognised limitations. Moreover, they have all encouraged the greater release of information to the community. The Secretary of State has announced twice yearly updates to the House of Commons on the security situation in Northern Ireland.

On 28 February 2013, the Secretary of State advised that the threat level remained severe. She went on to say that "It is clear from the violence carried out by both republican and loyalist groups that there are still people in Northern Ireland who demonstrate contempt for democracy and the rule of law. Their numbers remain small, but the threat they pose continues to be very real."<sup>45</sup> More recently, on 5 June 2013, the Secretary of State advised that "While the threat level in Northern Ireland remains at severe, progress

---

<sup>45</sup> The Secretary of State for Northern Ireland's statement to the House of Commons, 28 February 2013.

has been made. Excellent co-operation between the PSNI and other agencies has resulted in a number of arrests and charges over recent months.”<sup>46</sup>

As noted in the 2012 report of David Anderson Q.C., (Independent Reviewer of Terrorism Legislation), Northern Ireland Related Terrorism (NIRT) “is directed largely towards national security targets, with a view to provoking a repressive response. It has not mounted direct attacks on mass transport and has not sought in recent years to cause multiple deaths among the general public. NIRT does not involve suicide operatives: but it often gives warnings of explosions and (for that reason) is able to use the weapon of hoax. NIRT is locally based: it has few international connections (other than with the Republic of Ireland), sticks mainly to well-tried bomb-making technology and is more likely to communicate by word of mouth than by the internet. Many dissident republican terrorists are in their 40s or 50s (though some are much younger and some much older): most al-Qaida inspired terrorists tend to be in their 20s and 30s. NIRT is not self-standing but shades into both public disorder (which is sometimes used as a cloak for terrorist activity) and organised crime (which is often the main business of the terrorist, on the republican as well as the loyalist side, and where gang rivalry results in bombings and shootings which are not politically motivated). The intimidation created by NIRT is the product of frequent violent incidents in particular areas, rather than the background threat of a major spectacular such as 9/11 or 7/7.”<sup>47</sup>

However, Mr Anderson Q.C. recorded that dissident republican attacks focused principally on the police, remained widespread and that “the constant struggle against what remains of violent republicanism in Northern Ireland warn against complacency.”<sup>48</sup>

---

<sup>46</sup> The Secretary of State for Northern Ireland in response to a House of Commons Oral Question, 5 June 2013.

<sup>47</sup> *The Terrorism Acts in 2011 Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, David Anderson QC, June 2012, at paragraph 2.17.

<sup>48</sup> *Ibid*, at paragraph 2.30.

Despite the real and serious threat, the vast majority of the public have supported and endorsed the political process and policing, which has led to the devolution of policing and justice to the Northern Ireland Assembly. Communities, which formerly may have not supported the police, have engaged in an unprecedented way with policing and the justice system and their engagement on those issues has been a significant contribution to a more peaceful society. Despite the undeniable threat that remains, in particular from dissident republican groups, there appears to be general agreement that “it seems unlikely that it will turn into a large-scale campaign threatening Northern Irish society as a whole... Nor did it any longer have the capacity to destabilise political progress.”<sup>49</sup>

It remains therefore of critical importance that police use of powers to stop and search and to question are not permitted to undermine community confidence in the police. It is worth noting that in comments made to Mr Whalley CB (Independent Reviewer of the JSA) during his period of consultation in 2011/2012, the focus was “more on the quality of the police response than on the continuation of the powers as such”.<sup>50</sup> However, he also recognised that the continuation of such powers is, for some, a “stumbling block” and has a “potentially radicalising effect”.<sup>51</sup> Mr Whalley’s view, with which the Committee respectfully agrees, is that there must be a focus on the operational effectiveness of the use of the powers and the safeguards governing their use.

The Committee will continue to engage with the community and monitor the practical effect of the use of the powers and their impact on community confidence and ensure that a strong community policing ethos is adopted.

---

<sup>49</sup> *Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007 Fifth Report: 2011- 2012*, Robert Whalley CB, November 2012, at paragraph 65.

<sup>50</sup> *Ibid*, at paragraphs 80-85.

<sup>51</sup> *Ibid*, at paragraphs 80-85.

## **LEGAL FRAMEWORK: POWERS AND DUTIES**

To set this thematic review in context and to effectively monitor the PSNI use of powers, clarity of the legal framework within which the powers are used is essential. Furthermore, the community which is served by the PSNI is entitled to as much information about the powers as it is possible to give. For those reasons, this report sets out in some detail the legal framework, the relevant case law and the practice of PSNI. In places, it is enormously technical but where possible technical and legal language has been avoided. It is hoped that enhances rather than diminishes the report.

### **DUTIES OF POLICE: GENERAL**

Police officers have a duty to: protect life and property; to preserve order; to prevent the commission of offences; and, where an offence has been committed, to take measures to bring the offender to justice.<sup>52</sup> The police are further obliged to, so far as practicable, carry out their functions in co-operation with, and with the aim of, securing the support of the local community.<sup>53</sup> Those general duties must at all times inform the police use of powers to stop and search and question. While the powers to stop and search and question should be directed at fulfilling those duties, the police must operate within the strict limits of the powers themselves. A duty to protect life or property, for example, however laudable, does not permit a police officer to usurp or exceed the powers prescribed and circumscribed by express statutory provision. Where reasons are specifically provided by legislation for the lawful exercise of power, police may not rely on any other rationale for its use.

Each and every exercise of a lawful power must be in accordance with the ECHR. That means that when exercising powers contained within TACT and JSA police officers must respect and protect the human rights and

---

<sup>52</sup> Section 32(1) of the Police (Northern Ireland) Act 2000.

<sup>53</sup> Section 31A(1) of the Police (Northern Ireland) Act 2000.

fundamental freedoms protected by the ECHR so as to limit to the greatest extent possible any interference with those rights.

The Human Rights Act 1998 makes it unlawful for a public authority (which includes the police) to act in a way which is incompatible with the individual rights and freedoms contained within the ECHR unless, by reason of primary legislation, the police could not have acted differently or were acting so as to give effect to the provisions of primary or secondary legislation and that legislation cannot be read so as to give effect to ECHR rights.<sup>54</sup> That requires not only that police officers avoid infringing human rights but that they take proactive steps to secure individuals' rights. Those rights include the right to life,<sup>55</sup> the right not to be subjected to torture, or to inhuman or degrading treatment,<sup>56</sup> the right to liberty and security,<sup>57</sup> the right to a fair trial,<sup>58</sup> no punishment without law,<sup>59</sup> the right to respect for private and family life,<sup>60</sup> the right to freedom of thought, conscience and religion,<sup>61</sup> the right to freedom of expression,<sup>62</sup> the right to freedom of assembly and association,<sup>63</sup> and the right not to be discriminated against in the enjoyment of ECHR rights on any ground such as sex, race, colour, language, religious belief, political opinion, national or social origin, association with a national minority, property, birth or other status.<sup>64</sup> The ECHR underpins all action and policy of the police.

---

<sup>54</sup> By virtue of section 6 of the Human Rights Act 1998. Importantly, by section 3 of the Human Rights Act all primary and subordinate legislation must be read and given effect to in a way which is compatible with the ECHR. However, that does not affect the validity, continuing operation or enforcement of any incompatible primary legislation and does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

<sup>55</sup> Article 2 ECHR.

<sup>56</sup> Article 3 ECHR.

<sup>57</sup> Article 5 ECHR.

<sup>58</sup> Article 6 ECHR.

<sup>59</sup> Article 7 ECHR.

<sup>60</sup> Article 8 ECHR.

<sup>61</sup> Article 9 ECHR.

<sup>62</sup> Article 10 ECHR.

<sup>63</sup> Article 11 ECHR.

<sup>64</sup> Article 14 ECHR.



## Article 5 ECHR: the right to liberty and security

An important provision governing powers to detain and to arrest is Article 5 ECHR, which protects the liberty and security of each person. Article 5(1) provides that no person may be deprived of his or her liberty save in the circumstances prescribed by Article 5(1) (a) to (f).<sup>65</sup> That list of exceptions is exhaustive and must be given a narrow interpretation.<sup>66</sup> In addition to falling within one of the specific exceptions any restriction of the Article 5 right must be lawful and carried out in accordance with a procedure prescribed by law. In other words, a restriction which does not conform to national law will necessarily be in breach of Article 5(1) but if it does so conform it must also be compatible with the ECHR.

The ECtHR has emphasised consistently that it is one of the fundamental principles of a democratic society that the state must strictly adhere to the rule of law when interfering with the right to personal liberty.<sup>67</sup> No-one may be dispossessed of his or her liberty (meaning an individual's physical liberty), in an arbitrary fashion.<sup>68</sup> Article 5(1) applies to deprivation of liberty not mere restriction on movement but the distinction is not always easy to discern. In determining whether a level of restraint amounts to a deprivation of liberty the court will look at a number of factors such as the nature of the restraint, its duration and the effects and manner of the restraint in question. The duration of the detention is not, on its own, decisive. By way of example, the detention of a person for one hour prior to deportation and the detention of a person for

---

<sup>65</sup> The restrictions are: (a) lawful detention post-conviction by a competent court; (b) lawful arrest for non-compliance with a lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) lawful arrest and detention to bring a person before a competent legal authority on reasonable suspicion of having committed an offence or when reasonably considered necessary to prevent the commission of an offence or fleeing after having done so; (d) detention of a minor by lawful order for educational supervision or for purpose of bringing before competent legal authority; (e) lawful detention for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) lawful arrest or detention of a person for the purpose of preventing his unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

<sup>66</sup> *Ireland v United Kingdom* (1979-80) 2 EHRR 25; *Quinn v France* (1996) 21 EHRR 529.

<sup>67</sup> *Brogan v United Kingdom* (1989) 11 EHRR 117.

<sup>68</sup> *Engel v Netherlands* (1979-80) 1 EHRR 647; *Weeks v United Kingdom* (1988) 10 EHRR 293.

the purpose of carrying out a blood test have both been considered to amount to deprivations of liberty.<sup>69</sup>

The House of Lords, in the *Gillan* case, held that a short detainment for the purposes of carrying out a TACT stop and search would not normally amount to a deprivation of liberty.<sup>70</sup> That decision was considered upon application to the ECtHR. The ECtHR disagreed with the judgment of the UK House of Lords on a number of grounds, including on the application of Article 5 ECHR. The ECtHR observed that “although the length of time during which each applicant was stopped and searched did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5.”<sup>71</sup>

Therefore, the power to stop and search an individual does not necessarily give rise to an interference with the Article 5(1) rights of the individual: it is an assessment dependent upon the facts and circumstances of a particular case. Article 5(1) is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol 4. In a recent case, the Grand Chamber of the ECtHR held that in order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5(1), “the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of liberty and restriction on movement is one of degree or

---

<sup>69</sup> See for example, *X v Austria* (1979) Application 8278/78.

<sup>70</sup> *R (on the application of Gillan (FC) & another (FC) v Commissioner for Police for the Metropolis & another* [2006] UKHL 12, see, for example, Lord Bingham at paragraph 25.

<sup>71</sup> *Gillan and Quinton v The United Kingdom (Application No. 4158/05)*.at paragraph 57. However, given the ECtHR’s primary finding that the impugned stop and search power under section 44 TACT was incompatible with Article 8 ECHR, it did not have to go on to consider whether Article 5(1) ECHR had in fact been infringed.

intensity, and not of nature or substance.”<sup>72</sup> In a subsequent case, in the English High Court, it was held that “The first question is whether the search in the instant case amounted to a deprivation of liberty. Resolution of this question depends upon all the facts and circumstances of the particular case: the type of search, its duration, the manner in which it was conducted and its effect....”<sup>73</sup>

The fact that a stop and search *may* constitute a deprivation of liberty, depending on the circumstances, has important consequences. A detention will be unlawful and incompatible with the very essence of Article 5 where there is no record detailing such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it. It has been held that the “unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention [ECHR] and discloses a most grave violation”.<sup>74</sup> That underlines the central importance of record-keeping, beyond the administrative formalities required by TACT and JSA. Record-keeping is discussed below<sup>75</sup> but at this stage it is worth emphasising that record-keeping is not bureaucracy: it is a fundamental requirement to ensure compliance with the ECHR.

Furthermore, Article 5 prohibits detention which is arbitrary in its motivation or effect.<sup>76</sup> Therefore, a detention will be in violation of Article 5 if its purpose does not fall within Article 5(1) (a) to (f). A detention will also be arbitrary if its purpose falls within a permitted exception but it is disproportionate to its purpose or was resorted to in bad faith.<sup>77</sup> The requirement that the detention must be lawful means that the law on which the detention is based must itself be precise and accessible. It must be sufficiently precise so that a person may

---

<sup>72</sup> *Austin & Others v UK* (39692-09) at paragraph 57.

<sup>73</sup> *R (Roberts) v Metropolitan Police Commissioner* [2012] EWHC 1977 at paragraph 11. This case considered a challenge to the lawfulness of the exercise of a stop and search power under section 60 of the Criminal Justice and Public Order Act 1994.

<sup>74</sup> *Menesheva v Russia* Application 59261/00 (March 9, 2006).

<sup>75</sup> At pages 95 to 96 below.

<sup>76</sup> *Weeks v United Kingdom* (1988) 10 EHRR 293.

<sup>77</sup> Lord Hope in *R v Governor of HMP Brockhill ex parte Evans (No.2)* [2001] 2 AC 19, UKHL.

foresee, to a reasonable degree, the circumstances in which his or her detention may result. This is often described as the “quality of law” requirement.

### **Article 6 ECHR: right to a fair trial**

Article 6 ECHR, in so far as it is relevant to this thematic review, provides that in the determination of his/her civil rights and obligations or of any criminal charge against him/her, every individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The reasonable time requirement within the Article 6 ECHR right may be engaged at a pre-arrest stage, for example, during a search or as a result of the seizure of a person’s goods.<sup>78</sup> That demonstrates the seriousness with which the ECtHR treats pre-arrest entry, search and seizure. It is incumbent on police to treat it with equal seriousness.

### **Article 8 ECHR: respect for private life, the home and correspondence**

As long ago as 1765, the courts established the fundamental principle that the state may not enter private premises without express judicial or statutory authority. In a case concerning the entry onto a private dwelling and the removal of personal papers pursuant to an executive warrant, the absence of anything on the statute book providing express authority made the entry unlawful.<sup>79</sup> Since then, the common law has protected that principle which is now also guaranteed by Article 8 ECHR.

Article 8(1) ECHR provides that everyone has the right to respect for his private and family life, his home and his correspondence. By Article 8(2) there may be no interference by a public authority (including the police) with the exercise of the right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder

---

<sup>78</sup> *Eckle v Germany* (1983) 5 EHRR 1.

<sup>79</sup> *Entick v Carrington* [1765] 19 State Trials 1029.

or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Article 8 contains both negative and positive obligations. The state is under a negative obligation not to interfere with privacy rights but the ECtHR has extended Article 8 to impose a positive obligation on the state to take measures to prevent private parties from interfering with those rights.<sup>80</sup>

As a general rule, the ECtHR has confirmed that any entry onto private premises (whether a person's home or business premises)<sup>81</sup> is an interference with the right guaranteed by Article 8(1) which must therefore meet the requirements of Article 8(2). As a starting point, any interference must be prescribed by law. In other words, there must be a legal basis for the power. But it does not end there: any statutory or common law power of entry must be exercised in accordance with the ECHR and Article 8(2) in particular. The entry or search must be proportionate to one of the aims set out in Article 8(2).<sup>82</sup> As stated above, for an interference to be prescribed by law the law must itself be accessible and foreseeable and it must provide adequate safeguards against abuse.

The case law of the ECtHR clearly establishes that covert and secret surveillance by state agencies constitutes a particular threat to democracy and freedom which requires strict justification in the interest of national security or for the prevention of crime. The system itself must provide adequate and effective guarantees against abuse.<sup>83</sup> A police power to stop and question is not covert surveillance but it "partakes some of the characteristics of surveillance. The fact that it can lead to stopping and questioning in circumstances which do not ensure even privacy between the police and the individual adds to the potential for invasions of the Article 8

---

<sup>80</sup> *Y v the Netherlands* (1985) 8 EHRR 235.

<sup>81</sup> *Niemietz v Germany* (1993) 16 EHRR 97.

<sup>82</sup> Article 8(2) aims are: the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.

<sup>83</sup> For example, in *Klass v Germany* (1979-80\_ 2 EHRR 214; *Erdem v Germany* (2002) 55 EHRR 383; *In the matter of an application by Fox and McNulty for judicial review and in the matter of an application by Canning for judicial review* [2013] NICA 19.

right... The relevant law must be clear and precise and thus will require rules to ensure that the power is not capable of being arbitrarily exercised in circumstances which do not justify its exercise.”<sup>84</sup>

Moreover, there must be no other less intrusive means of achieving the legitimate aim and the power must be exercised proportionately. While the absence of prior judicial authorisation for an entry or search does not, of itself, mean the exercise of the power is unlawful it is clear that any power exercised in the absence of such authorisation must be subject to very anxious scrutiny. In particular, if asked to determine the lawfulness of such a power, the court will scrutinise the safeguards provided by domestic law to prevent the disproportionate interference with the Article 8 ECHR right and will consider the manner in which the power has been exercised in practice.<sup>85</sup>

The powers to enter and search contained in the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE)<sup>86</sup> is considered by the vast majority of legal commentators to meet those requirements. For example, PACE provides a statutory basis for the powers, it requires prior judicial authorisation where practicable, it restricts powers of entry to more serious offences, it requires that less intrusive measures have either failed or been impracticable, it provides protection for confidential, journalistic and privileged material and, importantly, it enshrines the principle that a search must be limited to the extent reasonably required. However, the ECtHR has held that even compliance with the technicalities of PACE does not automatically mean that the police will have exercised the PACE powers in a way which is compatible with the ECHR.

In one case, police officers in Great Britain exercising a power pursuant to a PACE warrant, entered a person’s home forcibly to search for stolen cash. However, they did so in the mistaken belief that the mother of the suspect

---

<sup>84</sup> *In the matter of an application by Fox and McNulty for judicial review and in the matter of an application by Canning for judicial review* [2013] NICA 19, at paragraph 45.

<sup>85</sup> *Camenzind v Switzerland* (1999) 28 EHRR 458; *McLeod v United Kingdom* (1999) 27 EHRR 493.

<sup>86</sup> PACE powers are not considered specifically in this thematic review.

resided in the premises whereas the residents of the premises were wholly unconnected to the suspect. The ECtHR found that the police had not undertaken basic steps to verify the identity of the residents who were caused considerable fear and distress by police actions. As a result, the exercise of the power by the police was not proportionate. The ECtHR said “Put in Convention [ECHR] terms, there might have been relevant reasons, but, as in the circumstances they were based on a misconception which could, and should, have been avoided with proper precautions, they cannot be regarded as sufficient.”<sup>87</sup> The ECtHR did not query the police officer’s genuine belief as to the identity of the residents but stressed that Article 8 was intended to protect against abuse of power, however motivated. The ECtHR held therefore that the interference was not justified under Article 8(2) ECHR. It is therefore essential that police officers exercise caution and care before interfering with a person’s ECHR rights and carry out sufficient checks to satisfy themselves that they are acting on reliable information.

The ECtHR has been similarly strong in its approach to the powers of other public authorities to seize documents during a search of premises. French customs law was condemned as permitting customs officials to exercise powers which were unduly wide and “too lax and full of loopholes for the interferences with the applicant’s right to have been strictly proportionate to the legitimate aim pursued.”<sup>88</sup> In another case, the ECtHR found an unjustified violation by German police in the search of a lawyer’s business premises because the warrant was drawn in broad and unspecific terms: the warrant referred only to “documents” without limitation. Furthermore, because the search was of a lawyer’s premises the law failed to provide additional safeguards for the protection of professional confidence, it was carried out without the presence of an independent observer and was more extensive than was necessary for its legitimate purpose.<sup>89</sup>

---

<sup>87</sup> *Keegan v United Kingdom* (2007) 44 EHRR 33.

<sup>88</sup> *Funke v France* (1993) 16 EHRR 297. In that case, customs officials searched the applicant’s home and seized a wide range of documents as part of an inquiry into exchange-control offences. The court was particularly critical of the customs’ officials’ powers to themselves assess expediency, number, length and scale of the inspection.

<sup>89</sup> *Niemetz v Germany* (1993) 16 EHRR 97.

Should it require restatement, this emphasises the extent to which a court will consider individual practice and not just the policy or legal framework. Therefore, the Committee and the Policing Board must be concerned with police practice. The powers contained within TACT and JSA, which do not require the prior issue of a warrant before entering premises, are less obviously compatible with the ECHR than PACE. Those powers must, and will be, subjected to an even more critical review and analysis and judged according to their exercise in practice. As the ECtHR has stressed, where a search takes place without prior judicial authorisation it is important to be “particularly vigilant” to ensure that the power is subject to very strict limits.<sup>90</sup>

### **PSNI Code of Ethics**

In carrying out their functions, police officers must be guided by the PSNI Code of Ethics.<sup>91</sup> The Code is underpinned by the ECHR and other relevant international treaty obligations. It emphasises that officers must safeguard the rule of law, protect human dignity and conduct investigations in an accountable and responsible manner. PSNI Service Improvement Department and the Office of the Police Ombudsman for Northern Ireland both judge a police officer’s conduct according to the standards laid out in the Code of Ethics.

### **Northern Ireland Act 1998**

The PSNI are also obliged to have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status, gender, sexual orientation, between persons with a disability and persons without, and between persons with dependants and persons without.<sup>92</sup> Furthermore, PSNI must have regard to the desirability of promoting good relations between persons of different religious belief,

---

<sup>90</sup> *Camezind v Switzerland* (1999) 28 EHRR 458.

<sup>91</sup> Section 31A(2) of the Police (Northern Ireland) Act 2000.

<sup>92</sup> Section 75(1) of the Northern Ireland Act 1998.



political opinion or racial group.<sup>93</sup> It is unlawful for PSNI to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.<sup>94</sup>

## **POLICE POWERS: STOP, SEARCH AND QUESTION UNDER TACT AND JSA**

The statutory powers available to PSNI officers *specifically* for the purpose of investigating terrorist activity are contained, principally, in the Terrorism Act 2000 (TACT) and the Justice and Security (Northern Ireland) Act 2007 (JSA). The powers available to all police services in the United Kingdom under TACT include: 'cordoned' areas; arrest without warrant; extended detention; search of premises and persons; stop and search in designated areas; restrictions on parking; and, port and border controls. JSA provides the PSNI with additional powers of entry, search and seizure that are not available to police services in Great Britain under the common law or statutory provisions such as TACT.

This thematic review is limited to the powers contained within TACT and JSA but it must be remembered that the police retain all of the other more 'orthodox' powers available to tackle crime to which the safeguards of the Police and Criminal Evidence (Northern Ireland) Order 1989 apply. TACT and JSA must be viewed as exceptional or unorthodox powers to which recourse should only be had when other powers are insufficient.

## **TERRORISM ACT 2000 (TACT)**

This thematic review is concerned only with the use by PSNI of powers to stop and search and to stop and question under TACT and JSA, however, the power to arrest a person suspected of terrorism offences is clearly relevant to the exercise of those powers. Therefore, before dealing with stop and search powers a brief analysis of the TACT power to arrest on reasonable suspicion is set out below.

---

<sup>93</sup> Section 75(2) of the Northern Ireland Act 1998.

<sup>94</sup> Section 76(1) of the Northern Ireland Act 1998.

## **POWER OF ARREST ON REASONABLE SUSPICION OF BEING A TERRORIST (SECTION 41 TACT)**

### **Terrorism**

“Terrorism” is defined by TACT as the use or threat of action where the action involves serious violence against a person, serious damage to property, which endangers another person’s life, creates a serious risk to the health or safety of the public or a section of the public, or is designed to interfere with or seriously to disrupt an electronic system. If firearms or explosives are used or threatened, the use or threat of use must be made for the purposes of advancing a political, religious, racial or ideological cause. If firearms or explosives are not used, an additional element is required: the use or threat must be designed to influence the government or an international governmental organisation, or to intimidate the public or a section of the public. An action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.<sup>95</sup>

This is an extremely wide definition, which gives the police a very wide discretion. The definition is, however, one that corresponds closely to the model definition provided by the UN Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism.<sup>96</sup> The definition of terrorism includes any such action whether intended to take place in the United Kingdom or elsewhere. In other words, it is of extraterritorial effect. David Anderson Q.C., the Independent Reviewer of Terrorism, has commented extensively on the territorial reach of TACT. For example, the concern that “the broad scope of the counter-terrorism legislation may serve to encourage police in the belief, and public in the acceptance, that it can be used against anyone and at any time.”<sup>97</sup> He intends to keep that under review and the Committee will discuss that further with him.

---

<sup>95</sup> Section 1 of the Terrorism Act 2000.

<sup>96</sup> Martin Scheinin, December 2010, Human Rights Council, 16<sup>th</sup> Session, A/HRC/16/51.

<sup>97</sup> *The Terrorism Acts in 2011 Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, David Anderson QC, June 2012, at paragraph 3.7.

## Suspected terrorist

A police constable may arrest without warrant a person whom he reasonably suspects to be a terrorist and may search that person for evidence that he is a terrorist.<sup>98</sup> A person arrested under this power may be detained without charge and without the intervention of a court, for up to 48 hours. Pre-charge detention can be extended for up to 14 days on judicial authority. There is no power to release, on police bail, a person arrested under section 41 TACT.<sup>99</sup> The power of arrest under section 41 is therefore markedly different from other arrest powers.

By virtue of Article 5(2) and (4) ECHR, which applies to all detentions, the police are obliged to give a detained person sufficient information for him or her to understand why the police have made the arrest and the detainee has a right to have the lawfulness of the detention decided speedily by a court.<sup>100</sup> Importantly, the section 41 power is also subject to the common law, which means that if the police have reached the conclusion that prima facie proof of the arrested person's guilt is unlikely to be discovered by further inquiries of the suspect or of other potential witnesses, they must release the suspect from custody unconditionally.<sup>101</sup> David Anderson Q.C. noted "while section 41 arrest may present a tempting opportunity to disrupt, to gather intelligence or simply to clear the streets, none of these purposes is a sufficient basis for its exercise. In particular, multiple precautionary arrests, made on no basis other than association with persons suspected of terrorism, will not be tolerated by the courts."<sup>102</sup> The Committee respectfully agrees and wishes to emphasise the importance of the PSNI applying that principle in practice.

---

<sup>98</sup> Sections 41(1) and 43(2) of the Terrorism Act 2000.

<sup>99</sup> PACE Code H at para 1.6.

<sup>100</sup> See also for example *Bank Mellat v HM Treasury* [2010] 3 WLR 1090. The compatibility of the detention powers with Art. 5 ECHR was considered by the Northern Ireland Court of Appeal, which rejected the Appellant's criticisms: *In the matter of an application for judicial review by Colin Duffy and others (No. 2)* [2011] NIQB 16. The UK Supreme Court refused permission to appeal in November 2011.

<sup>101</sup> *Holgate-Mohammed v Duke* [1984] 1 AC 437.

<sup>102</sup> *The Terrorism Acts in 2011 Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, David Anderson QC, June 2012, at paragraph 7.55.

## Police use of the TACT arrest power

David Anderson Q.C. previously compared the trends in section 41 arrests and detention in Northern Ireland and Great Britain and noted that “it appears that section 41 arrests are sparingly used in Great Britain, but are more likely to result in lengthy periods of detention and charges for terrorist offences. In Northern Ireland, by contrast, the section 41 arrest power is frequently used but lengthy periods of detention and charges for terrorist offences are relatively rare.”<sup>103</sup> He stated that he was struck “by the very low proportion of those arrested under section 41 [in Northern Ireland] who are subsequently charged under the Terrorism Acts: less than 5% (a total of 8 people) in 2009-10.”<sup>104</sup>

In his 2012 report, David Anderson Q.C. echoed a recommendation in the Human Rights Annual Report 2011 which required the PSNI to carry out a review of section 41 arrests. Mr Anderson stated that he looked forward to seeing the PSNI’s response in relation to the safeguards that the Committee had requested. He made a recommendation, applicable to police services across the United Kingdom, that police should avoid recourse to section 41 arrest and detention in cases where the suspect is always likely to be charged, if at all, under laws other than terrorism legislation.<sup>105</sup>

In response to the recommendation in the Human Rights Annual Report 2011, PSNI carried out a review to ensure that section 41 arrests were being carried out in appropriate circumstances. By letter dated 8 January 2013, Assistant Chief Constable Harris wrote to the Human Rights and Professional Standards Committee to outline the findings of that review and to seek to assure the Committee that police officers do not use the TACT power of arrest in cases where it is reasonably anticipated that the suspect is more likely to be charged under non-terrorism legislation.

---

<sup>103</sup> *Report on the operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, David Anderson QC, July 2011, paragraph 7.33.

<sup>104</sup> *Ibid.* paragraph 7.45.

<sup>105</sup> *The Terrorism Acts in 2011. Report of the Independent Reviewer on the operation of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, David Anderson Q.C., June 2012, paragraph 7.75.

David Anderson Q.C. noted in his 2012 report that whilst there remains a disparity, the figures for 2010/2011 revealed a narrowing in the gap between charging practice in Great Britain and Northern Ireland.<sup>106</sup> The upward trend in the proportion of section 41 detainees charged with terrorism offences in Northern Ireland appears to be continuing. During 2011/2012, of 159 section 41 TACT detainees, 39 (25%) were charged and of those, 20 (13%) were charged with terrorism related offences.<sup>107</sup> During the six month period between 1 April 2012 and 30 September 2012 there were 82 section 41 TACT detainees. Of these, 29 (35%) were charged, including 26 (32%) for terrorism-related offences and 3 (4%) for non-terrorism offences.<sup>108</sup>

The Northern Ireland Office publishes annual statistics which detail charges brought under terrorism legislation.<sup>109</sup> A recent report (to end March 2012) reveals that between 1 April 2011 and 31 March 2012 a total of 22 charges under TACT were brought in Northern Ireland against a total of 16 persons.<sup>110</sup> A further 3 charges were brought against 3 persons under the Terrorism Act 2006.<sup>111</sup> The report also reveals that between 19 February 2001 and 31 March 2012, a total of 360 charges under TACT have been brought in Northern Ireland against 271 persons. The charges are as follows:

- Section 11 (Membership of proscribed organisation) – 82 charges
- Section 12 (Support of proscribed organisation) - 15 charges
- Section 13 (Uniform of proscribed organisation) - 10 charges

---

<sup>106</sup> *The Terrorism Acts in 2011. Report of the Independent Reviewer on the operation of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, David Anderson QC, June 2012, page 68.

<sup>107</sup> This information was provided by PSNI Statistics Branch.

<sup>108</sup> Letter from ACC Harris dated 8 January 2013 to the Human Rights and Professional Standards Committee.

<sup>109</sup> Northern Ireland Office statistical report which covers the time period 1 April 2011 to 31 March 2012: *Northern Ireland Terrorism Legislation: Annual Statistics 2011/2012*, Northern Ireland Office, November 2012.

<sup>110</sup> Section 12 (support) – 4 charges; section 13 (uniform) – 2 charges; section 15 (fund-raising) – 1 charge; section 57 (possession for terrorist purposes) – 12 charges; section 58 (collection of information) – 2 charges; and section 103 (terrorist information) – 1 charge. Note that the Northern Ireland Office statistics do not indicate the power under which those charged with these offences were arrested – the power of arrest used in each case was not necessarily section 41 TACT.

<sup>111</sup> Section 1 (encouragement of terrorism) - 2 charges; and section 5 (preparation of terrorist acts) – 1 charge.

- Section 15 (Fund-raising) - 42 charges
- Section 16 (Use and possession) - 4 charges
- Section 17 (Funding arrangements) - 4 charges
- Section 19 (Disclosure of information: duty) - 1 charge
- Section 54 (Weapons training) - 1 charge
- Section 56 (Directing terrorist organisation) - 1 charge
- Section 57 (Possession for terrorist purposes) - 131 charges
- Section 58 (Collection of information) - 53 charges
- Section 103 (Terrorist information) - 16 charges

Statistics on the number of persons subsequently prosecuted and convicted of TACT offences are not published by the Northern Ireland Court Service but David Anderson Q.C. has reported that there were 5 defendants dealt with by the Northern Ireland courts during the 2011 calendar year who were charged with at least 1 offence under TACT. Of those, 2 were acquitted of TACT offences and 3 were convicted of at least 1 such offence: 1 was convicted of 2 counts under section 57 (possession for terrorist purposes); the other convictions related to membership of a proscribed organisation and to the provision of money or property for the purpose of terrorism.<sup>112</sup> Comparing these conviction figures to the number of people charged under TACT each year,<sup>113</sup> it would seem that there is a high rate of attrition in terrorism cases.

## **TACT: STOP AND SEARCH WITH REASONABLE SUSPICION**

### **Search of premises - suspected terrorist: section 42**

A justice of the peace may issue a warrant for the search of premises if he or she is satisfied that there are reasonable grounds for suspecting that a person

---

<sup>112</sup> *The Terrorism Acts in 2011. Report of the Independent Reviewer on the operation of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, David Anderson QC, June 2012, paragraph 10.35.

<sup>113</sup> Using the information provided in the Northern Ireland Office statistical report published in November 2012, it can be calculated that 271 persons charged over a period of 11 years amounts to an average of 25 persons charged a year in Northern Ireland under TACT since February 2001.

whom the police officer reasonably suspects to be a terrorist is to be found there.<sup>114</sup>

### **Stop and search of persons and vehicles: sections 43 and 43A**

A police officer may stop and search any person whom he or she reasonably suspects to be a terrorist to discover whether he or she has in their possession anything which may constitute evidence that he or she is a terrorist.<sup>115</sup> Previously, the power did not extend to vehicles but the power has now been extended to expressly include this power.<sup>116</sup> The search must be limited to looking for items which may connect the individual or the vehicle to terrorism. The requirement that such a search be carried out by someone of the same sex has been repealed.<sup>117</sup> However, that does not mean that a police officer should not always attempt to have an officer of the same sex present. The officer may detain a person for so long as necessary to carry out a search.<sup>118</sup> If a police officer *does* reasonably suspect a person to be a terrorist, the proper power to be exercised is that contained at section 43 TACT rather than the power provided by virtue of an authorisation under section 47A.<sup>119</sup>

As at 31 March 2013, there were no reported uses by PSNI of section 43A TACT, which came into force on 10 July 2012 with the Protection of Freedoms Act 2012. To ensure that the new power is monitored adequately the Policing Board recommended in its Human Rights Annual Report 2012 that the PSNI should forthwith collect statistics on the use of the powers contained at section 43A TACT and amend its quarterly statistical reports to include the statistics collected.<sup>120</sup> That recommendation was accepted by the PSNI.<sup>121</sup>

---

<sup>114</sup> Section 42 of the Terrorism Act 2000.

<sup>115</sup> Section 43(1) of the Terrorism Act 2000.

<sup>116</sup> Section 43A of the Terrorism Act 2000 as amended by section 60(3) of the Protection of Freedoms Act 2012.

<sup>117</sup> The requirement contained in section 43(3) of the Terrorism Act 2000 was removed by section 60(1) of the Protection of Freedoms Act 2012.

<sup>118</sup> Section 43 and 43A of the Terrorism Act 2000.

<sup>119</sup> Section 47A is discussed below at page 40 *et seq.*

<sup>120</sup> *Human Rights Annual Report 2012*, Recommendation 4, Northern Ireland Policing Board

<sup>121</sup> *PSNI Human Rights Programme of Action 2012*, PSNI, May 2013.

## **Recording requirements: section 43 and 43A**

Before a search takes place under section 43 or 43A TACT the police officer must inform the person (or the person in charge of the vehicle) to be searched of his or her entitlement to a copy of the record of the search or of the right to apply for a copy within 12 months if it is wholly impracticable to provide a copy at the time. Each and every officer who has carried out a search under section 43 or 43A TACT must make a record of that search *at the time* unless it is not genuinely and reasonably practicable to do so, for example, because of the numbers involved or because of some other genuine operational reason such as continuing disorder. The record should be completed immediately unless it is genuinely not practicable to do so, in which case it should be completed as soon as reasonably practicable.<sup>122</sup>

For the purposes of completing the record, the police officer will ask the person for his or her name, address and date of birth. However, the officer must be clear that there is no power to require and therefore no obligation to provide that information under section 43 or 43A TACT. This can be compared to the power under section 21 JSA to stop and question, considered below. In the event that a person does not voluntarily provide the identifying information the police officer will always record: a description of the person searched; the vehicle registration number (if a vehicle has been searched); the date, time and place of the stop and the date, time and place of search if different from the place of initial stop; the purpose of the search; grounds for the search including an informative explanation of the suspicion; the outcome of the search; a note of any injury or damage to property resulting from the search; the officer's warrant or other identification number and the police station to which the officer is attached. If a vehicle has been searched and a number of individuals within the vehicle have been searched there must be a separate record made of each search.<sup>123</sup>

---

<sup>122</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraph 10.1.

<sup>123</sup> The Code of Practice provides expressly that the name of the officer need not be included on the record in respect of any TACT search, at paragraph 10.5



## STOP AND SEARCH WITHOUT SUSPICION: OLD SECTION 44 TACT

Use of the controversial power under section 44 TACT, which allowed a police officer to stop and search a pedestrian or a vehicle in a designated area without having a suspicion that that person was a terrorist or had committed a relevant offence if a senior police officer had first specified the area in an authorisation because he or she considered it expedient for the prevention of acts of terrorism, was suspended by the Home Office in July 2010. That was in response to the judgment of the ECtHR in the case of *Gillan & Quinton* which held that the use of the section 44 TACT power was an unlawful interference with Article 8 ECHR (the right to respect for family and private life) because it was neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.<sup>124</sup> Although the ECtHR did not proceed to make a finding under Article 5 ECHR (because it was unnecessary given the primary finding); the ECtHR did comment that the element of coercion inherent in the search was indicative of a deprivation of liberty.<sup>125</sup>

Prior to July 2010 authorisations pursuant to section 44 TACT had been given which covered extensive geographic areas with the geographic boundary of Northern Ireland being the only apparent constraint on the extent of the authorisation and that those authorisations were renewed at the end of each authorisation period. In March 2011, a remedial order was laid before Parliament which provided for an interim replacement power.<sup>126</sup> The replacement power permitted a stop and search without suspicion but only in much more tightly controlled circumstances. That interim amendment was accompanied by a Code of Practice.<sup>127</sup> By that time, however, the extensive

---

<sup>124</sup> *Gillan and Quinton v United Kingdom* (Application No. 4158/05).

<sup>125</sup> *Gillan and Quinton v United Kingdom* (Application No. 4158/05) at paragraph 57.

<sup>126</sup> The remedial order was laid in accordance with section 10 of the Human Rights Act 1998, which permits primary legislation to be amended by order where there are compelling reasons for doing so to remove an incompatibility with the ECHR: Terrorism Act 2000 (Remedial Order) 2011, S.I. 2011/631. The interim replacement power was made permanent by the Protection of Freedoms Act 2012 and is contained within section 47A TACT.

<sup>127</sup> The interim Code was produced by the Northern Ireland Office (NIO) and issued in March 2011. Since then, the NIO has consulted upon and published a Code of Practice which takes account of the changes introduced by the Protection of Freedoms Act 2012: *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000* Northern Ireland Office, August 2012.

use of the section 44 TACT power had caused understandable concern amongst the community and had a negative impact in some quarters (in both Northern Ireland and Great Britain) on community confidence in policing.<sup>128</sup>

## **STOP AND SEARCH WITHOUT SUSPICION: NEW SECTION 47A TACT**

### **Authorisations**

The main changes effected by the Protection of Freedoms Act 2012, now found in sections 47A to 47AE TACT, include the way in which an authorisation for use of the without suspicion stop and search power is given.<sup>129</sup> In both authorising and using the powers, officers must have regard to the new statutory Code of Practice.<sup>130</sup> The purpose of the Code is to set out the basic principles for the use of powers by police officers under sections 43 and 43A TACT and the authorisation and use of powers by police officers under section 47A of, and schedule 6B to, TACT. An authorisation for a stop and search under section 47A TACT can be given only by an officer of the rank of Assistant Chief Constable or above.<sup>131</sup> Moreover, the authorising officer must reasonably suspect that an act of terrorism will take place and must reasonably consider that the authorisation is *necessary* to prevent such an act. Under the old section 44 TACT, *i.e.* prior to amendment, an authorisation could be given if the senior officer considered it *expedient* for the prevention of acts of terrorism.

Therefore to satisfy the requirements of TACT, as amended, a general high level of threat from terrorism and the vulnerability to attack (for example at an iconic building or event) are relevant to the decision to authorise but are not

---

<sup>128</sup> See for example *From War to Law Liberty; Stop and Think A Critical Review of the use of Stop and Search Powers in England and Wales* Equality and Human Rights Commission March 2010;

<sup>129</sup> Section 47A-47E and Schedule 6B TACT came into force on 10 July 2012 by virtue of section 61 of the Protection of Freedoms Act 2012.

<sup>130</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012.

<sup>131</sup> An authorising officer must be either confirmed in rank or temporarily promoted to the rank of ACC: an Acting ACC may not give an authorisation: paragraph 7.29 of the Code of Practice.

sufficient of themselves to warrant the giving of an authorisation. Importantly, the giving of an authorisation may not be justified because it would reassure the community or, crucially, because it would be a deterrent or provided an intelligence-gathering opportunity. The time period for which an authorisation may endure and the geographic area for which it may apply have also been limited: an authorisation under section 47A TACT must last for no longer and cover no greater a geographic area than is necessary to prevent an act of terrorism. The authorisation must justify as necessary each geographical area and each time period for which it is to last albeit it may be influenced by the ability of terrorist groups to change their methods or targets quickly.

The authorising officer is also required specifically to consider: the proportionality of the use of the without reasonable suspicion power; that any searches that are authorised are limited to searching for evidence that a person has been concerned in the commission, preparation or instigation of acts of terrorism or the vehicle is being used for acts of terrorism; whether there are other search powers that may be used, in particular those that require individual officers to have reasonable suspicion before conducting the search; the safety of the public and police officers; and, the risk of serious damage to property.<sup>132</sup> The authorising officer must therefore consider how the powers are to be used if an authorisation is given. That means the authorising officer must ensure that officers who are conducting searches are properly briefed and tasked. For example, the authorising officer should consider whether the most appropriate use of the powers will involve vehicle check-points or searches of individuals in the vicinity of particular locations. Given the extent of the authorising officer's consideration he or she should thereafter also be able to indicate the factors that may help target searches more effectively within the authorised area.

An authorisation may relate to a single suspected act of terrorism or it may relate to multiple threats of acts terrorism, for example, by different terrorist

---

<sup>132</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraph 7.10.

groups in the same or different areas or by a single terrorist group in the same or different areas, which are occurring at the same time or over a short period of time. Importantly, they should also be linked in some other way, for example, relating to a particular event. The Code of Practice provides that in those circumstances it may be appropriate to include multiple threats within one authorisation.<sup>133</sup> If however those circumstances do not exist, multiple threats should not be dealt with in a single authorisation. A general high level of threat alone is not sufficient for any authorisation, without more supporting information, but may be a relevant factor to be taken into account.

An authorisation must be given in writing unless it is not practicable to do so in the circumstances.<sup>134</sup> If not practicable to give an authorisation in writing it may be given orally but an oral authorisation must be confirmed in writing as soon as reasonably practicable.<sup>135</sup> The Secretary of State must be informed of an authorisation as soon as reasonably practicable after it is given.<sup>136</sup> The Secretary of State must confirm an authorisation if it is to last longer than 48 hours.<sup>137</sup> The authorising officer must not wait for 48 hours to confirm the authorisation if it is reasonably practicable to do it sooner. The authorisation must be submitted on a standard form which must include a detailed account of the intelligence and must be supported by a copy of the classified material upon which the authorisation relies. It must, on the face of the authorisation, justify both its geographical and temporal extent and explain why it is considered necessary. The authorisation therefore ought to be a comprehensive document which provides the Secretary of State with sufficient detail and evidence to make a reasoned and informed decision to confirm, cancel or vary it.

If the Secretary of State does not confirm an authorisation it automatically ceases to have effect after 48 hours. If the Secretary of State cancels an authorisation it ceases to have effect immediately. However, in that event the

---

<sup>133</sup> *Ibid*, at paragraph 7.7.

<sup>134</sup> For example, in cases of urgency.

<sup>135</sup> Paragraph 3 of Schedule 6B to the Terrorism Act 2000.

<sup>136</sup> Paragraph 7(1) of Schedule 6B to the Terrorism Act 2000.

<sup>137</sup> Paragraph 7(2) of Schedule 6B to the Terrorism Act 2000

use of the powers during the initial period is not rendered unlawful. The giving of rolling authorisations, in each case for less than 48 hours (in an attempt to exclude the Secretary of State's consideration), is expressly prohibited and is defined as an abuse of the provisions.<sup>138</sup> An authorisation may never extend beyond 14 days but it may be renewed at the end of each 14 day period.

An authorisation must not be given for the 14 day maximum period unless that can be justified as necessary. Convenience is never a good reason for extending the authorisation to the maximum period. Therefore, the time period must be explained and justified separately. Each renewal must comply with the same strict requirements of section 47A and each must be considered on its own merits. A renewal will only be justified on the basis of a new intelligence assessment. It is never appropriate to simply renew an authorisation indefinitely; on each and every occasion that a renewal is contemplated all of the relevant criteria must be satisfied. If an authorisation mirrors the authorisation which immediately preceded it and is based upon previous information which remains relevant, the relevance of that information must be justified afresh. The authorising officer must also ensure, and set out in the authorisation, information which demonstrates that any police officer who may exercise the section 47A power will be properly briefed on the use of the powers including on the provisions of the Code of Practice.

The fact that an authorisation has been given for a specified area and for a specified period of time does not absolve the authorising officer from reviewing it before the expiry of the time period or in respect of geographical extent. Therefore, circumstances giving rise to each authorisation should be kept regularly under review and as circumstances change the authorisation should be reassessed. This is particularly important where the authorisation relates to multiple threats. Crucially, as soon as the criteria for the authorisation fall below what is required by section 47A TACT, which means that the authorising officer no longer holds the reasonable suspicion upon which it was based, he or she must immediately cancel the authorisation,

---

<sup>138</sup> Confirmed by paragraph 7.37 of the Code of Practice.

inform the Secretary of State and brief officers who may have been, or may anticipate, using the powers.

The threshold for the giving of an authorisation, and therefore for the exercise of the use of the power within the designated area, are high. If there is any doubt about the stringency of the requirements it is reinforced by the fact that until May 2013 not one authorisation was given in any part of Great Britain or Northern Ireland. The Independent Reviewer of Terrorism Legislation, David Anderson Q.C., has said “These changes amount to a cautious rebalancing in favour of liberty. In my judgement they do not materially increase the risk from terrorism.”<sup>139</sup>

However in Northern Ireland, unlike in Great Britain, the PSNI have an additional power to stop and search without suspicion under the Justice and Security (Northern Ireland) Act 2007 (JSA). When section 44 TACT was suspended there was a significant increase in the use of the powers under JSA. On 9 May 2013, the Northern Ireland Court of Appeal held that sections 21 and 24 JSA were unlawful given that was not a statutory Code of Practice in place.<sup>140</sup> A Code of Practice was subsequently introduced on 15 May 2013.<sup>141</sup> Between the judgment of the Court of Appeal on 9 May 2013 and the introduction of a statutory Code of Practice on 15 May 2013, the PSNI considered and authorised the use of the section 47A TACT power. The Policing Board’s Human Rights Advisor will review those authorisations with a view to reporting to the Committee and thereafter publicly albeit without reference to closed material.<sup>142</sup>

---

<sup>139</sup> *The Terrorism Acts in 2011 Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, David Anderson QC, June 2012, at page 4.

<sup>140</sup> Section 21 JSA contains a power to stop and question and section 24 JSA contains a power to stop and search “without suspicion”. The JSA powers and the Court of Appeal judgment are considered in more detail from page 52 below.

<sup>141</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013.

<sup>142</sup> If a section 47A authorisation was in fact in place during this time and the power to stop and search exercised by officers as per the authorisation, these individual uses of the power will be reflected in the PSNI quarterly stop and search statistics for 1 April 2013 – 30 June 2013. These statistics are due to be published in August 2013 and are available through the PSNI website: [www.psnipolice.uk](http://www.psnipolice.uk)

## Use of the without suspicion power within authorised areas

An authorisation properly made under section 47A TACT confers power on police officers to search pedestrians and anything carried by a pedestrian<sup>143</sup> and a vehicle, its driver, passengers and anything in or on the vehicle.<sup>144</sup> The power is limited to searching for evidence that the individual is or any of the individuals are terrorists or for evidence that a vehicle is being used for the purposes of terrorism. The power may be exercised whether or not the police officer has an individual reasonable suspicion that there is such evidence. A police officer who, during the course of a section 47A search forms a reasonable suspicion of the commission of a criminal offence, may proceed to search for the articles about which the reasonable suspicion criterion is satisfied but may only do so if the threshold for exercise of those other powers has been met, for example, if the officer acquires a reasonable suspicion that the person being searched is carrying stolen property, the search for that property must be conducted under Article 3 of the Police and Criminal Evidence (Northern Ireland) Order 1989. Any use of section 47A TACT as an instrument to aid non-terrorism related policing is unacceptable and unlawful. It is fundamental to the lawful exercise of the section 47A power that it is used only for the legitimate purpose of preventing terrorism.<sup>145</sup>

A police officer may seize and retain an article which he or she discovers in the course of a section 47A TACT search which he or she reasonably suspects is intended to be used in connection with terrorism.<sup>146</sup> Importantly, while the power to stop and search is not dependent upon reasonable suspicion the power to seize *does* require the officer to have formed a reasonable suspicion that the article(s) he or she intends to seize are intended

---

<sup>143</sup> Section 47A(3) of the Terrorism Act 2000 as amended by the Protection of Freedoms Act 2012.

<sup>144</sup> Section 47A(2) of the Terrorism Act 2000 as amended by the Protection of Freedoms Act 2012.

<sup>145</sup> See for example Lord Carlile's comments in 2009 in respect of the Metropolitan Police use of "without suspicion" TACT powers (which were then contained within section 44 TACT): paragraph 147 of the *Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, Lord Carlile of Berriew CBE Q.C., June 2009. See also PACE Code of Practice A, paragraph 2.25.

<sup>146</sup> Section 45(2) of the Terrorism Act 2000.

to be used in connection with terrorism. During a section 47A search, a police officer is not authorised to require the person to identify himself or herself or to give an explanation for their presence in the location or about their movements. Other powers are available to the police to question an individual, which must be used if the person is to be required to answer questions.<sup>147</sup>

As provided by the Code of Practice, “section 47A powers should only be authorised where other powers or measures are insufficient to deal with the threat and, *even where authorised*, officers should still consider whether section 47A powers are the most appropriate to use.”<sup>148</sup> This represents an important curb on the use of the powers and an approach which the Policing Board wishes to endorse strongly. Recourse to the use of intrusive powers, which have the potential to undermine police community relations, should be used as a last rather than as a first resort.

The criteria on which the power is exercised by individual police officers must be kept under strict review. As made abundantly clear by the courts, including the UK House of Lords as far back as 2006 in relation to the old section 44 power, the power is not one that should be exercised randomly.<sup>149</sup> In other words guidance issued by the Police College,<sup>150</sup> which stressed the randomness of such searches, was not in accordance with the law. While the PSNI did not adopt the guidance formally, the Human Rights Advisor was concerned that the initial training delivered to officers (which was subsequently amended) was predicated on the assumption that searches may be ‘random’.

During the course of this thematic review, there was the additional concern among some stakeholders that the without suspicion powers contained within TACT and the JSA were actually being used selectively to target and harass

---

<sup>147</sup> For example, section 21 of the Justice and Security (Northern Ireland) Act 2007.

<sup>148</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraph 3.4.

<sup>149</sup> *R (on the application of Gillan (FC) & another (FC) v Commissioner for Police for the Metropolis & another* [2006] UKHL 12.

<sup>150</sup> Which was previously the National Police Improvement Agency.



certain individuals repeatedly as a result of their past or current political or religious belief.<sup>151</sup> That must be kept under review. The Policing Board's Human Rights Advisor intends to pay close attention to this particular criticism in the course of her on-going monitoring.

The PSNI maintains a database known as 'STOPS' which records the use of stop, search and question powers by police officers. Data is input directly by the handheld *Blackberry*<sup>TM</sup> devices carried by all officers. The Human Rights Advisor to the Policing Board carried out a dip sample of, including other things, records of searches. She also raised the issue of alleged harassment with a number of intelligence officers. She was not obstructed in that task and was not prevented from accessing any information or officer with whom she wished to speak. There was no *evidence* of misuse of the powers for the purpose of harassing any individual. However, she recorded an important caveat: the Human Rights Advisor can do no more than dip sample a small number of records. She was advised that the systems in place did not (due to issues with the search facility) permit reliable interrogation according to the name of the person stopped. She was advised that the PSNI is undertaking a review of systems to improve the search engine, which will permit the necessary interrogation of the system by the PSNI when complete. The Human Rights Advisor will report to the Policing Board on this issue following a further review.

It must be restated that any selection of a person based upon, for example, religious belief or political opinion is unlawful. At all times PSNI should have regard to their obligations under sections 75 and 76 of the Northern Ireland Act 1998 (the duties to promote equality of opportunity and good relations and the duty not to discriminate) and under Article 14 ECHR, which prohibits discrimination in the exercise of any ECHR right. Furthermore, reasonable suspicion is required if an officer intends to search an individual or vehicle under section 43 or 43A TACT.

---

<sup>151</sup> JSA powers are discussed below at pages 52 *et seq.*

As the Code of Practice states, reasonable suspicion “can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person’s race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. A person’s religion cannot be considered as reasonable grounds for suspicion and should never be considered as a reason to stop or stop and search an individual.”<sup>152</sup>

However, the Code of Practice also recognises that reasonable suspicion may exist without *specific* information or intelligence on the basis of “some level of generalisation stemming from the behaviour of the person. For example, for the purposes of section 43....suspicion that a person is a terrorist may arise from the person’s behaviour at or near a location which has been identified as a potential target for terrorists.”<sup>153</sup> That scenario should be considered and applied narrowly. Reasonable suspicion should be linked to credible and current intelligence or information relating to an article that is carried, a particular suspect or suspected terrorist activity. It is worth remembering that the use of the powers is much more likely to be effective if based upon current and credible intelligence and information.

Until 2010, the PSNI exercised the old section 44 TACT power on both a random *and* targeted basis. Following judgment in the *Gillan* case, the PSNI no longer select a person to be stopped and searched on a purely random basis but that in itself presents the police with a challenge. On what basis does an officer exercise a power which does not permit random selection but which does not require individual reasonable suspicion? If the authorisation has been properly considered, justified and briefed out to officers there should

---

<sup>152</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraph 6.3.

<sup>153</sup> *Ibid.* at paragraph 6.4.

be sufficient information and intelligence available to guide officers in their individual uses of the powers.

While the selection of an individual or vehicle for a search under this power does not have to be based upon reasonable suspicion in the traditional sense the officer should have a *reason* for selecting that individual or vehicle. It can be very difficult to explain the subtle distinction but officers must be sufficiently well trained and briefed so that it becomes almost instinctual. The following may assist. A reason may be, for example, that the behaviour of the individual or vehicle gave cause for concern or the person had been questioned under another power and the answers to questions gave cause for concern.

It must be emphasised that it is never lawful for section 47A TACT to be used for the purpose of detaining or delaying a person from going about their business, even if that business is to join a protest or otherwise to cause a disruption. In the latter case, the police have sufficient other powers to prevent, for example, a breach of the peace. Some stakeholders raised, at an early stage of the consultation phase of this thematic review, a concern that police may instigate or prolong a search under the then section 44 TACT power to prevent a person entering an area, for example, to join a protest. During the course of this thematic review the Human Rights Advisor to the Policing Board saw no evidence to suggest that had been or was ever likely to be considered an appropriate use of the power by the PSNI. For the avoidance of doubt, however, it must be made abundantly clear that to do so, whether under section 43, section 43A or section 47A TACT or under any provision of the JSA, would be unlawful.

### **PSNI review of the use of powers**

Supervising officers should keep the use of without suspicion powers under close review with a particular emphasis on whether they are being used on the basis of inappropriate profiling, stereotyping or so as to harass any individual. All supervising officers have a duty to satisfy themselves that officers under their supervision are acting within the law and proportionately.

Therefore, supervising officers should carry out regular reviews of records of stops and searches carried out by those under their supervision to check for trends and patterns that may emerge. If any trends or patterns emerge that give cause for concern the supervising officer is obliged to take steps to redress it. This is in addition to the responsibility of senior officers (*i.e.* officers above the rank of Superintendent and ACC authorising officers) to monitor the use of the powers to ensure they are being used appropriately.

The Committee is not satisfied that the systems are in place to enable senior officers or supervising officers to sufficiently examine records of stops and searches to identify whether any particular officer or officers are using the powers inappropriately. The monitoring of individual officers as well as trends and patterns across the PSNI is an important safeguard that is required by the Code of Practice.<sup>154</sup> While there is always the mechanism of complaint to the police or to the Police Ombudsman by a person aggrieved by an inappropriate use of the powers, those mechanisms are not sufficient to identify trends and will miss all but those who are moved to or feel able to make a formal complaint. Therefore, the Committee recommends that the PSNI should undertake to develop a mechanism which enables both supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search under section 43, 43A and 47A TACT according to the name and number of the police officer and according to the name of the person searched.

### **Recommendation 1**

**The PSNI should develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search under section 43, 43A and 47A of the Terrorism Act 2000 according to the name and number of the police officer and according to the name of the person searched.**

---

<sup>154</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at part 12.

## **Recording requirements: section 47A TACT**

Before a search takes place the police officer must inform the person or the person in charge of the vehicle to be searched of his or her entitlement to a copy of the record of the search or to apply for a copy within 12 months if it is wholly impracticable to provide a copy at the time. Each and every officer who has carried out a search under section 47A TACT must make a record of that search unless it is not genuinely and reasonably practicable to do so, for example, because of the numbers involved or because of some other genuine operational reason, such as continuing disorder. The record should be completed immediately unless it is genuinely not practicable to do so, in which case it should be completed as soon as reasonably practicable.<sup>155</sup>

For the purposes of completing the record, the police officer will ask the person for his or her name, address and date of birth. However, the officer must be clear that there is no power to require, and therefore no obligation to provide, that information under section 47A TACT. This can be compared to the provision under JSA to stop and question, considered below. In the event that a person does not voluntarily provide the identifying information the police officer will always record: a description of the person searched; the vehicle registration number (if a vehicle has been searched); the date, time and place of the stop and the date, time and place of search if different from the place of initial stop; the purpose of the search; the nature of the power and any authorisation given; the outcome of the search; a note of any injury or damage to property resulting from the search; the officer's warrant or other identification number and the police station to which the officer is attached. If a vehicle has been searched and a number of individuals within the vehicle have been searched there must be a separate record made of each search.<sup>156</sup>

---

<sup>155</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at part 10.

<sup>156</sup> The Code of Practice provides expressly that the name of the officer need not be included on the record in respect of any TACT search, at paragraph 10.5

## JUSTICE AND SECURITY (NORTHERN IRELAND) ACT 2007 (JSA)

The grounding legislation for the Justice and Security (Northern Ireland) Act 2007 (JSA) was the Terrorism Act 2000 (TACT). TACT was intended to be a United Kingdom wide framework for combating terrorism. Part VII of the Terrorism Act 2000 contained provisions specific to Northern Ireland. It was subject to annual renewal in the United Kingdom Parliament, limited to five years in the absence of further primary legislation. Part VII was due to expire on 18 February 2006. The Terrorism (Northern Ireland) Act 2006, however, extended Part VII for a further limited period. JSA provided a mechanism for continuing those Part VII powers.

JSA contained powers for police to stop and search without suspicion, which were similar to those contained in the old section 44 TACT. JSA was therefore amenable to the same challenge as that brought by the applicants in the *Gillan* case.<sup>157</sup> However, when the Government announced its review of counter-terrorism powers, in July 2010, JSA was not specifically considered. That meant that with the suspension of section 44 TACT, the PSNI had a comparable power on the statute book, to which it turned. There was an almost immediate transfer from the use of the without suspicion TACT power to the without suspicion JSA power. Unsurprisingly, that caused disquiet among many within the community. They saw the use of JSA, with some justification, as a continuation (under a different piece of legislation) of intrusive powers which were incompatible with the ECHR and which had been expressly disavowed. In fact in many ways JSA was even more vulnerable to challenge as the powers were not linked to any *terrorist* related activity (but were restricted to searching for munitions etc.) or constrained by any requirement for an authorisation by an Assistant Chief Constable.<sup>158</sup>

After some delay, JSA was included within the review of counter-terrorism powers and was, finally, subject to amendment by the Protection of Freedoms

---

<sup>157</sup> *Gillan and Quinton v The United Kingdom* (Application No. 4158/05).

<sup>158</sup> As has been made clear by for example the Independent Reviewer of the JSA its powers may be used in relation to serious organised crime.

Act 2012.<sup>159</sup> JSA powers are now more tightly circumscribed and subject to a similar authorisation regime as TACT. Everything that is said above about section 47A TACT applies with equal force to JSA. The progress towards the JSA amendments however was complex and fragmented at times. Moreover, despite the JSA being in force for some years a final Code of Practice was not made until 15 May 2013.<sup>160</sup> That presented the PSNI with an enormous challenge: to balance the need to use powers that were available on the statute book and which the police considered helpful in combating terrorism with the jurisprudence of the courts condemning such use under TACT as incompatible with the ECHR. It is a credit to the PSNI that in advance of the legislative amendments it introduced its own internal regime of authorisations and guidance which closely mirrored that required for section 47A TACT. That demonstrates a commitment within the PSNI not only to do what it is mandatory but to go further and embrace the spirit of the law as underpinned by the ECHR.

### **The *Fox, McNulty, Canning* judgment**

Before turning to the specific provisions of the JSA, a recent decision of the Court of Appeal in Northern Ireland must be considered in some detail. That judgment has significant impact on the current use of the powers under sections 21 and 24 JSA, which were held to be incapable of lawful exercise in the absence of a statutory ECHR compliant Code of Practice. On 9 May 2013, the Northern Ireland Court of Appeal delivered its judgment on the lawfulness of the police powers to stop and question and to stop and search persons under section 21 and 24 of the JSA.<sup>161</sup> The case involved challenges by way of judicial review to the legislative framework of the JSA prior to amendment

---

<sup>159</sup> Schedule 6 to the Protection of Freedoms Act 2012 amended Schedule 3 to the Justice and Security (NI) Act 2007. It introduced an authorisation regime in relation to power to stop and search for munitions and wireless apparatus and introduced a new power to stop and search on reasonable suspicion of unlawful munitions and wireless apparatus.

<sup>160</sup> A final code was laid before Parliament on 14 May 2013 in the wake of the *Fox, McNulty Canning* judgment and took effect on 15 May 2013: *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013.

<sup>161</sup> *In the matter of an application by Fox and McNulty for judicial review and in the matter of an application by Canning for judicial review* [2013] NICA 19.

by the Protection of Freedoms Act 2012 but it also considered the lawful use of the new powers in the absence of a Code of Practice. As the Court of Appeal put it, the “spotlight is on the legality of the legislative framework rather than on the individual actions of the police officers.”<sup>162</sup>

The challenges were brought by three individuals who had been subjected to numerous exercises of the powers to stop and search under section 24 JSA and one of whom had been subject to the power to stop and question under section 21 JSA.<sup>163</sup> The challenge was to the use of the powers as they existed prior to amendment by the Protection of Freedoms Act 2012. It was argued by the respondent (the PSNI) that events had been overtaken as a result of the introduction of a new statutory regime and the introduction, in particular, of an authorisation process.

Dealing firstly with section 21 JSA, the Court of Appeal considered whether Articles 5 ECHR (the right to liberty) and Article 8 ECHR (the right to respect for private and family life) were engaged in a stop and question of an individual under section 21 JSA. If so, for the purposes of Article 8<sup>164</sup> the Court had to assess whether it was in accordance with the law and necessary in a democratic society (the latter of which requires a consideration of the proportionality of the power).

The Court began its deliberations by stating that “It is undoubtedly one of the hallmarks of a free and democratic society that its citizens have a right to move freely within their state subject only to justifiable and necessary legal restraints on that freedom. The individual is entitled to expect that he can exercise his freedom to move untrammelled by the need to account for those movements. It is also a hallmark of a free society that people are entitled when they wish to keep private their personal identity in the absence of some justifiable reason why they should be required to identify themselves. The exercise by agents of the state of a state power to ask a citizen to identify

---

<sup>162</sup> *Ibid.* at paragraph 35.

<sup>163</sup> Powers under the JSA are dealt with at pages 52 *et seq* below.

<sup>164</sup> Article 8(1) ECHR is a qualified right which means it can be limited in accordance with the provisions of Article 8(2).



himself and to account for his movements has the clear potential to interfere with the individual's private life. A person coming or going to venues, the identification of which he may quite legitimately consider to be private or confidential, would justifiably consider it an invasion of his privacy to be stopped and questioned about his movements. Such questions may involve enquiries requiring him to divulge information relating to aspects of his private life which may, for example, relate to his involvement in lawful political, social, cultural or sexual activities which may be considered by some to be controversial or unacceptable. The power to stop and question, particularly, when this may occur in a public place and in the presence or hearing of others, could clearly invade the private life of the individual concerned. While it is argued by the respondent that such a power does not pass a threshold of seriousness so as to give rise to any potential breach of article 8, it is not difficult to envisage factual scenarios and lines of questioning which could occur within the exercise of an untrammelled section 21 power that would give rise to an interference with a private life of the individual.”<sup>165</sup>

The case law of the ECtHR clearly establishes that covert and secret surveillance by state agencies constitutes a particular threat to democracy and freedom which requires strict justification in the interest of national security or for the prevention of crime. The system itself must provide adequate and effective guarantees against abuse.<sup>166</sup> A police power to stop and question is not covert surveillance but it “partakes some of the characteristics of surveillance. The fact that it can lead to open stopping and questioning in circumstances which do not ensure even privacy between the police and the individual adds to the potential for invasions of the Article 8 right... The relevant law must be clear and precise and thus will require rules to ensure that the power is not capable of being arbitrarily exercised in circumstances which do not justify its exercise.”<sup>167</sup>

---

<sup>165</sup> *In the matter of an application by Fox and McNulty for judicial review and in the matter of an application by Canning for judicial review* 9 May 2013, Ref GIR8854, at paragraph 40.

<sup>166</sup> For example, *Klass v Germany* (1979-80\_ 2 EHRR 214; *Erdem v Germany* (2002) 55 EHRR 383; *In the matter of an application by Fox and McNulty for judicial review and in the matter of an application by Canning for judicial review* 9 May 2013, Ref GIR8854.

<sup>167</sup> *In the matter of an application by Fox and McNulty for judicial review and in the matter of an application by Canning for judicial review* 9 May 2013, Ref GIR8854, at paragraph 45.

The Court was easily satisfied that there was a legal basis for the section 21 stop and question power, *i.e.* the JSA, but went on to consider the ‘quality of the law’ requirement demanded by the ECHR. The Court stated “It is clear that section 21 expressed as a broad discretionary power does not in itself provide guarantees or safeguards against abuse. It is widely framed and does not contain any rules designed to ensure that the power is not arbitrarily exercised. This is not to say that the 2007 Act read as a whole does not contain the means to ensure a legislative framework which would satisfy the ‘in accordance with law’ requirement provided that the power is a necessary one which satisfies the test of necessity and proportionality under article 8.2.”<sup>168</sup> The Court did accept that section 21 if accompanied by a properly formulated statutory Code of Practice (which ensures only an ECHR compliant exercise of the power), to be read in conjunction with section 21 could provide a legal framework capable of satisfying the ‘quality of law’ requirement. Crucially, the Court held that in the absence of such a statutory code the PSNI did not have a proper basis in ECHR compliant law to exercise the power.<sup>169</sup>

In respect of the compatibility of section 21 JSA with Article 5 ECHR the Court of Appeal held “Section 21 provides that a person can be stopped and questioned. Such a stopping for limited purposes specified can only be so long as is necessary to ascertain the limited amount of information permitted. Section 21 is so worded that it cannot be construed as a lawful power to move from a mere stopping of a person to pose a number of questions to effectively detaining him. Thus, if in fact the police officer’s purported exercise of the section 21 power constitutes an action which, properly interpreted, amounts to a deprivation of liberty he has exceeded the powers in section 21. Any code of practice made under section 34<sup>170</sup> must take account of the limitations of the power conferred in section 21.”<sup>171</sup>

---

<sup>168</sup> *Ibid.* at paragraph 46.

<sup>169</sup> *Ibid.* at paragraph 49.

<sup>170</sup> Section 34 JSA empowers the Secretary of State to issue a Code of Practice regarding the exercise of the JSA powers by police officers.

<sup>171</sup> *Ibid.* at paragraph 55.

The Court of Appeal then considered section 24 JSA as it was prior to amendment by the Protection of Freedoms Act 2012. In particular, whether the police power to stop and search under section 24 was an unlawful breach of the Article 5 and/or Article 8 ECHR rights in the absence of a requirement for reasonable suspicion that a person had wireless apparatus or munitions on him or her. The absence of a Code of Practice was again central to the Court's analysis. The Court had no difficulty finding that the use of the section 24 power was an interference with the Article 8 ECHR right and went on to consider the 'quality of law' requirement. As with section 21, the Court held that because the adequate safeguards to prevent the arbitrary exercise of the power had not been put in place the power was not properly exercisable.<sup>172</sup>

However, the Court rejected the argument that the power could not be validly exercised in the absence of reasonable suspicion. The Court gave an example to demonstrate its reasoning, "if intelligence indicated to the police that terrorists were transporting a bomb travelling in the direction of a given town centre in a red Ford vehicle, the stopping by the police of red Ford vehicles in the vicinity of the town, even in the absence of individual suspicions in relation to an individual driver, could properly be considered as justifiable and as a necessary and proportionate response to the risk of mass death and destruction. No reasonable law abiding and humane citizen could properly object to a relatively minor invasion of his privacy to help prevent a potential atrocity which could result in death or destruction. The new amended legislation represents the current legislative choice as to the applicable basis to stop and search."<sup>173</sup>

As a result of that judgment, dated 9 May 2013, the PSNI immediately suspended the use of sections 21 and 24 JSA. A final Code of Practice was then laid before Parliament, to take effect on 15 May 2013.<sup>174</sup> That Code is in similar terms as a draft code that the Northern Ireland Office had previously

---

<sup>172</sup> *Ibid.* at paragraph 59.

<sup>173</sup> *In the matter of an application by Fox and McNulty for judicial review and in the matter of an application by Canning for judicial review* 9 May 2013, Ref GIR8854, at paragraph 60.

<sup>174</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013.

issued for public consultation.<sup>175</sup> Whether or not that Code is itself compliant with the ECHR is to be considered by the High Court in Belfast.

## **POWER TO STOP AND QUESTION: SECTION 21 JSA**

A police officer may stop and question any person for so long as is necessary to establish his or her identity and movements.<sup>176</sup> That includes the power to stop a vehicle and to question the occupants of the vehicle either separately or jointly.<sup>177</sup> The power is limited in time to that necessary to question the person stopped to ascertain his or her identity and movements. While “identity and movements” are not defined, it is clear that questions should not extend to any extraneous matter which is not strictly limited to confirmation of the identity of the person stopped or their recent movements. Identity may include name, address and date of birth. A person who fails to stop when required to do so, refuses to answer a direct question or fails to answer a direct question to the best of his or her knowledge and ability commits a criminal offence.<sup>178</sup> If arrested for such an offence the person must be informed of the reason for that arrest.

While a person may choose to provide, for example, an identification card to confirm identity, section 21 does not permit the police officer to require production of a document. The Code of Practice for the exercise of JSA,<sup>179</sup> which was laid before Parliament in May 2013, suggests a person may provide identification to confirm identity but it does not make it clear that a form of identification cannot be required. That should be made express and schematic. That is particularly important in respect of section 21(1) JSA because it is a criminal offence to fail to answer questions.

---

<sup>175</sup> *Consultation on a Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, December 2012.

<sup>176</sup> Section 21(1) of the Justice and Security (NI) Act 2007.

<sup>177</sup> Section 21(5) of the Justice and Security (NI) Act 2007.

<sup>178</sup> Section 21(3) of the Justice and Security (NI) Act 2007.

<sup>179</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraph 6.5.

## **Recommendation 2**

**The PSNI should amend its Aide Memoire and include within its new policy (to be developed as per Recommendation 11 of this thematic review) clear instruction that the power to stop and question under section 21(1) of the Justice and Security (Northern Ireland) Act 2007 may not be used to require a person to confirm identity where identity is already known and may not be used to require a person to produce identification for the purpose of confirming identity.**

If the police officer already knows the identity of the person stopped there is no requirement and therefore no lawful power to stop that person to require him or her to confirm identity. During the course of this thematic review, a number of stakeholders expressed their belief that persons had been stopped and questioned as to identity by a police officer who clearly knew that person's identity. It must be made abundantly clear that exercise of the section 21(1) JSA power in those circumstances would not be in accordance with the law.

Regardless of whether or not identity is already known, a police officer can exercise the section 21 JSA power to stop a person to question about his or her movements. Questions relating to movements include, for example, the start and end points of the journey and the route. Once identity and movements have been established, the officer has no lawful power to continue with any further questioning. The police officer should, unless genuinely impracticable to do so, advise the person stopped at the outset of the extent of the power to stop and question. A record must be made of a stop and question and the person informed of his or her right to request a copy of that record within the following 12 months.

There is no statutory requirement that the officer has a reasonable suspicion in the traditional sense before exercising the power. In that respect, the same principles must apply as have been outlined above as to arbitrary selection

and proportionality.<sup>180</sup> As set about above there is no requirement for reasonable suspicion but it is clear from the judgments of the UK House of Lords and the ECtHR that the power must not be exercised on a purely random basis: there must be a *basis* or reason for exercising the power in an individual case. For example, the police may have intelligence that suspected offenders (the identity of whom is not known) are within a specified geographical location at a particular time. The police may therefore need to stop and question a number of individuals within that location at that time.

## **ENTRY AND SEARCH: SECTION 24 & SCHEDULE 3 JSA**

Section 24 and Schedule 3 to JSA provides the police with a power to enter premises to search for any wireless apparatus or munitions unlawfully on the premises. It also provides the police with a power to stop and search any person for any wireless apparatus or munitions unlawfully on the person. Munitions are explosives, firearms and ammunition, including anything used or capable of being used in the manufacture of an explosive, a firearm or ammunition. Wireless apparatus means a scanning receiver or transmitter, which includes equipment that can send or receive or intercept messages or which can operate or control machinery or apparatus. That includes radios and mobile telephones.<sup>181</sup>

### **Premises (including vehicles)**

A police officer may enter and search any premises (as opposed to any dwelling, which is dealt with differently) for the purpose of ascertaining whether there is wireless apparatus or unlawful munitions on the premises.<sup>182</sup> “Premises” is defined as any place and includes a vehicle, an offshore installation, a tent and a moveable structure. The officer may require any person who is on the premises or who enters while the search is being carried out to remain on the premises, to move from one part to another or not to

---

<sup>180</sup> For example, at pages 9, 46 to 48, 60 and 107.

<sup>181</sup> Paragraph 1 of schedule 3 to the Justice and Security (NI) Act 2007

<sup>182</sup> Section 24 and schedule 3 of the Justice and Security (NI) Act 2007

enter premises, so long as he or she reasonably believes it is necessary in order to carry out the search or to prevent it from being frustrated.<sup>183</sup> The power cannot be exercised for longer than four hours unless an officer of at least the rank of Superintendent has authorised an extension to the period by a further four hours.

A police officer may stop a vehicle and take it to any place for the purpose of carrying out a search under Schedule 3 JSA. That search is limited to a search for munitions unlawfully in the vehicle or wireless apparatus in the vehicle.<sup>184</sup> If a vehicle has to be removed, for example to avail of search facilities or simply to a quieter part of the road, the driver must be informed of the location of the removal and the reason for it. The police must not retain a vehicle for any longer than is necessary to conduct the search. Where such a search is carried out in relation to a vehicle, the police officer carrying out the search may, if he or she reasonably believes that it is necessary in order to carry out the search or to prevent it from being frustrated, require a person in or on the vehicle to remain with it or require a person in or on the vehicle to go to and remain at any place to which the vehicle is taken.<sup>185</sup> Any requirement may only last for so long as reasonably necessary to carry out the search and in any event for no longer than four hours. The person subject to such a requirement must be informed immediately when it comes to an end.

An officer who stops and searches a vehicle must make a record of the search unless in the circumstances it is not reasonably practicable to do so. The record should include: the location and place of the vehicle; its registration number; the date and time of the search; details of any damage caused during the search; details of anything seized during the search; and, the officer's identification number and the name of the police station to which he or she is attached. The record should also include the name and address of the person appearing to be the person in charge of the vehicle (if known).

---

<sup>183</sup> Paragraph 2 of Schedule 3 to the Justice and Security (NI) Act 2007.

<sup>184</sup> Section 26(1)(b) of the Justice and Security (NI) Act 2007.

<sup>185</sup> Section 26(1) of the Justice and Security (NI) Act 2007.

That person should be informed of his or her right to have a copy of the record and how that might be obtained.<sup>186</sup>

## Dwellings

If a police officer intends to search a dwelling, which is defined as a building or part of a building used as a dwelling and a vehicle which is habitually stationary and which is used as a dwelling, the search must have been authorised by a senior officer and the officer entering the dwelling must have a reasonable suspicion that the dwelling contains wireless apparatus or munitions unlawfully in the dwelling.<sup>187</sup> The distinction is therefore drawn between a place which can be regarded as a person's home and which cannot. A police officer may seize, retain and, if necessary, destroy any unlawfully held munitions and may seize and retain any wireless apparatus found during the course of a search of premises. A police officer may, if he or she reasonably believes that it is necessary in order to carry out the search or to prevent it from being frustrated, require a person who is on the premises when the search begins, or who enters during the search, to remain on the premises; require a person to remain in a specified part of the premises; require a person to refrain from entering a specified part of the premises; require a person to go from one specified part of the premises to another; or, require a person who is not a resident of the premises to refrain from entering them.<sup>188</sup>

Any requirement ceases to have effect after the conclusion of the search in relation to which it was imposed.<sup>189</sup> In any event, no requirement may remain in place for longer than four hours unless an officer of at least the rank of Superintendent has authorised an extension of by a further four hours and only if he considers that necessary in order to carry out the search or to

---

<sup>186</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at section 9.

<sup>187</sup> Paragraph 2(2) of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007

<sup>188</sup> Sub-paragraph 3(1) of schedule 3 to the Justice and Security (Northern Ireland) Act 2007.

<sup>189</sup> Sub-paragraph 3(2) of schedule 3 to the Justice and Security (Northern Ireland) Act 2007.



prevent the search from being frustrated.<sup>190</sup> A person commits an offence if he or she knowingly fails to comply with a requirement imposed during a search or wilfully obstructs, or seeks to frustrate, a search of premises.<sup>191</sup>

When an officer carries out a search of premises he or she must, unless it is not reasonably practicable to do so, make a written record of the search.<sup>192</sup>

The record must contain: the address of the premises searched; the date and time of the search; any damage caused in the course of the search; the police number of the officer conducting the search; and a record of anything seized in the course of the search. The record must also include the name (if known) of any person appearing to the officer to be the occupier of the premises searched. Importantly, a person may not be detained in order to discover his or her name. If the officer does not know the name of a person appearing to be the occupier of the premises searched, he must include in the record a note describing that person.<sup>193</sup> A copy of that record must be supplied to any person appearing to the officer to be the occupier of the premises searched. The copy should be supplied immediately or as soon as is reasonably practicable.<sup>194</sup>

## **SEARCH OF PERSONS: SECTION 24 & SCHEDULE 3 JSA**

### **Persons: with suspicion**

A police officer may stop a person whether or not in a public place to search him or her for the purpose of ascertaining whether he or she has any wireless apparatus or munitions unlawfully.<sup>195</sup> The exercise of the power requires the officer conducting the search to have a reasonable suspicion that the person has wireless apparatus or munitions unlawfully on him or her. The officer may

---

<sup>190</sup> Sub-paragraph 3(3) & (4) of schedule 3 to the Justice and Security (Northern Ireland) Act 2007.

<sup>191</sup> Sub-paragraph 8(1) of schedule 3 to the Justice and Security (Northern Ireland) Act 2007.

<sup>192</sup> Sub-paragraph 6(1) of schedule 3 to the Justice and Security (Northern Ireland) Act 2007.

<sup>193</sup> Sub-paragraphs 6(2) to 6(4) of schedule 3 to the Justice and Security (Northern Ireland) Act 2007

<sup>194</sup> Paragraph 7 of schedule 3 to the Justice and Security (Northern Ireland) Act 2007

<sup>195</sup> Section 24 and schedule 3 to the Justice and Security (NI) Act 2007 as amended by schedule 6 to the Protection of Freedoms Act 2012.

seize any munitions or wireless apparatus found during the course of the search unless it appears to the constable that the munitions or wireless apparatus have been, and will be, used only lawfully.<sup>196</sup>

### **Persons: without suspicion**

A police officer may also stop and search a person *without* reasonable suspicion that he or she has wireless apparatus or munitions unlawfully on him or her if, but only if, a senior officer (of at least the rank of Assistant Chief Constable) has given an authorisation in relation to a specified area or place and the authorising officer reasonably suspects whether in relation to a particular case or a description of case that the safety of any person might be endangered by the use of munitions or wireless apparatus. The authorising officer must also reasonably consider that the authorisation is *necessary* to prevent such danger.

A record must be made of every stop and search. An officer who is present at a search should ensure that a record is made at the time unless it is reasonably impractical to do so. The person should be informed that a full record will be available, how it can be accessed and that it can be requested within 12 months of the search. An officer will ask for the name, address and date of birth of the person searched, but it is essential that officers understand there is no power to require and therefore no obligation to provide those details.

The record must always include: the name of the person searched or (if it is withheld) a description; the date, time, and place of first detention; the date, time and place the person was searched (if different from the place of detention); the purpose of the search; the basis for the use of the power, including any necessary authorisation that has been given; the outcome of the search; a note of any injury or damage to property resulting from it; and the officer's identification number and the name of the police station to which the

---

<sup>196</sup> Paragraph 5 of Schedule 3 to the Justice and Security (NI) Act 2007.

officer is attached. The name of the police officer is not required to be included on the record. A record is required for each person searched. However, if a person is in a vehicle and both are searched, and the object of the search is the same, only one record will be completed. A record of the stop will be made electronically by the officer unless that officer does not have an electronic device in which case a paper record will be made. A unique reference number and guidance on how to obtain a full copy of the record must be provided to the person searched. Where an electronic record cannot be made or a unique reference number cannot be provided at the time, guidance must still be given to the person searched.<sup>197</sup>

The fact that the basis for the *use* of the power must be recorded, *including* any necessary authorisation that has been given, indicates that something more is required than a recitation that an authorisation has been given for the power to stop and search under the JSA. Therefore, officers must do more than simply advise of the source of the powers, which appears to have been standard practice previously.

## **Authorisations**

To satisfy the requirements of JSA, a specific high level of threat from munitions or wireless apparatus must be demonstrated. The authorising officer must be satisfied that the use of the power is *necessary* to prevent such endangerment. An authorisation may not be given solely on the basis of general endangerment from wireless apparatus or unlawful munitions.<sup>198</sup> That is, however, a factor which may be taken into account. Importantly, the giving of an authorisation may not be justified because it would reassure the community or, crucially, because it would be a deterrent or intelligence-gathering tool.<sup>199</sup> The time period for which an authorisation may endure and the geographic area for which it may apply is limited: an authorisation must last for no longer and cover no greater an area than is necessary to prevent

---

<sup>197</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraph 8.75 to 8.78.

<sup>198</sup> *Ibid*, at paragraph 8.21.

<sup>199</sup> *Ibid*, paragraph 8.21.

an act of terrorism. The authorisation must justify as necessary each geographical area and each time period for which it is to last albeit it may be influenced by the ability of terrorist groups to change their methods or targets quickly. In any event, an authorisation may last for no longer than 14 days.<sup>200</sup>

The authorising officer is also required specifically to consider: the proportionality of the use of without reasonable suspicion powers; that any searches that are authorised are limited to searching for evidence of wireless apparatus or munitions; whether there are other search powers that may be used, in particular those that require the individual reasonable suspicion of the officer conducting the search; the safety of the public and police officers; and, the risk of serious damage to property. The authorising officer must therefore consider how the powers are to be used if an authorisation is given. That enables the authorising officer to ensure that officers who are conducting the searches are properly briefed and tasked. For example, the authorising officer will consider whether the most appropriate use of the powers will involve vehicle check-points or searches of individuals in the vicinity of particular locations. Given the extent of the authorising officer's consideration he or she should thereafter also be able to indicate the factors that may help target searches more effectively within the designated area.

An authorisation may relate to a single suspected act of a person endangering life by having unlawful munitions or wireless apparatus or it may relate to multiple threats of endangerment. In those circumstances it may be appropriate to include multiple threats within one authorisation.<sup>201</sup> If however the threats are not in some way linked, multiple threats should not be dealt with in a single authorisation. A general high level of threat alone is not sufficient for any authorisation: further supporting information would be required. While the JSA does not prevent an authorisation from being given which relates to the whole of Northern Ireland for 14 days, if such an

---

<sup>200</sup> Paragraph 4C of Schedule 3 to the Justice and Security (NI) Act 2007.

<sup>201</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, paragraph 8.20.

authorisation is given it must be justified as being necessary to deal with a particular threat.

An authorisation must be given in writing unless it is not practicable to do so in the circumstances.<sup>202</sup> If it is not practicable to give an authorisation in writing it may be given orally but an oral authorisation must be confirmed in writing as soon as is reasonably practicable.<sup>203</sup> The Secretary of State must be informed of an authorisation as soon as reasonably practicable after it is given.<sup>204</sup> The Secretary of State must confirm an authorisation if it is to last longer than 48 hours.<sup>205</sup> The authorising officer must not wait for 48 hours to confirm the authorisation if it was reasonably practicable to do so any sooner. The authorisation must be submitted on a standard form which must include a detailed account of the intelligence and must be supported by a copy of the classified material upon which the authorisation relies.

It must, on the face of the authorisation, justify both its geographical and temporal extent and explain why the authorisation is considered necessary. In determining what is necessary in terms of duration and geography the authorising officer should make an assessment of what is the most appropriate operational response, taking into account all relevant factors. Relevant factors would always include information about the endangerment caused by suspected use of munitions or wireless apparatus (and any known information about its likely scope and duration). As the Code of Practice states “It could also include but should not be restricted to: known tactics and capabilities of individuals and groups who may be intent on endangering the public; recent activity posing a danger to the public.”<sup>206</sup>

The authorisation therefore ought to be a comprehensive document, which provides the Secretary of State with sufficient detail and evidence to make a reasoned and informed decision to confirm, cancel or vary it. If the Secretary

---

<sup>202</sup> For example, in cases of urgency.

<sup>203</sup> Paragraph 4A(1) of Schedule 3 to the Justice and Security (NI) Act 2007.

<sup>204</sup> Paragraph 4D(1) of Schedule 3 to the Justice and Security (NI) Act 2007.

<sup>205</sup> Paragraph 4D(2) of Schedule 3 to the Justice and Security (NI) Act 2007.

<sup>206</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, paragraph 8.24.

of State does not confirm an authorisation it automatically ceases to have effect after 48 hours. If the Secretary of State cancels an authorisation it ceases to have effect immediately. However, in that event the use of the powers during the initial 48 hours is not rendered unlawful. The giving of rolling authorisations in each case for less than 48 hours (in an attempt to exclude the Secretary of State's consideration) is expressly prohibited and is defined as an abuse of the provisions. An authorisation may never extend beyond 14 days but it may be renewed at the end of each 14 day period. An authorisation must not be given for the maximum period unless that can be justified as necessary. Convenience is never a good reason for extending the authorisation to the maximum period.

Therefore, the time period must be explained and justified separately. Each renewal must comply with the same strict requirements and must each be considered on its own merits. A renewal will only be justified on the basis of a new intelligence assessment. It is never appropriate to simply renew indefinitely authorisations: on each and every occasion there is a renewal all of the relevant criteria must be satisfied. If an authorisation mirrors the authorisation which immediately preceded it and is based upon previous information which remains relevant, the relevance of that information must be justified afresh. The authorising officer must also ensure, and set out in the authorisation, information which demonstrates that any police officer who may exercise the power will be properly briefed on the use of the powers including on the provisions of the Code of Practice.<sup>207</sup>

The fact that an authorisation has been given for a specified area and for a specified period of time does not absolve the authorising officer from reviewing it before the expiry of the time period or in respect of geographical extent. Therefore, circumstances giving rise to each authorisation should be kept regularly under review and as circumstances change the authorisation should be reassessed. This is particularly important where the authorisation relates to multiple threats. Crucially, as soon as the criteria for the

---

<sup>207</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraph 8.27.

authorisation fall below what is required, which means that the authorising officer no longer holds the reasonable suspicion upon which it was based, he or she must immediately cancel the authorisation, inform the Secretary of State and brief officers who may have been or may anticipate using the powers.

### **Monitoring JSA authorisations**

There have been a number of authorisations made under section 24 JSA. There is a standard but lengthy form that contains detailed guidance for the authorising officer as to the information required: this is not a form that can be filled in carelessly or partially. The form is underpinned throughout by reference to the JSA and also to relevant human rights standards. Throughout, the authorising officer is required to set out the basis for the authorisation and explain the rationale with supporting material. The material is provided to the Secretary of State together with the form. The high threshold of necessity is highlighted on the form and the officer is mandated to justify why in his or her view the authorisation is necessary for the reasons set out in the JSA, is proportionate to the legitimate aim to be achieved and why less intrusive powers (for example reasonable suspicion powers) are insufficient in all the circumstances. Each authorisation that the Policing Board's Human Rights Advisor dip-sampled during the course of this thematic review was completed manually. That is more than simply an administrative matter: the manual completion of a form prevents the 'cut and paste' of information from previous forms albeit it does not prevent them being manually copied. It therefore requires individual completion on each occasion. Each authorisation makes the link expressly between the intelligence and the necessity for the use of the powers.

In a detailed report, drawing on evidence from consultees and stakeholders, the Committee on the Administration of Justice (CAJ) raised a number of

serious concerns about the new authorisation regime.<sup>208</sup> Those concerns deserve to be taken seriously and the Committee has taken them seriously. One particular concern should be addressed here. CAJ queries the extent to which the Security Service is involved in the authorisation process and asks “whether the intelligence on which they make their requests is visible to the PSNI authorising officer”.<sup>209</sup> The Human Rights Advisor to the Policing Board has raised that issue directly and has sought to examine the extent to which, as it may be put, the PSNI are in control of executive policing decisions. She has been unable to advise the Committee conclusively on this matter but has undertaken to pursue the matter further.

What the Human Rights Advisor has been able to advise the Committee to date is that the PSNI authorising officer remains (both legally and in practice) the relevant officer with whom responsibility rests for the decision to give an authorisation. In that respect, the authorising officer has a vested interest in ensuring that all authorisations are based upon reliable information and are necessary and proportionate. Furthermore, the authorising officer is responsible for assessing the intelligence relevant to his or her decision-making and for compiling the supporting material that accompanies the authorisation when it is provided to the Secretary of State. The PSNI has advised the Human Rights Advisor that all material relevant to an intelligence assessment is visible to the PSNI. It seems highly likely however that the Security Service (having primacy as it does in respect of national security intelligence matters) will have an important part to play in providing intelligence to the PSNI.

Following the transfer of primacy for national security intelligence matters to the Security Service in 2007, it was a fundamental principle of the St Andrews Agreement that all national security intelligence including that of the Security Service would be visible to the PSNI, the PSNI would retain responsibility for all executive policing operations and the PSNI would be informed of all

---

<sup>208</sup> *Still part of life here? A report on the use and misuse of stop and search/question powers in Northern Ireland*, Committee on the Administration of Justice, November 2012.

<sup>209</sup> *Ibid.* at page 3.



counter-terrorist investigations and operations in Northern Ireland.<sup>210</sup> It is of critical importance that intelligence is visible to the PSNI and that the PSNI is responsible for all executive policing operations. That includes decisions to authorise certain areas within which powers to stop and search can be used without suspicion. The Human Rights Advisor has not seen any evidence to suggest that is not the case. However, she is unable to provide any additional reassurance to that effect.

What can also be noted in this context is the extent of involvement of relevant District Commanders in the process of authorisations. The authorising officer consults with the relevant District Commander to consider the criteria for the authorisation and the potential impact of the use of the powers within the relevant District. While that does not, and cannot, override the authorising officer's responsibility for making his or her own personal assessment it is an important element of the consideration. The District Commander is uniquely placed to advise on the intelligence picture and he or she is operationally responsible for the use of the powers within District. If a District Commander's views are to be taken into account that necessitates the Commander being fully briefed on the intelligence which is being considered for the purposes of an authorisation. As stakeholders have repeatedly advised the Committee, the 'importation' of officers from outside District to carry out intrusive stop and search powers is seen as undermining of neighbourhood policing and community confidence in policing. The fact that the District Commander is part of the process and can influence considerations of the operational use of the powers is welcomed. The PSNI has confirmed that District Commanders are tasked with oversight of the use of the powers within their area of responsibility and therefore must be part of the process.

While that appears to be the practice, the Committee recommends that the involvement of the relevant District Commander(s) should be formally recognised and required by PSNI policy. Accordingly, when the PSNI develops its policy on the use of powers to stop and search and question

---

<sup>210</sup> Annex E to the St Andrew's Agreement.

under TACT and JSA it should include a specific requirement that the relevant District Commander(s) should be consulted before an authorisation is given and he or she should have an opportunity to influence the authorisation.<sup>211</sup>

### **Recommendation 3**

**The PSNI should include within its new policy on the use of powers to stop and search and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 (to be developed as per Recommendation 11 of this thematic review) a requirement that the relevant District Commander(s) should be consulted before an authorisation is given and he or she should have an opportunity to influence the authorisation.**

The Committee is of the view that all information which can be put into the public domain to better explain the authorisation process and the related national security arrangements should be put into the public domain to assist the community in understanding those arrangements. The Policing Board is working towards that and will report further in due course.

Having considered the issues carefully, having inspected a number of authorisations and having spoken to relevant officers and officials it was apparent to the Policing Board's Human Rights Advisor that authorisations are considered so as to limit, rather than widen, their extent and that the PSNI are conscious of the need to justify each and every authorisation on the basis of intelligence. The authorisations are detailed, critical and well-reasoned. In the authorisations viewed by the Human Rights Advisor each contained a fresh analysis (as they must) of the necessity for the use of the powers. Furthermore, each and every authorisation is carefully considered by the Secretary of State and her officials before being confirmed, cancelled or varied. Robert Whalley CB has also analysed the authorisation regime and the process of giving authorisations. He has reported that he is "satisfied that the current procedures deal comprehensively with the detailed

---

<sup>211</sup> As to the development of PSNI policy, see Recommendation 11.

requirements”.<sup>212</sup> He went on to describe the process as “exhaustive and comprehensive... [and that] authorising officers have exercised their function scrupulously and in full recognition of the magnitude of the decisions they are taking.”<sup>213</sup>

A criticism levelled at the TACT authorisation process by the ECtHR in the *Gillan* case was that the Secretary of State had not refused to confirm any authorisation and therefore the process did not appear to adequately protect against abuse. Whether or not the Secretary of State ‘cancels’ an authorisation does not *in itself* determine that the authorisation regime is not robust. It is equally possible that the PSNI is rigorous in its application of the regime and that authorisations are only made when necessary. It was clear to the Policing Board’s Human Rights Advisor that the relevant PSNI officers were mindful of the high threshold now applied by the Secretary of State. It was also clear that the Secretary of State’s officials scrutinised each authorisation carefully and critically.

The Committee on behalf of the Policing Board will continue to monitor the giving of authorisations with this particularly in mind. It is essential, however, that the Policing Board’s role is clearly delineated from that of the PSNI and others. The Human Rights Advisor to the Policing Board carries out this monitoring exercise (which necessarily involves viewing sensitive material) on behalf of the Board in discharge of its oversight function. Neither the Advisor nor the Board is part of the process in any way and will not take any part in the authorisation process other than to monitor and report. Should the PSNI, at any time in the future, authorise the exercise of the without suspicion power to stop and search under section 47A TACT it must ensure that the same standards apply as currently apply in respect of JSA authorisations.

---

<sup>212</sup> *Report of the Independent Reviewer Justice and Security (NI) Act 2007, Fifth Report*, Robert Whalley CB, November 2012.

<sup>213</sup> *Ibid.* at paragraph 247.

## Use of the section 24 JSA power within authorised areas

Importantly, while the fact of an authorisation means that the officer proposing to carry out a search need not have individual reasonable suspicion, he or she may only search for the purpose of ascertaining whether a person has wireless apparatus or munitions unlawfully.<sup>214</sup> It follows that the principles set out above in relation to TACT without suspicion powers apply with equal force.<sup>215</sup>

An officer may detain that person for such time as is reasonably required to permit the search to be carried out. The detention must be at or near the place where the search is carried out.<sup>216</sup> For example, a person may be asked to move to the side of a pavement or to a quieter area on the same road. A person may not be required during such a search to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves.<sup>217</sup> An authorisation may be in writing or given orally if it is not reasonably practicable to be given in writing but if given orally it must be confirmed in writing as soon as reasonably practicable.<sup>218</sup>

As noted above, section 24 confers a wide range of powers some of which require an authorisation, some of which do not. Some powers require reasonable suspicion but some do not. Some powers relate to people and some relate to premises, vehicles and dwellings. It is difficult to assess from the quarterly statistical reports the extent of the use of the *range* of section 24 powers as the statistics relate only to searches of persons and all such searches are recorded collectively. Therefore, in its Human Rights Annual Report 2012, the Policing Board recommended that the PSNI should collect and thereafter disaggregate its statistics according to the range of section 24

---

<sup>214</sup> Paragraph 4A(3) of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007 as amended by schedule 6 to the Protection of Freedoms Act 2012.

<sup>215</sup> See pages 40 – 52.

<sup>216</sup> Paragraph 4A(6) of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007 as amended by schedule 6 to the Protection of Freedoms Act 2012.

<sup>217</sup> Paragraph 4A(5) of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007 as amended by schedule 6 to the Protection of Freedoms Act 2012.

<sup>218</sup> Paragraph 4A(7) of Schedule 3 to the Justice and Security (Northern Ireland) Act 2007 as amended by schedule 6 to the Protection of Freedoms Act 2012.

powers. In particular, that the statistics should identify the powers used according to whether the stop and search was pursuant to an authorisation, was undertaken with reasonable suspicion or without and whether it was exercised in relation to a person, vehicle or premises.<sup>219</sup> That recommendation was accepted.<sup>220</sup>

## **POWER TO ENTER PREMISES: SECTION 23 JSA**

A police officer may enter any premises if he or she considers it necessary in the course of operations for the preservation of peace or the maintenance of order.<sup>221</sup> Whether it is necessary to enter premises should be considered in the context of the police duty<sup>222</sup> to protect life and property, preserve order, prevent the commission of offences and bring offenders to justice. However, to that should be added the requirement that it is necessary in a democratic society for the achievement of one of those legitimate aims and that the entry is proportionate to that aim.<sup>223</sup> No warrant is required. “Premises” is defined as any place including a vehicle, offshore installation, tent or moveable structure.

The power to enter premises which are a *building* depends upon a written authorisation<sup>224</sup> having been given by an officer of at least the rank of Superintendent unless it has not been reasonably practicable to obtain written authorisation in which case oral authorisation<sup>225</sup> should be given by an officer of at least the rank of Inspector. Therefore, a written authorisation should be made for all pre-planned operations. An oral authorisation will only be appropriate in more urgent situations where the operation has not been planned but there is sufficient time to request an authorisation from an Inspector. When an oral authorisation has been made the officer making it

---

<sup>219</sup> *Human Rights Annual Report 2012*, Northern Ireland Policing Board, February 2013, Recommendation 5.

<sup>220</sup> *PSNI Human Rights Programme of Action 2012*, PSNI, May 2013.

<sup>221</sup> Section 23 of the Justice and Security (NI) Act 2007.

<sup>222</sup> Section 32 of the Police (NI) Act 2000.

<sup>223</sup> This is discussed further above.

<sup>224</sup> Section 23(3)(a) of the Justice and Security (NI) Act 2007.

<sup>225</sup> Section 23(3)(b) of the Justice and Security (NI) Act 2007.

must make a written record of the authorisation as soon as reasonably practicable.<sup>226</sup>

If it has not been reasonably practicable to obtain either written or oral authorisation, because the situation is very urgent, a police officer may still enter premises lawfully if an immediate response is required to preserve the peace or maintain order.<sup>227</sup> Each entry to a building must be recorded as soon as reasonably practicable by the officer entering the building. The record must contain the address and location of the building, the date and time of entry, the purpose of entry, the police number of each officer who enters the building and, where authorisation has been given, the number and rank of the authorising officer.<sup>228</sup> Copies of the record, including any authorisation made, should be provided to the owner or occupier of the building as soon as reasonably practicable after entry. Furthermore, any other person who has sufficient reason to request a copy of the record must be supplied with a copy. All authorisations and records must be retained for at least 12 months or longer if there are associated legal proceedings.

In all cases concerning entry to a building (whether a private dwelling or a business premises), Article 8 ECHR (the right to respect for private and family life) and Article 1 of the First Protocol to the ECHR (the right to peaceful enjoyment of possessions) will be engaged. Therefore, an officer should always consider whether entry is prescribed by law, is necessary and proportionate. For example, if there is a less intrusive means of preserving the peace that should be considered before entering the premises. Furthermore, officers should attempt to secure the cooperation of the owner or occupier of the building, should inform that person of the intent to enter pursuant to section 23 JSA, must be respectful of any person or property on the premises and leave the premises secure if they were previously secure. The officer must leave the building as soon as it is no longer necessary to remain for the preservation of peace or the maintenance of order.

---

<sup>226</sup> Section 23(5) of the Justice and Security (NI) Act 2007.

<sup>227</sup> Section 23(2)(b) of the Justice and Security (NI) Act 2007

<sup>228</sup> Section 23(6) of the Justice and Security (NI) Act 2007.

Until 2009, the PSNI did not compile statistics or report upon the use of the power to enter premises. Following the review of the powers by the Independent Reviewer of the JSA, Mr Robert Whalley CB, those statistics are now included within Mr Whalley's annual review.

As the same principles apply to JSA as to TACT (as to which see above), the importance of monitoring the use of powers must be paramount. Therefore, the Policing Board recommends that the PSNI should undertake to develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search under sections 21 and 24 of JSA according to the name and number of the police officer and according to the name of the person searched.

#### **Recommendation 4**

**The PSNI should develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search and questions under sections 21, 23 and 24 of the Justice and Security (Northern Ireland) Act 2007 according to the name and number of the police officer and according to the name of the person searched.**

## CONDUCT OF SEARCHES: TACT & JSA

In addition to the absolute requirement to only exercise the powers available within the law and in accordance with the statutory Codes of Practice, the police must be mindful that the manner of a search may cause unnecessary distress, alarm and resentment and thereby undermine community confidence in the police and alienate individuals and groups. Therefore, each and every search must be carried out with consideration and courtesy for the person or premises being searched. While that may seem self-evident, some stakeholders have reported to the Committee their concerns at the manner in which searches are conducted, particularly of young men.<sup>229</sup> Should there be any doubt about the importance of people being treated with courtesy and consideration, the TACT and JSA Codes of Practice, which must be read along with the legislation and must be complied with, make it an express requirement. Therefore, an officer who does not treat a person with courtesy and consideration is not only behaving badly he or she will be in breach of the Codes of Practice as well as the PSNI Code of Ethics.

Police officers should be reminded, through training and operational briefings, of the distress and alarm that can be caused to an individual detained by the police and subjected to an intrusive search. During such an encounter the police officer will be armed and he or she will have access to powers which the subject may fear will be used without good cause. That can be very frightening, whether that person has encountered the police previously or not. The police officer should always attempt to gain the cooperation of the person being searched even if he or she at first is resistant to the search. It can also be embarrassing for a person to be stopped and searched in a public place. The Code of Practice requires that “every reasonable effort must be made to minimise the embarrassment that a person being searched may experience.”<sup>230</sup>

---

<sup>229</sup> This issue was raised with the Human Rights and Professional Standards Committee during roundtable meetings held in Belfast, Armagh and Derry/Londonderry during 2012.

<sup>230</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraph 8.63; *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43,*



The legislation itself provides some protection in that a person searched under section 47A TACT or section 24 JSA may not be required to remove any clothing in public save for headgear, footwear, an outer coat, a jacket or gloves.<sup>231</sup> A search in public of clothing, which has not been removed, must be restricted to superficial examination of outer garments but an officer is permitted to place a hand inside the pockets of the outer clothing, or feel around the inside of collars, socks and shoes so long as that is reasonably necessary in the circumstances to look for the object of the search or to remove and examine any item reasonably suspected to be the object of the search. A person's hair may also be searched in public so long as it is reasonably necessary to look for the object of the search.<sup>232</sup>

If it is reasonably necessary to require a person to remove anything other than outer clothing that should be conducted in a more private setting, for example, in a police vehicle or nearby police station and should be conducted by a person of the same sex unless that is not genuinely possible. While it is not a requirement of the legislation that a search is carried out by a person of the same sex it is important that the police make every effort to ensure that a person of the same sex is available. For example, if a person is required to remove a shirt or trousers it is likely to be of great concern to do so in the presence of police officers of the other gender. The PSNI has confirmed that in such circumstances an officer of the same gender *should* carry out the search. In respect of a transgender person, particular sensitivity is required: the search should be conducted in accordance with the PSNI Protocol *Treatment of the Transgender Community*. As per the Protocol, "the views of all parties to the search should be fully taken into account before reaching any decision on who should conduct the search." Where a person has a Gender

---

43A and 47A of the Terrorism Act 2000, Northern Ireland Office, August 2012, at paragraph 9.8.

<sup>231</sup> Paragraph 4A(5) of Schedule 3 to the Justice and Security (NI) Act 2007; Paragraph 1 of Schedule 6B to the Terrorism Act 2000.

<sup>232</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraph 8.67 – 8.68; *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraphs 9.12 & 9.13.

Recognition Certificate they must, in every respect, be treated as a person of the gender recorded on the Gender Recognition Certificate.<sup>233</sup>

While a person may be detained during the course of a search,<sup>234</sup> the detention must be for no longer than is reasonably required to carry out the search. In other words, the officer must make reasonable efforts to ensure that the person is detained for as short a period of time as is reasonably necessary. The search should be conducted at or near the point at which the person or vehicle was stopped unless it is genuinely not practicable to do so.

Officers must be fully aware and respectful of cultural and religious differences. For example, some people cover their heads or faces for religious reasons. While that does not mean a person cannot be asked to remove the headwear or face covering if it is reasonably necessary for it to be removed to conduct a search for an item, an officer should permit it to be removed out of public view. Since the Code of Practice does mention the removal of headwear and face coverings there is not sufficient guidance on such issues. The Committee therefore considers it important that the PSNI develop guidance, in consultation with stakeholders, on the conduct of a search which sets out in sufficient detail the range of cultural and religious issues that may arise during a search and which addresses specifically what an officer should do when presented with language barriers or sensory impairment.

## **Recommendation 5**

**The PSNI should develop guidance, in consultation with relevant stakeholders, on the conduct of searches under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007, which sets out in sufficient detail the range of cultural and religious issues that may arise during a search and which addresses specifically what an officer**

---

<sup>233</sup> The Policing Board has published an extensive review of the rights of transgender people including rights in relation to police searches: *Policing with and for persons who identify as Lesbian, Gay, Bisexual and Transgender*, That report can be accessed through the publications section of the Policing Board's website [www.nipolicingboard.org.uk](http://www.nipolicingboard.org.uk)

<sup>234</sup> By virtue of paragraph 4A(7) of Schedule 3 to the Justice and Security (NI) Act 2007 and paragraph 2 of Schedule 6B to the Terrorism Act 2000.

**should do when presented with language barriers or sensory impairment.**

## **BRIEFING OF OFFICERS: TACT & JSA**

It is important that TACT and JSA powers are used only by those officers who have been trained on the use of the powers. When an officer is deployed to use the powers, he or she must be briefed on the circumstances in which it is appropriate to use the powers. The PSNI developed a new training package covering all of the powers under TACT and JSA, which has now been delivered to every officer who may have recourse to the powers. The Policing Board's Human Rights Advisor has reviewed the materials used for the training and has attended a number of training sessions. She found those training sessions to be comprehensive and to include a careful and considered analysis of the history of the use of powers in Northern Ireland and their potential to impact upon community confidence. Officers were challenged throughout the training to discuss their preconceptions about counter-terrorism policing and to consider the views of stakeholders. The trainers were fully engaged in the training and delivered it with enthusiasm and with an impressive understanding of the competing rights of all people in Northern Ireland. If in any doubt before the training, officers who attended left with the requisite degree of knowledge to ensure they were equipped to use the powers lawfully and effectively.

That said, the messages delivered in training require repetition on a regular basis to ensure they are applied in practice. To that end, officers about to be deployed who may have recourse to use the powers should be briefed fully. They should be reminded that there may be more appropriate powers, for example, those requiring reasonable suspicion and of the requirements as to recording each stop and search and question and the provision of information to the person stopped.<sup>235</sup>

---

<sup>235</sup> As required by the *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraphs 8.3- 8.4; and the *Code of Practice for the*

The briefing should make officers aware of relevant current information and intelligence, including current threats. Briefings should be as comprehensive as possible in order to ensure officers understand the nature and justification for the operation (which will in turn help officers to understand what evidence they are looking for in the course of a search). This is underlined by the Code of Practice.<sup>236</sup> Therefore, officers using the powers should be provided with as full an intelligence picture as reasonably possible, which will ensure that officers understand the context of the authorisation and assist them in knowing what to look for. Of particular importance is the requirement that officers be reminded of the limits of a lawful search. For example that a section 24 search is limited to searching for wireless apparatus or munitions unlawfully on a person or within premises or a vehicle and TACT searches are limited to searching for evidence that a person being searched is a terrorist or that a vehicle being searched is being used for the purposes of terrorism. As the Code of Practice makes clear, that does not permit a search generally for items that *could be* used in connection with terrorism, for example, by another individual in different circumstances.<sup>237</sup>

It is essential that the PSNI is able to demonstrate that officers are briefed appropriately and that the powers are used proportionately. That requires that individual officers are reminded that each is individually responsible for the exercise of the powers and accountable at law for each use. The PSNI has produced a document described as an Aide Memoire (which will be regularly reviewed and updated), which provides each officer with a helpful summary of the powers, a guide on how to interact with the person being stopped and the information required to be given to that person. That Aide Memoire is kept under review. For example, it was amended immediately upon judgment being given in the *Fox, McNulty, Canning* case.<sup>238</sup>

---

*Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraphs 8.51 – 8.52.

<sup>236</sup> TACT Code *ibid.* at paragraph 8.5; and JSA Code *ibid.* at paragraph 8.53.

<sup>237</sup> TACT Code *ibid.* at paragraph 8.6.

<sup>238</sup> *In the matter of an application by Fox and McNulty for judicial review and in the matter of an application by Canning for judicial review* [2013] NICA 19, discussed above at pages 54 – 59.

There may be occasions when, due to the genuinely urgent requirement to deploy officers,<sup>239</sup> that the sort of briefing described above is simply not possible. In those circumstances, the fact that each police officer already has available a copy of the Aide Memoire (either in paper form or through the hand-held *Blackberry*<sup>TM</sup> device) and has received detailed training will go a long way to ensuring that the powers are exercised appropriately. It is therefore crucial that the Aide Memoire is maintained, readily available and accessible to all officers and is amended and redistributed to all officers as soon as there is any change in the law or practice.

## **MONITORING THE USE OF TACT & JSA POWERS**

In the early stages of this thematic review, it was clear that some officers were confused about the apparent overlap of the powers in TACT and JSA. Often, where a multiplicity of powers was used, it was only the first power that was recorded. For example, if the first power to be used was a search power pursuant to TACT, which led on to the use of JSA powers to question and to search, only the TACT power was recorded. That explains in some part the *apparent* infrequency of the use (or at least recording) of the use of JSA powers. TACT however does not permit a police officer to require answers as to identity and movements.<sup>240</sup> Therefore, should a police officer want to ask such questions, he or she must rely formally on section 21(1) JSA.

Accordingly, for every stop and search carried out pursuant to a section 47A TACT authorisation which is followed by questioning as to identity and movements the constable has exercised two distinct powers, both of which must be recorded. Furthermore, all procedural requirements which accompany an exercise of the section 21 JSA power must be complied with in addition to those required by TACT. The PSNI recording form did not, as first

---

<sup>239</sup> The TACT and JSA Codes of Practice make clear that such circumstances should be “exceptional” thereby reinforcing the importance of comprehensive briefings on the intelligence picture, see paragraph 8.10 of the TACT Code *ibid.* and paragraph 8.58 of the JSA Code *ibid.*

<sup>240</sup> As set out above, the TACT powers may be used only to search for items connected with terrorism and the JSA powers may be used only to search for wireless apparatus or munitions.

drafted, permit multiple powers to be recorded. That was a critical oversight, which has now been corrected. Each form now permits the recording of multiple uses of powers.

The PSNI, through its Human Rights Adviser, previously carried out reviews of certain Districts where the powers had been used more extensively, for example in G District (Foyle, Limavady, Magherafelt and Strabane). As a direct result, some additional internal procedural safeguards have been put in place by the PSNI, which go some way to ensuring consistency across Districts and within Districts. They include:

- A Terrorism and Security Powers Delivery Group<sup>241</sup> which scrutinises the use of such powers on a quarterly basis and reports to the PSNI Security and Serious Harm Programme Board;
- Issues that arise from the Delivery Group are referred to the Service Executive Board of the PSNI;
- Senior officers attend meetings of their Policing and Community Safety Partnerships which permit specific concerns about the use of powers to be raised with police.<sup>242</sup>

Monitoring the use of JSA and TACT powers is an important exercise and one which the PSNI must be committed to continuing. It is an important safeguard which should be undertaken across the PSNI on a regular basis.

## **Recommendation 6**

**The PSNI should conduct a review, at least annually, of the ambit and use of the powers to stop, search and question contained within the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 during the previous 12 months to ensure that the powers are being**

---

<sup>241</sup> Which was previously called a User group.

<sup>242</sup> The local accountability structures whereby senior officers are required to attend meetings of the Policing and Community Safety Partnerships and can address specific concerns about police actions is referenced in the new *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraph 5.2; and in the *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraph 13.2.

**used in accordance with law and not disproportionately. Thereafter, the Chief Officer responsible for stop and search powers should provide a briefing to the Performance Committee of the Northern Ireland Policing Board. The first review should be completed within 12 months of the publication of this thematic review.**

## **MONITORING ETHNICITY AND COMMUNITY BACKGROUND: TACT & JSA**

Good record-keeping does more than ensure that a person subjected to a stop and search or question is informed of his or her rights; it ensures that the obligation on police to monitor the use of the powers can be satisfied. For example, as *per* the TACT and JSA Codes of Practice, a supervising officer is required to “ensure in the use of stop and search powers that there is no evidence of them being exercised on the basis of stereo-typed images of inappropriate generalisations... Supervisors must also examine whether the records reveal any trends or patterns which give cause for concern, and if so take appropriate action to address it... Supervision and monitoring must be supported by the compilation of comprehensive statistical records of stops and searches at, service, area and local level. Any apparently disproportionate use of the powers by particular officers or in relation to specific sections of the community should be identified and investigated.”<sup>243</sup> It seems to the Committee that should include community background. As the JSA Code states, “the powers should be used only if it is proportionate and necessary. Proportionality requires the powers to be used only where justified by the particular situation.... If these fundamental principles are not observed the use of the powers may be drawn into question.”<sup>244</sup>

The TACT Code of Practice for England, Scotland and Wales specifically provides that a record of a search must always include a note of the self

---

<sup>243</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, at paragraphs 5.9 to 5.11; *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraph 12.1.

<sup>244</sup> JSA Code *ibid.* at paragraphs 5.12 to 5.13.

defined ethnicity, and, if different, the ethnicity as perceived by the officer making the search, of the person searched or of the person in charge of the vehicle searched (as the case may be). Officers should be aware and explain to members of the public, especially where concerns are raised, that this information is required to obtain a true picture of stop and search activity and to help improve ethnic monitoring, eliminate any discriminatory practice, and promote effective use of the powers.<sup>245</sup>

The Policing Board, as the organisation with the statutory responsibility to monitor the use of the powers, has previously recommended that the PSNI should compile and publish statistics according to ethnicity but it has not previously recommended that the PSNI should compile and publish statistics according to community background. However, taking into account the revised Codes of Practice and the continued concern amongst some stakeholders that the powers are being used disproportionately against people from a catholic/nationalist/republican background the Committee has reconsidered that issue. The PSNI may wish to consult the Equality Commission in this respect.

The Committee does not suggest that police officers require a person to identify according to community background, not least because there is no power to require that information during a stop, but recommends that the following policy should be considered. The PSNI should as soon as reasonably practicable but in any event within three months of the publication of this thematic review, include within its recording form the community background of the person stopped and searched or questioned. At the conclusion of the first 12 months of the recording period those statistics should be analysed. Thereafter, the PSNI should present its analysis of the statistics to the Performance Committee and thereafter publish the statistics in its statistical reports.

---

<sup>245</sup> *Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47a of schedule 6b to the Terrorism Act 2000*, Home Office, July 2012, at paragraphs 5.4.1 to 5.4.2



## **Recommendation 7**

**The PSNI should as soon as reasonably practicable but in any event within 3 months of the publication of this thematic review consider how to include within its recording form the community background of all persons stopped and searched under sections 43, 43A or 47A of the Terrorism Act 2000 and all persons stopped and searched or questioned under section 21 and 24 of the Justice and Security (Northern Ireland) Act 2007. As soon as that has been completed the PSNI should present to the Performance Committee, for discussion, its proposal for monitoring community background. At the conclusion of the first 12 months of recording community background, the statistics should be analysed. Within 3 months of that analysis the PSNI should present its analysis of the statistics to the Performance Committee and thereafter publish the statistics in its statistical reports.**

As the new JSA Code of Practice, which includes provisions on avoiding discrimination in the use of the powers, emphasises “Racial or religious profiling is the use of racial, ethnic, religious or other stereotypes, rather than individual behaviour or specific intelligence, as a basis for making operational or investigative decisions about who may be involved in criminal activity. Officers should take care to avoid any form of racial or religious profiling when selecting people to search under section 24 / schedule 3 powers. Profiling in this way may amount to an act of unlawful discrimination, as would discrimination on the grounds of any protected characteristics...great care should be taken to ensure that the selection of people is not based solely on ethnic background, perceived religion or other protected characteristic. Profiling people from certain ethnicities or religious backgrounds may also lose the confidence of communities.”<sup>246</sup>

---

<sup>246</sup> *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, paragraphs 5.6 to 5.8.

## STATISTICAL ANALYSIS

The PSNI, working with the Committee, has devised its own bespoke template for recording the use of relevant powers to stop and search and question. The PSNI provides comprehensive reports to the Committee on a quarterly basis which analyse the use of the powers according to geographic area, gender, ethnicity, power used and subsequent arrest. Reports are also available on the PSNI website, albeit the published reports contain slightly less information as a result of statistical reporting rules.<sup>247</sup> That development is extremely positive and demonstrates a real effort by the PSNI to ensure that its use of the powers is proportionate. The PSNI should be commended for its production of the reports, which are extensive and which enable a more critical analysis of the use of the powers. To that extent, the PSNI has gone further than any other police service in Great Britain or Ireland.

To properly analyse the statistics on the use of TACT and JSA powers, their use since 2009 is set out below. As evidenced by the table below, prior to July 2010 the power to stop and search under section 24 JSA was used relatively sparingly by PSNI. Following the Home Secretary's announcement on 8 July 2010 that the section 44 TACT power to stop and search was suspended, PSNI's use of section 24 JSA dramatically increased. Use of section 24 JSA reached its peak between October 2010 and December 2010 but, even at its peak, use of this power did not represent a full scale displacement of section 44 TACT.

The section 44 TACT replacement power, section 47A TACT, was introduced as a temporary legislative provision on 18 March 2011 and became a permanent legislative provision on 10 July 2012 by virtue of the Protection of Freedoms Act 2012. However up until 31 March 2013, section 47A TACT had not been used by PSNI. The police instead continued to rely upon section 24 JSA in order to conduct "without suspicion" searches.

---

<sup>247</sup> Unrestricted versions of the statistical reports are published on the PSNI website: [www.psnipolice.uk](http://www.psnipolice.uk)

Up until 10 July 2012 there was no authorisation requirement in respect of without suspicion stops and searches carried out under section 24 JSA. Since 10 July 2012, by virtue of the Protection of Freedoms Act 2012, the section 24 power is more tightly circumscribed and subject to a similar authorisation regime as is required for section 47A TACT. Shortly after section 47A TACT was introduced (in March 2011 by way of a remedial order), PSNI introduced its own internal regime of authorisations for section 24 JSA. This may in part explain why the use of section 24 JSA between July 2011 and September 2011 decreased compared to the previous quarter. Since then, use of the JSA power has not reached the same level as it did during its peak in 2010 and there has been an overall trend of reduction in its use with a total of 7,687 uses in 2012/2013 compared to 12,699 uses in 2011/2012 (a 39% reduction).

As reflected in the table below, there has also been a decreasing trend over the past two years in respect of PSNI's use of the power to stop and question under section 21 JSA. Use of the power reduced from 5,355 uses in 2010/2011 to 3,511 uses in 2011/2012 (a 34% reduction). It reduced further to 2,803 uses in 2012/2013 (a 20% reduction compared to the previous year).

In his most recent report, Robert Whalley CB, the Independent Reviewer of JSA, comments on the trend in the use of JSA powers during his reporting year (August 2011 to July 2012) compared to his previous reporting year. He queried the reason for it. He notes "They [PSNI] attribute this in part to the major training programme for all PSNI officers likely to use these powers. That has been done partly in response to the need to refresh officers' knowledge and skills following the changes brought about by the Protection of Freedoms Act 2012 and partly in response to the recognition of the value of ensuring that officers have the greatest possible familiarity with the range of powers available to them, and their most appropriate sequencing, when individual officers are in contact with the public. It also reflects greater use of the powers in planned operations in response to available intelligence. That factor will be significant in the present year if the police continue to seek authorisations under the new regime described at length above, given the enhanced role which intelligence will play in such operations. Intelligence is a vital tool for the

protection of the public and it will continue to be important to maintain a strong link between intelligence collection and analysis and police operations.”<sup>248</sup>

As has been explained earlier in this thematic report, section 24 JSA confers a wide range of powers some of which require an authorisation, some of which do not. Some powers require reasonable suspicion but some do not. Some powers relate to people and some relate to premises, vehicles and dwellings. It is difficult to assess from PSNI’s quarterly statistical reports the extent of the use of the range of section 24 powers as the statistics relate only to searches of persons and all such searches are recorded collectively. Therefore, in its Human Rights Annual Report 2012, the Policing Board recommended that the PSNI should collect and thereafter disaggregate its statistics according to the range of section 24 powers. The recommendation required that the statistics identify the powers used according to whether the stop and search was pursuant to an authorisation, was undertaken with reasonable suspicion or without and whether it was exercised in relation to a person, vehicle or premises.<sup>249</sup> That recommendation was accepted by PSNI<sup>250</sup> and therefore these disaggregated figures ought to be reflected in future statistical reports.

---

<sup>248</sup> *Report of the Independent Reviewer: Justice and Security (Northern Ireland) Act 2007. Fifth Report, 2011-2012*, Robert Whalley CB, November 2012, paragraphs 342 – 343.

<sup>249</sup> *Human Rights Annual Report 2012*, Northern Ireland Policing Board, February 2013, Recommendation 5.

<sup>250</sup> *PSNI Human Rights Programme of Action 2012*, PSNI, May 2013.

**FREQUENCY OF USE OF POWERS ACROSS ALL PSNI DISTRICTS, 1 APRIL 2009 to 31 MARCH 2013<sup>251</sup>**

		<b>PACE</b>	<b>TACT s.43</b>	<b>TACT s.44</b>	<b>TACT47A<sup>252</sup></b>	<b>JSA s.21</b>	<b>JSA s.24</b>
<b>2009/2010</b>	<b>Q1 (Apr '09 – Jun '09)</b>	5,346	15	3,571	-	494	96
	<b>Q2 (Jul '09 - Sept '09)</b>	6,312	34	11,136	-	1,874	179
	<b>Q3 (Oct '09 – Dec '09)</b>	6,286	27	5,786	-	1,027	118
	<b>Q4 (Jan '10 – Mar '10)</b>	6,046	21	8,277	-	1,890	228
	<b>TOTAL 2009/2010</b>	<b>23,990</b>	<b>97</b>	<b>28,770</b>	<b>-</b>	<b>5,285</b>	<b>621</b>
<b>2010/2011</b>	<b>Q1 (Apr '10 – Jun '10)</b>	5,997	33	8,841	-	1,962	175
	<b>Q2 (Jul '10 - Sept '10)</b>	5,691	170	314 <sup>253</sup>	-	921	2,925 <sup>254</sup>
	<b>Q3 (Oct '10 – Dec '10)</b>	5,566	93	1	-	1,424	5,067
	<b>Q4 (Jan '11 – Mar '11)</b>	5,531	79	-	-	1,048	3,554
	<b>TOTAL 2010/2011</b>	<b>22,785</b>	<b>375</b>	<b>9,156</b>	<b>-</b>	<b>5,355</b>	<b>11,721</b>
<b>2011/2012</b>	<b>Q1 (Apr '11 – Jun '11)</b>	4,899	115	-	-	962	4,197
	<b>Q2 (Jul '11 - Sept '11)</b>	4,527	48	-	-	829	2,762
	<b>Q3 (Oct '11 – Dec '11)</b>	5,832	40	-	-	873	3,206
	<b>Q4 (Jan '12 – Mar '12)</b>	5,488	51	-	-	847	2,534
	<b>TOTAL 2011/2012</b>	<b>20,746</b>	<b>254</b>	<b>-</b>	<b>-</b>	<b>3,511</b>	<b>12,699</b>
<b>2012/2013</b>	<b>Q1 (Apr '12 – Jun '12)</b>	4,909	51	-	-	870	2,290
	<b>Q2 (Jul '12 - Sept '12)</b>	5,777	38	-	-	545	1,475
	<b>Q3 (Oct '12 – Dec '12)</b>	6,004	58	-	-	835	2,348
	<b>Q4 (Jan '13 – Mar '13)</b>	4,121	20	-	-	553	1,574
	<b>TOTAL 2012/2013</b>	<b>20,811</b>	<b>167</b>	<b>-</b>	<b>-</b>	<b>2,803</b>	<b>7,687</b>

<sup>251</sup> These figures are sourced from PSNI stop and search statistical reports, available online through [www.psnipolice.uk](http://www.psnipolice.uk). Note that this table does not reflect the total number of individual persons against whom the powers were used as a combination of powers may be used in respect of the same individual, or the powers may be used against the same individual on more than one occasion. Note also that use of the power to stop and search a vehicle under section 43A TACT (which was introduced as a new power by the Protection of Freedoms Act 2012) is not included in the PSNI statistical reports. Recommendation 4 of the Policing Board's *Human Rights Annual Report 2012* recommended that use of this power is included by PSNI in future statistical reports.

<sup>252</sup> Section 47A was introduced as a temporary legislative provision on 18 March 2011 (towards the end of Quarter 4 of 2010/2011). It became a permanent legislative provision on 10 July 2012 (part way through Quarter 2 of 2012/2013).

<sup>253</sup> The Home Secretary's announcement that use of the section 44 TACT power was suspended came on 8 July 2010 which was part of the way through Quarter 2 of 2010/2011.

<sup>254</sup> Note the surge from Quarter 2 of 2010/2011 onwards in respect of the PSNI's use of section 24 JSA: this correlates with the announcement by the Home Secretary in July 2010 that use of the section 44 TACT power was suspended.

Stop, search and question powers are predominantly used by PSNI against young, white males.<sup>255</sup> As per the table below, where age was recorded during 2012/2013, more than half of the persons who were stopped, searched and/or questioned during 2012/2013 were under 26 years (17,261, 57%). A total of 4,827 (16%) were under 18 years. 12,434 (41%) were aged between 18 and 25 years. This is similar to the proportion of young people against whom the powers were used during the previous year. That does not of itself demonstrate that the powers are being used inappropriately but it certainly should alert the PSNI to that possibility. It should be noted that the figures set out in the table include powers of stop and search under PACE. Therefore, the extent of use of powers under TACT and JSA specifically against young people is unknown.

**AGE OF PERSONS STOPPED, SEARCHED AND/OR QUESTIONED UNDER PACE, SECTION 43 TACT AND SECTION 21 AND 24 JSA ACROSS ALL PSNI DISTRICTS, 1 APRIL 2011 – 31 MARCH 2013**<sup>256</sup>

<b><u>Age band</u></b>	<b><u>No. of persons 2011/2012</u></b>	<b><u>No. of persons 2012/2013</u></b>
<b>10 and under</b>	12	14
<b>11 – 14</b>	998	845
<b>15 – 17</b>	3,996	3,968
<b>18 – 25</b>	13,261	12,434
<b>26 – 35</b>	7,042	6,458
<b>36 – 45</b>	4,489	3,942
<b>46 – 55</b>	2,670	2,041
<b>56 – 65</b>	845	576
<b>Over 65</b>	568	105
<b>unknown</b>	1,387	119
<b><u>TOTAL</u></b>	<b><u>35,268</u></b>	<b><u>30,502</u></b>

<sup>255</sup> For example, of the 31,468 uses of PACE, TACT and JSA powers to stop, search and question during 2012/2013, 28,908 uses (92%) were in respect of males and only 2,560 (8%) in respect of females. 30,136 uses (96%) were in respect of white people. The next highest ethnic grouping against whom the powers were used was Irish Travellers with 753 uses (2%).

<sup>256</sup> These figures are sourced from restricted versions of the PSNI stop and search statistical reports. The information is provided to the Performance Committee further to a recommendation in the Policing Board's thematic review of policing with children and young people, published January 2011. Age statistics for financial years prior to 2011/2012 are not available.

As noted elsewhere in this thematic review report, the charge rate following the arrest of a person under terrorism legislation is relatively low.<sup>257</sup> Similarly, as demonstrated by the table below, the rate of arrest over the past three years following use of a power to stop and search or stop and question under TACT or JSA, whilst improving, is lower than the rate of arrest following a stop and search under PACE. Of particular note, but perhaps unsurprising, is the fact that the powers that can be exercised without suspicion have a much lower arrest rate than those requiring reasonable suspicion.

**ARREST RATE FOLLOWING USE OF STOP, SEARCH AND/OR QUESTION POWERS UNDER PACE, TACT AND JSA ACROSS ALL PSNI DISTRICTS, 1 APRIL 2010 TO 31 MARCH 2013**<sup>258</sup>

	<b><u>2010/2011</u></b> <b><u>arrest</u></b> <b><u>rate</u></b>	<b><u>2011/2012</u></b> <b><u>arrest</u></b> <b><u>rate</u></b>	<b><u>2012/2013</u></b> <b><u>arrest</u></b> <b><u>rate</u></b>
<b>PACE</b>	6.80%	7.57%	8.12%
<b>TACT 43</b>	1.33%	4.72%	6.59%
<b>TACT 44</b>	0.57%	-	-
<b>JSA 21</b>	0.49%	1.20%	1.28%
<b>JSA 24</b>	0.81%	0.87%	1.07%
<b><u>OVERALL</u></b> <b><u>ARREST</u></b> <b><u>RATE</u></b>	<b><u>3.76%</u></b>	<b><u>4.83%</u></b>	<b><u>5.96%</u></b>

The Committee receives, on a quarterly basis, detailed information from PSNI according to policing Area and District in which the various stop, search and question powers are used. The same level of detail as provided in the reports to the Committee cannot be reproduced as to do so would breach statistical disclosure rules aimed at upholding data protection obligations. However, to give an indication of the geographical spread of PSNI use of stop, search and question powers, the table below sets out the PSNI collective use of PACE, TACT and JSA according to Area and District during 1 April 2012 to 31 March 2013.

<sup>257</sup> See pages 33 to 36 of this thematic review.

<sup>258</sup> These figures are sourced from restricted versions of the PSNI stop and search statistical reports provided to the Performance Committee. For a more detailed breakdown of the 2010/2011 and 2011/2012 figures, see the Policing Board's Human Rights Annual Reports for 2011 and 2012.

**NUMBER OF PERSONS STOPPED AND SEARCHED UNDER PACE,  
SECTION 43 TACT AND SECTIONS 21 AND 24 JSA BY AREA AND  
DISTRICT, 1 APRIL 2012 – 31 MARCH 2013<sup>259</sup>**

<b>Policing District / Area</b>	<b>Total Persons</b>
North Belfast	1,304
West Belfast	1,864
<b>'A' District</b>	<b>3,168</b>
East Belfast	1,042
South Belfast	3,043
<b>'B' District</b>	<b>4,085</b>
Ards	669
Castlereagh	1,002
Down	1,562
North Down	505
<b>'C' District</b>	<b>3,738</b>
Antrim	881
Carrickfergus	190
Lisburn	1,781
Newtownabbey	848
<b>'D' District</b>	<b>3,700</b>
Armagh	926
Banbridge	359
Craigavon	2,062
Newry&Mourne	1,953
<b>'E' District</b>	<b>5,300</b>
Cookstown	649
Dungannon	769
Fermanagh	691
Omagh	741
<b>'F' District</b>	<b>2,850</b>
Foyle	2,698
Limavady	763
Magherafelt	608
Strabane	1,121
<b>'G' District</b>	<b>5,190</b>
Ballymena	1,072
Ballymoney	231
Coleraine	905
Larne	134
Moyle	129
<b>'H' District</b>	<b>2,471</b>
<b>N. Ireland</b>	<b>30,502</b>

<sup>259</sup> These figures are sourced from the PSNI stop and search statistical report for 1 April 2012 – 31 March 2013, available online through [www.psni.police.uk](http://www.psni.police.uk). Statistical reports for previous years can also be obtained through the PSNI website.



## **PHOTOGRAPHY**

It is worth mentioning specifically the police approach to persons taking photographs or digital images within an authorised zone. It must be made clear to officers that neither TACT nor JSA prohibits any person from taking photographs or digital images within an authorised zone. Unless photography is lawfully prohibited under other relevant legislation, a police officer does not have authority to prohibit a person taking a photograph. If the officer reasonably suspects, however, that the photograph or image is being taken as part of terrorist reconnaissance, there are specific powers which can be used. Section 43 of TACT provides the officer with power to search a suspected terrorist and to arrest on that ground. While the images or memory stick may be lawfully seized pursuant to section 43, the officer does not have power to destroy the film or delete images. Furthermore, routine perusal of personal documents or images during a section 43 search may well infringe the person's right to respect for private and family life. The PSNI has, by electronic message, circulated guidance to that effect to all officers.

## **RECORD-KEEPING: TACT & JSA**

The Chief Constable of the PSNI is obliged to make arrangements for securing that a record is made of each exercise by a constable of a power under sections 21 to 26 JSA in so far as it is reasonably practicable to do so, and a record is not required to be made under another enactment.<sup>260</sup> Moreover, as outlined above in respect of the various TACT and JSA powers, police officers must advise the subject of a TACT or JSA search of their entitlement to a copy of the record of the search. For a large part of this thematic review the PSNI relied on manual paper forms. That created a number of difficulties not least in the monitoring of record-keeping. There was often a delay between the completion of a search and the submission of the record to the central data-base. There was also a risk (realised in a very small number of cases) of records going missing for periods of time. Another issue

---

<sup>260</sup> Section 37 of the Justice and Security (NI) Act 2007.

related to the quality of the record-keeping. In some instances the forms did not contain all of the requisite information. All of those issues were addressed speedily by the PSNI by the issue of additional guidance to officers on form filling and the importance of record-keeping. Record-keeping is every bit as important as the other safeguards contained within TACT and JSA. The records are more than purely procedural so the PSNI must keep under review the quality of record-keeping.

During the course of this review, full-time officers were issued with hand-held *Blackberry*<sup>TM</sup> devices, which permit the electronic recording of all stops and searches.<sup>261</sup> The PSNI has demonstrated to the Policing Board's Human Rights Advisor the use of the devices and the recording of records of stop and search and question. The use of the devices, each of which is identified to an individual officer, should ensure that record-keeping is both straightforward and reliable. The drop-down menu requires that all records must be filled in sequentially: no part may be manually overridden. In addition to the mechanics of recording, the devices have enabled significant improvements in the accessibility of guidance for police officers.

By way of example, the hand-held device enables the police officer to access the Aide Memoire and Code of Practice. The device will also remind officers to advise the person searched about their entitlement to access a record of the search. The officer must give the person a copy of the unique reference number and advice about how to obtain a copy. A card is completed and is handed to the person who was stopped. That card contains advice on how to obtain the record. Because the records are collated centrally according to a unique identification number, the person who applies for a copy of the record may attend any operational police station in Northern Ireland to obtain their copy. Since introduction of the devices, the consistency and reliability of record-keeping has improved considerably and has removed the initial cause for concern about the standard of record-keeping. This will continue to be monitored.

---

<sup>261</sup> The devices were introduced with effect from 1 February 2012.

During the course of this thematic review the Human Rights Advisor to the Policing Board examined a sample of records relating to the exercise of powers. As outlined above, some minor matters of an administrative nature were identified, which required remedy. The PSNI undertook to put the necessary measures in place and immediately did so. Mr Whalley CB scrutinises the record-keeping of the exercise of JSA powers in each annual report. He is uniquely placed to do so and has developed detailed analysis of the use of the JSA powers. The Policing Board's Human Rights Advisor has had the opportunity of working alongside Mr Whalley CB on occasion and has discussed various matters with him in depth. His careful, comprehensive and robust scrutiny over the last few years has contributed to enormous improvements in the PSNI use of powers. The Committee believes that he provides a critical and essential level of oversight and accountability.

## **YOUNG PEOPLE: TACT & JSA**

In January 2011, the Policing Board completed a dedicated thematic review of policing with children and young people. A recurring issue for many stakeholders was the use of powers to stop and search and question which some believed was a disproportionate use of the powers against young people. The Policing Board recommended, to enable a proper analysis to be undertaken, that the PSNI should include the approximate age of persons stopped, searched and questioned in its statistical reporting.<sup>262</sup> PSNI accepted that recommendation and commenced the process of including age information in the quarterly statistical reports provided to the Committee on behalf of the Policing Board.<sup>263</sup> As demonstrated by those statistics between 1 April 2012 and 31 March 2013, where age was recorded, more than half of the persons who were stopped, searched and/or questioned during 2012/2013 were under 26 years (17,261 57%). A total of 4,827 (16%) were under 18 years. 12,434 (41%) were aged between 18 and 25 years. That

---

<sup>262</sup> Recommendation 20 of the *Human Rights Thematic Review: Children and Young People*, Northern Ireland Policing Board, January 2011.

<sup>263</sup> An officer will record the age either provided by the person stopped (although there is no obligation to provide age information) or based upon the officer's assessment of age.

does not of itself demonstrate that the powers are being used inappropriately but it certainly should alert the PSNI to that possibility.

A further issue that was raised during the thematic review was the manner in which young people were dealt with by police during stops and searches. The police must be mindful of the vulnerability of young people and the potential for an adverse impact to resonate throughout the community and undermine police community relations. The PSNI took that seriously and has produced a stop and search information card for young people who are stopped, searched and/or questioned. That card has been produced with considerable input from the Children's Law Centre, the Northern Ireland Commissioner for Children and Young People (NICCY) and Include Youth. It has yet to be officially launched but will provide an overview of the powers, the right to be told the reason for the exercise of the power, the extent of information to be provided by a police officer and how the stop and search should be carried out. The card is to be used by all police officers. Each police officer will complete relevant details on the front of the card to include, for example, the date, the police officer's station and the unique reference number. The card is then provided to the young person. The Committee wishes to see the information card launched as soon as reasonably possible.

The Committee welcomes this positive initiative and commends the PSNI and those stakeholders who contributed to the production of the card. The Committee believes that this initiative demonstrates a strong partnership between PSNI and stakeholders which has produced real results which will ultimately enhance the protection of the rights of young people who are stopped, searched and/or questioned. The Committee believes there is also significant benefit for the police both in terms of the community engagement exercise and in the protection of police officers who can be assured that they are doing all they can to respect and protect the rights of young people. It was therefore recommended in the Policing Board's Human Rights Annual Report 2012 that the PSNI should consider issuing the same or a similar card to all

persons who were stopped, searched or questioned.<sup>264</sup> PSNI has accepted that recommendation.<sup>265</sup>

A further very positive development, aimed at reducing the alarm and distress caused to children by the use of powers either against their parents or guardians or against the children themselves, is an initiative started in G District (Foyle, Limavady, Strabane, Magherafelt). Officers in G District developed guidance on the conduct of stops and searches which may involve a child. If a child is present during a search the officers conducting the search will make every effort to ensure that the child remains at all times within the sight of the parent or guardian, that they will be treated sensitively commensurate with their vulnerability, the officers will attempt to explain in simple language what is happening and reassure the child that there is nothing to fear and will, if possible and appropriate in the circumstances, leave the search of the child who is in the company of adults to the end of the process. The Policing Board's Human Rights Advisor spent time with relevant senior officers in G District discussing the guidance and she was impressed by the level of care and consideration applied to the guidance and the real understanding of police officers of the peculiar vulnerabilities of children. The Committee believes that guidance could usefully be adopted by all Districts.

### **Recommendation 8**

**The PSNI should develop and thereafter issue guidance to all police officers in Northern Ireland on stopping and searching children. That guidance should draw upon the guidance already produced and issued in G District.**

### **COMMUNITY ENGAGEMENT: TACT & JSA**

It is clear that effective policing is only possible where the police have the support and confidence of the community. It bears repeating that the police

---

<sup>264</sup> *Human Rights Annual Report 2012*, Northern Ireland Policing Board, February 2013, Recommendation 6.

<sup>265</sup> *PSNI Human Rights Programme of Action 2012*, PSNI, May 2013.

need the support of the community every bit as much as they need the support of legislative powers to combat criminality and terrorism. Therefore, any police action which has the potential to undermine community confidence in, and thereafter community support for, the police must be taken very seriously indeed.

As the Patten Commission recommended in 1999, policing with the community should be a core function of the police service and every police station and, by extrapolation, every police officer. That remains as valid today as it ever was, perhaps increasingly so. Furthermore, the Police (Northern Ireland) Act 2000 requires the police service to carry out its functions in co-operation with, and with the aim of securing the support of, the local community.<sup>266</sup> This is particularly important when the police exercise powers which depend upon information being shared by the community but which bring police officers (potentially) into conflict with the community. The PSNI must take steps to explain the use of the powers at a local level. District Commanders, in conjunction with the Committee and Policing and Community Safety Partnerships, should develop a strategy to engage with their local communities and provide a mechanism for community representatives or individual members of the community to raise issues of concern.<sup>267</sup>

The Codes of Practice on the authorisation and exercise of TACT and JSA stop and search and question powers, under the heading of ‘Oversight and Community Engagement’, state that the “appropriate use and application of these powers should be overseen and monitored by the Northern Ireland Policing Board.”<sup>268</sup>

---

<sup>266</sup> Section 32(5) of the Police (NI) Act 2000.

<sup>267</sup> The *Practice Advice on Stop and Search in Relation to Terrorism*, NPIA, 2008 has recommended such community consultation.

<sup>268</sup> *Code of Practice (Northern Ireland) for the authorisation and exercise of stop and search powers relating to sections 43, 43A and 47A of the Terrorism Act 2000*, Northern Ireland Office, August 2012, at paragraph 13.1; likewise, the *Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007*, Northern Ireland Office, May 2013, states at paragraph 5.14 that the use and application of the JSA powers should be overseen and monitored by the Policing Board and the Independent Reviewer of JSA.

A considered community engagement strategy and outreach programme enables the police to respond appropriately. Importantly, it is the community being 'policed' by the PSNI which has so much to contribute to the effectiveness of any policing operation and to the combating of terrorism within Northern Ireland. All of those individuals and groups who made submissions to the Committee were keen to emphasise that they did not object *per se* to the police exercising powers to stop and search for the purposes of combating terrorism so long as those powers were exercised properly and proportionately. However, they also expressed concern at the nature of the TACT and JSA powers and the potential impact of the exercise of those powers upon communities. Communities are not an obstruction to effective policing; they are integral to it. Community engagement is therefore central to the effective realisation of police objectives.

During the Committee's discussions, in August 2012, with the independent reviewers of terrorism legislation, the Committee raised the issue of the community impact of the use of counter-terrorism powers and whether there remained an operational need for all of the counter-terrorism powers. Those issues are considered regularly by the independent reviewers in their respective annual reports. In his report on the review of the operation of JSA powers in 2011/2012, Robert Whalley CB records that the view of senior police officers is that use of JSA powers "has continued to have a significant preventative and disruptive effect on residual terrorist groups and contributed to their overall strategy to protect the public, confirming the view which they took last year."<sup>269</sup> Mr Whalley notes that the PSNI "see a continuing need for the powers in the Justice and Security Act throughout the current year. That is also the view of the President of the Association of Chief Police Officers of England, Wales and Northern Ireland (ACPO)..."<sup>270</sup>

Robert Whalley CB acknowledges that opinion on the use of JSA powers varies and each year he considers a wide range of views from not only police

---

<sup>269</sup> *Report of the Independent Reviewer: Justice and Security (Northern Ireland) Act 2007. Fifth Report, 2011-2012*, Robert Whalley CB, November 2012, para. 346.

<sup>270</sup> *Ibid.* para. 348.

and politicians, but also from independent bodies, groups and individuals. In his most recent report he notes “Some people have said to me, in terms which I respect, that the existence of these powers has a potentially radicalising effect lending credence to the long-held narrative about the intrusive, arbitrary and discriminatory nature of police activity in Northern Ireland which, to the extent that it was ever reformed, is now sliding back to its default mode of a paramilitary force. There is limited evidence to reinforce these assertions, powerful though they are. Perceptions are important, but they lack weight in the absence of specific information. Equally powerful are the views of those who believe that nothing should be done to limit police effectiveness at a time of severe threat. My conclusion is that the greater danger, for the policing project as a whole, lies less in how these powers are perceived in the abstract than in their direct impact in everyday situations. Hence the focus in much of this report on their operational effectiveness and the safeguards governing their use.”<sup>271</sup> Mr Whalley CB concludes that the “operational indicators clearly point towards the continuation of the JSA powers for a further year.”<sup>272</sup>

During 2012, the Committee held meetings with a range of community workers and representatives in Derry/Londonderry, Armagh and Belfast to discuss issues relating to policing. Some of the discussion centred on the police use of powers to stop and search persons and vehicles and to enter and search premises, with a particular emphasis on the impact that such operations may have on community confidence in policing. It became apparent during those meetings that some members of the community experienced an enhanced confidence in the police by the use of powers but for many more, the use of the powers had undermined community confidence and in particular their view of the ‘normalisation of policing.’

By way of example, the following was submitted to the Committee:

- Some people feel constantly targeted and harassed by police carrying out stop and search operations and ‘house raids’;

---

<sup>271</sup> *Ibid.* paras. 626 – 629.

<sup>272</sup> *Ibid.* para. 634.



- Stop and search is the biggest ‘confidence breaker’ within communities;
- Some perceive decisions to stop and search certain individuals or groups as ‘politically motivated’;
- There is little information readily accessible about the outcome or benefit of such stops and searches. The police should do more to address negative perceptions if they are incorrect;
- Of particular concern is ‘house raids’ which has an immediate and profound impact on those living within the area (some of whom see the raids as reminiscent of the 1980s) and on young people in particular.

Those concerns and perceptions must be addressed if the PSNI is to continue to police in association with and for the benefit of the community. Even if PSNI believes it can counter those allegations, police cannot afford to ignore them. It seems to the Committee that an important exercise would be to engage proactively with communities in the oversight and assessment of the use of powers to stop and search and question.

### **Recommendation 9**

**Each District Commander should, in consultation with District Policing and Community Safety Partnerships, Independent Advisory Groups, Reference Groups (where applicable) and the Performance Committee, devise a strategy for improved consultation, communication and community engagement in respect of its use of stop and search powers under both the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007. That strategy should include an agreed mechanism by which the PSNI will explain the use of powers to the community and will answer any issues of concern.**

The Committee understands that the PSNI intends to engage more proactively with the community and commentators. The PSNI also intends to engage actively with the Committee on the Administration of Justice, which

recently published a report on stop and search powers.<sup>273</sup> The Performance Committee believes that will be a constructive exercise both for the police and the community and will look forward to receiving an update from the PSNI on progress.

## **TRAINING: TACT & JSA**

During the course of this thematic review the Human Rights Advisor to the Policing Board observed training both in the classroom and in practical scenarios. That training has been developing and has taken account of the legislative amendments made to TACT and JSA powers.

When the Policing Board's Human Rights Advisor first observed training (in 2010 – prior to the legislative amendments), she found that the training was delivered by extremely committed officers who were dedicated to improving standards generally and of each officer individually. The trainers not only provided training on the basic policing skills but were motivational and inspirational reinforcing the message that police officers' central role within the community is to protect the human rights of all members of it. There was a real attempt to enshrine human rights protection into all lessons. However, at that stage the Human Rights Advisor observed some inconsistency in training and a failure in some cases to understand fully and explain the importance of human rights protection in practical scenarios.

For example, human rights were seen by some as an additional 'topic' to be covered at the end of the lesson thereby missing their central importance; that human rights principles run throughout all police activity. They are as integral to good policing as knowledge of the codes of practice and the technical legal provisions. The effective use of stop and search can only be achieved by quality training, received by all officers at the strategic and operational level. PSNI must be able to assess whether training has been effective. To evaluate whether training has delivered the desired outcome, there must be a robust

---

<sup>273</sup> *Still part of life here? A report on the use and misuse of stop and search/question powers in Northern Ireland*, Committee on the Administration of Justice, November 2012.

mechanism for evaluating the use of powers in practice and for evaluating officers who exercise those powers.

It was recommended at an early stage that the training should be reviewed to assess its delivery of legal principles, that it should cover the supervision and monitoring of powers and that it should provide the professional and social skills required. That training was intended to include the context in which powers are exercised and the impact upon the community of the exercise of those powers.<sup>274</sup> In that context, scenario-based training was particularly encouraged. Scenario based training can make use of role-play with actors briefed to express disquiet with the process and to challenge officers. The actors then provide a 'debrief' to the officers on how they felt the search was conducted and made observations for improving the encounter.

Following the ECtHR judgment in *Gillan*<sup>275</sup> and the subsequent legislative amendments to TACT and JSA, the PSNI undertook to review all training on the use of powers to stop and search and question. The PSNI recognised that in the context of the use of intrusive powers officers had to be clear about the limits of their authority and the guiding principles within which they must operate. A huge amount of work was thereafter undertaken to produce comprehensive training materials and deliver training to all operational officers. The PSNI developed a new training package, which has now been delivered to every officer who may have recourse to the powers. There is also a training programme for senior officers.

The authorisation processes for TACT and JSA powers also make important links to the training of officers. For example, an authorising officer must be able to confirm that all PSNI officers are trained to execute statutory powers in support of human rights considerations and the PSNI Code of Ethics and that there is an ethos of proportionality reflecting the principle of the minimal necessary exercise of the powers.

---

<sup>274</sup> In a draft thematic review by the Committee which was suspended pending the Government review of counter-terrorism legislation.

<sup>275</sup> *Gillan and Quinton v The United Kingdom* (Application No. 4158/05), discussed above at pages 6 – 12.

The Policing Board's Human Rights Advisor has reviewed the materials used for the new training package and has attended a number of training sessions. She found those training sessions to be comprehensive and to include a careful and considered analysis of the history of the use of powers in Northern Ireland and their potential to impact upon community confidence. Officers were challenged throughout the training to discuss their preconceptions about counter-terrorism policing and to consider the views of stakeholders. The trainers were fully engaged in the training and delivered it with enthusiasm and with an impressive understanding of the competing rights of all people in Northern Ireland. If in any doubt before the training, officers who attended left with the requisite degree of knowledge to ensure they were equipped to use the powers lawfully and effectively. That said, the messages delivered in the training require repetition on a regular basis to ensure they continue to be applied in practice.

Training alone is not enough. Supervision is essential to improving practice across the service and at an individual officer level. Stakeholders have expressed, to the Policing Board and to Robert Whalley CB in his detailed review, the important role senior officers must play in setting the tone of policing in their areas. That role is critical to the use of intrusive powers which affect the liberty and freedom of members of the public. Particular comment was directed to the role of District Commanders in overseeing the use of police powers. For that reason, the Policing Board's Human Rights Advisor has paid particular attention to the use of powers in each District and has discussed issues arising with a number of District Commanders.<sup>276</sup>

More is required to ensure that police officers are accountable internally to their supervisors who must then be accountable to their District Commanders. Supervisory officers are central to developing consistency across the PSNI and to providing a check on any officer who may not act in the manner expected of him or her. Particular attention should be paid to the training of

---

<sup>276</sup> This is discussed further above at pages 72 - 73.

supervisors with that in mind. Supervisors must be clear on the law and on policy and best practice. The supervisor is then well placed to check the performance of their officers and to provide on-the-spot guidance. In that way, supervisors should identify when officers are, for example, not filling in search records properly, appear to be exercising the power to stop and search in a discriminatory manner or are conducting the searches inappropriately. In particular, the supervisor should review multiple searches of any individual to assess whether the search is intelligence-led rather than for other inappropriate reasons. The Human Rights Advisor to the Policing Board will return to reviewing records relating to, for example, multiple searches of individuals and will report back to the Committee.

Robert Whalley CB, the Independent reviewer of JSA, has also considered this issue. He refers to one example of supervisory oversight as follows “in one district the JSA powers are specifically covered in performance interviews. I have been shown a typical performance review for July 2012 (seven pages of detailed records and statistics). Six officers are selected at random for interview each month by each of the District’s Chief Superintendents and Superintendents.”<sup>277</sup> The Committee believes this is an approach which is sufficiently respectful of the serious nature of the use of such powers and their potential to damage police community relations which should reflect upon a police officer’s performance. Therefore, the Committee recommends that the use of JSA and TACT powers to stop and search and question are included specifically in performance interviews.

## **Recommendation 10**

**The PSNI should introduce into officers’ performance reviews, where relevant, the use of Terrorism Act 2000 and Justice and Security (Northern Ireland) Act 2007 powers to stop and search and question. During such a review any substantiated complaint made about an officer’s use of the powers should be considered.**

---

<sup>277</sup> *Report of the Independent Reviewer: Justice and Security (Northern Ireland) Act 2007. Fifth Report, 2011-2012*, Robert Whalley CB, November 2012, at paragraph 290.

## PSNI POLICY: TACT & JSA

Throughout the course of this thematic review the Committee has highlighted a number of areas for which there is insufficient or no guidance for police officers and no clearly accessible strategic lead. The Committee believes all of those issues should be addressed in a new PSNI policy.

While the PSNI clearly must operate within the law, including the Codes of Practice which provide the parameters of lawful use of the power and have some internal guidance, for example an Aide Memoire on the use of powers, there is not a comprehensive *integrated* policy document. That means there is no statement of the PSNI's own policy on the exercise of the powers. For example, there is no document which a police officer can consult to assist him or her in understanding the approach of the PSNI across Northern Ireland. A number of issues are not addressed in the Codes of Practice but could be addressed in PSNI policy. For example, the requirement that District Commanders are consulted prior to an authorisation being given should be enshrined in a policy document. That policy could also cover issues such as the conduct of searches, the briefing of officers, the individual responsibility of all police officers for their use of the powers, a hierarchical structure of internal oversight and accountability and record-keeping. The policy should also make clear that inappropriate use of powers will be dealt with robustly by supervisory officers and PSNI's Service Improvement Department.

Robert Whalley CB, the Independent Reviewer of the JSA (who also covers by agreement with David Anderson Q.C. the Independent Reviewer of Terrorism Legislation, the use of stop and search under TACT), has recorded the suggestion made to him that "it would be helpful, especially for operational officers, to have one code which covers all potential powers. That would certainly emphasise the need for the individual police officer to decide which is the most suitable power in a given situation."<sup>278</sup> The Policing Board believes this could be achieved by an integrated policy document which could include

---

<sup>278</sup> *Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007 Fifth Report: 2011- 2012*, Robert Whalley CB, November 2012, at paragraph 186.

police strategies, operational orders, strategic and tactical management, risk assessment, community engagement, community impact assessments and human rights standards.

The PSNI should have a clear written policy on the use of TACT and JSA stop and search and question powers and that policy should be disseminated amongst all officers and civilian staff. The lead officer for stop and search should ensure that the policy is kept under review and any amendments are communicated immediately to officers and staff. In so far as it is possible to do so without compromising confidential operational tactics the policy should be available to the public. The formulation of the policy should involve the community which should be encouraged to participate in the process. The participation of the community should be meaningful. In particular, the community should be asked to voice its concerns over the policy and/or practice of the PSNI and to share its experience of the practical application of the powers.

As highlighted elsewhere in this thematic review, community consent and support are integral to effective policing. A stand-alone policy document which makes clear to every officer the PSNI's expectations of them will help ensure consistent use of powers across the PSNI while permitting individual District Commanders a degree of autonomy to reflect local issues. Local communities are well placed to advise the PSNI about the impact upon their communities of the use of powers and to assist the PSNI in developing strategy. That policy should be disseminated to all relevant officers.

### **Recommendation 11**

**The PSNI should conduct a review of policy and produce a stand-alone policy document setting out the framework within which powers to stop and search and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 must be exercised. The policy should contain clear guidance on the PSNI's strategic and policy goals and on the individual exercise of the powers, the conduct of searches, record-keeping and the responsibility of each officer to ensure**

**compliance. The policy should incorporate reference to the statutory Codes of Practice and relevant human rights principles.**

## **CONCLUSION**

The debate about the police use of powers to stop and search and stop and question can become clouded by many false assumptions, which it is hoped are challenged in this thematic review, but what is abundantly clear is that the Human Rights Act 1998 does not value individual rights at the expense of the community. Rather, it provides a model for a functioning society within which certain rights can be limited while protecting the human rights of all members of society. The Committee has stressed many times, but wishes to restate its central message, that there is no conflict between human rights and policing because policing *is* the protection of human rights. The police fight crime, they maintain public order but they do so in association with the community and for the benefit of the community. The PSNI and the community must understand that and appreciate that scrutiny and accountability will result in a better and more effective police service, rather than a weakened one.

The PSNI, for its part, must ensure that message is delivered consistently to police officers and police staff of all ranks and across the service. In the use of intrusive powers to stop and search and question in particular any departure from a human rights based approach and any temptation, for example, to use powers improperly or disproportionately or to use the powers for reasons other than those connected with terrorism is counter-productive to community policing and combating terrorism. The criticisms of the PSNI in this thematic review and in the course of other reviews, for example, in the report of the Committee on the Administration of Justice,<sup>279</sup> have highlighted that the PSNI use of the powers in practical scenarios requires some attention. Regardless of policy, structures and mechanisms for review what ultimately will be judged is the application of powers in practice.

---

<sup>279</sup> *Still part of life here? A report on the use and misuse of stop and search/question powers in Northern Ireland*, Committee on the Administration of Justice, November 2012.



The jurisprudence of the European Court of Human Rights has made clear that human rights protection must be practical and effective. The true measure of that is the experience of those people who encounter the police on the streets of Northern Ireland.

The best safeguard against any abuse of powers in practice is the training, supervision and discipline of the officers who are entrusted with the exercise of those powers. Public confidence in the police and good relations with the community are fundamental both to the legitimacy of the police but also to the PSNI's ability to police effectively. During the course of this review, the Committee was as satisfied as it could be that the PSNI's use of the powers contained within the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 are in accordance with the law. There remains some residual concern, however, about the selection of individuals chosen to be subject to the exercise of the powers and the conduct of some searches.

It has not been possible within the confines of this thematic review to reach a firm view on individual uses of powers, not least because individual complaints must be dealt with by the Office of the Police Ombudsman, but the Committee will continue to keep this issue under review and will continue to work closely with Robert Whalley CB and David Anderson Q.C. to ensure that every safeguard against abuse is in place and applied in practice. The Committee will thereafter monitor the use of the powers strictly to ensure that the selection of a person is never based purely upon age, gender, race, religion or political belief. To use the powers otherwise is contrary to a proper application of the law. The use of anti-terrorism powers must always be based upon an objective assessment of the threat of terrorism.

A continued analysis of the records of searches should reveal whether, for example, certain individuals may be stopped repeatedly and whether the decision to stop those individuals was based upon proper criteria. That analysis will be conducted in relation to the use of section 43, 43A and 47A TACT and the powers under sections 21, 23 and 24 JSA. An important caveat must be recorded: it is ultimately for the PSNI, in receipt of all of the relevant

information and cognisant of the limits of statutory power, the application of the Human Rights Act 1998 and the guidance (provided by, amongst others, this thematic review and the reviews of David Anderson Q.C. and Robert Whalley CB), to decide whether, and if so to what extent, the powers should be used in any particular situation. Where other powers are available which are less intrusive, they should be considered. The mere fact that the powers are used frequently does not, in itself, suggest an inappropriate use.

The Committee will, working with the PSNI and its stakeholders, keep under review the PSNI use of powers. The Committee welcomes the continued engagement with all stakeholders and members of the community across Northern Ireland. This thematic review has laid the ground work for future monitoring which the Committee will undertake as a recurring item on its agenda. The Committee will continue to report publicly on the outcome of its monitoring exercise and in particular on its findings in relation to particular areas of concern such as multiple searches of individuals, the alleged disproportionate or other inappropriate use of the powers and any alleged inappropriate conduct during the exercise of the powers.

What became clear during the course of this thematic review was that the PSNI have gone to enormous efforts to put in place a rigorous regime that seeks to guarantee that the powers are always used in accordance with law and appropriately. The PSNI has taken its obligations very seriously and is acutely aware of the potential for the inappropriate exercise of the powers to undermine the progress that has been made in police/community relations. The PSNI must continue to focus on that. The newly amended TACT and JSA powers are still in their infancy therefore some stumbling blocks are likely to be encountered. Over the course of the next 12 months the Committee will review the issues again and report upon the success or otherwise of the efforts by the PSNI to ensure that the powers are used effectively, proportionately and so as to secure community confidence rather than undermine it.

## **RECOMMENDATIONS**

### **Recommendation 1**

The PSNI should develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search under section 43, 43A and 47A of the Terrorism Act 2000 according to the name and number of the police officer and according to the name of the person searched.

### **Recommendation 2**

The PSNI should amend its Aide Memoire and include within its new policy (to be developed as per Recommendation 11 of this thematic review) clear instruction that the power to stop and question under section 21(1) of the Justice and Security (Northern Ireland) Act 2007 may not be used to require a person to confirm identity where identity is already known and may not be used to require a person to produce identification for the purpose of confirming identity.

### **Recommendation 3**

The PSNI should include within its new policy on the use of powers to stop and search and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 (to be developed as per Recommendation 11 of this thematic review) a requirement that the relevant District Commander(s) should be consulted before an authorisation is given and he or she should have an opportunity to influence the authorisation.

### **Recommendation 4**

The PSNI should develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search and questions under sections 21, 23 and 24 of the Justice and Security (Northern Ireland) Act 2007 according to the name and number of the police officer and according to the name of the person searched.

### **Recommendation 5**

The PSNI should develop guidance, in consultation with relevant stakeholders, on the conduct of searches under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007, which sets out in sufficient detail the range of cultural and religious issues that may arise during a search and which addresses specifically what an officer should do when presented with language barriers or sensory impairment.

### **Recommendation 6**

The PSNI should conduct a review, at least annually, of the ambit and use of the powers to stop, search and question contained within the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 during the previous 12 months to ensure that the powers are being used in accordance with law and not disproportionately. Thereafter, the Chief Officer responsible for stop and search powers should provide a briefing to the Performance

Committee of the Northern Ireland Policing Board. The first review should be completed within 12 months of the publication of this thematic review.

#### **Recommendation 7**

The PSNI should as soon as reasonably practicable but in any event within 3 months of the publication of this thematic review consider how to include within its recording form the community background of all persons stopped and searched under sections 43, 43A or 47A of the Terrorism Act 2000 and all persons stopped and searched or questioned under section 21 and 24 of the Justice and Security (Northern Ireland) Act 2007. As soon as that has been completed the PSNI should present to the Performance Committee, for discussion, its proposal for monitoring community background. At the conclusion of the first 12 months of recording community background, the statistics should be analysed. Within 3 months of that analysis the PSNI should present its analysis of the statistics to the Performance Committee and thereafter publish the statistics in its statistical reports.

#### **Recommendation 8**

The PSNI should develop and thereafter issue guidance to all police officers in Northern Ireland on stopping and searching children. That guidance should draw upon the guidance already produced and issued in G District.

#### **Recommendation 9**

Each District Commander should, in consultation with District Policing and Community Safety Partnerships, Independent Advisory Groups, Reference Groups (where applicable) and the Performance Committee, devise a strategy for improved consultation, communication and community engagement in respect of its use of stop and search powers under both the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007. That strategy should include an agreed mechanism by which the PSNI will explain the use of powers to the community and will answer any issues of concern.

#### **Recommendation 10**

The PSNI should introduce into officers' performance reviews, where relevant, the use of Terrorism Act 2000 and Justice and Security (Northern Ireland) Act 2007 powers to stop and search and question. During such a review any substantiated complaint made about an officer's use of the powers should be considered.

#### **Recommendation 11**

The PSNI should conduct a review of policy and produce a stand-alone policy document setting out the framework within which powers to stop and search and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007 must be exercised. The policy should contain clear guidance on the PSNI's strategic and policy goals and on the individual exercise of the powers, the conduct of searches, record-keeping and the responsibility of each officer to ensure compliance. The policy should incorporate reference to the statutory Codes of Practice and relevant human rights principles.

## Northern Ireland Policing Board

---

Waterside Tower  
31 Clarendon Road  
Clarendon Dock  
Belfast BT1 3BG

Tel: 028 9040 8500 Fax: 028 9040 8544  
Textphone: 028 9052 7668

Email: [information@nipolicingboard.org.uk](mailto:information@nipolicingboard.org.uk)  
Website: [www.nipolicingboard.org.uk](http://www.nipolicingboard.org.uk)  
Facebook: [www.facebook.com/policingboard](http://www.facebook.com/policingboard)  
Twitter: @nipolicingboard

## Document Title

---

Human Rights Thematic Review on the use of police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007

## Online Format

---

This document is available in PDF format from our website.

## Published October 2013

---

This document may also be made available upon request in alternative formats or languages. Requests for alternative formats should be made to the Northern Ireland Policing Board.

## Disclaimer

---

While every effort has been made to ensure the accuracy of the information contained in this document, the Northern Ireland Policing Board will not be held liable for any inaccuracies that may be contained within.