



Promoting Justice / Protecting Rights

STILL PART OF LIFE HERE?

A report on the use and misuse of stop and search/question powers in Northern Ireland

November 2012

It is a central proposition of this report that the fundamental purpose of policing should be, in the words of the Agreement, the protection and vindication of the human rights of all...

...in practice tension does occur between human rights and policing. Police have powers to limit rights and freedoms, for example, by arresting people. ... Yet the judgments that police officers make every day on this point determine the difference between good policing and bad.

They also determine the difference between effective policing and ineffective policing. We cannot emphasize too strongly that human rights are not an impediment to effective policing but, on the contrary, vital to its achievement. Bad application or promiscuous use of powers to limit a person's human rights – by such means as arrest, stop and search, house searches – can lead to bad police relations with entire neighbourhoods, thereby rendering effective policing of those neighbourhoods impossible. In extreme cases, human rights abuses by police can lead to wrongful convictions, which do immense damage to the standing of the police and therefore also to their effectiveness. Upholding human rights and upholding the law should be one and the same thing.

*'A New Beginning: Policing in Northern Ireland', The Report of the Independent Commission on Policing in Northern Ireland', September 1999 (Patten Report)
Paragraphs 4.1 & 4.3.*

© Committee on the Administration of Justice November 2012

The material may be reproduced, free of charge, in any format or medium without specific permission, provided the reproduction is not for financial or material gain. The material must be reproduced accurately and not used in a misleading context. If the material is to be republished or issued to others, acknowledgement must be given to its source, copyright status, and date of publication.

This publication is available on our website.

CAJ
Committee on the Administration of Justice
2nd Floor, Sturgen Building
9-15 Queen Street
Belfast
BT1 6EA
Tel: 028 9031 6000
Fax: 028 9031 4583
info@caj.org.uk
www.caj.org.uk
ISBN: 978-1-873285-50-3

CONTENTS

	Page
About CAJ	1
Executive Summary and Recommendations	2
1: Background and lessons from past CAJ research	
Background and methodology	5
Report on security force harassment “It’s Part of Life Here”	5
Review of emergency legislation	6
War on terror report	6
2: Stop, and search/question powers and human rights law	
Intrusion and non-discrimination	8
Legal certainty and the <i>Gillan</i> challenge to ‘section 44’	10
Protection of Freedoms Act 2012	12
Canning judgement	14
ECHR Compatibility of current powers	15
3: Current stop and search/question powers	
The ordinary law (PACE)	20
Terrorism Act (TACT) 2000	21
Justice and Security (NI) Act 2007	22
4: Current usage of powers: concerns and issues	
A community perspective on the present usage of powers	25
The Policing Board	27
Statistics on usage and effectiveness	29
Strategic Policy on the use of stop and search/question	31
Monitoring of powers	34
Misuse of Powers	37
5: Conclusions	
Still part of life here?	43

About CAJ

CAJ is an independent human rights organization with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaign on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Esmee Fairbairn Foundation, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON. The organization has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Executive Summary and Recommendations

This section summarises the main findings of this report and also enumerates a specific recommendations to address a number of the issues it uncovers.

- Stop and search powers are routinely used by police services across the world and can be an entirely legitimate law enforcement tool when police officers have good reason to suspect an individual may be carrying something unlawful. Human rights concerns are engaged when stop and search/question powers are used in an arbitrary and discriminatory manner.
- The usual threshold in domestic law for determining whether the police have a good reason to target a person for search is that of 'reasonable suspicion' in relation to the individual. There are two 'emergency-type' powers still on the books that do not require that threshold to be met, namely search powers under the Terrorism Act 2000 (TACT) and search and question powers under the Justice and Security (Northern Ireland) Act 2007 (JSA).
- CAJ in the past has raised concerns about the impact of stop and search powers, particularly in relation to when powers were used ineffectively, unnecessarily or as a form of harassment. Our 2008 *War on Terror: Lessons from Northern Ireland* report concluded the experience here was not only that "stop and search operations rarely produced anything of immediate value" but also that policies which were meant to be targeted "had a detrimental impact on whole communities..." and that "harassment of this kind became very counterproductive, alienating a large number of people..." concluding that "deterrence" as a justification for the powers was not effective.
- In 1994 a CAJ research report examining the question of security force harassment, including through unnecessary use of stop and search/question powers, was entitled "It's Part of Life Here". In the intervening period the situation has changed so that there is no longer the widespread deployment of soldiers or vehicle checkpoints. However, the TACT/JSA powers were still used over 22,000 times in the 2010/11 reporting year. There is some evidence of the power being targeted on particular areas and this report seeks to ascertain whether, for some, being routinely subjected to the powers unnecessarily is 'still part of life here'. In CAJ's view far from being an effective 'deterrent', if the main interface of members of a community with policing is being subjected to unnecessary stop and search/question operations, such practices are likely to fuel conflict rather than prevent it.
- 'Section 44' of TACT was found incompatible with the European Convention on Human Rights in the *Gillan and Quinton v the UK* judgment, in essence, on the grounds that it did not have sufficient safeguards to prevent its use in an arbitrary manner. Both the TACT and JSA powers were then amended by the Protection of Freedoms Act 2012 to add additional safeguards. This included the introduction of a requirement for a general 'authorisation' to be in place for the PSNI to exercise the JSA search powers. The Independent Reviewer of TACT indicated at the time of his most recent report that the new 'Section 47A' TACT powers were yet to be used. Although there has been an

overall reduction in usage the PSNI have effectively switched from TACT to using the JSA powers.

- As well as an Independent Reviewer of TACT there is also an Independent Reviewer of the JSA, who can recommend repeal of JSA stop and search powers. The Northern Ireland Policing Board also has a Human Rights Advisor and human rights committee. All three produce annual reports. Given concerns raised with the use of the powers the Policing Board has also been carrying out an ongoing Thematic Review into the use of stop and search powers which has not yet been published. *CAJ would urge all these mechanisms to address in their reports whether it is appropriate and necessary to have two emergency-type powers with similar functions deployed in Northern Ireland, consider the arguments for repeal and assess the adequacy of the new safeguards.*
- CAJ and others, including the Human Rights Commission, were critical that even the new safeguards did not go far enough to ensure powers could not be exercised in an arbitrary or discriminatory manner. This includes concerns about the Secretary of States role in oversight of 'authorisations' to use the powers, given Ministers had never once refused a 'section 44' authorisation. Questions have also arisen in this research as to the extent that the Security Service (MI5) are involved in requesting authorisations, including whether the intelligence on which they make their requests is visible to the PSNI authorising officer. *CAJ urges the Independent Reviewer of JSA and the Policing Board Human Rights Advisor to examine and comment on in their reports the appropriateness of authorisations granted under the JSA since their commencement, including examining the role of MI5.*
- In so far as there is information available, the use of both of the JSA and TACT powers by the PSNI seems ineffective with arrest rates well under 1%. It is not clear if the arrests actually relate to 'terrorist' (scheduled) offences or other matters, including resisting the stop and search. The PSNI also does not collect figures relating to any subsequent charges or convictions, indicating that the police themselves do not actually evaluate how effective the powers are in relation to the results they produce. *CAJ recommends that the PSNI gather and publish such data.*
- Statistics provided to the Policing Board indicate over half the persons stopped and searched are under 25, and 14% of those subjected to the powers are children. It is not clear if these stops largely relate to powers under the ordinary law (PACE) or the JSA/TACT powers. *CAJ urges that these statistics are broken down by power and the PSNI, Commissioner for Children and Young People (NICCY) and Policing Board further examine the reasons for and impact of the level of usage of stop and search/question against children and young people.*
- Remarkably there is no direct monitoring of stop and search/question on grounds of community background. This is despite such monitoring being an essential tool to prevent the use of powers in a manner which constitutes ethnic/racial profiling, and the related targeting of persons perceived to belong to 'suspect communities'. Statistical data on other ethnic groups is provided but is no longer published. Both the United Nations and Council of Europe anti-racism bodies who oversee the UK's human rights commitments have recently made clear statements that sectarianism in Northern Ireland

is to be treated as a form of racism and not as some distinct phenomenon to which international standards do not apply. *As well as gathering ethnic monitoring data on other groups CAJ urges the PSNI to bring its own definition of sectarianism in line with the views of the competent international treaty bodies and to initiate and publish results of monitoring of stop and search/question powers on the grounds of (Protestant/Catholic etc) community background.*

- Although CAJ has also received reports of some usage of JSA and TACT powers in working class Protestant/unionists communities it appears the PSNI have a particular policy of wide deployment of the powers to preventively 'disrupt' potential dissident republican activity. Such a policy appears incompatible with the legislation which indicates it should be used to genuinely search for specific items such as weapons. The TACT Code of Practice explicitly states the power should not be deployed as a "deterrent or intelligence gathering tool". However, there is some indication that the powers appear to be deployed for both purposes. It would also be problematic if persons are targeted on the basis of low-level Police intelligence information, insufficient to reach the threshold of reasonable suspicion, which relates to legitimate political affiliations or activities rather than evidence of unlawful activity. The PSNI has established a Terrorism and Security Powers User Group to provide internal oversight of the use of powers. *CAJ urges the PSNI to first clearly articulate its policy in relation to use of the JSA/TACT powers and for the PSNI, Policing Board and Independent Reviewer to examine and assess compatibility of this with the permitted usage of the powers under the legislation.*
- A Code of Practice which sets out the parameters and requirements in relation to the use of stop and search/question powers over and above what is on the face of the legislation is usually provided as an essential safeguard against arbitrary exercise of powers. It is remarkable that despite JSA powers having been used since 2007 the Northern Ireland Office (NIO) is yet to issue a tailored code of practice on the JSA powers. *CAJ urges the NIO as a matter of urgency to consult on a JSA Code of Practice with among other matters requirements for monitoring on grounds of age and community background (as well as other grounds), production of effectiveness statistics and reflecting the prohibition in the TACT code of practice of these powers being used as deterrent or intelligence gathering tool.*
- CAJ has heard a number of complaints about Police misuse of, and apparent misconduct, in exercising stop and search powers including reports of refusals to issue records. Where records are duly given concerns have been expressed that the switch from paper to electronic recording has made obtaining records less accessible. There have been particular complaints about the role of PSNI Tactical Support Group (TSG units) in stop and search operations. *CAJ urges the Office of the Police Ombudsman to ensure there is clear guidance to staff in relation to the matters which would constitute police misconduct in relation to stop and search/question powers in order for complaints to be dealt with effectively.*

Chapter 1: Lessons from past CAJ research

Background and methodology

The production of this report has been prompted by concerns about the present day usage and impact of stop and search /question powers. Predominantly the issues raised with us relate to the use of 'emergency-type' stop and search/ question powers under the Terrorism Act 2000 (TACT) and Justice and Security (Northern Ireland) Act 2007 (JSA), rather than stop and search powers under the 'ordinary' law. As a result these 'emergency-type' stop and search/question powers will be the main focus of this report

Practical concerns regarding these issues have been brought to CAJ's attention through a variety of avenues. For the past number of years representations have been made to CAJ's solicitor about stop and search activity perceived to be harassment both from affected persons and their legal representatives. CAJ was also invited to attend a packed public meeting in the Creggan area of Derry-Londonderry where a range of concerns and experiences were voiced about the widespread use of stop and search/question powers in the area. CAJ has now concluded work on taking statements and details from persons who have approached us, and this information is used in this report. CAJ also examined other materials in the public domain, including court and media reports as well as reports and other materials produced by the Policing Board and Independent Reviewers of the JSA and TACT powers. Before examining present day experience however it is worth reflecting on CAJ's previous views on the matter from three previous CAJ reports.

Report on security force harassment "It's part of life here"

CAJ published research in 1994 entitled '*Its part of life here*' based on a survey of young people's (aged 17-18) experiences with the security forces. This found 25% of respondents had been subject to stop and search powers and of them 40% reported that they had been harassed in the process. Noting there was a high level of complaints relating to stop and search the report commented that there were "widespread feelings" that the process went "beyond necessary inconvenience and into the realm of harassment".¹

Looking at harassment in general, one of the research report's most striking findings was that around 50% of young Catholics reported experiences of harassment.² A range of experiences were recorded including, for example, persons who felt they had been singled out because of GAA connections.³ The report also noted that, whilst not as numerous as in Catholic areas, there were increasing complaints of harassment in Protestant working class areas.⁴ It also outlined a problem of 'ghettoisation of policing' whereby officers did not represent the communities they were policing on class,

¹ McVeigh, Robbie, "*It's part of Life here...: The Security Forces and Harassment in Northern Ireland*" CAJ 1994, p80.

² As above p94.

³ As above p111.

⁴ As above p122.

sectarian and gender grounds, with the research also identifying a “serious, if largely unacknowledged, problem of sexist harassment throughout the security forces.”⁵

The research also examined the analysis that harassment was a “nursery for future conflict” given that such experiences were leading young people to question the fairness and legitimacy of the administration of justice.⁶ Among the other findings of the report were that systems to monitor security force harassment were “woefully inadequate” and that there were “strong reservations about statutory complaints mechanisms’” ability to address allegations of harassment.⁷

Review of emergency legislation

In 1995, CAJ published a review of emergency legislation entitled “*No Emergency, No Emergency Law*”. Among the issues raised in relation to stop and search powers were that experience in many jurisdictions had shown how damaging the heavy-handed use of stop, question and search powers could be to police-community relations.

The research commented that the more loosely drawn up the power to stop, question and search is the greater the potential for its use to degenerate into victimisation and invariably be felt to be oppressive by the sections of the community against which it was targeted. The report was critical of the use of powers which did not require reasonable suspicion, and argued the use of such powers was counter-productive as abuse of the powers “or use in a manner which is experienced as heavy handed, leads to lack of respect for the law, which in turn creates further difficulties for law enforcement.” It also stated that the powers risked ‘generating’ crime through charges against persons which purely related to resisting the exercise of the powers themselves. The report contrasted the largely unfettered scope of stop, question and search powers under then emergency legislation with those under ordinary law requiring ‘reasonable suspicion’.⁸

The report also questioned the continued capacity of the military to exercise the powers despite a peace process and a move towards ‘normalization’. It also pointed to the lack of definition of what was meant by powers to question a person over their ‘identity’ and ‘movements.’ CAJ cited reports of “intimidating and unnecessary” use of the powers since the ceasefires. A key issue was the absence of a *Code of Practice* outlining parameters for the exercise of the powers meaning there was no detailed guidance on how such a search should be conducted, nor on matters such as record keeping.⁹

War on Terror report

In 2008, CAJ produced its ‘*War on Terror: Lessons from Northern Ireland*’ report emanating from evidence given by CAJ and a large number of groups and individuals in Northern Ireland to the International Commission of Jurists (ICJ) Eminent Jurists Panel.¹⁰

⁵ As above p197-8.

⁶ As above p101-2.

⁷ As above p203.

⁸ CAJ ‘*No Emergency, No Emergency Law – Emergency Legislation in Northern Ireland*’ CAJ1995, pp 23–28.

⁹ As above.

¹⁰ CAJ ‘*War on Terror, Lessons from Northern Ireland*’ CAJ 2008.

This report was a culmination of testimonies given to the ICJ in 2006 at a hearing in Belfast as part of for the ICJ's global inquiry into terrorism and counter-terrorism and human rights. A resounding message from the participants was that, in reality, experience of and targeting of 'suspect communities', in particular through stop and search powers, promoted a sense of injustice throughout the conflict in Northern Ireland.¹¹

Participants also concluded that "the targeting of suspect communities is counterproductive, it actually encourages those not predisposed to violence to get involved" and "the authorities alienated the very communities they needed to work with to resolve the conflict". Participants also took on directly the argument that random stop and search powers were justified as a "deterrent":

Some people have argued that if a person knows he or she is going to be stopped and searched it may be a useful deterrent, frightening people into not carrying weapons or bombs. If true the argument runs, conducting widespread stop-and-searches makes criminal or terrorist activity more difficult, and acts as a powerful deterrent....¹²

Participants queried this perspective arguing that local experience showed paramilitary groups operated in a less simplistic manner than the argument implied and that:

Certainly it was the experience of Northern Ireland that stop and search operations rarely produced anything of immediate value. But the policy which was meant to be targeted and act as a deterrent to particular individuals and activities had a detrimental impact on whole communities. Constant harassment of this kind became very counterproductive, alienating a large number of people trying to get on with their daily lives. Participants concluded that, in Northern Ireland at least, deterrence, as a justification for certain measures was not effective.¹³

The next chapter of this report outlines the human rights context of stop and search/question powers, including issues of legal certainty, interference in private life and non-discrimination. This includes outlining the legal challenges to the TACT 'section 44' powers in the *Gillan and Quinton v UK*¹⁴ case, the resultant changes to the legislation, and challenges to the JSA in the *Canning* case.

¹¹ As above section 4.2.3.

¹² As above.

¹³ As above.

¹⁴ *Gillan & Quinton v United Kingdom*, Application no. 4158/05, judgment of 12 January 2010.

2. Stop and search/question powers and human rights law

Intrusion and Non-Discrimination

Stop and search powers are routinely used by police services across the world and can be an entirely legitimate law enforcement tool when police officers have a good reason to suspect an individual may be carrying something unlawful such as stolen goods, drugs or a weapon. The usual threshold in domestic law for determining whether the police have a good reason to target a person for search is that of "reasonable suspicion" against the specific individual.

Stop and search powers engage two main sets of human rights. Firstly the right to privacy, as the powers are clearly intrusive, and secondly the right to non-discrimination when persons are singled out for searches on the basis of their ethnic/community background, age, gender, sexual orientation or similar grounds. Whilst the absence of a physical search may seem less intrusive many of the same issues transpire when police officers are empowered to stop and question individuals. Stop and search/question powers can also involve temporary detentions, there are often penalties for non-compliance. In addition the police can use reasonable force to ensure compliance.

In relation to intrusion the right to private and family life is not absolute and can be restricted for the purpose of law enforcement or national security. There are however limitations on such restrictions designed to prevent unnecessary intrusion. Powers to stop and search/question people are problematic in human rights terms when they are exercised in an arbitrary and disproportionate manner and effectively used as a tool of harassment and control rather than to genuinely search for prohibited items. It is difficult to argue a power is being used proportionately when it appears to render little by way of results. Given this a key indicator as to whether the level of searches being conducted is actually necessary, is their effectiveness in finding prohibited items they are designed to search for and the number of resultant arrests.

The term 'suspect communities' refers to the targeting of measures against particular communities considered 'suspect', and was coined in research by Paddy Hillyard in relation to the use of emergency legislation against Irish communities in Britain.¹⁵ The outworking of such practices was the demonization of the community and the fostering of a climate of fear within it. In relation to human rights law the discriminatory targeting of law enforcement measures has also been conceptualised as 'racial' or 'ethnic profiling'.

The use of effectively permanent, 'emergency' powers in Northern Ireland such as those under the Terrorism Act 2000 (TACT) or the Justice and Security (Northern Ireland) Act 2007 (JSA) has been particularly controversial. The powers include stop and search provisions which have dispensed with the usual requirement of 'reasonable suspicion'

¹⁵ Hillyard, Paddy *Suspect Community: Peoples experience of the Prevention of Terrorism Acts in Britain* Pluto Press, 1993.

against an individual. Human rights treaty bodies have been critical of these powers, including a Council of Europe Committee which recently called on UK authorities:

...to monitor closely the use of stop and search powers under the current laws adopted in the fight against terrorism to ensure that these powers are exercised in a reasonable and non-discriminatory manner.¹⁶

The UN Human Rights Committee has shared similar concerns warning such stop and search powers “are disproportionately used against persons belonging to some minority groups at United Kingdom ports, borders and railway stations and on the border with Ireland.”¹⁷

The Council of Europe’s European Commission on Racism and Intolerance (ECRI) General Recommendation on Combating Racism and Racial Discrimination in policing addressees racial profiling defining the practice as:

The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”.¹⁸

To prevent such practices ECRI urge: police training; monitoring broken down by grounds including ethnic origin, religion and nationality; and the introduction of a reasonable suspicion standard founded on objective criteria. Thomas Hammarberg, when Council of Europe Commissioner for Human Rights, also issued a viewpoint on the subject of stop and search being conducted on ethnic or religious grounds. He noted such practices clashed with human rights standards and “tend also to be counterproductive as they discourage people from cooperating with Police efforts” urging that there should be objective reasons why individuals are stopped and searched.¹⁹ United Nations bodies have pronounced in similar terms. The Durban Declaration made at the World Conference Against Racism urged states to eliminate racial profiling.²⁰ The UN Human Rights Committee has also held in a case against Spain relating to ID checks that stopping and singling out persons on the basis of ethnicity breached the right to non discrimination.²¹

Some may argue that these standards are not relevant to the two main communities in Northern Ireland. However, both UN and Council of Europe anti-racism treaty bodies have made clear statements that this not the case. The UN Committee on the Elimination of Racial Discrimination body has made clear that sectarian discrimination in

¹⁶ Advisory Committee on the Framework Convention for National Minorities (Third Opinion on the UK) ACFC/OP/III(2011)006, 22 December 2011, paragraph 122.

¹⁷ Human Rights Committee (Concluding Observations on UK) CCPR/C/GBR/CO/6, 30 July 2008, paragraph 19.

¹⁸ ECRI (Council of Europe) General Policy Recommendation No. 11 on Combating racism and racial discrimination in policing, adopted on 29 June 2007, CRI (2007) 39, Paragraph I.

¹⁹ Hammarberg T (2009) ‘*Stop and searches on ethnic or religious grounds are not effective*’ Viewpoints of the Council of Europe Commissioner for Human Rights, 20 July 2009.

²⁰ Declaration and Programme of Action (the Durban Declaration) adopted at the *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* Durban, 31 August - 8 September 2001, A/CONF.189/12 [72].

²¹ *Rosalind Williams Lecraft v Spain (Human Rights Committee)* Communication No. 1493/2006 UN Doc CCPR/C/96/D/1493/2006, 30 July 2009.

Northern Ireland is to be treated as a form of racial discrimination.²² Whilst there are still official definitions to the contrary in the law enforcement context²³ the Council of Europe has emphasised that sectarianism in Northern Ireland is to be treated as a form of racism.²⁴ What follows is that the above standards apply equally to profiling and monitoring on the basis of community background, the main indicator for which is often 'Protestant' or 'Catholic'.²⁵ The UN anti-racism committee has specifically requested the UK to provide it with "detailed statistical data disaggregated by ethnicity and community origin" in relation to the use of stop and search and its effectiveness.²⁶

Legal certainty and the *Gillan* challenge to 'section 44'

The issue of whether the 'section 44'²⁷ powers under TACT were so broadly drafted as to enable their arbitrary use by the police came to a head when successfully challenged in the *Gillan and Quinton v the UK* case before the European Court of Human Rights.²⁸ The power did not require individual reasonable suspicion but did require a general 'authorisation' to be in place allowing the police to use it in a specified place for a limited period of time.

The case hinged on the question of undue interference with Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR), which is given domestic effect by the Human Rights Act 1998.

ECHR Article 8(1) sets out that "everyone has the right to respect for his private and family life" and the limitation clause in Article 8(2) states any interference in the right by a public authority must be "in accordance with the law" and "necessary in a democratic society" for the purposes of one of a number of defined legitimate aims including "national security", "public safety" "the prevention of disorder or crime" or "the protection of the rights and freedoms of others".

In this case both applicants, a journalist and a protester, were stopped and searched near an arms fair under 'section 44', in theory, for articles which 'could be used in connection with terrorism'. Nothing incriminating was found on either applicant. They complained to the courts, but the High Court and Court of Appeal ruled that the

²² "Sectarian discrimination in Northern Ireland [...] attract[s] the provisions of ICERD in the context of "inter-sectionality" between religion and racial discrimination" Committee on the Elimination of Racial Discrimination (List of Themes on the UK) UN Doc CERD/C/GBR/18-20), paragraph 1(e).

²³ The PSNI Hate Motivation definitions state "The term 'sectarian', whilst not clearly defined, is a term almost exclusively used in Northern Ireland to describe incidents of bigoted dislike or hatred of members of a different religious or political group. It is broadly accepted that within the Northern Ireland context an individual or group must be perceived to be Catholic or Protestant, Nationalist or Unionist, or Loyalist or Republican." http://www.psnipolice.uk/hate_motivation_definitions.pdf (accessed 15 October 2012).

²⁴ The treaty body finds treating "sectarianism as a distinct issue rather than as a form of racism problematic, as it allows sectarianism to fall outside the scope of accepted anti-discrimination and human rights protection standards", Advisory Committee on the Framework Convention for National Minorities, (Third Opinion on the UK) Strasbourg, ACFC/OP/III(2011)006, 22 December 2011, paragraph 126.

²⁵ Religion is often included as an indicator of ethnicity along with other factors relevant to the 'two main communities' such as citizenship, national identity and decent.

²⁶ Committee on the Elimination of Racial Discrimination (List of Themes on the UK) UN Doc CERD/C/GBR/18-20), paragraph 18.

²⁷ The powers were contained within sections 44-47 of the Terrorism Act 2000 but were usually colloquially referred to as 'section 44'.

²⁸ *Gillan & Quinton v United Kingdom*, Application no. 4158/05, judgment of 12 January 2010.

exercise of the powers by the police were legitimate given the nature of the general 'terrorist threat against the UK'.

The main issue for the Court to consider was whether the exercise of the 'section 44' stop and search powers were incompatible with the applicants rights under Article 8. This ultimately hinged on the requirement of legal certainty ("in accordance with the law") rather than the general principle of proportionately ("necessary in a democratic society").

The applicants alleged violations of other ECHR articles relating to freedom of expression (Article 10); freedom of assembly (Article 11) and the right to liberty (Article 5). The Court did not ultimately consider these given its finding on Article 8. It did however comment in relation to Article 5 that as they were deprived of freedom of movement during the search and liable to arrest and detention if they had refused this was indicative of a deprivation of liberty.²⁹

The Court ultimately found that 'section 44' failed the legal certainty test under ECHR Article 8 in that the powers were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse".³⁰ The Court outlined that the "accordance with the law" test did not just mean the power had to be set out in a law but that the legislation must be sufficiently clear and foreseeable to enable the individual to regulate their conduct. The Court held:

For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the [ECHR]. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles in a democratic society enshrined in the [ECHR], for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise...³¹

The 'section 44' power did not require individual reasonable suspicion and the Court was unimpressed by the arguments of the UK government that the existing safeguards were effective in preventing arbitrary use. In particular the Court:

- regarded the process of needing a time bound 'authorisation' for a particular location as ineffective as entire police areas, such as London, had been effectively permanently designated;
- was unimpressed by the range of reasons for which an authorisation could be granted, noting there was no requirement for authorisations to be considered 'necessary', and hence no assessment of proportionality; Rather authorisations could be granted when considered "expedient for the prevention of Acts of

²⁹ Gillan, paragraph 57.

³⁰ As above, paragraph 87.

³¹ As above, paragraph 77.

terrorism” the Court commenting expedient meant only ‘helpful’ or ‘advantageous’ rather than necessary;

- noted that, in practice, the Secretary of States’ power to refuse or time limit an authorisation appeared never to have been exercised;
- noted that although there was the possibility of judicial review over authorisations and individual stops and searches applicants would face ‘formidable obstacles’ which would make it “difficult if not impossible to prove that the power was improperly exercised”;
- held the power reserved too much discretion for individual police officers both in not having to demonstrate individual *reasonable suspicion* in the manner in which the *Code of Practice* did not provide any restriction on the officers decision to stop and search, and also in the broad *purpose* for which the search was permitted – namely looking for articles which could be used in connection with terrorism, which could cover a ‘very wide category’ of everyday items;
- considered the powers of the Independent Reviewer of the Terrorism Act were limited to general assessment;
- questioned the effectiveness of the power which had been used over 100,000 times in 2007/8 but that “none of the many thousands of searches had ever related to a terrorism offence”³² and was clearly being used for purposes beyond its original intention;
- held that there was “a clear risk of arbitrariness in the grant of such a broad discretion to the police officer” and that, whilst *Gillan* dealt with persons from the majority ethnic community, there was a concurrent risk of discriminatory application against minorities.³³

The use of ‘section 44’ was suspended in light of the judgment and the UK passed the Protection of Freedoms Act 2012.

Protection of Freedoms Act 2012

As a result of the *Gillan and Quinton* ECtHR judgment the UK repealed the ‘section 44’ powers and amended, through the Protection of Freedoms Act 2012, TACT 2000 to introduce replacement stop and search powers under what is now ‘section 47A’ of TACT.³⁴

The revised powers contained changes to the authorisation procedure and purpose for which the power could be used. The power retained the ability to be used without individual reasonable suspicion against the person stopped. The purpose of the power was also changed from searching for any article which could be used “in connection with terrorism” to searching for evidence that the person searched is a “terrorist” or, in

³² Alluding to: ‘2007 Report of Independent Reviewer of the Terrorism Acts’ Lord Carlisle, July 2008, paragraph 131.

³³ *Gillan*, paras 80-86.

³⁴ In the interim period before the passage of the Protection of Freedoms Act 2012, in March 2011, the UK Home Secretary introduced the replacement powers on an interim basis through a Remedial Order under section 10 of the Human Rights Act 1998 (Terrorism Act 2000 (Remedial Order) 2011, SI 2011/631). The purpose of a Remedial Order is to speedily amend primary legislation to remove incompatibility with ECHR rights when there is a compelling reason to do so. In this instance the UK Home Secretary felt there would be an operational vacuum for police if they did not have access to the powers, albeit ultimately there was not as the replacement powers under the remedial order were never used.

relation to searches of vehicles, anything which may constitute evidence the vehicle is being used for the “purposes of terrorism.”³⁵

The authorisation procedure had been criticised given that, far from being tied to a tight location in response to a particular threat, most or all of vast areas including London and Northern Ireland had all but been permanently designated.³⁶ This was not universally the case. In 2005 the Independent Reviewer reported that no Scottish police force had ever used them, leading him to conclude that “at the very least this demonstrates that other powers are on the whole perfectly adequate for most purposes.”³⁷

The changes to the authorisation process consisted of heightening its threshold. Rather than being given when “expedient for the prevention of acts of terrorism” for up to (a renewable) 28 days, an authorisation can now only be given when a senior police officer “reasonably suspects that an act of terrorism will take place and reasonably considers that the authorisation is necessary to prevent such an act.” The authorisation can now last for no longer and cover no greater an area than reasonably considered necessary to prevent an attack. A new Code of Practice was issued which sets out that authorisations in Northern Ireland:

- can only be made by an Assistant Chief Constable or above;
- cannot be granted solely on the basis that there is a general high threat from terrorism;
- cannot be granted on the basis that the use of powers is a ‘useful deterrent or intelligence-gathering tool’;
- must be presented with “a detailed account of the intelligence which has given rise to reasonable suspicion that an act of terrorism will take place. This should include classified material where it exists.”³⁸

Strikingly illustrative of the arbitrary purpose for which the ‘section 44’ power had been used was the fact that, despite being used in more than 250,000 times in one year alone (2008/09), the TACT Independent Reviewer reports that it had “never produced not even one successful prosecution for a terrorist offence in Great Britain.”³⁹ In his most recent report covering 2011 the TACT Independent Reviewer confirms by contrast the new ‘section 47A’ power had not been used a single time since its introduction.⁴⁰ This indicates both the ineffectiveness and unnecessary deployment of the predecessor ‘section 44’ power.

³⁵ Section 47A(4) Terrorism Act 2000 (as amended by Protection of Freedoms Act 2012).

³⁶ In terms of the origin of these types of powers the *Gillan* judgment sets out: “The police power to stop and search at random where expedient to prevent acts of terrorism was first introduced as a response to the bombing campaign between 1992 and 1994 in and around London. Section 81 of the Criminal Justice and Public Order Act 1994 inserted a new section 13A into the Prevention of Terrorism (Temporary Provisions) Act 1989 (“the 1989 Act”) in similar terms to section 44 of the 2000 Act...but without any requirement that the Secretary of State confirm the authorisation. The Prevention of Terrorism (Additional Powers) Act 1996 created an additional, separate power to stop and search pedestrians, under section 13B of the 1989 Act. The 1996 Act also established for the first time the confirmation procedure involving the Secretary of State paragraph 26.

³⁷ ‘2005 Report of Independent Reviewer of the Terrorism Acts’ Lord Carlile 2006, paragraph 96.

³⁸ ‘Code of Practice (Northern Ireland) for the Authorisation and Exercise of Stop and Search Powers Relating to Section 47a of Schedule 6b to the Terrorism Act 2000’ Northern Ireland Office 2011, paragraphs 6.1; 6.8; 6.18.

³⁹ ‘The Terrorism Acts in 2011, Report of the Independent Reviewer’ David Anderson Q.C. June 2012, paragraphs 8.2 and 8.6.

⁴⁰ As above, paragraph 8.2.

Despite the suspension of 'section 44' stop and search powers without individual reasonable suspicion did not cease in Northern Ireland, given the presence of another 'emergency-type' power on the statute books under the JSA. Unlike the TACT powers the JSA contains both stop and search (section 24) and stop and question (section 21) powers. According to the Independent Review of TACT:

The removal of the section 44 power appears in Northern Ireland to have coincided with a very large increase in the use of another no-suspicion stop and search power, not available in Great Britain: JS(NI)A 2007 section 24. A power used 1,163 times in 2009/10 was used 16,023 times in 2010/11: an increase of more than twelve times.⁴¹

Despite an overall reduction in searches it is clear that the PSNI effectively switched to the JSA once 'section 44' had been withdrawn. As detailed in the next chapter these powers are largely limited, in theory, to searching for 'munitions and transmitters' and questions on 'identity and movements'. These powers never originally required an 'authorisation' procedure. On the back of the *Gillan* judgment the JSA was amended to introduce an authorisation procedure, but only for the JSA search power when exercised by police.⁴² The new requirement for an authorisation did not cover the section 21 stop and question power presumably as the state was then arguing that 'questioning', unlike searching, does not infringe the right to private life and hence does not engage Article 8 at all.⁴³

Canning judgment

This position, along with the compatibility of the JSA powers with the ECHR *per se* was put to the test in a recent Judicial Review taken by *Canning and others*. In this instance the High Court, contrary to the position articulated by the PSNI, held that the stop and question powers as well as the stop and search powers *did* engage and constitute interference in Article 8.⁴⁴ However, on the grounds that the "contextual factors which apply in Northern Ireland are markedly different from those applied in *Gillan*," the High Court did not find that the exercise of the JSA powers had been incompatible with the ECHR.⁴⁵

This judgment echoes the positions of lower courts in *Gillan* which concentrated on the context of a 'terrorist threat' rather than on whether the legislation, in this case the JSA prior to its amendment, was sufficiently circumscribed to prevent its abuse. The contextual factors given by the court included the ongoing:

- "high level of threat ...by dissident republicans";

⁴¹ As above, Paragraph 8.25.

⁴² As above, s 4A (1) (a) & (b) (i)(ii) and (iii). The new authorisation procedure requires a senior PSNI officer to grant an authorisation only when he/she reasonably suspects that the "safety of any person might be endangered by the use of munitions or wireless apparatus" and/or reasonably considers that the authorisation is necessary to prevent the danger. The specified area or place is also to be no greater than is necessary to prevent the danger and the authorisation is allowed only to be in place for the time period necessary to prevent such danger.

⁴³ In the matter of an application by Canning, Fox & McNulty for Judicial Review [2012] NIQB 49, paragraphs 88-92.

⁴⁴ As above, paragraph 119.

⁴⁵ As above, paragraph 123.

-
- the powers being vital tools for the PSNI to protect life;
 - the powers not being used in a random or blanket basis but being intelligence-led with “no evidence of systemic misuse or discriminatory misuse”;
 - safeguards of scrutiny by the PSNI ‘Terrorism and Security Powers User Group’, Independent Reviewer of the JSA, and potential for judicial review.

Despite the person in question having no convictions the PSNI Chief Inspector who gave evidence to the trial made a statement as fact that one of the applicants “is a dissident Republican”. From context this appears to imply involvement in unlawful activity rather than the use of a label for political affiliations, which would also be problematic if used to single out individuals for stop and search. The PSNI went on to argue that “reliable and credible intelligence” supports “reasonable suspicion that the applicant has been involved in terrorist activity” at the times when he was stopped by the police.⁴⁶ Clearly in such an instance it would be unclear why, if this was the case, the PSNI would not rely on powers requiring reasonable suspicion rather than JSA section 24.

In relation to the other applicants in the case the PSNI indicated that “the use of the power is frequently intelligence-driven” and that powers are used when there is intelligence against an individual but it is insufficient to reach the threshold of reasonable suspicion.⁴⁷ Clearly such an approach would therefore hinge on the quality of intelligence and could be measured by the success in actually finding prohibited items, a matter returned to later in this report. Particularly problematic in relation to low-level intelligence would be if such information pertains not to involvement in unlawful activity but to assumptions about the ‘risk’ an individual poses because of their legitimate political activities or background.

ECHR compatibility of Current Powers

Sections 21 and 24 of the JSA do not require individual reasonable suspicion and hence their compatibility with ECHR Article 8 is at best questionable. Government’s argument is clearly that there are now additional safeguards to afford compatibility of both the new TACT powers and the amended JSA power.

There are differing views as to whether any such stop and search power can ever be compatible with the ECHR. One view is that the lack of any requirement for individual reasonable suspicion renders selection for stop and search/question arbitrary and risks discrimination in the exercise of the power. In this instance, the only ECHR compatible manner to exercise such a power would be to seek a temporary derogation from Article 8 (and potentially other ECHR protections). Temporary derogations are permitted under Article 15 the ECHR but only when a high threshold is reached namely at times of war or a “public emergency threatening the life of the nation”.⁴⁸

⁴⁶ As above, paragraphs 2 and 26.

⁴⁷ As above, paragraphs 27 and 29.

⁴⁸ Provided that the derogation only is to the extent strictly required by the exigencies of the situation and provided that such measures are not inconsistent with the states other obligations under international law (ECHR, Article 15).

Another viewpoint is that in very exceptional circumstances, such as preventing real and immediate attacks, it can be permitted under the ECHR to stop and search without individual reasonable suspicion. For example, if there is a bomb threat against a court building or an attempted sectarian murder, placing vehicle checkpoints or stopping pedestrians in the immediate vicinity, or areas where there are likely to be similar attacks, to seek to intercept the perpetrators and their weapons can be regarded as necessary to protect life at times of threat that do not reach the threshold of an emergency. In relation to advocates of the latter position assessments of ECHR compatibility of the power are based on whether the restrictions on the scope of the power are sufficiently tightly defined and the safeguards against its misuse robust enough to ensure that the power is only used in such exceptional circumstances and only where necessary.

The Westminster Joint Committee Human Rights also supported this position when they were considering the changes to the Terrorism Act post *Gillan*.⁴⁹ In their view:

...a very tightly circumscribed power with sufficiently robust safeguards against abuse is not inherently incompatible with Convention rights, provided its definition and safeguards ensure that it is confined to the exceptional circumstances in which such a power is shown to be needed in order to prevent a real and immediate risk of terrorist attack.⁵⁰

If this view is taken then it is necessary to consider whether the relevant safeguards introduced are adequate enough to prevent arbitrary use. Indicators of this include whether usage at present appears to be arbitrary and whether the safeguards set out will actually provide an effective remedy for persons subjected to misuse of the power. For example if a power is tied to only searching for 'munitions and transmitters' and is used for an entirely different purpose will bringing a complaint to a Court or the Police Ombudsman be likely to succeed in practice? If the position is as noted in *Gillan*, where the Court states that restraint is only "by a police officer's honesty to divulge what type of incriminating article he was looking for on the occasion of the question"⁵¹ there is no effective safeguard.

The Northern Ireland Human Rights Commission when commenting on the Protection of Freedoms Bill did acknowledge there were additional safeguards but, among other matters, argued that there were still "questions as to whether it will be feasible in practice to verify compliance with some of the authorisation criteria." The Commission questioned whether it was effective and appropriate for a government Minister empowered to approve authorisations, particularly as Ministers had never previously refused a single request:⁵²

⁴⁹ Human Rights Joint Committee, 'Fourteenth Report, Terrorism Act 2000 (Remedial Order) 2011, Stop and Search without Reasonable Suspicion' at <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/155/15502.htm>

⁵⁰ As above, paragraph 55.

⁵¹ *Gillan*, paragraph 70.

⁵² JSA authorisations need to be confirmed by a Minister within 48 hours. In the event the Minister did refuse to confirm the authorisation the power will have still been used lawfully in the interim and it is unlikely individuals subjected to it will ever know there was in fact no basis for the authorisation (JSA, (as amended by the Protection of Freedoms Act 2012) Schedule 3, paragraph 4D; (2) An authorisation ceases to have effect at the end of the period of 48 hours beginning with the time when it is given unless it

The role given to the Secretary of State in providing oversight to authorisations is only permissive: restrictions “may” be instigated but there is no duty to do so, if the authorisation criteria have not been met. In relation to oversight of s.44 TACT authorisations, shortly before the suspension of use of the power the Police Service of Northern Ireland (PSNI) confirmed to the Commission that while there was dialogue in respect of the necessity of applications, the PSNI was not aware of any instance where the Secretary of State had actually refused or curtailed an authorisation. In addition to the question of whether a member of the Executive is the appropriate person to provide such oversight, the more general effectiveness of this particular safeguard is therefore questionable.⁵³

Compounding this is also the fact that even where legal proceedings may be taken relating to an authorisation under the JSA, the Secretary of State may prevent the challenge by issuing a certificate stating that the authorisation was justified and that the “interests of national security are relevant to the decision” or just that “the decision was justified”, with appeal only to a special tribunal in a closed session (i.e. which hears evidence in secret).⁵⁴

The judgment in *Gillan* was also critical of the potential geographical width of authorisations to stop and search without reasonable suspicion. Under the new legislation the area of authorisation can in fact still apply to the whole of Northern Ireland. Although legislation states the area should be ‘no greater than is necessary’ it is questionable as to whether an over broad authorisation could be effectively challenged. Critics of the geographical area in the TACT state that the authorisation should be no greater than one square mile or five square kilometres which would reduce the risk of the power being used arbitrarily. The Human Rights Commission confirmed that “just before the suspension of section 44, the PSNI confirmed that an authorisation for its use was in place for the whole of Northern Ireland (approximately 14,000 km²)” and argued that if an authorisation under the new power did the same it was difficult to see in practice how it could be effectively challenged.⁵⁵

The Commission was also concerned that there was “no explicit requirement on the face of the legislation for ethnic monitoring (which in Northern Ireland would presumably include grounds of ‘community background’)”.⁵⁶ Such matters could also be covered in a Code of Practice, however the power to issue a Code of Practice under the JSA is only permissive, and to date none has been issued.

In relation to other issues with the legislation whilst in the absence of deployment of soldiers their search and question powers have not been routinely used CAJ

is confirmed by the Secretary of State before the end of the period. (3) An authorisation ceasing to have effect by virtue of subparagraph (2) does not affect the lawfulness of anything done in reliance on it before the end of the period concerned.)

⁵³ Northern Ireland Human Rights Commission ‘*Submission to Joint Committee on Human Rights on Protection of Freedoms Bill*’ March 2011, paragraph 10.

⁵⁴ JSA (as amended by the Protection of Freedoms Act 2012) schedule 3 paragraph 4(2).

⁵⁵ Northern Ireland Human Rights Commission ‘*Submission to Joint Committee on Human Rights on Protection of Freedoms Bill*’ March 2011, paragraph 11.

⁵⁶ As above paragraph 12.

nevertheless has questioned the necessity of the permanent availability of the powers to the military.⁵⁷

Practically the PSNI's *Terrorism and Security Powers User Group* is referenced as an oversight mechanism offering procedural safeguards to the public in the *Canning* judgement. This PSNI oversight group has included in its Terms of Reference: community impact, monitoring, environmental scanning including identifying needs or responding to new or emerging issues, as well as best practice and training/training needs.⁵⁸

The next chapter will examine the scope of existing powers in Northern Ireland.

⁵⁷ CAJ's submission no. S 337, '*Submission to the Scrutiny Committee on the Protection of Freedoms Bill*', May 2011.

⁵⁸ Police Service of Northern Ireland, Freedom of Information Request, F-2012-03578.

3. Current stop and search/question powers

In addition to the JSA and TACT powers referenced in the previous chapter the other main stop and search power in Northern Ireland is found under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE). The power under PACE is part of the ordinary criminal law now devolved to the Northern Ireland Assembly. Both the powers in TACT and the JSA are considered 'counter terrorism' or 'security' powers and retained by Westminster.⁵⁹

Numerous other lesser used stop and search powers do exist and range from those under laws controlling firearms to those under wildlife legislation.⁶⁰ Road traffic laws also contain powers to stop a vehicle and ask for documentation such as driving licences.⁶¹ There are also powers to enter and search houses or other premises and controls for ports and airports. Under separate provisions of TACT people can be stopped, questioned and searched in order to decide if they 'are terrorists' at any port, airport, or when near the border area.⁶² There are also general immigration 'control' powers to question and see passports on international travel, but this does not include travel within the UK-Ireland Common Travel Area.⁶³

There are two Independent Reviewers with a remit to monitor the emergency-type powers in the JSA and TACT respectively. Both issue annual reports on the operation of the powers. There has been some collaboration between the two reviewers in relation to reporting on stop and search powers in Northern Ireland given the specific overlap and linkage between both sets of legislation. Under the terms of reference the JSA reviewer is entitled to "make recommendations to be considered by the Secretary of State on whether to repeal the powers."⁶⁴

Whilst there are many similar human rights concerns with powers exercised, for example, in ports⁶⁵ the main focus of this report is on the 'emergency-type' stop and search/questions powers exercised in the streets. This chapter will therefore provide detail of the parameters of the JSA and TACT powers, first however by way of contrast the provisions of PACE will be outlined.

⁵⁹ In the case of the JSA see paragraph 9(1)(c) Schedule 3 of the Northern Ireland Act 1998 (as amended by the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010) which makes the powers a potentially devolvable 'reserved matter'; paragraph 17 Schedule 2 of Northern Ireland Act makes "other provisions for dealing with terrorism and subversion" an 'excepted' matter, i.e. one which it never intends to devolve to the Assembly.

⁶⁰ A list of 18 powers under a number of discrete pieces of legislation is listed in an appendix (Annex A) to PACE Code of Practice, Code A, Northern Ireland Office 2007.

⁶¹ Road Traffic (Northern Ireland) Order 1981, article 180.

⁶² Terrorism Act 2000, schedule 7.

⁶³ Immigration Act 1971, section 1(3).

⁶⁴ 'Report of the Independent Reviewer, Justice and Security (Northern Ireland) Act 2007 (2010–2011)' Robert Whalley CB, page 2. The Independent Reviewer is a statutory role provided for under section 40 of the JSA.

⁶⁵ For further a critique of use of immigration powers see Northern Ireland Human Rights Commission 'Our Hidden Borders: the UK Border Agencies powers of detention' NIHRC, April 2009.

The ordinary law (PACE)

PACE powers are available to the police at any time. There is no need for a general authorisation. A police officer however must have individual 'reasonable suspicion' to exercise the power. The search can only be for 'stolen or prohibited articles' and the officer has to have reasonable grounds for suspecting that such items may be found. PACE does not contain any stop and question powers.

Codes of Practice, the policy documents where more detailed provisions and safeguards for legislation are often set out, were last issued for PACE in 2007.⁶⁷ PACE Code A provides policy not just on PSNI usage of powers under PACE but also on stop and search powers under other legislation including the now defunct 'section 44.' Code A predates the existence of the JSA powers. Among the matters stipulated in Code A are:

- Powers to stop and search must be used fairly, responsibly, with respect for people being searched and without discrimination on the grounds of religious belief or political opinion, racial group, age, marital status, sexual orientation, gender, or disability;
- "Any misuse of the powers is likely to be harmful to policing and lead to mistrust of the police";
- Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/or intelligence... or some specific behaviour by the person concerned;
- ... 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;
- All stops and searches must be carried out with courtesy, consideration and respect for the person concerned. This has a significant impact on public confidence in the police. Every reasonable effort must be made to minimise the embarrassment that a person being searched may experience;
- Before the search reasonable steps should be taken to tell the person to be searched matters including: the identity of the officer; the legal search power being used; a clear explanation of the purpose of the search; what the grounds for reasonable suspicion were (if applicable);
- A written record must be made of the search, unless it is not practicable to do so, containing details such as the date time, identity of person searched and officer, purpose, and grounds for search, and outcome of search;

⁶⁶ Police and Criminal Evidence (Northern Ireland) Order 1989, article 3.

⁶⁷ 'PACE Codes of Practice, Code A', Northern Ireland Office, 2007

What is notable is that there is no specific provision for ethnic monitoring within the record keeping duties in Code A. This is in contrast to the counterpart code in Great Britain which obliges the collection of the "self 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."⁶⁸

Terrorism Act 2000 (TACT)

TACT powers superseded similar provisions in earlier emergency legislation.⁶⁹ As detailed in the previous chapter the original 'section 44' power under TACT was superseded in 2011 by section 47A. There are some powers in TACT which require reasonable suspicion and some that do not.

TACT section 43 and 43(A) stop and search provisions covers search of persons and vehicles, *with* reasonable suspicion. A police officer may stop and search a driver or passenger or the vehicle or anything in the vehicle or carried by a person in the vehicle if they have '*reasonable suspicion*' that the person is a 'terrorist' or that "the vehicle is being used for the purposes of terrorism". Anything found that 'may constitute evidence' of this can be seized.⁷⁰

Under the new section 47A of TACT a uniformed police officer can stop and search any vehicle or pedestrian *without* individual reasonable suspicion. Again the search can only be for evidence that a person is 'a terrorist' or that a vehicle is being used 'for the purposes of terrorism'. As detailed in the previous chapter this power requires an '*authorisation*' to be in place to use the power in a particular area. The authorisation must relate to the need to prevent an actual terrorist attack rather than a generalised threat. The threshold for making an authorisation is higher under the new powers. At the time of writing the most recent official data indicates the section 47A power is yet to be used.⁷¹

A Code of Practice for Northern Ireland covering the new power has been issued which puts parameters on the authorisation procedure, the duration of which should not exceed 14 days.⁷² The Code of Practice echoes many of the provisions of its earlier PACE counterpart. This includes provisions on:

- non-discriminatory use with a specific section on avoiding racial and religious profiling;

⁶⁸ 'Police and Criminal Evidence Act 1984 Code A Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search' Home Office 2010, paragraph 4.3a.

⁶⁹ The Terrorism Act 2000 superseded and repealed the legislation including Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996.

⁷⁰ Originally this power did not extend to vehicles but was amended under the Protection of Freedoms Act 2012 to do so. The power was also amended to remove the requirement of same sex searches, the argument being that as most searches take place on the street it will bring it in line with other 'non-terrorist' stop and search provisions which do not have a same sex search requirement.

⁷¹ See 'The Terrorism Acts in 2011, Report of the Independent Reviewer' David Anderson Q.C. June 2012, paragraph 8.2. and PSNI 'Stop and Search Statistics: Quarter 4 2011/12' published 31 May 2012.

⁷² 'Code of Practice (Northern Ireland) for the Authorisation and Exercise of Stop and Search Powers Relating to Sections 43, 43A and 47A of, and Schedule 6B to, the Terrorism Act 2000' Northern Ireland Office, May 2012, paragraph, 7.11.

- instructions on supervision and monitoring of comprehensive statistical records;
- commitments to exercising the powers in a manner which assures respecting ECHR rights;
- reiteration that misuse of powers will be harmful to counter-terrorism policing and could lead to disciplinary action;
- stipulations any disproportionate use of the powers in relation to specific sections of the community is to be identified and investigated.⁷³

However the information which must be recorded still does not stipulate ethnic or community background data.⁷⁴

Justice and Security (NI) Act 2007

Unlike PACE and TACT the JSA also contains a stop and question power and some of its provisions also extend to soldiers. The JSA powers replaced predecessor temporary provisions on a permanent basis in 2007.⁷⁵ As alluded to earlier despite having been used for five years there is still no Code of Practice for the JSA.⁷⁶ This means there is no binding policy framework beyond the legislation defining and restricting the scope of usage of the powers.

The PSNI has produced a one page *aide memoire* for officers on the exercise of the JSA and TACT powers which has been shared with CAJ under freedom of information. Headlined “BE POLITE AND PROFESSIONAL” it sets out the scope of each power in terms of whether authorisations are needed and what can be legitimately searched for. It covers duties to keep records and it also contains standardised language for officers to use to explain why an authorisation has been granted, namely: “Due to the current threat in the area and to protect public safety a stop and search authorisation has been granted.”⁷⁷

Section 21 stop and question powers

Under section 21, a police officer or soldier may stop and question any person for so long as is necessary to question him/her about his/her ‘identity’ and ‘movements’. ‘Identity’ and/or ‘movements’ are not clearly defined. It is unclear if identity means giving your date of birth or address. It is also unclear as to how much detail a person must provide about his or her movements. There is no specific obligation to carry ID, although this is an obvious way of demonstrating identity, nor is there any obligation to answer unrelated questions. Additional powers are granted under section 21 *to soldiers* to question the person about what he/she knows about a recent explosion or another recent incident endangering life, or what he/she knows about a person killed or injured in a recent explosion or incident.

⁷³ As above, paragraphs 3.5, 11.3, 12.3 and 3.6.

⁷⁴ As above, paragraph 10.4

⁷⁵ Part VII of the Terrorism Act 2000 applied only in Northern Ireland and the intention was that, through the transitional phase of the peace process to normalization, it would eventually lapse and become redundant. While Part VII did lapse on 31 July 2007, a number of its provisions were enacted in a modified form in the Justice and Security (Northern Ireland) Act 2007 and came into effect on 1 August 2007.

⁷⁶ Section 34 of the JSA does contain a permissive power for the Secretary of State to issue a Code of Practice in connection with the exercise of the powers.

⁷⁷PSNI ‘Aide Memoire, Stop/Search/Question Justice and Security (NI) Act 2007 and Terrorism Act 2000’. Emphasis in original.

There are no requirements for reasonable suspicion to use these powers. There is also no requirement for a prior 'authorisation' in order to use this power. It is an offence (punishable by a fine) to fail to stop or to refuse to answer a question or to fail to answer to the best of his/her knowledge and ability.⁷⁸ Section 21 is rarely used as a stand-alone power, but mainly in conjunction with TACT or JSA search powers.

Section 24 & schedule 3 stop and search powers

The power permitting searches for "unlawful munitions and transmitters" (i.e. explosives, guns and related remote control devices) is covered by section 24 and schedule 3 of the JSA. Searches by police and soldiers require reasonable suspicion in a private place.

As detailed in the previous chapter, the Protection of Freedoms Act 2012 amended the JSA to introduce an 'authorisation' procedure for police officers who use the section 24 *stop and search* power *without* individual reasonable suspicion in a public place.⁷⁹ This authorisation requirement did not extend to soldiers who, if deployed, can use the powers *without* individual reasonable suspicion in a public place without one.⁸⁰ The changes also introduced a new power for PSNI to conduct searches *with* reasonable suspicion (for which an authorisation is not required).⁸¹ JSA searches on private property do require reasonable suspicion.

In relation to the purpose for which the search can be conducted the legislation appears clear that:

A constable may exercise the power conferred by an authorisation under this paragraph only for the purpose of ascertaining whether the person has munitions unlawfully with that person or wireless apparatus with that person.⁸²

The Official Report from Parliament further indicates the intention behind the powers and their extension to the military. The powers were passed at the time of the ending of 'Operation Banner' (covering the operational deployment of the British Army in Northern Ireland) and the Patten Report had envisaged the role of soldiers being reduced to bomb disposal and police support for extreme public order situations. The Secretary of State outlined that the "powers are necessary to deal with a number of different circumstances. They will help in managing parades, road closures, and dealing with extreme public order incidents." In relation to deployment in "combating loyalist and dissident republican terrorism" examples are given of scenarios where the power will be used including at parades or responding effectively to bomb threats.⁸³ These are therefore the purposes for which the JSA powers were intended.

⁷⁸ 'Fourth Report of the Independent Reviewer of the Justice and Security Act', Robert Whalley CB, November 2011.

⁷⁹ Justice and Security (NI) Act 2007 (as amended by the Protection of Freedoms Act 2012) schedule 3, paragraph 4A.

⁸⁰ As above, paragraph 4(1).

⁸¹ As above, paragraph 4(4).

⁸² As above, paragraph 4A(4). This provision was also contained in the original act (schedule 3 paragraph 4(1)(b)).

⁸³ Hansard Second Reading House of Commons Justice and Security Bill, cited in 'First Report of the Independent Reviewer of the Justice and Security Act', Robert Whalley CB, October 2008, paragraph 53.

Taking the legal and policy frameworks discussed above into consideration the following chapter examines experiences reported to CAJ regarding current use of stop and search/question powers, in particular JSA powers.

4: Current usage of powers: concerns and issues

The following chapter details reports and complaints received by CAJ in relation to alleged misuse of stop and search/question powers in the present day and the range of respective policy issues which arise. Whilst detailed information on experiences is not based on a comprehensive large sample survey or research exercise, there is sufficient data to point to significant concerns about present day usage and adverse impacts of stop and question/search policy and practice.

This chapter will start with the examination of a community perspective on the use of stop and search/question powers in the local area given at a public meeting. It will then look at information from the Policing Board and statistical indicators of usage and effectiveness of the JSA/TACT powers. The next section will address questions of strategic policy in the use of the powers including the absence of a JSA code of practice, questions of the compatibility with the legislation of PSNI operational policy of using the powers for 'disruption', and issues around record keeping. The issue of monitoring of powers will then be discussed on particularly on grounds of age and ethnicity before a final section which outline reports of misuse of the powers and commentary on complaints mechanisms.

A community perspective on the present usage of powers

In 1994 the CAJ survey on harassment of young people, in raising the perception that the 'security forces' were not policing areas or communities in the interest of those areas or communities, cautioned "this perception cannot simply be dismissed as the biased opinion of a few malcontents or extremists"⁸⁴ and warned against an official response of counter accusation or denial to the issues raised rather advocating that they were taken seriously. In 2012 CAJ would equally caution against any official approach of dismissing grassroots concerns as being artificially engendered, or viewing a community with suspicion.

CAJ attended a large public meeting in spring 2012 in the Creggan area of Derry-Londonderry in relation to stop and search in the area. CAJ was invited to the meeting to outline the scope of the powers. Over one hundred persons attended and the range of incidents reported at this meeting provides a key example of a contemporary community perspective on experience of stop and search. The issues reported to us included but were not limited to:

- Inappropriate use of emergency powers to stop and question a person about their 'identity' and 'movements' particularly when there was repeated requests for a person's name when the person's identity was already clearly known to the PSNI officer, at times from earlier stops on the same day;
- Inappropriate use of the emergency stop and search powers which only permit searching for munitions and transmitters, as searches frequently involved looking

⁸⁴ McVeigh, Robbie *'It's part of Life Here...: The Security Forces and Harassment in Northern Ireland'*, CAJ 1994, p198.

through other items, in particular documents, which this power does not permit search for (this included reports of PSNI officers using this power as an opportunity to seize personal documents as well as officers recording numbers of credit cards and taking mobile phones off children);

- Incidences of multiple and repeated stops and searches with nothing found, and hence their motivation perceived to be harassment rather than genuinely searching for items;
- Many persons reporting repeated stops - one individual reporting around 150 and another reported being stopped 500 times in three years;
- Difficulties caused by the switch to PSNI officers recording stops and searches on Blackberries giving out a white card with a reference number (the actual stop and search report has to be collected by the individual or their solicitor at the police station) rather than the former system of obtaining a carbon copy ('blue docket') of the original form (known as "PACE 1TA") ;
- Incidents of PSNI officers giving out blank white cards *without* search numbers or the officer's number on (meaning the search cannot be traced and potentially was not recorded);
- Incidents of PSNI officers refusing to record searches and refusing to give cards out at all (either openly stating the search would not be recorded or that the Blackberry device was 'broken');
- Searches largely not being carried out by PSNI community police but by PSNI Tactical Support Group (TSG) units whose police numbers were often not visible, making it more difficult to identify them;
- Unnecessarily heavy handed interventions by TSG units, including against pregnant women, verbally abusive behaviour by some officers;
- Officers refusing to allow affected individuals to observe searches of own vehicles or premises;
- The indirect impact of public stops and searches stigmatising targeted individuals and affecting, among other matters, their prospects of employment;
- The impact of the seizure of items during searches and the delay in their return. In one instance tools and computers seized and held for nearly a year had effectively prevented an individual from working. It was perceived this is being done deliberately (official reason often given is backlog of forensic examinations). Another individual had waited several years for the return of his items;
- Stopping and questioning of young children, often when they were present with the adult being questioned. There were also concerns that complaints to the Children's Commissioner could not be dealt with;

- Community activists who themselves had decided to monitor, document and record problems of stop and search subsequently being subjected to arrests, searches and seizures of such materials on grounds that it may be “information useful to terrorists”; Community activists having to delete photographs of stops and searches on the spot;
- Concerns about the lack of effective remedy from the Office of the Police Ombudsman where many persons had made complaints. A particular issue raised was that the that Police Ombudsman’s Office can rely on PSNI information that is not disclosed to individual to deem searches ‘justified’;
- Concerns that powers are being used in a discriminatory manner targeted at persons in the area (effectively as a ‘suspect community’) rather than being used even-handedly.

The following section examines information gathered by the Policing Board, including further community perspectives.

The Policing Board

The principal oversight body for the PSNI is the Northern Ireland Policing Board. The Board’s role in monitoring stop/question and search is part of its general role of police oversight. Also the TACT Code of Practice for the stop and search powers states that the Board should oversee and monitor the “appropriate use and application” of the powers.⁸⁵

The most recent Annual Human Rights Report indicates Human Rights and Professional Standards Committee agreed Terms of Reference for a Thematic Review of PSNI Stop and Search Powers in March 2010. The review is not yet in the public domain, but the report indicates it will be published during 2012.⁸⁶ A Thematic Review was published on policing with children and young people. Among its recommendations, accepted by the PSNI, were that ‘approximate age’ data be included on stop and search /question statistics.⁸⁷

The Human Rights and Professional Standards Committee held an evidence session in May 2010 in Derry-Londonderry which heard representations from stakeholders of both republican/nationalist and loyalist/unionist community representatives as well as district PSNI and District Policing Partnership representatives. Among the matters emerging were:

- Republican/nationalist community representatives expressed concerns that any inappropriate use of stop and search powers within their communities was counterproductive and that current use undermined attempts to “establish Civic

⁸⁵ ‘Code of Practice (Northern Ireland) for the Authorisation and Exercise of Stop and Search Powers Relating to Sections 43, 43A and 47A of, and Schedule 6B to, the Terrorism Act 2000’ Northern Ireland Office, May 2012, paragraph 13.1.

⁸⁶ Northern Ireland Policing Board ‘Human Rights Annual Report 2011’, p32.

⁸⁷ Northern Ireland Policing Board ‘Human Rights Thematic Review on Children and Young People’ January 2011.

Policing". The issue of TSG's was raised with the view that a single TSG exercise was capable of undermining months of good community policing and that there was a possible gap in oversight in respect of TSGs;

- Loyalist/unionist groups contributions focused on PSNI involvement with young people in Derry-Londonderry, including the suggestion that the Police in Derry-Londonderry needed a strategy for dealing with children and young people as well as a general communication strategy. Some representatives regarded stop and search as an issue affecting republican/nationalist communities more than loyalist/unionist communities, including concerns that inappropriate use of powers could be exploited for propaganda purposes; and
- District Policing Partnership representatives raised specific allegations around the perceived misuse of the powers by the PSNI; the perceived use of the power disproportionately in 'G District' (includes Derry-Londonderry city and Strabane where there is particularly high usage); and inappropriate use of the powers undermining community policing. The PSNI responded that the high use in 'G district' was intelligence based and necessary in response to severe 'dissident threats'⁸⁸

The Human Rights and Professional Standards Committee has raised issues about stop and search/ question at its meetings over the years. This includes its meeting in November 2009, when the PSNI first suggested a Thematic Review following questions and concerns raised by Committee members in relation to the frequency of stop and search against particular individuals (multiple stops), the disproportionate use of powers in different geographical areas, and the lack of provision of information in relation to religious background of persons stopped and searched.⁸⁹

In September 2007 members requested further information on both the community background of those stopped and searched and the number of actual arrests which ensued as a result of stop and search. The Committee was told at its next meeting that the stop and search record form ('PACE 1/TA') did not record religion and that searching for information on arrests would be a 'labour intensive exercise'.⁹⁰ This is of course an indication that despite the extensive deployment of stop and search powers the PSNI was either not themselves evaluating their effectiveness in terms of the results produced, or did not regard this indicator as relevant, as the emergency-type powers at least were not being used to genuinely search for prohibited items. The next section will further examine statistics on usage and effectiveness of stop and search/question powers, including information both from official PSNI statistics and information now provided to the Policing Board.

⁸⁸ Northern Ireland Policing Board, Minutes of Meeting of the Human Rights and Professional Standards Committee held on 12 May 2010, item 6.

⁸⁹ Northern Ireland Policing Board, Minutes of Meeting of the Human Rights and Professional Standards Committee held on 11 November 2009, item 5.

⁹⁰ Northern Ireland Policing Board, Minutes of Meeting of the Human Rights and Professional Standards Committee held on 10 October 2007, item 3.4.

Statistics on Usage and Effectiveness

Vehicle checkpoints and street searches may be much more infrequent in the present day than in the past in many parts of Northern Ireland but the most recent PSNI annual figures indicate there were over 22,000 stops and searches/ questions in the 2010/11 year involving the TACT/JSA emergency type powers.⁹¹ A similar number of persons were stopped and searched under PACE.

The PSNI publish both quarterly statistical bulletins and an annual summary of the use of stop and search powers on their website. At present, these bulletins include statistics on the usage of PACE, TACT and the JSA; a geographical breakdown of policing areas of usage for all three powers; data on the reason for searches under PACE; arrest statistics in general and broken down for PACE.

The Policing Board Annual Human Rights Reports also contain information about stop and search, including statistical data which is provided to the Board beyond what is published by the PSNI itself. This includes further information on arrests and references to monitoring on grounds of age and ethnic group. For example statistics in recent Policing Board reports show that more than half the persons stopped and searched/questioned (under all legislation) in 2010/11 were under 25.

Statistics on effectiveness

In relation to indicators of effectiveness arrest statistics are broken down by power in the most recent Policing Board report. The statistics also indicated very low arrest rates ranging from 0.49% to 0.81% for the TACT/JSA emergency type stop and question/search powers, compared to 6.80% for those used under the ordinary law (PACE).⁹² There are limitations to the detail of the statistics as information is not given as to the level of charges or convictions, if any, resulting from the use of the JSA/TACT powers, nor is information given on the reasons for the arrests.

A Freedom of Information request to the PSNI did seek to obtain further data.⁹³ The PSNI indicated that in order to provide charges and convictions statistics it would involve a prohibitively expensive manual trawl through records. There is therefore no information available on charges or convictions or on what the arrest was actually for. Such information would illustrate whether those arrested under JSA/TACT were actually arrested for suspected 'terrorist' (scheduled) offences, or other offences including actually resisting or obstructing the stop and search itself.

The fact the PSNI do not have the charges or conviction rates broken down or at hand for analysis suggests that the police service themselves are not even evaluating, for

⁹¹ PSNI Stop and Search Statistics, 2010/11 1 April 2010-31 March 2011, page 3.

⁹² Human Rights Annual Report 2011, page 34-36.

⁹³ PSNI FoI Response number F-2012-03580. This response did give arrest figures over a broader timeframe stating that between 1 August 2007 and the 30 June 2012 123 persons were arrested after being stopped and questioned under section 21 of the JSA, and 253 persons were arrested after being stopped and searched under section 24 of the JSA (these powers may have been used in combination with other legislation, including section 44 of TACT).

example, the effectiveness of the JSA power in terms of it actually finding munitions or other prohibited items.

It is worth drawing attention that the knock on effects of stop and search/question go beyond the often brief interference in a person's privacy, occasioned by the actual question or search, into stigmatisation which can affect persons working and social lives. Whilst stop and search/question used properly can be a legitimate policing tool, if its use is unnecessary and ineffective, there is a price to pay in both generating suspicion about individuals in question, or if and when focused on particular communities, stigmatising the community itself. CAJ has heard testimonies about the everyday knock on effects of stop and search which, whilst they do not necessarily relate to misuse of the powers, provide a reminder that such powers should only be used when really necessary.⁹⁴

Statistics on usage

In relation to statistics on usage it is notable there is a significant jump in use between 2007 to 2009 of emergency-type powers which do not require individual reasonable suspicion. The annual totals increase from around 3,600 stops in 2007/8 to almost 10,000 in the 2008/9 reporting year. Even starker are the statistics for usage in the first quarter of this two year period, showing only 124 stops in contrast to the usage in the last quarter, showing over 4000. Notably in this period usage is overwhelmingly the TACT power rather than the JSA powers which were introduced in 2007.⁹⁵ The trends of high usage continue into 2009 and early 2010 with usage of 'section 44' TACT searches alone averaging around 6000 a quarter. There is increased use of the JSA question power within this period with the power being used an average of 1,500 times a quarter – most often in combination with 'section 44' searches. The JSA search power is still used much less in this period, around 150 times a month.⁹⁶

The above trends change following the withdrawal of the 'section 44' TACT power in July 2010. Two patterns emerge from this point on. First there is a clear switch to reliance on the section 24 JSA power, the use of which increases considerably to around 3,500 searches per quarter (including when combined with the question power). However there is a considerable overall reduction in searches, given the previous average of around 6000 per quarter. There is also some fluctuation during different times of the year. In the absence of any other data, indicating a change in threat levels at the time of the withdrawal of the 'section 44' power, it would be reasonable to

⁹⁴ One incident relates to a man being stopped on a school run with the children in their school uniforms and the knock on effect that had. In this instance a passing friend had to take his young daughter to school whilst the PSNI searched him and his son. A number of incidents relate to third parties, for example work colleagues, reportedly changing their behaviour over apparent fear of 'guilt' by association with individuals who has been subjected to stop and search. One interviewee indicated "a co-worker that I gave a lift to once was stopped and searched and after that he won't take a lift off me again" another interviewee stated he had stopped to speak to a "man I knew slightly" in the street to congratulate him on getting on a local football team. The man in question was then subjected to stop and question shortly afterwards on the apparent grounds he had been seen talking to the interviewee. Subsequently the individual "crosses the road" to avoid contact with the interviewee in the street.

⁹⁵ PSNI 'Stop and Search Statistics 2008/9 1 April 2008 to 31 March 2009' p3. This data represented the number of stop and search/questions under each power including stops and searches which used multiple legislation.

⁹⁶ PSNI 'Stop and Search Statistics 2010/11 1 April 2010 to 31 March 2011' p3. Figures based on an average of the five quarters from 1 April 2009 to 30 June 2010. The above caveat applies.

conclude that the 'surplus' searches at least – almost half – were not operationally necessary.

It is also worth reflecting that, although there are similarities between the powers, there are supposed to be differences. At the one level the JSA is more restrictive in the types of items that can be searched for ('munitions and transmitters') than TACT (evidence the person 'is a terrorist' or that the vehicle searched is being used for the 'purposes of terrorism'). In relation to authorisations however if the letter of the legislation is abided by, the TACT authorisations (reasonably suspects an act of terrorism will take place) may be a higher threshold to reach than that required for JSA authorisations (reasonably suspects the safety of any person might be endangered by the use of munitions or transmitters). The Independent Reviewer of the JSA cautioned against the PSNI undertaking a straight 'switch' to relying on JSA rather than TACT stating each power should be used on its own merits:

Displacement from section 44 would not in itself be sufficient reason for increased use of section 24. That would have short-circuited all the careful procedures...which guide and constrain the individual officer's discretion. Any increase in the use of section 24 must be capable of justification on its merits and not simply as a response to the loss of power.⁹⁷

Powers are only supposed to be used for the purpose for which they were originally granted. The next section will examine strategic policy and operational practice in relation to use of stop and search/question.

Strategic Policy on the use of stop and search/question

Lack of JSA Code of Practice

As alluded to elsewhere in this report the first major lacuna is the absence of a tailored Code of Practice for the exercise of the JSA powers. To date the Northern Ireland Office has not even initiated consultation despite the commencement of the powers 2007. The PACE Code of Practice (Code A) predates the JSA, and although it does not explicitly exclude it from its scope it has clearly not been designed to accommodate its specific provisions. The TACT Code of Practice is clear that it does not apply to JSA powers,⁹⁸ leaving the JSA as the only powers which are not regulated by a Code of Practice. It is unclear what the legitimate rationale for this would be considering codes have been produced expeditiously for the revised TACT powers. The NIO has recently indicated to CAJ that a Code of Practice for the JSA powers will be consulted on shortly.

Authorisations

⁹⁷ 'Fourth Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007', Robert Whalley CB, November 2011, paragraph 231.

⁹⁸ 'Code of Practice (Northern Ireland) for the Authorisation and Exercise of Stop and Search Powers Relating to Sections 43, 43A and 47A of, and Schedule 6B to, the Terrorism Act 2000' Northern Ireland Office, May 2012, paragraph 1.2.

The requirement for JSA authorisations is relatively recent and hence yet to be reported on by the Independent Reviewer, Policing Board, or to feature in a court judgment. One issue that has come to CAJ's attention is the potential role of MI5 in the authorisation process. One PSNI District Commander at a recent policing conference openly remarked he regularly attended MI5 headquarters to be briefed on how stop and search were to be operated in his area. Another senior police officer remarked that MI5 requests the granting of stop and search 'authorisations', on the basis of intelligence but the said intelligence data may not be actually disclosed to the senior officer. However if MI5 is not disclosing the rationale for the request it is difficult to see how the senior officer is complying with the legislation which states an authorisation can only be granted when there is generalised reasonable suspicion that the safety of persons may be endangered by munitions and transmitters, and that the authorisation must be restricted to what the senior officer reasonably considers to a specified area and timeframe necessary to prevent such danger.⁹⁹

Whilst there is no Code of Practice for the JSA powers the equivalent Code for the revised TACT 2000 powers states that authorisations can only be made by an Assistant Chief Constable or above and must be presented with "a detailed account of the intelligence which has given rise to reasonable suspicion that an act of terrorism will take place. This should include classified material where it exists."¹⁰⁰ Whilst authorisations and their rationales are not publicly available they may be made available to the Independent Reviewer or Policing Board Human Rights Advisors who would be in a position to explore this matter further.

PSNI strategic operational policy: disruption and prevention?

Turning to the issue of PSNI strategic policy in the usage and deployment of JSA and TACT powers, a key issue which has emerged for CAJ is that police at times appear to have a policy of using the powers for the purpose of 'disruption' of persons who they 'suspect' might be 'dissident republicans'. In 2009, the then Chief Constable Hugh Orde, at a public meeting of the Policing Board in Derry-Londonderry defended the 200% jump in the use of stop and search by saying, "the policy aimed to disrupt dissident republican activity."¹⁰¹ In addition, the JSA Independent Reviewer noted the arguments of Senior PSNI officers that the powers have had a "significant preventative and disruptive effect".¹⁰²

There are a number of issues with this not least that such a use does not seem to be compatible with the permitted purpose of the power. The JSA is clear that the PSNI "may only exercise the power for the purpose of ascertaining whether the person has munitions unlawfully"¹⁰³ which indicates it should not be used when police are not genuinely searching for items.

⁹⁹ Justice and Security (Northern Ireland) Act 2007 (as amended by Protection of Freedoms Act 2012) paragraph 4A.

¹⁰⁰ 'Code of Practice (Northern Ireland) for the Authorisation and Exercise of Stop and Search Powers Relating to Sections 43, 43A and 47A of, and Schedule 6B to, the Terrorism Act 2000' Northern Ireland Office, May 2012, paragraph 6.18.

¹⁰¹ 'Orde defends stop and search rise' BBC News Online 18 February 2009 (accessed October 2012, available at: http://news.bbc.co.uk/1/hi/northern_ireland/7898346.stm).

¹⁰² 'Fourth Report of the Independent Reviewer of the Justice and Security Act' Robert Whalley CB, November 2011, paragraph 233.

¹⁰³ Or 'wireless apparatus' Schedule 3, Paragraph 4A(4).

If there is genuinely 'reasonable suspicion' against individuals then use of an emergency-type power would not be necessary. 'Disruption' could also clearly be read as 'harassment' and indeed discriminatory if persons are being singled out in relation to their perceived political or community affiliations rather than actual involvement in unlawful activity. PSNI evidence given to the court in the *Canning* case stated that persons are targeted for stop and search/questioning on the basis of low-level intelligence that would not reach the threshold of reasonable suspicion. As referenced above there are a number of cases of persons who have been stopped over 100 times which fits with a pattern of a policy 'disrupting' (or indeed 'harassing') particular 'suspects' to 'deter' their future involvement in unlawful activity for which there is no evidence they are presently engaged in. This appears far from the stated purposes the Westminster Parliament had in mind when bringing in the JSA or indeed the new TACT powers. From experience outlined earlier in this report, far from being a deterrent if the main interface of persons with policing is unnecessary stop and search/question in this manner it is likely to fuel conflict rather than prevent it.

There is some information about specialist PSNI counterterrorism teams employing stop and search powers as a significant part of their operational strategies. In 2010, in response to questions about stop and search the PSNI told the Foyle District Policing Partnership it had set up 'Operation Inspire' which, according to the *Derry Journal*, is a "special team" to "track down dissident republican suspects." The local PSNI commander indicated that "only specific individuals are currently being stopped and searched... focusing right in on the people who are trying to kill us"¹⁰⁴ Again if targeting is taking place in this manner on the basis of reliable information it is unclear why powers requiring reasonable suspicion are not being used.

The JSA Independent Reviewer has indicated that "even when an officer is under no requirement to have reasonable suspicion (for example in a case of stop under section 21 or a search for munitions in a public place under section 24 and schedule 3) he must have a basis for his action in respect of the person or location in question."¹⁰⁵ The Reviewer has examined the extent to which such reasons are reflected in records noting that internal PSNI guidance had indicated that when grounds exist a record should be made.¹⁰⁶ The Reviewer indicates this could be a powerful tool in assessing legitimate usage of the powers. This would undoubtedly be the case, yet it is notable that there is little statistical or analysis available to date to verify the purposes for which searches are taking place.

¹⁰⁴ 'PSNI Set up Special Team to Tackle Dissidents', *Derry Journal*, 1 October 2010.

¹⁰⁵ 'Fourth Report of the Independent Reviewer of the Justice and Security Act 2007', Robert Whalley CB, November 2011, paragraph 179.

¹⁰⁶ As above, paragraph 180 referring to Guidance produced by the Criminal Legislation and Procedures Branch of the PSNI in November 2009 said in relation to section 21.

Record keeping methods

An accessibility issue raised with CAJ is the decision to move to using electronic means to record searches rather than the issue of paper records at the time of the search. Formerly standard practice was to issue paper documents often referred to as 'blue dockets' by interviewees. Searches can now be recorded on Blackberries and individuals given a reference number whereby a full record can then be obtained usually by attendance at a police station.

There has been a general debate, beyond the local arena regarding police paper work and the amount of time officers have to spend filling in forms. Whilst filling in a paper stop and search/question record does not appear to be a particularly complex or time consuming task, this may lie behind the switch to electronic recording. The change does however make receiving a record less accessible as a significant number of persons are likely to be unable or unwilling to attend police stations to collect records, particularly when they have difficult relations with the PSNI. Among the potential chill factors are perceptions that attendance at police stations could result in attempts to recruit persons as informers. All in all, it appears much more likely that records will no longer be collected by affected persons and hence less likely that challenges to misuse of powers will be successfully pursued. In addition, the absence of a carbon copy paper form may make persons less amenable to filling in self-defined monitoring data.

Monitoring of Powers

At present, some monitoring data is gathered and presented on categories such as age and ethnic group. In a glaring omission data on the latter category does not include the two main communities through a category such as religious background. There is also no data presented on other grounds such as gender.

Age based monitoring: children and young people

Statistics in the latest Policing Board Annual Human Rights report show more than half the persons stopped and searched/questioned (under all legislation) in 2010/11 were under 25: 14% were under 18. The largest number were in the 18-25 age group (2,911) with figures stating 886 15-17 year olds, 189 11-14 year olds and two persons aged 6-10 were stopped and questioned or searched from 1 July 2011-30 September 2011.¹⁰⁷ There is no breakdown to indicate if these figures predominantly relate to PACE powers or the JSA/TACT powers which are the primary focus of this report. Such a breakdown, as well as correlations with arrest figures, would be helpful in ascertaining both the purposes and effectiveness for which stop and search/question powers are being deployed against young persons as well as informing analysis as to whether young persons *per se*, or young persons in particular areas, are being treated as a suspect community.

Since CAJ's 1994 report into young peoples' experiences with the security forces, there have been other research findings and consultation responses which show that young people's experience with the police remains predominantly negative. A 2010 report

¹⁰⁷ Policing Board Annual Human Rights Report, 2011, p34.

showing the 33% of children and young people's first encounter with the police is them being told to 'move on' and the second highest encounter (29%) through stop and search.¹⁰⁸ The Belfast-based Children's Law Centre (CLC) has raised concerns about increased usage of stop and search powers and their use on very young children. Noting the figures of stops of under 16s between 2008 and 2009 had doubled and that 27 persons under 9 had been stopped, the youngest being three years old, the NGO commented:

CLC has obvious concerns about the PSNI's use of its power to 'stop and search' children who are below the age at which they may be legally culpable of any criminal activity. In addition, we have serious concerns about the disproportionate use of the PSNI's power to 'stop and search' on children and young people under the age of 16.¹⁰⁹

CLC also commented on the likely impact of the use of such powers in this way:

The experience of being stopped and searched for children and young people is very distressing and perhaps frightening. It is also inevitable that the experience of being stopped and searched without due cause by the PSNI will have a significant impact on young people's perceptions of the PSNI as well as being very detrimental to relationships between the PSNI and young people in general.¹¹⁰

The Policing Board Human Rights Thematic Review into Children and Young People also addressed the issue of stop and search/question, emphasising the lasting impact the manner of the interaction of police in exercising the powers can have on a young person.¹¹¹

Ethnic Monitoring

Ethnic monitoring has long been the key mechanism for preventing discriminatory usage of stop and search powers, often known as 'ethnic profiling'. As alluded to in chapter one there a range of treaty body recommendations to the UK urging ethnic monitoring of stop and search as well as general recommendations that the framework and requirements of international standards are also applied to the two main communities in Northern Ireland as well as other ethnic groups.

The PSNI have discontinued publishing ethnicity data alongside its annual stop and search statistics. Ethnicity data, although not that relating to the two main communities, is gathered and is presented to the Policing Board.¹¹² The ethnicity data is not published, presumably as the small numbers involved may risk identifying individuals.

¹⁰⁸ Achieve Enterprises and Institute of Conflict Research 'Beyond the Margins, Building Trust in Policing with Young People', p18 March 2011.

¹⁰⁹ Children's Law Centre 'Submission to the Human Rights and Professional Standards Committee of the Northern Ireland Policing Board in its Consideration of Complaints, Discipline & Civil Actions' December 2011, p4.

¹¹⁰ As above p5.

¹¹¹ Northern Ireland Policing Board 'Human Rights Thematic Review of Children and Young People', January 2011 p92.

¹¹² Northern Ireland Policing Board 'Annual Human Rights Report 2011' page 33.

This would not generally be the case with community background (i.e. Protestant or Catholic, unionist or nationalist etc) given the much higher numbers. Policing Board publications do provide some analysis of the available figures. This includes data highlighting that Irish Travellers are much more likely to be subjected to stop and search than the total population, with figures indicating in 2006-7 Travellers had a one in 22 chance of being stopped compared to one in 107 for the total population.¹¹³

Gathering ethnic monitoring data is not required by the JSA legislation and in the absence of a JSA Code of Practice, it cannot be stipulated there either. The TACT Code of Practice in Great Britain requires the recording of ethnicity data, but this is not the case for the equivalent code in Northern Ireland. The recent Northern Ireland TACT Code does state that, to avoid discrimination "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."¹¹⁴ The Code also stipulates supervising officers "must ensure there is no evidence of exercise of powers through stereotyped images or inappropriate generalisations and identify and investigate any apparent disproportionate use of the powers against "specific sections of the community."¹¹⁵ Whilst an important objective, it is not clear how such a role is effectively discharged without the aid of ethnic monitoring inclusive of community background.

In addition to the aforementioned position of the Northern Ireland Human Rights Commission, CAJ has also raised the importance of monitoring stop and search activity on the basis of ethnicity, including community background.¹¹⁶ There has been debate as to whether it is appropriate or if there is too much sensitivity in Northern Ireland to asking individuals to record their community background. However, such concerns would appear little different to those expressed and discounted in early debates on whether it was appropriate to gather data on other aspects of ethnicity during stop and search for the purpose of preventing discrimination. A similar self defining tick box form post-stop and search/question could assist in gathering such data. In the absence of this, it is not clear how the proportionality of the use of such powers is being monitored, except perhaps through the use of proxy indicators.

One proxy indicator of the likely community background of individuals is the residential locations in which stops are taking place. The PSNI Annual Statistics do breakdown the recorded usage of stop and search/question powers by policing district and sub district. An examination of the most recent annual statistics on the main emergency-type stop and search power section 24 of JSA reveals significant differentials between areas. For example, in Belfast there are significant differences between West Belfast (688 searches) and East Belfast (54). The numbers for Lisburn (1290) and Foyle (914) are the highest. Comparing towns, even when accounting for population differences, there are significant differences between the Craigavon (701), Strabane (675) Newry (628) with

¹¹³ Policing Board 'Human Rights Thematic Review of Children and Young People', January 2011 page 5-6.

¹¹⁴ Paragraph 10.3.

¹¹⁵ Paragraph 11.1-3.

¹¹⁶ See CAJ's submission to the United Nations Committee on the Elimination of Racial Discrimination on the UK's 18th to 20th Periodic Reports under the International Convention on the Elimination of All Forms of Racial Discrimination, July 2011; CAJ's submission no. S295 CAJ's submission on the UK's 3rd Periodic Report to the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities March 2011.

Limavady (14), Larne (20), and Moyle (21).¹¹⁷ There is no further breakdown of statistics in relation to individual electoral wards or smaller units which would be able to drill down and indicate if the powers were being targeted at particular communities, areas or individuals within the above sub-districts. Whilst in part there is a PSNI policy to preventively 'disrupt' potential dissident republican activity, CAJ has also received reports of some usage of JSA and TACT powers in working class Protestant/unionists communities. Without ethnic monitoring data on the basis of religion or more detailed breakdowns by geographical area it is difficult to ascertain the extent there are differentials.

If powers were genuinely targeted in response to real threats there could of course be objective and reasonable justifications for differentials. However, in the absence of data which shows the relative effectiveness of the powers (in terms of arrests and convictions) or data showing the rationale and reasoning for decisions it is difficult to reach such a conclusion. In relation to qualitative data received by CAJ or carried in the media, we have received reports from persons who feel they have been targeted directly because of their political, family or community affiliations. In one instance a community worker reported being stopped on a regular basis and "this also affects their involvement in community work as they feel police are trying to put them off being involved." Complaints have also been made to CAJ about police targeting young men wearing Gaelic Athletic Association (GAA) clothing or coming from GAA matches. The motivation was perceived as sectarian. CAJ also received reports from persons who perceived they had been targeted because of their political affiliation. One interviewee expressed concern that "these actions are deliberately directed at people like [me] because we are vocal in raising concerns about prisoners' issues and other matters." An interviewee who was canvassing for an independent councillor reported being stopped and searched outside a polling station with a PSNI officer allegedly taking leaflets off the individual and throwing them in the air. The next section will specifically deal with issues of alleged police misconduct in conducting stop and search operations.

Misuse of Powers

The following section examines reports of alleged misuse of powers or other behaviour which may constitute police misconduct.

Inappropriate use of questioning powers

CAJ has been told of instances of repeated use of identity question powers when the person's identity is already known to the police officer concerned. This includes when the identity is known from previous stops, including earlier stops on the same day by the same police officer. Those who raised the issue saw use of the powers in this way as simply a form of harassment.

One person stated that he was stopped just over twenty times in a three week period. The individual worked long hours to support his partner and children, got up very early to go to work and felt he was repeatedly harassed in the process of doing so. Overall,

¹¹⁷ PSNI 'Stop and Search Statistics 2010/11 1 April 2010-31 March 2011', p4.

the issue of repeated stops was reported to CAJ with a number of persons reporting being stopped over 100 times. This would indicate the powers are being targeted against particular individuals rather than being targeted at random individuals in response to, for example, a bomb threat against a particular location.

The JSA Independent Reviewer has already indicated questioning a person on their identity when it is already known is a misuse of the power, and would be sufficient basis for a complaint to the Police Ombudsman. He also drew attention to circumstances when it would be unnecessary to question about an individual's movements:

An example of an inappropriate use of the powers would be where the police stop under section 21 someone already known to them and question him about his identity. I have received some reports that this has occurred. It cannot be justified and should not happen. In such cases the Police Ombudsman provides an avenue for investigating a complaint. Where however the known person was stopped to question him about his movements the issue is not so straightforward. If the basis of the questioning related to recent incidents or known threats it would indeed be justified, but in a case where there is no such linkage the questioning would be very hard to justify.¹¹⁸

Inappropriate use of section 24 search powers

CAJ has heard a wide range of complaints in relation to inappropriate searches under s24 of the JSA, which only empowers searches for munitions and transmitters. The overall concern shared with CAJ was of incidences of multiple and repeated stops in which nothing was found and the searches were considered have taken place by the individual subjected to them not to genuinely search for items but for the purpose of harassment. In addition there were reports of section 24 searches which often involved looking through other items, which were clearly not munitions or transmitters, in particular documents.

Although it is not always clear which powers are being used there were reports of officers using the JSA to seize personal documents, including identity documents and record credit card numbers after section 24 searches. Another individual reported the removal of a number of mobile phones including those belonging to children. There were reports of items which were clearly neither 'munitions' nor 'transmitters' being taken such as running shoes and even stones being removed from a garden. According to those who have had items removed no charges have followed. The use of section 24 as an intelligence or information gathering tool does not appear compatible with the legislation.

Refusals to keep or give records

Concern around how stop and search/question activity is recorded has been one of the recurring issues raised with CAJ. The individual misconduct issue relates to reported incidents of officers refusing to record searches. An interviewee said that the PSNI

¹¹⁸ 'Third Report of the Independent Reviewer of the Justice and Security Act', Robert Whalley CB, November 2010, paragraph 111.

“sometimes don’t give a record” even when requested and officers had stated “they don’t have to give one.” There are also reports of officers giving out white cards without search numbers or without the officer’s number on it and openly saying that they were not going to record the search. Other reports are of information being given just on the corner of a piece of note paper. CAJ has heard an allegation of a police officer saying he had no record sheets despite the documents visibly sitting in the outer pocket of the police officers jacket at the time. There are reports of police officers saying the Blackberry is broken so they are unable to give out a record.

Heavy handedness

Individuals who made complaints about ‘heavy handed’ stop and search operations to CAJ often singled out PSNI Tactical Support Group (TSG) units for criticism. This included complaints that police were unnecessarily heavily armed (beyond standard issue sidearms) when carrying out operations, unnecessarily large numbers of officers being involved in operations, and the identification numbers of TSG officers at times not being visible. At the aforementioned public meeting complaints were made of unnecessarily heavy handed interventions by TSG units, including against pregnant women with verbally abusive behaviour by some officers. An individual reported to CAJ that such a search had been “a very intimidating experience” with the search having been conducted by a dozen officers one night “with machine guns and everything”. Another man explained how four police cars and nine police stopped and searched him with his children aged 10 and 7 coming out of a shop in his town and detained them for thirty minutes. No arrest or charges followed.¹¹⁹

One of the most high profile cases reported to CAJ and aired in the media relates to an incident in 2011 when a minibus returning from a day trip from Dublin organised by the Republican Network for Unity was stopped for two hours whilst extensive searches took place of the bus, and of adults and children on board. The following question was asked in the Dáil in relation to the incident, with a TD asking the Minister for Justice and Equality:

...if his attention has been drawn to an incident that occurred on 26 June 2011 when a group of adults and children travelled by private bus from Belfast to visit Kilmainham Gaol and Glasnevin Cemetery before which all passengers, before their departure were videoed by police at the pick-up point near Conway Mill in west Belfast: if his further attention has been drawn to the fact that on their return the bus was stopped by the PSNI near Banbridge who entered the bus with video cameras and filmed, that there were around 100 police officers, including some plain clothed, some masked and heavily armed as well as a special search team of British Soldiers accompanied by search dogs: if his attention has further been drawn to the fact that nothing of note was found during this search.¹²⁰

¹¹⁹ Under article 33 of the JSA, a constable or a member of the army may if necessary use reasonable force for the purpose of exercising a power conferred on them. The PACE and TACT codes of practice explain the use of reasonable force to be used “as a last resort if necessary to conduct a search or to detain a person or vehicle for the purposes of a search (PACE Code A 2007, paragraph 3.2; TACT Code (Northern Ireland) May 2012, paragraph 9.9.

¹²⁰ Dáil Éireann Debate Vol. 769 No. 2 question [29984/12] 20 June 2012.

The Minister responded the incident had taken place outside his jurisdiction. The *Belfast Telegraph* reported:

A group, comprising 12 children and nine adults, was returning to Belfast from a visit to Dublin's Kilmainham jail when the minibus they were travelling in was stopped on the A1 dual carriageway close to Banbridge shortly after 5pm on Sunday. Police last night said four children were searched during the operation. However, this is disputed by parents who say all but one child on board the bus was searched. They also claim that one child wet himself during the search.

A Belfast woman who was on the bus with her two children, said they were traumatised by the incident. She said: "It was horrifying, especially for the kids, and my wee girl who is four is totally traumatised. My nine-year-old son panics every time he sees a police Land Rover. The PSNI took videos of the adults and the children, even though we told them we didn't want that."¹²¹

Police response to community monitoring of stop and search

Because of increased targeted stop and search/question activity in specific communities some community groups decided to monitor, document and record problems of stop and search/question in their areas. However, there were reports of incidents of subsequent arrests, searches and seizures of materials from them on grounds that it may be "information useful to terrorists." In addition, it was reported to CAJ following one public meeting on stop and search a number of those who had participated had their homes searched in the days which followed. Whilst there was no stated link, those subjected to the search did perceive that it related to their organising around the issue. There have also been reports of persons who have taken pictures being stopped by the PSNI and told to delete them, although no obvious legal power exists to do this.

Abusive language and threats

CAJ has also heard allegations of threatening and/or abusive language being used during stop and search/question operations. The most serious recent allegation is that an officer told a political activist he would be shot dead when conducting a stop and search of him.¹²² CAJ has also received reports of low level abuse, such as abusive gestures or refusals to explain actions, that nevertheless may stigmatise an individual and impact on matters such as their employment:

I work as a litter collector and one Thursday at [X] Market, the busiest day, myself and three others were stopped and searched by police officers in front of all the traders. We were put up against the wall with our work high visibility vests on us. Our supervisor asked the police what was going on and he was told it was no concern of his. I asked my supervisor not to report this as I am afraid I could lose my work and particularly my overtime at the weekends.

¹²¹ 'Probe after children searched by PSNI during minibus day trip' Belfast Telegraph 1 July 2011.

¹²² See "PSNI and éirígí at loggerheads over alleged 'death threat'" Newry Times 29 October 2012.

At work when out picking up litter with a Bradshaw machine, police drove by and gave me the middle finger. Another work colleague with me witnessed this. I am afraid to report any work related incident to employers as I am afraid that I will lose my overtime or my job.

Other reports to CAJ extended to allegations of threats being made against the subjects' children. One person reported an incident where police officers said "smart remarks" which he found "sinister" such as "[W]e hope [child] is ok. We hope [child] is safe.' Another complainant was asked if he was "still out running" that he "needs to be careful around those back roads. How's the children...how's the mother?"

Complaints

A recurring theme raised with CAJ by persons who had made formal stop and search complaints was dissatisfaction with the outcome.

The Office of the Police Ombudsman for Northern Ireland is the independent body with a formal statutory role in investigating complaints of misconduct or criminality by the police. Statistics provided to CAJ report 183 complaints were made to the Police Ombudsman in the three years from 2009-2012 in relation to JSA and 'Section 44' TACT stop and search powers. Over 500 recommendations by the Office were made in relation to closed complaints in the same period, in most cases it was not possible to prove allegations and in only a small number was further action taken.¹²³

Clearly there will be instances whereby persons are aggrieved by the discretion the legislation affords a PSNI officer to (lawfully) conduct a search under the JSA/TACT and such matters will not constitute individual misconduct. Nevertheless there are clearly instances, as indicated above in this report, whereby powers are misused and may constitute misconduct and hence be matters for which the Police Ombudsman can provide redress for. This would presumably be dependent on officials in the Ombudsman's office having clear guidance as to appropriate and inappropriate usage of the powers. Given as confidence issues have been raised with CAJ by persons subjected to stop and search/question there would be merit in the Police Ombudsman reviewing how it deals with stop and search/question complaints. Clearly such guidance could be further developed in the context of an eventual JSA code of practice.

A number of persons had also sought to make complaints to the Northern Ireland Commissioner for Children and Young People (NICCY). NICCY is empowered to investigate complaints by children against public authorities but should not do so when another statutory complaints mechanism exists.¹²⁴ NICCY confirmed to CAJ it was therefore largely precluded from taking complaints on stop and search/question given the role of the office of the Police Ombudsman. This of course does not preclude NICCY from other work to address the issues facing young persons in relation to stop and

¹²³ Figures supplied to CAJ by Office of the Police Ombudsman November 2012. 48 complaints related to JSA powers and 135 to 'section 44'. The formal recommendations made in the 2009-2012 period were: Action Recommended: 5; Not Substantiated: 288; non-cooperation by complainant 97; to PPS no criminal charges recommended 22; informally/locally resolved <5; other recommendations 87.

¹²⁴ The Commissioner for Children and Young Peoples (Northern Ireland) Order 2003. The PSNI is listed as a "relevant authority" the Commissioner can investigate complaints against in paragraph 12 of schedule 1 of the Order.

search and the NICCY has previously raised concerns about the application of stop and search to young persons with the Policing Board.¹²⁵

An issue on which there has been some discussion is how the Police Ombudsman deals with complaints from persons under 16. The NGO *Include Youth* recently reported that in response to Policing Board questions:

...it would appear that the [Police Ombudsman's] Office's default position regarding complaints from all under 18s is not to record such complaints unless a young person is accompanied by an 'appropriate adult'. We believe that such a practice is entirely without justification on the basis of either principle or practice. Article 12 of the UN Convention on the Rights of the Child, along with the UN Committee on the Rights of the Child's General Comment No 12 provide clear guidance to all public authorities regarding the rights of children and young people to have their voices heard. In law and practice children aged 10 can be held criminally liable, and many young people are living independently by the age of 16 or 17 years of age.¹²⁶

Given the high proportion of stops and searches/questions on young persons clearly it is important that relevant complaints mechanisms are accessible.

The final chapter of this report seeks to draw a number of general conclusions in relation to present issues relating to the use of stop and search/question powers.

¹²⁵ See 'Response from the Northern Ireland Commissioner for Children and Young People to the Community Safety Strategy' NICCY, 15 April 2011, p12.

¹²⁶ Boyce, Sara 'I Fought the Law and The Law Won': Police Ombudsman and Child Rights' Include Youth 16 July 2012.

5. Conclusions

Still part of life here?

Echoing the title of our 1994 report '*It's part of Life here*' which focused on broader issues of harassment, as well as that linked to stop and search, this present report has examined the question of whether it is *still* part of life here to experience the misuse of stop and search powers, particularly for those living in 'suspect communities'. Whilst the general deployment of vehicle checkpoints is no longer widespread, increasingly CAJ is being contacted in relation to stop and search powers and their continued use in a manner perceived to be harassment. Frequent experience of stop and search/question powers appears to be still part of life in some communities. It is notable that stop and search/question is currently the principle present-day issue being raised with CAJ in relation to police practice and conduct.

Past CAJ research has highlighted the counterproductive nature of the unnecessary use of stop and search powers in damaging confidence in policing. There is a particular context in the last number of years following the St Andrew's Agreement and the decision of Sinn Féin to recognise the PSNI as the legitimate police service. There is therefore an official context of seeking to ensure confidence and support among republicans in the PSNI. At community level it appears that the manner in which emergency-type stop and search/question continues to be operated is conflicting with that objective. It appears difficult to argue this is unavoidable in the absence of evidence that the powers are producing effective results. It is particularly notable that the PSNI itself does not appear to evaluate the effectiveness of the JSA/TACT emergency-type powers in relation to the number of charges and convictions for scheduled offences resulting from their use. This may be connected to PSNI operational policy as to why emergency-type powers are being deployed. It appears that, in part at least, rather than being used to actually search for items the PSNI have a policy of using the powers for the 'disruption' of persons that the PSNI 'suspect' might be 'dissident republicans'. There are questions over the legitimacy of such an approach, not least as the use of the JSA search power in this manner does not seem to be compatible with the legislation. By past experience, not only is such an approach likely to lead to ineffective use of the powers, is also more likely to fuel rather than deter conflict.

What is particularly striking is the similarity of many of the concerns documented in previous research to many of the issues being raised with us today. There are also correlations between many of the past deficiencies in the legal, policy and institutional framework, and those manifesting themselves now, in particular the lack of a JSA Code of Practice. Among the policy issues identified are whether the complaints mechanisms are effectively dealing with misuse of stop and search/question powers and whether the oversight of the new JSA general 'authorisation' process is adequate. Along with the lack of a Code of Practice the most glaring omission in the policy framework relates to monitoring, particularly monitoring on the grounds of community background. As long as such practices and gaps persist many of the issues raised in this report are likely to continue to be 'still part of life here'.