REPORT OF THE INDEPENDENT REVIEWER
JUSTICE AND SECURITY (NORTHERN IRELAND) ACT 2007

TWELFTH REPORT 1st August 2018 – 31st July 2019

David Seymour CB

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1. INTRODUCTION

1.1 On 11th November 2013 I was appointed by the Rt Hon Theresa Villiers, the then Secretary of State for Northern Ireland, to the post of Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 (referred to throughout this Report as the JSA). My appointment was for a 3 year period starting on 1st February 2014. I was re-appointed to this post for a further period of 3 years ending on 31st January 2020 by the Rt Hon James Brokenshire MP, the then Secretary of State. The function of the Reviewer is to review the operation of sections 21 to 32 of the JSA and the procedures adopted by the military for the handling of complaints. Sections 21 to 32 are summarized in Part 1 of **Annex C**. Broadly speaking they confer powers to stop and question, stop and search and to enter premises to search for munitions etc., to stop and search vehicles, to take possession of land and to close roads. They are designed to address the specific security situation which exists in Northern Ireland. In announcing the appointment the then Secretary of State said that –

"The role of the Independent Reviewer is vital in securing confidence in the use of the powers…as well as the procedures adopted by the military for investigating complaints".

Lord Anderson QC, as the former Independent Reviewer of Terrorism Legislation for the UK, has said that the value of the Reviewer lies in the fact that he is independent, has access to secret and sensitive national security information, is able to engage with a cross section of the community and produces a prompt report which informs public and political debate. That is the purpose of this Review.

1.2 Under section 40(3) the Secretary of State can require me to include in the Report specified matters which need not relate to the use of the powers in the JSA. In his letter to me of 6th October 2017 the Secretary of State requested that the issue on non-jury trials (NJTs) be addressed in my annual Report. The terms of reference for my review of NJTs are at paragraph 14.2 of the 10th Report.

1.3 Consequently, this Report is divided into two Parts – Part 1 deals with the use of the powers in sections 21 to 32 and Part 2 examines the operation of the NJT system. **The main analysis of NJTs is set out in Part 2 of the 10th Report and Part 2 of this Report (and the 11th Report) is supplementary to that main analysis.**

1.4 I am grateful to the organizations and individuals who engaged in this process. I am also grateful to officials in the NIO, MoD, PSNI and PPS who facilitated these discussions.

1.5 The previous 11 Reports covering the years 2008 to 2018 can be found on the Parliamentary website:

www.gov.uk/government/pubications

1.6 All references in this Report to sections are to sections in the JSA unless otherwise stated.

1.7 Any comments on this or previous Reports can be submitted to:

thesecretary@nio.gov.uk

EXECUTIVE SUMMARY

Part 1 – operation of the powers in sections 21 to 32

2.1 The **methodology** adopted for Part 1 of this Report is set out in paragraphs 3.1 to 3.3.

2.2 The **security situation** remains at "SEVERE" and is summarized in paragraphs 4.1 to 4.5. The **public order** situation has been mainly quiet with the exception of serious disturbances in Derry in April 2019 during which a young journalist, Lyra McKee, was murdered (paragraph 4.6).

2.3 On 25th February 2020 the Court of Appeal handed down its judgment in the case of **Ramsey**. Broadly speaking, it held that the regime of JSA powers was ECHR compliant but it decided that the failure of the PSNI to record the basis for each individual stop and search was contrary to the Code and unlawful. It also commented on the need for a system of community monitoring to ensure effective supervision of the powers (paragraphs 5.1 to 5.6). An application by a 16 year old girl challenging the lawfulness of her stop and search under the JSA was dismissed by the High Court (paragraphs 5.7 to 5.9).

2.4 There has again been a **general decrease in the use of JSA powers** (paragraphs 6.1 to 6.7).

2.5 There was **general agreement about the progress** in relation to this aspect of policing over the past 5 years and on what still remains to be done (paragraph 7.1). **The number of complaints to the Ombudsman about the use of JSA powers is very low** (paragraphs 7.2 to 7.9). There is **concern about the use of stop and search of children** (paragraphs 7.10 to 7.18). Progress has been made on the deployment of **BWV** when JSA powers are used (paragraph 7.19 to 7.23). **Only 0.4% of people who are stopped etc. go to a police station to collect a copy of their stop/search record** (paragraph 7.24). There are **very few formal outcomes** following a JSA stop and search (paragraphs 7.27 to 7.29). There has been **no progress on devising a system of community monitoring of stop and search under JSA** (paragraphs 7.30 to 7.41). The **supervision of the use of these powers has improved** but there is no consistent pattern across the PSNI and there is room for some improvement (paragraph 7.42).

2.6 The processing of **authorisations** continues to be done in a systematic and thorough manner (paragraphs 8.1 to 8.3).

2.7 The role of the **armed forces** remains unchanged. The level of EOD activity remains high and the **number of finds of munitions** was the **highest** for many years. There were only **4 complaints** – 2 of which did not involve army personnel and the other 2 were not followed up (paragraphs 9.1 to 9.11).

2.8 There were no developments in relation to **road closures and land requisitions** (paragraph 10.1 to 10.5).

2.9 **Recommendations** are made relating to **record keeping and community monitoring** in the light of the Court of Appeal's judgment in **Ramsey** (paragraph 11.3).

Part 2 – non-jury trials (NJTs)

2.10 Part 2 of the 10th Report contained a general analysis of NJTs. Part 2 of this Report **supplements and updates that analysis** (paragraphs 12.1 to 12.2).

2.11 In the case of **Hutchings** in 2019 the Supreme Court held that a former British soldier prosecuted in connection with a fatal shooting in Northern Ireland in 1974 could be tried without a jury (paragraphs 13.1 to 13.4).

2.11 The **processing of NJT certificates by the DPP** continues to be done to a very high standard. **In particular, the response time by the PSNI to the PPS request for information has shown a marked improvement**. There were 14 cases during the reporting period where the issuing of a NJT certificate was considered and this is consistent with the number of such cases in previous years (paragraphs 14.1 to 14.4).

2.12 There are **conflicting views on the need for NJTs** in Northern Ireland. Some – on both sides of the community – say that their retention is essential and others – again on both sides of the community – say that they are unnecessary (paragraphs 15.1 to 15.7).

2.13 **Two recommendations are made to reduce the number of NJTs within the confines of the existing legislation.** The alternative is the continuance of these temporary arrangements for the foreseeable future (paragraphs 16.1 to 16.4).

3. METHODOLOGY

3.1 The approach taken in this Report is the same as in previous Reports. I visited Northern Ireland on 11 occasions between May and December 2019. These visits were for either 2 or 3 days. I met with PSNI officers of all ranks from Chief Constable to constable. I visited them at their HQ in Knock Road, Belfast and also at other stations in Belfast (Lislea Drive, Grosvenor Road and Lisnasharragh). I also visited PSNI stations in Derry, Lurgan and Carrickfergus. I spoke to officers in the Paramilitary Task Force, the Intelligence Branch and the Centre for Information on Firearms and Explosives (CIFEX). I also spoke to the Communications Director and PSNI statisticians. I was also briefed by the Army at Thiepval Barracks in Lisburn and at Aldergrove and by MI5, the NIO and the DoJ. A full list of the individuals and organizations whom I consulted is at **Annex B**. I also expect to discuss this Report prior to publication with the Parliamentary Under-Secretary of State at the NIO. I also attended a conference at Queen's University, Belfast called "Patten 20 years on. Young People, Policing and Stop and Search". This conference was attended by the Chief Constable and senior PSNI officers, politicians, academics and a wide range of interested bodies. On 9th December 2019 I attended the Police Powers Development Group quarterly meeting at PSNI HQ in Knock Road, Belfast. This meeting was chaired by ACC Todd and is a comprehensive review of the current use of police powers including those in the JSA.

3.2 I observed the 12th July parades at Holywood and in the evening in the Lower Newtownards Road and was briefed in the Silver Room in Grosvenor Street Police Station.

3.3 I discussed NJTs with politicians and members of the Bar, the PSNI, the PPS, Northern Ireland Human Rights Commission and other interested organizations.

4. SECURITY AND PUBLIC ORDER

Security

4.1 The threat from terrorism in Northern Ireland remains at SEVERE meaning that an attack is highly likely. There are two key groups – the New IRA and the Continuity IRA (CIRA). Other smaller groups (Oglaigh na hEireann (ONH), Arm na Poblachta (ANP) and the Irish Republican Movement (IRM)) continue to have the intent to carry out attacks but are lacking the capability to do so. All DR groups are opposed to the political process and committed to the use of violence to advance their causes. It is clear that, even in Republican areas, support from the community is low.

4.2 During this reporting period security forces disrupted one DR attack plot though DRs carried out 3 attacks and attempted or aborted a further 9 attacks. DRs continue to target and/ or attack police officers and members of the armed forces in an effort to undermine normalisation within Northern Ireland.

4.3 Incidents during this reporting period include –

- during mid-November 2018 a range of terrorist material including 2 AK variant firearms, was recovered from an address in West Belfast after the Fire Service was called to deal with a fire in an outbuilding;

- in December 2018 an improvised weapon was recovered in the Dunmurry area of Belfast. It is unclear whether the terrorists had failed to initiate the attack or the weapon failed. It is assessed that a passing PSNI patrol vehicle was the intended target. CIRA later claimed responsibility.

- on January 19th 2019 a vehicle born improvised explosive device (VBIED) detonated outside the Courthouse in Derry. The terrorists provided a warning which allowed the PSNI to clear the area. There were no injuries. The New IRA claimed responsibility for this attack;

- During March 2019 a number of crude postal devices were sent to addresses in Scotland and England with one being recovered in a Limerick post depot after being returned. One functioned but there were no injuries. The New IRA later claimed responsibility.

- in early June 2019 the New IRA claimed responsibility for placing an under vehicle IED on a PSNI officer's car in East Belfast;

- on 26th July 2019 there was an attempted attack against PSNI officers in Craigavon. This was a two-stage attack with a suspicious tube being placed on the ground to lure officers into the area with a victim-operated IED positioned very nearby in an attempt to kill the first responder. This was later claimed by the CIRA.

4.4 The threat from terrorism in Northern Ireland is regularly restricted by the response of the PSNI, MI5 and their security partners north and south of the Irish border. During this reporting period there were over 170 disruptive actions against DRs (including arrests, charges and seizures).

4.5 In addition to these "national security" attacks (ie attacks against emanations of the British State) there were other attacks involving munitions by both loyalist and republican paramilitary groups often associated with feuds both between and within these

organizations. The JSA is concerned with preventing any risk arising from the use of munitions and not just risks arising from national security attacks.

Public order

4.6 As is well documented, on 18th April 2019 the PSNI conducted an intelligence led search of property in the Creggan Estate in Derry in an attempt to find IRA munitions. Serious public disorder then followed and about 50 petrol bombs were thrown at the police and several vehicles were hijacked and burnt out. At approximately 11pm gun shots were fired at the police and a 29 year old journalist, Lyra McKee, was murdered. Saoradh – an unregistered political party formed by DRs – claimed that a "republican volunteer" had accidentally shot Ms McKee while defending the community from "Crown forces". That night saw the worst outbreak of public disorder during this period which, on the whole, was relatively quiet. Parades passed off without major incident. In particular there was no trouble on the evening of the 12th July during the return of the Orange Order parade in Belfast.

5. LEGAL CHALLENGES

5.1 In the case of **Ramsey [2018] NIQB 83** the applicant challenged, by way of judicial review, 7 incidents in 2013 of stop and search without reasonable suspicion under section 24 of the JSA. The grounds of challenge were extensive but the High Court dismissed the application save for a ruling that the PSNI were in breach of the Code by not recording the specific basis for the stop and search. The appellant appealed against the main findings and the PSNI cross appealed on the issue of the need to record the basis for the stop and search.

5.2 The NIPB expressed concern that the PSNI had not implemented that part of the judgment which requires them to record the basis of the search. In my view, it was perfectly proper for the PSNI to wait until there was a definitive judgment from the Court of Appeal before embarking on a programme of re-training and incurring costs in re-programming the software for officers' hand held devices.

5.3 The PSNI have consistently taken the view (supported by Independent Reviewers) that they were only required to record the legal basis of the search (in practice the authorisation under the JSA) and not the specific basis (reasonable or otherwise) which prompted each individual stop and search (see paragraph 9.2 of the 11th Report). This is an argument which goes back some years when the Ombudsman disagreed with the PSNI approach – see paragraphs 11.4 to 11.6 of the 7th Report published in 2015. Clearly, this was a matter which could only be resolved by a clear judgment from the Court of Appeal.

5.4 That judgment was handed down on 25th February 2020. The Court of Appeal held that –

(a) the authorisation regime did satisfy the "quality of law" test and the JSA, including the Code, contained adequate safeguards to prevent abuse and the arbitrary exercise of the powers – in other words, subject to paragraph (b) below, the powers in the JSA were ECHR compliant;

(b) even though the exercise of the power to stop and search under the JSA did not require reasonable suspicion, the failure of the PSNI to record the basis of the search was contrary

to the Code and a breach of the appellant's rights under Article 8 of the ECHR (right to respect for private life etc.).

5.6 If that is the end of the litigation (which started over 6 years ago) the following observations can be made –

(a) in broad terms, the power to stop and search without reasonable suspicion under the JSA has been given a clean bill of health in terms of ECHR compliance;

(b) the PSNI will in future have to record the basis of each individual use of the power and not rely on the mere fact that an authorisation (made by an ACC and confirmed by the Secretary of State) is in place. The Lord Chief Justice said at paragraph 61 that –

"This is not a random or suspicion-less power. The requirement for a basis is absolutely critical. *The proper interpretation of the Code requires that the basis be recorded and* ***thereby provides a proper means of carrying out effective monitoring and supervision of the exercise of the power****".*

However, he also added that –

..the requirement for the officer to record the basis for the search is itself a discipline in ensuring that the officer acts in accordance with the requirements of the Code. ***The record need not be extensive comprising at most a sentence or two but providing sufficient information to explain why there was a basis****".*

It would appear that, as was suggested in paragraph 9.3(b) of the 11th Report, a general or formulaic description of the basis would be all that is necessary - thus enabling some succinct options to be incorporated into the software of the officer's Blackberry;

(c) there was a strong emphasis in the judgment on the need to record the basis to ensure effective monitoring and supervision of the exercise of the powers. The judgment said nothing about the availability of the record to the person who has been stopped and searched. It remains the case (see paragraph 7.25 below) that a person who is stopped and searched has to visit a police station to obtain a copy of the search record and, in this reporting period, only 0.4% of those individuals went to a police station to collect it. Under paragraph 8.69 of the Code the officer should have outlined the basis for the exercise of the power prior to the individual being stopped and searched but the formal record (which will in future explain the basis for the police action) will still need to be collected in person at a police station.

(d) the judgment emphasizes the importance of supervising officers monitoring the use of stop and search. The Lord Chief Justice stated that –

"Effective monitoring and supervision can only be achieved if there is a record for the basis of the search" (paragraph 53) and –

"The Code does not specify any particular methodology by which the monitoring and supervision of the exercise of the power is to be carried out in order to guard against the risk of discrimination. Paragraph 5.9 of the Code requires, however, that supervising officers must ensure in the use of stop and search powers that there is no evidence of them being exercised on the basis of stereotyped images or inappropriate generalisations. Supervising

officers can only carry out that task if they have the information which enables them to make a judgment about the manner in which the powers are exercised" (paragraph 55).

The current arrangements for supervision are discussed at paragraph 7.42 below. This is a potential area for improvement particularly in the light of the clear terms of this judgment;

(e) the Lord Chief Justice also made the following important observations on the need for community monitoring of the exercise of these powers –

"Although there is no specific methodology required under the Code for the monitoring of community background ***we accept that the monitoring and supervision requirements of the Code establish a duty on the part of the PSNI to devise a methodology of enabling such monitoring and supervision.*** *There is evidence that that such work has been undertaken by the PSNI. The Code does not impose any requirement on a member of the public to indicate anything about community background. It is not, therefore, possible to establish such background by way of questioning. There was initial reluctance on the part of the PSNI to leave it to individual officers to make an assessment of the community background of the individual stopped. In some cases that might be informed by previous experience with an individual but in others there may be little basis for making any determination"* (paragraph 56)

and

"The evaluation of the pilot by the PSNI has tended to suggest that ***the best option may be assessment by the individual police officers of community background.*** *We understand that such an option has not yet been implemented but* ***we are satisfied that the requirements of the Code are that some proportionate measure is put in place in order to ensure that there can be adequate monitoring and supervision of the community background of those being stopped and searched***" (paragraph 58).

The issue of community monitoring is addressed at paragraphs 7.30 to 7.41 below. There are just three observations to make in respect of this part of the judgment -

- it is clear that there is a **legal obligation** on the PSNI to deliver a system of community monitoring;

- it is not clear why the Court of Appeal considered that the failure to do this did not give rise to any illegality whereas the failure to record the basis of each individual search did give rise to a breach of Article 8;

- the outcome of any community monitoring will show that the use of the powers is predominantly directed against DRs who come from a particular part of the community. However, that, in itself, would only be evidence of discrimination and disproportionality in the absence of an objectively justifiable account of where the main threat from the use of munitions arises (which is the problem that the JSA is intended to address). Such an explanation is readily available and a matter of public record. As the Lord Chief Justice said at paragraph 31 of the judgment *"the learned trial judge…..noted that in light of the nature and threat from DRs it would come as no surprise to anyone in Northern Ireland that the impact on exercise of this power was more likely to be felt by the perceived catholic and/or nationalist community"*;

(f) attached to the judgment is a useful analysis of all the recommendations made by the Independent Reviewer in the eleven Reports since the Act was passed. The analysis demonstrates, in the words of the Lord Chief Justice *"a high rate of acceptance of those recommendations….The consideration given by the relevant authorities to the recommendations of the Independent Reviewer is itself part of the safeguards. There is no obligation to accept every recommendation but if the scheme is to operate lawfully it must follow that timely and serious consideration is given to those recommendations and a reasoned response as to whether or not to accept them is provided"*.

5.7 In the case of **Alise ni Murchu [2019] NIQB 75** a 16 year old girl challenged the lawfulness of her stop and search under sections 21 and 24. She was searched along with her father who was known to the police. The PSNI officer's affidavit records that *"in accordance with intelligence briefing information given to me in respect of (the applicant's) father I took the decision that there should be a stop and search of (her) father, the vehicle he was driving and any person in the vehicle"*. The applicant challenged the stop and search on 3 grounds –

(a) the powers exercised by the police officer failed to meet the 'quality of law' test required for the interference with the applicant's rights under Article 8 of the ECHR (right to private and family life) and was therefore contrary to section 6 of the HRA;

(b) the police acted contrary to section 6 of the HRA read together with Articles 14 (discrimination) and 8 of the ECHR because they failed to ensure different treatment for children as opposed to adults when subjected to JSA stop and search powers;

(c) the police failed to meet their obligations under section 53 of the Justice (Northern Ireland) Act 2002 to have the best interests of the child as their primary consideration.

5.8 In its judgment the Court quoted at length from the Supreme Court judgment in **R (On the application of Roberts) (Appellant) v Commissioner of Police of the Metropolis and Another (Respondents) [2015] UKSC 79** which contained a pertinent analysis of "suspicionless" stop and search –

"41. Any random "suspicionless" power of stop and search carries with it the risk that it will be used in an arbitrary or discriminatory manner in individual cases. There are, however, great benefits to the public in such a power, as was pointed out by Lord Neuberger and Lord Dyson in ***Beghal*** *and by Moses LJ in this case. It is the randomness and therefore unpredictability of the search which has the deterrent effect and also increases the chance that weapons will be detected. The purpose of this is to reduce the risk of serious violence where knives and other offensive weapons are used, especially that associated with gangs and large crowds. It must be borne in mind that many of these gangs are largely composed of young people from black and minority ethnic groups. While there is concern that members of these groups should not be disproportionately targeted, it is members of these groups who will benefit most from the reduction in violence, serious injury and death that may result from the use of such powers. Put bluntly, it is mostly young black lives that will be saved if there is less gang violence in London and some other cities.*

42. It cannot be too often stressed that, whatever the scope of the power in question, it must be operated in a lawful manner. It is not enough simply to look at the content of the power. It has to be read in conjunction with Section 6(1) of the HRA which makes it unlawful for a

police officer to act in a manner which is incompatible with the Convention rights of any individual. It has also to be read in conjunction with the Equality Act 2010, which makes it unlawful for a police officer to discriminate on racial grounds in the exercise of his powers.

43. It might be thought that these two additional legal constraints were sufficient safeguards in themselves. The result of breaching either will be legal liability and probably disciplinary sanctions as well. It is said that, without the need to have reasonable grounds for suspecting the person or vehicle stopped to be carrying a weapon, it is hard to judge the proportionality of the stop. However, that is to leave out of account all the other features, contained in a mixture of the Act itself, PACE and the Force Standard Operating Procedures, which guard against the risk that the officer will not, in fact, have good reasons for the decision. The result of breaching those will in many cases be to render the stop and search itself unlawful and to expose the officers concerned to disciplinary action".

5.9 In dismissing the application for judicial review the judge placed reliance on the totality of the safeguards and measures in place to regulate police conduct and also the findings of the Independent Reviewer in his 7th, 9th and 10th Reports. In particular, it should be noted that –

(a) The judge quoted with approval, Treacy LJ's observations in **Ramsey** that

"……. the authorisation process, police training, the control and restriction on the use of the impugned powers by the Code of Practice, complaints procedures, disciplinary restraint on police officers including the requirement to act, inter alia, in accordance with the Code, the risk of civil action and/or judicial review together with the independent oversight of various bodies previously detailed in my view constitute effective safeguards against the risk of abuse. The system appears to be carefully designed to structurally ensure that the power is not exercised arbitrarily and is kept constantly under review at least on an annual basis by the Independent Reviewer whose annual reports are publicly accessible"

In other words, what is key, in ECHR terms, is the cumulative impact of a number of safeguards and protections which may evolve over a period of time to adapt to changing circumstances;

(b) The judge also stated that *"the PSNI also carry information cards which they may give to children or young people who are stopped and searched"*. It emerged at the conference at Queen's University (see paragraph 7.12 below) that these cards are no longer handed out during a stop and search of a child. It may be helpful if the PSNI were to consider, in consultation with organizations representing the interests of children, whether this card (possibly updated) or something similar might be given to a child stopped and searched under JSA or TACT.

6. STATISTICS

6.1 Detailed statistics relating to the use of JSA and TACT powers are at **Annex D**.

6.2 The number of occasions on which the powers were used by the PSNI between August 1st 2018 and July 31st 2019 (together with comparison with the previous year) is as follows –

JSA

(a) Section 21, stop and question – **1,233** (down from 1,427) – a **14% decrease**;

(b) Section 23, entry of premises – **5** (down from 6);

(c) Section 24/Schedule 3, paragraph 4, stop and search for munitions – **5,654** (down from 6,202) – a **9% decrease**;

(d) Section 24/Schedule 3 paragraph 2, power to enter premises – **206** (up from 178) – a **16% increase**;

(e) Section 26/Schedule 3, power to search vehicles – 13,747 (down from 15,307) – a **10% decrease**.

TACT

(a) Section 43, stop and search of persons reasonably believed to be a terrorist – **52** (down from 71) – a **27% decrease**;

(b) Section 43A, stop and search of vehicle reasonably believed to be used for terrorism – **14** (down from 20) – a **30% decrease**;

(c) Section 47A, stop and search without reasonable suspicion where senior police officer reasonably believes an act of terrorism will take place – **NIL (the same as last year)**.

Commentary on statistics

6.3 These statistics show another annual decline in the use of JSA and TACT powers in Northern Ireland (with the exception of the power to enter premises). This is the third year in a row that the rate of use has declined. The use of the power to stop and question (section 21) is one third of what it was in the period 2011/12 and the use of the power to stop and search (section 24) is one half of what it was in that period. Although there has been a drop in the use of stop and search under other legislation (PACE/ Misuse of Drugs/ Firearms) this has only been by 3% (from 21,660 to 21,072). The explanation for this greater decline in the use of JSA and TACT powers is not clear. The security situation has not improved over the past 3 years and the decline is not explained by any specific strategy on the part of the PSNI. It may be that the use of the powers is increasingly more targeted. It is also possible that the resource constraints and the impact of social media may have had an inhibiting effect. Whatever the reasons these statistics –

- undermine any narrative that suggests that the PSNI are using these powers on a greater scale than in the past. Indeed, the contrary is true;

- indicate a downward trend which is not replicated elsewhere, for example, in England the Times reported on 8th July 2019 that stop and search had doubled in the past two years in 8 of England's largest forces. The total number of people stopped and searched in England under all legislation in 2018 was 214,240 (up from 178,318 in 2017).

6.4 As regards the use of the power to stop and question (section 21) –

(a) it is important to note that the use of this power during this reporting period is **the lowest since the JSA was passed in 2007** (this may in part be explained by the fact that as the

use of JSA powers is increasingly targeted on those whose identity is known to the police there is less need to question the individual to ascertain his identity);

(b) this power is used consistently throughout the year with the lowest monthly number (77) in June 2019 and the highest in April 2019 (127);

(c) there were some daily spikes in the use of the power (sometimes over 20) for which there is an operational explanation – but there were 64 days during this year when the power was not used at all;

(d) the power was used most frequently in Belfast City (296) and least frequently in Fermanagh and Omagh (13). Despite the well documented disturbances in Derry the power was only used in that District on 149 occasions (with 4 other Districts recording higher use).

6.5 As regards the use of the power to stop and search (section 24/Schedule 3) –

(a) the power was used throughout this period on every day – the highest monthly use was in November 2018 and the lowest in June 2019;

(b) there were 8 daily spikes when the power was used on more than 35 occasions but (with one exception) this appears to be the result of daily fluctuation rather than any specific operational need;

(c) 3 of the 11 police districts (Belfast City, Derry City and Strabane and Armagh, Banbridge and Craigavon) accounted for nearly 60% of all use of the power;

(d) the power was used in all 11 Districts - the lowest use being in Antrim and Newtownabbey (116) and the highest use in Belfast City (1,267);

(e) Despite the general decline by 9% in the use of this power across Northern Ireland during this period, the use in Belfast City increased (from 1,065 in 2017/18 to 1,267). This increase was largely focussed on West Belfast. By contrast the use of the power in Derry City and Strabane fell from (1,449 to 1,253);

6.6 As regards the use of the power to search premises (Section 24/Schedule 3) one factor in the increase of 16% was the activity of the PSNI's Paramilitary Crime Task Force (PCTF) whose operations accounted for 5% of the use of these powers. As of May 2019 the PCTF had carried out 388 searches; made 175 arrests; prevented the loss of £1.3M of revenue; taken 150 firearms, imitation firearms and other offensive weapons off the streets; seized or restrained £800,000 of cash; seized drugs with a street value of £300,000; and secured 26 convictions.

6.7 In the 3 months of April, May and June 2019 the power was used on 72 occasions 50 of which occurred in Derry.

7. ISSUES ARISING FROM THE USE OF THE POWERS

Review of the past five years

7.1 In Chapter 14 of last year's Report I set out what I considered to have gone well over the previous 5 years and listed the areas where further progress was needed. I specifically asked many of the people listed in **Annex B** whether they agreed with this analysis and nobody dissented from it. That represents a consensus across the PSNI, government,

outside bodies and community leaders and representatives on both sides of the community. What follows is a commentary on developments over the past year.

Complaints to the Ombudsman about the use of JSA powers

7.2 As has been noted in previous reports, the use of JSA powers in Northern Ireland is a sensitive issue because

(a) in relation to stop and search, there is no requirement for reasonable suspicion;

(b) the powers are seen as a legacy of the Troubles;

(c) they are intrusive and not replicated elsewhere in the UK;

(d) some say that the powers are used disproportionately against one side of the community.

7.3 There have been several challenges to the JSA regime in the courts on ECHR grounds (which have so far been largely unsuccessful) and the use of the powers in individual cases has been the subject of complaints to the Ombudsman. One indication of whether these powers are used properly and appropriately is the number of complaints received by the Ombudsman and whether those complaints are upheld. It is only one indication amongst many. Some individuals decide not to complain to the Ombudsman (for various reasons) and some seek more instant redress through social media etc. Nevertheless it is instructive to look at how many JSA complaints have been dealt with by the Ombudsman in the past year.

7.4 Between 1st August 2018 and 31st July 2019 only 9 complaints were received by the Ombudsman in relation to a JSA stop and search/question. This represents less than 0.35% of all complaints (2,574) received in that period and only 5% of complaints following a police search (under all legislation).

7.5 Of those 9 complaints 4 were from residents in the Belfast City District and there was at least one complainant in each of the districts of Lisburn and Castlereagh, Mid Ulster and Derry City and Strabane. There was one complaint where the police district has not been identified.

7.6 The complaints contained 23 allegations mainly of oppressive conduct, assault, discriminatory behaviour, incivility, mishandling property and harassment. All the officers who were identified in these complaints were part of the local policing team and none were officers attached to the TSG.

7.7 Having considered these 9 complaints the Ombudsman decided that -

(a) in 4 cases there was no evidence of police wrongdoing and the cases were closed as being “not substantiated”;

(b) 3 were to be closed either because the complainant did not fully engage with his office or because the complaint was withdrawn;

(c) 2 of the complaints are still currently under investigation.

7.8 As in previous years this was a low level of complaint (last year there were 6).

7.9 All complaints to the Ombudsman are recorded on his complaints handling system. However, as only one category can be selected on the system, there may be a small number of cases where a complaint has been made under a number of categories (including JSA) but it has been recorded under a different heading. So the figures in the previous paragraph may be slightly higher. Nevertheless, the number of complaints about the JSA remains small and if the JSA powers were being abused to any significant degree one would expect a much higher number of complaints to be recorded. Two further points are worth mentioning –

(a) in the past two years up to 31st July 2019 **no complaint following a JSA search has been substantiated**;

(b) over the past 5 years there has been a **steady and consistent decline in the number of complaints about JSA searches** – 28 (2014/15); 23 (2015/16); 21 (2016/17); 9 (2017/18); 8 (2018/19).

Children

7.10 Between 1st August 2018 and 31st July 2019 there were 6,680 persons stopped under sections 21 and/or 24 of the JSA. On 201 occasions the person was a child i.e. under the age of 18. This represents 3% of those stopped. The number of children stopped only once was 178. However, 8 children were repeatedly stopped under this legislation (on average 3 times). Items were found on just one of those 201 occasions – namely illegal fireworks. During the same period there were 57 persons stopped under sections 43/43A of TACT. Of these, just one person was a child and nothing was found on him. These statistics are slightly less but not dissimilar to those of last year – see paragraph 8.5 of the 11th Report. The PSNI also report that (in relation to a slightly different period – 1st July 2018 to 30th June 2019) – 216 children were stopped and searched/questioned under section 21 and 24 and BWV was used in 44% of those encounters. Of the 120 cases where BWV was not used the main reason for not using it was "Operator Error" (i.e. the officer forgot or failed to use BWV properly) and the other possible reasons were No Camera Available, No Power and Faulty Camera.

7.11 The comparable statistics for stop and search powers under other legislation (PACE, Misuse of Drugs etc.) show a different picture. During the same period 21,040 persons were stopped under this other legislation of whom 3,311 were children (i.e. 15.7% of the total) and items were found on 533 of those children.

7.12 The use of stop and search powers in relation to children has recently come under increasing scrutiny. In his response to the last Report, the then Minister of State, Mr John Penrose MP, said in his letter to me on 28th February 2019 –

"I am concerned about the possibility of stop and search/question powers being perceived as being exercised unfairly and disproportionately against young people from particular backgrounds….I understand that this is a sensitive issue and I thank you for your review of the subject. I hope you will continue to assess and examine it regularly in future reports".

In the case of **Ailse Ni Murchu** (see paragraphs 5.7 to 5.9 above) on 9th August 2019 the court held, on application for judicial review by a minor of her stop and search under sections 21 and 24, that –

"Those involved in the creation and exercise of stop and search powers should not underestimate the potential for public harm in the event that the powers are used arbitrarily and excessively in respect of minors in terms of the effect it could have on confidence in and support for the PSNI".

This concern was recognized by the Chief Constable, Simon Byrne, when he gave his first conference speech since his appointment at the conference at Queen's University on 4th September to discuss young people and stop and search.

7.13 It is clear from paragraphs 7.10 and 7.11 above that the vast majority of stops and searches of children are made under legislation other than the JSA and TACT. However, the JSA power to stop and search is perceived in some parts of the community as toxic given that it does not require reasonable suspicion; is not replicated elsewhere in the UK; is concerned with the possession of munitions; and is therefore perceived as a hangover from the Troubles. Moreover, as community representatives have noted, many of the recent incidents of public disorder and rioting have involved children, some as young as 12/13, who have been given petrol bombs to throw at police. So it is important for there to be a clear focus on the impact of the use of these powers on children.

7.14 The concerns that were expressed in this context were –

(a) "things generally" were not good between young people and the police;

(b) children were often treated in the same way as adults during a stop and search. This was a cause for concern because the children caught up in these encounters have often already suffered trauma in their lives;

(c) in particular, new police recruits were unaware of the need to treat children differently (and, in Derry, for example, 60% of the local response teams were still serving in their probationary period);

(d) some young people do not see normal policing in the areas where they live;

(f) the PSNI is an increasingly middle class service whose officers do not always find it easy to relate to young people on the street who may be unemployed, in care or suffer from mental health problems;

(e) perhaps most tellingly, the PSNI do not recognize that they have a problem with young people and although the PSNI says the right things "nothing happens".

7.15 These perceptions may or may not be a fair reflection of the current situation (and it is worth recording here that the involvement of children on these occasions has been exploited and manipulated by DRs in the past – see paragraph 6.51 of the 9th Report). However, the views expressed in the previous paragraph are held by serious and well informed observers of the situation. It is clear that some police officers are very aware of these issues and can speak eloquently about them and there are encouraging signs of the PSNI addressing this issue –

(a) in Derry, young people (some from the Creggan), met police officers out of uniform in the Guildhall to discuss policing;

(b) the local PSNI leadership in Lurgan is taking initiatives with a range of partners to address this issue;

(c) the Youth Independent Advisory Group is a community led group of young people aged between 13 and 18 which provides independent advice to the PSNI;

(d) many senior officers attended the conference at Queen's University about stop and search and young people.

7.16 There is also a "Children and Young People Strategy" document prepared by the PSNI which recognizes the challenge ahead. It states –

"Stop and search can be highly emotive and if misused it can be harmful to the trust and confidence of children and young people towards the police. Children and young people's confidence in our use and transparency of stop and search is critical because it is one of the most intrusive powers we have and can give rise to strong feelings of resentment".

The document then goes on to state that the number of stops etc. involving young people has declined. In 2014/15, 15.7% of the people stopped and searched under all legislation were children (4,330). That reduced to 13% in 2018/19 (3,629). The section on Stop and Search concludes that the PSNI will scrutinize its use of stop and search powers to ensure that they are being exercised fairly. The challenge now for the PSNI is to transform that high level commitment into a cultural change which fosters empathy and understanding with children in every encounter and does not result in alienation. That is a challenge which goes some way beyond strict legal compliance with statutory obligations.

7.17 It is against this background that I recommended in paragraph 15.5 of last year's Report that the PSNI should monitor more closely its use of JSA powers when used in relation to children. Many of the people I consulted supported this proposal although the PSNI did not accept it. Without this further in depth analysis of how these powers are used in relation to children, the PSNI are not in a position to say , in relation to the 201 occasions when a child was stopped/searched/questioned under the JSA, –

(a) how many, if any, children were the primary object of the stop and search;

(b) when a child is a passenger in the car how frequently the child is searched (in addition to the adult driver) and what factors would typically influence that decision;

(c) how frequently the presence of a child has been a factor influencing the decision whether or not to use JSA powers;

(d) how many of these children were known to the police for previous involvement in criminal activity;

(e) how compliant the child was in the activity that caused the police to stop and search;

(f) the reaction of the child to the stop and search;

(g) what lessons have been learnt about the impact of using these powers against children.

7.18 A small percentage of this information might be gleaned by trawling through each individual search record. However, the creation of an ongoing central record which led to a creative an insightful analysis in this sensitive area, would be useful in terms of accountability, strategic thinking and spreading good practice across the PSNI. It is, arguably, an unnecessary piece of work so long as the powers are lawfully exercised, but,

given increasing concern about the alienation of teenagers, it is a piece of work which might prove both helpful to the PSNI and reassuring to others working in this field.

The use of body worn video (BWV)

7.19 Last year's Report showed that, by the end of July 2018 BWV was used in only 36% of stops/searches under JSA and TACT. On 10th May 2019 a direction was issued at ACC level to all officers that BWV must be used when exercising **all** stop and search powers. Failure to do so would not, however, be a disciplinary offence. Since that direction this percentage figure has risen, so far as JSA stops/searches are concerned, to 67% in October 2019. If vehicle only searches are excluded from the calculation, the figure for that month would be 76%. It is also a requirement that where BWV is not used during a stop and search then the officer must supply a reasoned explanation.

7.20 That still leaves a significant proportion of stops and searches where BWV is not used. There are several reasons for this including technical failure. There is also anecdotal evidence that BWV is not used because officers feel they need to be "word perfect" when exercising the powers together with "operator error".

7.21 The PSNI have completed a Project Evaluation for Body Worn Video. The general view is that, in relation to stop and search generally, the impact of the widespread use of BWV has resulted in better behaviour and improved encounters on the street. The Evaluation's focus, however, is not so much on stop and search but on the impact of BWV more generally on the criminal justice system. It concluded that –

"The new Body Worn Video system for PSNI has been delivered successfully and the BWV cameras are being well used…Officers generally have had a positive reaction to the introduction of BWV as reflected in the User Satisfaction Questionnaire….Importantly, the vast majority of officers believe that BWV has had a positive impact on the safety and security of victims and themselves".

The PSNI have no plans for a further evaluation as BWV is now considered to be part of normal business.

7.22 The Ombudsman has also produced an analysis "The Impact of Body Worn Video on Police Complaints in Northern Ireland". There has been a 9% decrease in the number of complaints made to the Ombudsman since the introduction of BWV (typically complaints of oppressive behaviour and assault). Other key findings were –

(a) Ombudsman staff thought that for nearly three quarters of the complaints the camera footage aided their investigation in that it was either critical to it or helpful;

(b) for a third of complaints the footage speeded up the investigation;

(c) the footage gave a relatively early understanding of the substance of the situation giving rise to the complaint, helped to refute quickly inaccurate versions of events and helped with the identification of individuals involved.

7.23 Recommendations were made in last year's Report about the use of BWV when a child is stopped and searched and the PSNI response to those recommendations is dealt with at paragraph 11.2 below.

Record keeping

7.24 This was dealt with in some detail in paragraphs 9.1 to 9.4 of last year's (the 11th) Report.

7.25 No progress has been made on finding a solution to the problem of those stopped having to visit a police station in person to obtain a copy of the stop/search record. Between 1st August 2018 and 31st July 2019 only 66 people went to a police station to collect a copy of the stop/search record – this represents only 0.4% of the total. The figure during the previous period was only 89 which represented 0.5% of the total.

7.26 In paragraph 8.6 of the 10th Report I recommended that the automated search record be moved onto the NICHE system not only for stops/searches under JSA and TACT but also for those under PACE, Misuse of Drugs Act etc. subject to the maintenance of existing safeguards in relation to access, supervision and disposal. The PSNI accepted this recommendation.

Outcomes

7.27 The pattern remains the same as in previous years.

7.28 The number of finds following a stop and search under section 24/Schedule 3 is as follows –

- on one occasion a firearm was found (and subsequent searches found an additional 2 firearms);

- on one occasion a replica firearm was found;

- on 3 occasions ammunition was found;

- on one occasion 5 kitchen timer units were found;

- on one occasion wireless telegraphy apparatus (a mobile phone) was seized.

The overall rate of success following a search for munitions under this power was 0.04%.

Of the 5,654 uses of this power, no further action was taken in 96% of cases (5,450); a report to the PPS was made in 2% of cases (89); an arrest was made in 2% of cases (86); a community resolution notice was issued in 1% of cases (28) and a Penalty Notice for Disorder was issued in one case. It should be noted that these outcomes may not be related to the initial reason for the stop and search. For example, some referrals to the PPS were for disorderly behaviour, possession of drugs or driving offences.

7.29 The number of finds following a search of premises under Section 24/Schedule 3 is higher. Of the 206 premises –

- on 8 occasions firearms, explosives and/or ammunition were found (this figure does not include replica firearms or anything which was capable of being used in the manufacture of an explosive, firearm or ammunition e.g. timers, pipes, etc.);

- on 116 occasions wireless telegraphy apparatus was seized and retained (mainly mobile phones). On some of these occasions more than one mobile phone might have been seized;

- on 63 occasions laptops and tablets were seized and retained (again more than one laptop or tablet may have been seized on the same occasion - the PSNI did not at the time keep statistics for the number of laptops and tablets seized –but see paragraph 11(2)(c) below).

Community monitoring

7.30 In October 2013 the NIPB published a paper entitled "Human Rights Thematic Review on the use of police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007". One of its recommendations was that –

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

7.31 This recommendation reflected concern that had also been expressed by others including –

(a) the CJINI in its 2009 Report on "The impact of Section 75 of the Northern Ireland Act 1998 on the criminal justice system in Northern Ireland" (section 75 requires public bodies in Northern Ireland to have due regard to the need to promote equality and the desirability of promoting good relations across a range of categories set out in the Act);

(b) the CAJ in its Report in November 2012 "Still Part of Life Here – A report on the use and misuse of stop/search and question powers in Northern Ireland".

7.32 As has been noted in paragraph 5.1 to 5. above, the Court of Appeal in **Ramsey** has now made it clear that the Code establishes a legal duty on the PSNI to devise a methodology for monitoring the community background of those who are stopped and searched under the JSA.

7.33 No progress has been made in delivering a positive response to NIPB's recommendation. It remains the only recommendation (out of 11) made in the NIPB's Thematic Review which has not been implemented. I have addressed this issue in the last 5 Reports and discussed it with many police officers of all ranks over the years. Some are relaxed about community monitoring – others are strongly opposed. I was advised that there was "no appetite" for this amongst senior ranks. The most frequently expressed concern is that the statistics, when published, will be exploited politically to show a bias towards against a particular community. Another concern is that this would, post Patten, be a retrograde step as the PSNI does not take into account community background when exercising these powers

7.34 On one view, the continuing concern about the community monitoring is a distraction. It is not the only method of ensuring that these powers are exercised properly and fairly. The purpose of the Independent Reviewer's Reports is specifically to monitor the use of the powers. I have consistently reported that these powers are necessary and exercised in a targeted and proportionate manner. All the general indicators set out in this Report support that conclusion and, in my numerous discussions with politicians and community leaders, that conclusion has not been seriously challenged. The use of the powers has been upheld in the courts and the number of complaints to the Ombudsman about the use of these powers is tiny. The statistics show that the powers are used in areas where the threat from the use of munitions is greatest. This position has been reached without any formal community monitoring and so it could, arguably, be said to be unnecessary. However, it is clear from the Court of Appeal's judgment in **Ramsey** that some system of community monitoring must be found.

7.35 Many arguments have been put forward over the years not adopting a system of community monitoring but this issue will now have to be revisited. Those arguments are set out below.

The information cannot be provided

7.36 In paragraphs 7.11 of the 7th Report (published January 2015) I reported, on the basis of PSNI briefing, that 40% of the stop/searches were against individuals who were searched more than once ("multiple searches"). I reported that 81% of those stopped on multiple occasions were suspected to be DRs or their associates accounting for 92% of all multiple searches. In G District (as it was) ie Derry 92% of those stopped on multiple occasions were suspected to be DRs accounting for 98% of all multiple searches. The Report went on to say –

"the PSNI would argue that these figures show that the powers are targeted at those who pose a threat to the public and demonstrate that they are used on an intelligence led basis to protect the public".

At paragraph 7.12 the Report continued –

"So 81% of the stop and searches on multiple occasions are of individuals suspected to be DRs or their associates. The remaining 19% of the searches include 7% who had a suspected criminal association; 3% had loyalist association; 1% were firearms related; 1% were related to interface disorder; and 8% were of unspecified background".

This analysis is 5 years old and relates only to repeat stops but it demonstrates not only that it is possible to provide this information but also that it can be deployed to demonstrate an appropriate and targeted use of the power.

It would be guesswork

7.37 The use of the powers is not random but intelligence led and often part of a targeted operation. So the police very often know who they are stopping and searching. Indeed, one of the recommendations in the NIPB's Thematic Review of 2013 was that the police *"should have a clear instruction that the power to stop and search may not be used to confirm identity where that is known or to require a person to produce identification to confirm such identity"*. This recommendation was made precisely because people who were known to the police

were being asked to confirm their identity and this was perceived as harassment. When I dip sample BWV of a stop and search under the JSA or TACT in the presence of PSNI officers it is never difficult to identify the community background of the individual concerned. In this context, it is relevant to note that the High Court in **Ramsey** (see paragraph 5.1 above) held that the failure of the police to record the basis for the stop and search did not automatically render the exercise of the power unlawful because the police officers were able to provide that basis by submitting further affidavit evidence. It is telling that the basis provided by the police officers included –

- individual known to police on basis of confidential briefings;

-individual stopped on previous occasions as a result of confidential briefings;

-car registered to individual known to have DR links.

Also in the case of **Alise ni Murchu** (see paragraph 5.2 above) the officer's affidavit records that *"in accordance with intelligence briefing information given to me in respect of (the applicant's) father, I took the decision that there should be a stop and search of (her) father, the vehicle he was driving and any person in that vehicle"*.

In other words, if these are typical grounds for triggering the use of JSA powers, the individual being stopped and searched is likely to be known to the officer and little guesswork would be involved.

The figures will be exploited

7.38 The concern that information concerning the community background of those subject to these powers will, if published, be politically exploited is legitimate but –

(a) that information will demonstrate, to nobody's surprise, that the powers are used on most occasions against known or suspected DRs and their associates. However, that use is not disproportionate to the threat posed by such individuals from the use of munitions. Nor does it demonstrate disproportionate use against a particular community – merely individuals within it. These powers have also, in recent years, increasingly been used in relation to members of loyalist paramilitaries as internal feuding amongst those groups has grown;

(b) as has been pointed out in previous reports, the use of JSA powers is particularly effective given the DR's *modus operandi* of transporting munitions across Northern Ireland. Other criminal justice act powers are often more appropriately used against other groups. It would be for the PSNI to demonstrate, perhaps more than they have in the past, how different powers are used to address different situations. However, any attempt to make political mischief from published figures relating to community monitoring of JSA powers in isolation would be unjustified. The use is proportionate to the threat and it is directed against individuals not communities. The key point is that the use of these powers should not be assessed in isolation but in the context of the use of the whole array of various criminal justice powers deployed by the police against all paramilitary organizations.

No legal basis

7.39 The PSNI have more recently stated that they cannot deliver a system of community monitoring based on officer perception because they are prevented from doing so by the GDPR and Part 3 of the Data Protection Act 2018 which came into force on 25th May 2018.

This is very complex legislation and it would be helpful to see a full explanation of this reasoning based on independent legal advice from an expert in this field. The key issue would appear to be whether the collection of data relating to community background is for *"law enforcement purposes"*. These are defined in section 31 of the 2018 Act as relating to the *"prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties including the safeguarding against and the prevention of threats to public security"*. If the collection of community monitoring data under the JSA falls within that definition then the processing of that data would fall to be governed by the Law Enforcement Directive which is implemented by Part 3 of the 2018 Act. However, if it does not fall within that definition then the processing would fall to be governed by the general provisions of the GDPR which has direct effect and the following would apply –

- the starting position of the GDPR is that the *"the processing of personal data revealing racial or ethnic origin .. religious or philosophical beliefs ..shall be prohibited";*

- **but** Article 9(2) then sets out various exceptions to the general prohibition including *"(g) processing for reasons of substantial public interest"*;

- section 10(3) of the 2018 Act states that *"the processing meets the requirements in point (g) of Article 9(2) only if it meets a condition in Part 2 of Schedule 1"*;

- Paragraph 8(1) of that Schedule then sets out the key condition which is that it is personal data revealing religious belief and is *"necessary for the purposes of identifying or keeping under review the existence or absence of equality of opportunity or treatment.. with a view to enabling such equality to be promoted or maintained"*.

If community monitoring of the use of JSA powers was thought to be necessary, as suggested by the Court of Appeal in **Ramsey**, then, on this interpretation of the GDPR, it would be reasonable to conclude that such monitoring would be lawful.

However, the position is not clear and, on an issue of such importance to both the PSNI and NIPB, it would be helpful for some definitive and independent guidance to be obtained and placed in the public domain.

No power to ask for information about community background

7.40 The PSNI have said that –

"there are, in addition, significant concerns as to the lack of power for police to ask for such information and of the liability of officers and the organization for any actions resulting from a person's response to a request from an officer".

However, the proposal that the monitoring should be based on officer perception does not require an officer to ask for this information. Other factors could give a sufficient indication. It would be an analysis done after the event without any question asked of the individual so this is an irrelevant concern.

7.40 In these circumstances, subject to a clear resolution of the GDPR issue, it should be possible for the PSNI to devise a system of recording the community background based on officer perception, personal knowledge, intelligence briefing and information gathered during the stop/search. It need not be part of the search record but could be recorded separately for the purposes of addressing the recommendation of the NIPB. The Lord Chief Justice

stated in **Ramsey** (paragraphs 5.1 to 5.5 above) that there is a legal obligation on the PSNI to devise a system of community monitoring and stated at paragraph 58 of the judgment that *"the evaluation of the pilot by the PSNI has tended to suggest that the best option may be assessment by the individual police officers of community background"*.

7.41 An alternative way of addressing this issue would be for a team consisting of a representative from the NIPB, the PSNI and an independent academic to provide an analysis on the basis of the search records and BWV. There would be sufficient certainty in the vast majority of cases for a reasonably accurate assessment to be made. There would be some "don't knows" but that would be the case whatever system of monitoring was devised. This would build on the work done by the PSNI back in 2016 based on anonymized data from stop and search records – which showed that during a 3 month period from 1st December to 29th February of 499 people stopped and searched in Derry City and Strabane 87% of those stopped and searched were Catholic and 13% were Protestant.

Supervision of the powers

7.42 It is clear from the Court of Appeal's judgment in **Ramsey** (see paragraph 5.(6)(d)) that the systematic and regular supervision of the use of these exceptional powers is one of the many safeguards that contribute to making these powers ECHR compliant – see paragraphs 8.12 and 8.13 of the last Report. This is a potential area for improvement and, although good practice would suggest that 10% of stops etc should be supervised, there is no consistent pattern and in some districts last year the figure was lower than that. In June 2019 an Instruction was issued that 10% of these stops etc must be dip sampled and scrutinized and it is PSNI policy that Chief Superintendents must take responsibility for making this happen. A Service Instruction covering Stop and Search currently in preparation reinforces this policy by requiring all first line managers to dip sample all stop and search powers and the outcome of all dip sampling must be recorded electronically for audit purposes. In areas where the use of JSA and TACT powers is high particular attention should be paid not only to the legality of the stop and search but also its appropriateness. It would be helpful if, in the performance review of each first line manager, details were given of the dip sampling carried out throughout the year and the effectiveness of the supervision.

Conclusion

7.44 The powers in the JSA remain necessary and continue to play a vital role in keeping people safe in Northern Ireland and the PSNI continue to refine and improve their use of these powers. In particular, progress continues to be made with the growing use of BWV and the introduction of more systematic supervision. However, there would be benefit in –

(a) an increased focus on how these powers are used in relation to children; (b) if the issue of community monitoring is to be taken forward, refining and publishing an analysis of the impact of GDPR on the PSNI's ability to record the community background of those who are stopped and searched under the JSA.

8. SCRUTINY OF AUTHORISATIONS

8.1 An authorisation under paragraph 4A of Schedule 3 brings into play the "no reasonable suspicion" stop and search powers of the JSA. The form for the authorisation is set out in

Annex E. I examined 12 of the authorisations made in the previous year choosing one from each month. The authorisation is made at ACC level and needs to be confirmed by the Secretary of State if it is to continue for up to 14 days. Again, the authorisation process was carried out thoroughly and diligently both in the PSNI and the NIO.

8.2 There are just 4 observations to make –

(a) not all the intelligence listed in box 4 of the authorisation expressly refers to the use of munitions (though that can often be inferred from the context). Where this is the case it would be helpful if the PSNI's covering note could clarify the position because on a number of occasions the relevance of this intelligence has, quite properly, been queried by those scrutinizing the authorisation;

(b) scrutiny by lawyers in the NIO has identified small factual errors (relating to the date and duration of the authorisation) and these have been rectified before the authorisation is placed before the Minister to confirm its continuance for up to 14 days (from the date it was made);

(c) the authorisation refers to the senior police officer "authorising the application". In fact he "makes" the authorisation under the Act and it is subsequently confirmed by, or on behalf of, the Secretary of State – but nothing turns on this deviation from the statutory language;

(d) amongst the intelligence contained in one authorisation form there is specific intelligence relating to threats to a witness in a trial with paramilitary connections (see paragraph 15.2 below).

8.3 I discussed the authorisation process with –

(a) the NIO official responsible for this area of work who confirmed the logistical challenges involved in securing a Minister's confirmation of the authorisation at (in effect) intervals of just less than 2 weeks when they may not be immediately available;

(b) Joanne Hannigan QC who examined the authorisations for the NIPB. We both agreed that the process was carried out in a proper manner and provided sufficient basis for the ACC to make the authorisation and for the Minister to confirm it.

9. THE ARMY

9.1 The role of the Army remains unchanged and as described in previous Reports.

EOD activity

9.2 Public concern about the role of the Army in relation to EOD activity remains low. That level of activity has remained high as is illustrated by the statistics in the table at **Annex D**. The Army were called out on 229 occasions during the past reporting period compared with 198 occasions in the previous year. That figure of 229 is broken down as follows (with the figures for the previous year in brackets) –

- on 19 (20) occasions to deal with an IED – typically an active device such as a pipe bomb;

- on 8 (10) occasions to deal with an explosion;

- on 37 (22) occasions to deal with a hoax – where an object is deliberately made to look like an IED and sometimes accompanied by a telephone warning confirmed by the police the purpose of which could potentially be a prelude to a “come on” attack;

- on 20 (14) occasions to deal with a false alarm ie a member of the public may genuinely have reported a suspect object giving rise to a legitimate concern but there was no telephone call or attribution;

- on one occasion (0) to deal with an incendiary device ie a device which is programmed to ignite and cause buildings to burn;

- on 144 (132) occasions the call out, very often acting on intelligence, was to deal with the discovery of munitions or component parts.

9.3 I spent some time at Aldergrove being briefed by the Army about their EOD work. There is a significant number of personnel involved in this work in separate EOD teams on 10 minutes notice to move. They are on permanent duty for the whole of their 4 month tour of duty. They are well equipped, highly skilled and perform a vital role in Northern Ireland. I was briefed on the most recent serious incidents in Dunmurry, Belfast, Craigavon, Fermanagh and Strabane and also the car bomb placed outside the Courthouse in Derry. The personnel engaged in this work are concerned that EOD activity is “ramping up” and the devices with which they have to deal show signs of a growing sophistication.

9.4 The amount of EOD activity has remained constant for many years. However, it is noticeable that the number of finds (144) is the highest for many years and there has been a marked increase in the number of hoax bombs.

Processing and handling of complaints

9.5 Section 40(6) requires me to investigate the manner in which complaints are dealt with by the Army. I have been provided with all their files relating to complaints and I am satisfied that the few complaints that were received were handled promptly and thoroughly.

9.6 There were 4 complaints this year -

9.7 On 17th August 2018 the Army was asked by the office of Gavin Robinson MP (DUP) about helicopter activity around the Palace Barracks in **Holywood** on the evening/early morning of 16th/17th August. The Army replied on 17th August that the rotary wing annoyance was not due to any army activity. A possible explanation was that the disturbance was caused by a police helicopter searching for a lost child.

9.8 On 18th September 2018 another complaint was received regarding night time helicopter activity at **Magherafelt**. The complaint was originally made through the Civil Aviation Authority. The papers show that the Army acknowledged on the following day that they did have helicopters in the area at the relevant time. A file note dated 15th October on the Army file shows that the Civil Aviation Authority had been advised of this and that the Army would look at any complaint that was raised. In the event, the complainant did not take the matter further;

9.9 On 20th September 2018 the NIO received correspondence from Sinn Fein MLA Dr Caoimhe Archibald (East Derry) about “ear splitting noise” caused by gunfire and explosions from the **Magilligan** area. The complaint was made by a resident in the Irish Republic. Army

records show that on 17th September there had been a “heavy day of firing” (including the use of tracers) between 09.55hrs and 13.18hrs in the course of vehicle anti ambush drills and also between 18.38hrs and 23.30hrs (night section attack drills). The MLA was sent a holding reply pending further investigation and on 5th October the Civilian Representative visited the MLA in Dungiven. He explained that the military and other agencies had used the training area in Magilligan on the day in question. He explained that, although complaints were rare they would be taken very seriously if they were genuine. He also informed her that the team who managed the ranges were fully engaged with the local community and worked hard to ensure that complaints were kept to a minimum but that ultimately training would continue. On the same day the Belfast Telegraph reported that the MLA had said that the training base at Magilligan should be taken out of the area. She was quoted as saying “*…we want to see an end to this type of activity and …the concerns of the local residents should be taken into account*.. *Twenty years on from the Good Friday Agreement, there should be no place for such installations whatsoever”*;

9.10 I followed up this complaint with the Army to find out –

(a) how frequently such noisy activities took place at Magilligan;

(b) whether any warning is given to residents before such activity took place;

(c) how often in the past there had been complaints about the noise.

Their response was –

(a) Magilligan is run by the Defence Training Estate to provide facilities for “dry training” (i.e. small arms weapons practice). The site is situated around the Magilligan point, bounded by Lough Foyle to the west and farmland to the east and south. HMP Magilligan sits on the western edge of the range complex. All the live firing ranges are orientated on a general north/south axis so the range area extends out to sea over the Magilligan Strand. The range complex is therefore governed by the prevailing wind conditions which can come across from the west over Donegal or run across the range complex inland or out to sea. Noise generated by range activity is therefore subject to these prevailing winds, the noise either being exaggerated and carried across neighbouring farms or dissipated out to sea. The sound of repeated firing can be disturbing. The training activity might last less than an hour or it can go on for days. There are two range sites in Northern Ireland (the other is just north of Newcastle at Ballykinler in County Down). Training is split across both sites and this can provide some respite for local residents. Intensive training can take place when preparing for overseas deployment (but not on the scale experienced by, for example, the residents of Salisbury Plain in England). Nevertheless “noisy activity” is a regular occurrence in and around Magilligan;

(b) the movement of weapons and ammunition is carefully controlled for security reasons and weapons are not held locally at Magilligan (or Ballykinler). They are transported to Magilligan in preparation for training. Consequently, consultation with the local community is not normally undertaken in order to protect the movement of troops, weapons and ammunition. However, there have been occasions in the past when local residents have been consulted eg air to ground gunnery practice prior to the G8 in Northern Ireland in 2013 – but engagement with the local community is the exception rather than the rule.

Nevertheless, the Army's relations with local farmers is good – some of whom graze their livestock on the range;

(c) complaints about range activity are sporadic and mostly concern the straying of tenant farm livestock, which graze on the range, straying onto neighbouring farmland.

9.11 On 24th October 2018 the NIO received a complaint that at 09.00hrs on 22nd September an 80 year old man, driving a quad bike through his land in **Cushendall** and in view of his house, came across two soldiers in camouflage gear wearing night sights and carrying rifles. The complaint was made by a relative of the driver via the Department of Foreign Affairs in Dublin. The complaint was referred to the Army who investigated the matter and concluded that the two men were not members of the Army. The NIO replied accordingly on 22nd November to the Department of Foreign Affairs and said that if the complainant wished to pursue his complaint then he should contact the Civil Representative. Nothing further was heard from the complainant.

9.12 This, again, is a very low level of complaint. It should be noted that, of the 4 complaints made this year, 2 did not involve Army personnel and the other 2 were not pursued after the Army had responded to the initial complaint.

10. ROAD CLOSURES AND LAND REQUISITIONS

10.1 There are powers in sections 29 to 32 for the Secretary of State to close roads and requisition land for the preservation of peace or the maintenance of order. In line with Agency Arrangements agreed between the Secretary of State and the DoJ (see paragraph 10.2 of the 7th Report) the requisition power in section 29 and the road closure power in section 32 can, in respect of devolved matters, be exercised by the DoJ. Again there have been few developments during this period and these road closures and land requisitions remain, for the time being, relatively uncontroversial.

10.2 As in previous years the DoJ made two land requisitions in Belfast under Section 29 – both relating to Orange Order parades and both made for the purpose of protecting public order –

(a) one for the annual Whiterock Parade on 29th June to requisition a site on the Forthriver Business Park in West Belfast (which is owned by Invest NI) in connection with the policing operation;

(b) one for the 12th July parade to requisition the same site in connection with the policing operation.

Both requisitions were for the minimum duration (24 hours) to ensure that public order was maintained.

10.3 The 4 road closures made by the Secretary of State under section 32 for national security purposes remain – see paragraph 13.4 of the 11th Report.

10.4 The powers in sections 29 to 32 are now largely exercised by the DoJ for the purposes of maintaining public order. However, they have their origin in the Northern Ireland (Emergency Provisions) Act 1973. The legislative history is as follows -

(a) section 17(2) of the 1973 Act permitted an authorisation to acquire land to be made for the preservation of the peace and the maintenance order – those powers are now in section 29;

(b) section 17(3) of the 1973 Act gave police officers and security forces powers to close roads temporarily;

(c) The powers in section 17 were then replicated in sections 19(2) and (3) of the Northern Ireland (Emergency Provisions) Act 1978;

(d) the power to make "permanent" road closures by order (now in section 32) was only introduced later when section 8 of the Northern Ireland (Emergency Provisions) Act 1987 inserted section 19A (road closure) into the 1978 Act;

(e) these provisions were re-enacted in the Northern Ireland (Emergency Provisions) Act 1991 - section 24(2) of that Act was what is now section 29; section 24(3) was what is now section 30; and section 25 was what is now section 32;

(f) again these provisions were re-enacted in the Terrorism Act 2000 – section 91 (the current section 29 of the JSA), section 92 (the current section 30 of the JSA); and section 94 (section 32 of the JSA).

10.5 The peace lines in Northern Ireland were established over decades using these powers. I received some representations about the DoJ's handling of peace lines. The Independent Reviewer of the JSA has not since 2007 previously looked at this issue but it appears to fall within the JSA remit. Peace lines are in place for public order (i.e. devolved) purposes and are the responsibility of the DoJ. The DoJ reports annually to the Secretary of State on the exercise of these powers.

11. RECOMMENDATIONS

11.1 A number of recommendations made in previous Reports are summarized at paragraphs 15.1 to 15.7 of the Eleventh Report and are not repeated here.

11.2 Four new recommendations were made in the Eleventh Report-

(a) **BWV should always be used in any case involving a child where JSA powers are used**. The PSNI have accepted this recommendation. PSNI email instructions to officers direct that BWV must be used in all cases where JSA powers are used;

(b) **Where BWV is not so used, this must be reported to a supervising officer with an explanation.** The PSNI have accepted this recommendation. Currently, where an officer uses JSA powers they must specify if BWV is used and, if that is not the case, the reasons why not. The PSNI have made arrangements for the automated flagging to the first line manager of **all** stop and search encounters where BWV has not been used. This will facilitate early identification of trends. At present supervisor dip sampling will not capture all cases where BWV has not been used;

(c) **a record should be kept of all computers and laptops seized and retained under JSA powers together with the duration of the retention.** The PSNI have accepted this recommendation. During this reporting period, it was not possible to provide this information although it was clear that of the 206 premises searched under Section 25/Schedule 3, 63

were premises where computers, laptops and tablets were seized. The PSNI are working on a system of retrieving this information for inclusion in the next Report:

(d) **Senior management in the PSNI, having looked at other ways of delivering community monitoring should now consider whether this could be done on the basis of officer perception**. This recommendation only required senior management in the PSNI to consider whether community monitoring could now be done on the basis of officer perception. The PSNI response was that there was no legal basis for them to do this. This will need to be reviewed in the light of the Court of Appeal's judgment in **Ramsey** (see paragraphs 5.1 to 5.6 above)

New recommendations

11.3 There are 3 new recommendations -

(a) if the litigation in **Ramsey** has now ended the PSNI should, in the light of the Court of Appeal's judgment

- make arrangements to ensure that the basis of each stop and search is recorded;

- give further consideration to implementing the NIPB's recommendation in relation to community monitoring and to do so on the basis of independent legal advice from Counsel specialising in the highly technical area of GDPR;

(b) an assessment of how effectively a first line manager has supervised the use of JSA should be part of his annual performance review (paragraph 7.43);

(c) the covering note from PSNI to the NIO about the intelligence underpinning the application for an extension of an authorisation should, where necessary, explain how the intelligence relates to the use (or threat of use) of munitions (paragraph 8.2(a)).

PART 2 – NON-JURY TRIALS (NJTs)

12. BACKGROUND

12.1 The provisions of the JSA relating to NJTs are set out in sections 1 to 9 and are at **Annex F** and the PPS's internal guidance on how these provisions are to be applied is at **Annex G**. Section 9 provides that these provisions shall expire after two years unless the Secretary of State by order extends that period for a further two years. Such an order has to be approved by both Houses of Parliament. The duration of these provisions has been extended by successive orders since 2007. These provisions were most recently extended until 31st July 2021 by the Justice and Security (Northern Ireland) Act 2007 (extension of duration of non-jury trial provisions) Order 2019. In 2017 the then Parliamentary Under-Secretary of State at the NIO, Chloe Smith MP said that –

"*As an extra and new measure of assurance, the independent reviewer of the 2007 Act will review the non-jury trial system as part of his annual review cycle, the results of which will be made available to the public in his published report. We hope that gives some extra reassurance to those interested in these issues".*

Accordingly, Part 2 of the 10th Annual Report addressed this issue. It sets out my terms of reference, the statutory framework and the wider context. It also describes the risks to

criminal trials in Northern Ireland; the nature and robustness of the NJT procedures; and juror protection measures. It also contains an analysis of sampled cases, sets out the criticisms of the current arrangements and makes some modest recommendations for their improvement. **So this Report (together with Part 2 of the 11th Report) is supplementary to the main analysis in the 10th Report**.

12.2 Broadly speaking, the analysis in the 10th Report stands and is not repeated here. The purpose of this part of the Report is to -

(a) consider the impact of recent legal challenges;

(b) analyse cases where NJT certificates have been issued in the past year;

(c) consider the conflicting views about the need for NJTs;

(d) set out further recommendations.

13. LEGAL CHALLENGES

13.1 The Supreme Court considered the NJT provisions of the JSA **In the matter of an application by Dennis Hutchings for Judicial Review (Northern Ireland) [2019] UKSC 26**. That case concerns a former British soldier who is being prosecuted in connection with a fatal shooting in 1974. The defendant challenged the decision of the DPP to grant a NJT certificate in his case. The DPP's decision was based on Condition 4 i.e. "the offence….was committed to any extent (whether directly or indirectly) as a result of, or in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons". He was further satisfied that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

13.2 The certified question for the Supreme Court was whether a true construction of Condition 4 in section 1(1) of the Act …includes "a member of the armed forces shooting a person he suspected of being a member of the IRA?". The Supreme Court held that the wording of Condition 4 was wide enough to cover this situation and dismissed the appeal.

13.3 The appellant had also argued that he should have been given an opportunity to make representations to the DPP before a certificate was granted. The Supreme Court held that, in the circumstances of this case, there was no such obligation. However, it concluded by observing –

"*That is not to say there will never be occasion where some information can be provided which would assist in the making of representations by a person affected by the issue of a certificate. I refrain from speculation as to how and when such an occasion might arise. I am entirely satisfied, however, that it does not arise in the present case".*

13.4 Although all future cases will be dealt with on their individual merits, two conclusions can be drawn from this judgment –

(a) it is highly likely that, unless the JSA is amended, any future prosecution of a former British soldier for acts committed during the Troubles will be tried without a jury;

(b) the DPP will, when considering an application for a NJT, need to consider whether there are any exceptional circumstances in any case which require further information to be

provided to the defendant - but that will clearly not be necessary other than in the most exceptional circumstances.

14. ANALYSIS OF RECENT CASES

14.1 The cases which were sampled are the 14 cases listed in **Annex H** all of which are cases where the DPP's decision whether or not to issue a NJT certificate were made between August 1st 2018 and July 31st 2019. The cases involved charges of murder, grievous bodily harm, membership of a proscribed organization, unlawful possession of ammunition, explosives and firearms, unlawful assembly and affray, demanding money with menaces, managing a brothel, blackmail, robbery, arson and the supply of Class A drugs. The cases involved defendants who were or had been members (or their associates) of a number of proscribed organizations across the political divide. The cases were dealt with thoroughly and in a highly professional manner following at all times the procedure set out in paragraphs 19.1 to 19.5 of the 10th Report. The intelligence from the PSNI was comprehensive and the consideration by the PPS of the relevant statutory tests was thorough and professional.

14.2 The process involved a significant degree of internal challenge both within the PSNI and PPS and also between those two organizations. In some cases the Criminal Justice section of the PSNI challenged the significance of the intelligence provided by the PSNI's C3 Intelligence Branch. In some cases the PPS thought the PSNI had been too restrictive in their consideration of whether the relevant Conditions had been satisfied and in other cases the PPS took the opposite view. So of the 13 cases where a certificate was granted, the PSNI and PPS only agreed on the same Condition (or set of Conditions) in 5 cases. This suggests a high degree of analysis and challenge and is consistent with a thorough and scrupulous adherence to the statutory process.

14.3 In the 11th Report I said (at paragraph 17.3(c)) that the response time by the PSNI to the PPS request for information was too slow – on average it was 7 months; the shortest response time was 6 weeks and the longest was 12 months. Between August 1st 2018 and July 31st 2019 the average response rate was 7 weeks – the shortest response time was 1 week and the longest was 7 months. In 8 of the 14 cases the PSNI response took one month or less. This is a significant improvement.

14.4. Other points to note are –

(a) all cases were properly considered on their merits. Particular significance was given to whether the defendant was a current or senior member of the proscribed organization; the extent to which the connection with the proscribed organization was central to the case; and whether there were indicators suggesting a specific risk of paramilitary intimidation – for example, in one case members of the public who witnessed the incident declined to make statements to the police because they feared retribution;

(b) in the one case where a certificate was refused there was insufficient intelligence to support the view that any of the conditions were met although there was a "spectre" of involvement by a proscribed organization;

(c) in no case was any reliance placed on Condition 3 – namely that an attempt had been made to prejudice the investigation or prosecution of the offence by or on behalf of a proscribed organization;

(d) the DPP recused himself in one case because of a risk of a perceived conflict of interest;

(e) the regular meetings between the PPS and PSNI (as recommended in paragraph 23.2(b)) of the 10th Report) have proved helpful;

(f) the certificates relating to the NJTs listed in **Annex J** have only been recently issued so no analysis of acquittal rates is possible because an insufficient number of these trials have been completed;

(g) the number of NJTs remains a small proportion of the overall number of crown court trials. As the then Parliamentary Under-Secretary of State said on 4th June 2019 in the debate on the order renewing these provisions *"over the last 10 years non-jury trials have consistently accounted for less than 2% of all Crown Court cases".* In the past year (1st August 2018 to 31st July 2019) 10 non-juror defendants pleaded guilty on all charges; 25 pleaded not guilty on at least one charge and were found guilty on at least one of those charges; and 7 were acquitted on all charges. That makes a total of 42 non-jury disposals – as opposed to 1,454 disposals for all other defendants (i.e. just under 3% of the total disposals in the Crown Court).

15. CONFLICTING VIEWS ON THE NEED FOR NJTs

15.1 Opinion is divided about the continuing need for NJTs. The NIO point to the continuing threat posed by paramilitary organizations and the fact that the threat level remains at SEVERE. The issue is whether that threat translates into a specific risk to jury trials and, if so, whether there are other means of addressing that risk which does not involve removing the right to jury trial.

15.2 Community leaders representing both sides of the sectarian divide, together with the PSNI and other commentators, have said that there is a clear risk posed by paramilitary organizations to the administration of justice. They emphasize the general capacity of those organizations to control and intimidate local communities. For example, they refer to the fact that there has never been a conviction for a punishment beating based on witness evidence; the notices on the Creggan Estate that informers will be shot; and the difficulty of securing contractors to dismantle unlawful bonfires. Lord Anderson QC, the former Independent Reviewer of Terrorism Legislation highlighted the fact that the conversion of intelligence into evidence is a challenge in many terrorism related investigations but appears to be particularly difficult in Northern Ireland because suspects can operate locally and they often leave no online trace. Moreover, it is sometimes necessary to protect sources of intelligence and there is a fear of retaliation on the part of witnesses (a feature of small tight-knit communities). I reviewed one recent case in which a NJT certificate had been granted where it was clear that members of the public who had witnessed the crime had declined to make statements to the police because they feared retribution.

15.3 However, others – again on both sides of the community – have pointed to the fact that there is no evidence of juror intimidation (for example in the context of inquests). It is relevant to note that in none of the cases listed in **Annex H** was any reliance placed on

Condition 3 – namely that an attempt had been made to prejudice the investigation or prosecution of the offence by or on behalf of a proscribed organization. They also point out that the NJT provisions were only designed to be temporary (hence the need for renewal every 2 years) and the need for "normalization" requires a move away from NJTs. The Bar, in particular, take the view that existing juror protection measures should be used more often to reduce the number of NJTs. On this side of the argument it has been pointed out that the NIO have never set out the circumstances in which they would be content to see the NJT provisions of the JSA repealed. These concerns reflect those of Lord Eames, the former Primate of All Ireland and Archbishop of Armagh, when he said during the renewal debate on 4th June that –

"The Minister has rightly told us that the situation at the moment demands a continuation of this unique way of administering criminal justice but I am a little troubled by the assumptions that public speakers are wont to use. They say "The situation continues" or "The problem exists". It is easy to make bland assumptions, so can the Minister first tell the House a little more of the methodology that the Government will exercise to reach the point of deciding that an order of this nature is no longer necessary…..Are we to be continually told that the situation continues to demand such exceptional measures? That is the reason for my question: what criteria will Her Majesty's Government utilise when, please God, the time comes that this will be a thing of the past".

15.4 In addition concern was expressed about the Consultation process which the NIO undertakes before each extension of these provisions by Parliament. Interested parties are invited to submit their views but there is no dialogue and each contribution is "blind" in the sense that there is no opportunity to challenge the views of other consultees. The majority of those consulted take the cautious view that nothing has changed sufficiently to justify a move away from the NJT system.

15.5 It is also worth noting, in this context, that the threshold for deciding whether to issue a certificate is very low. As Lord Kerr said in **Hutchings** –

"*The Director need only suspect that one of the stipulated conditions (in this case Condition 4) is met and that there is a risk that the administration of justice might be impaired if there was a jury trial. The circumstances in which such a risk might materialize and the specific nature of the risk or the impairment to the administration of justice which might be occasioned are not specified. It can only be supposed that these matters were deliberately left open-ended. The type of decision which the Director must take can be of the instinctual, impressionistic kind. Whilst the Director must, of course, be able to point to reasons for his decision, one can readily envisage that it may frequently not be based on hard evidence but on unverified intelligence or suspicions, or on general experience. It may partake of supposition and prediction of a possible outcome rather than a firm conclusion drawn from established facts".*

In these circumstances it is inevitable, as a purely factual matter, that some NJTs must have taken place in the past in circumstances where the risk on which the certificate was based would not, in reality, have materialised.

15.6 To sum up, there are conflicting views about the need to continue these NJT provisions. Under the current arrangements it is clear that there is an inbuilt bias against any move towards "normalization" and the repeal of the NJT provisions because –

(a) the current system is efficient, works well and delivers fair trials;

(b) it can plausibly be argued that nothing should change until the conditions for change are absolutely right ("the perfect being the enemy of the good" in the words of one commentator);

(c) persevering with the current arrangements for NJTs is the easier and safer option – removing NJTs would be a bold step.

15.7 If there is to be a move away from NJTs at some point in the foreseeable future then some proactive measures – not without risk – will have to be taken.

16. RECOMMENDATIONS

16.1 The choice then is between continuing with the current arrangements through renewal every two years or removing NJTs altogether. However, **within the confines of the current statutory arrangements**, there are two approaches which might be explored to pave the way towards a return to jury trials (which is the universally agreed aim) -

(a) the NIO could, in addition to conducting their Consultation with interested parties every two years, consider setting up a working party to look at the feasibility of using existing juror protection measures to reduce still further the number of NJTs. It is clearly the view of practitioners at the Bar that there is potential for greater use of such measures. Such a group could include representatives from the PPS, PSNI, the Court Service, the Bar, the Law Society and independent organizations with an interest in these matters. It could examine whether, within the framework of the JSA, practical measures could be taken to reduce the number of NJTs – for example by having jurors from outside the District where the case is to be heard; by screening jurors; relocating trials within Northern Ireland etc. Some of these issues have recently been considered in the round by the High Court in Belfast in **R v Laverty [2019] NICC 4** in a judgment delivered on 1st March 2019 (a murder case where there were contemporaneous and extensive postings on social media sites which were associated with the local community and which were both prejudicial and inaccurate). It is quite possible that such a working party might fail to agree on the potential for using such measures in cases where there is a paramilitary dimension – but at least there would have been a dialogue between the interested parties which the current consultation process does not allow. Moreover, if this process did take place (even if it failed to produce an agreed outcome), the Secretary of State would be in a stronger position to ask for a further extension of the existing arrangements in 2021. As Lord Reid of Cardowan said in the renewal debate –

"..it is therefore essential that not only will there be a regular review of this but that there will be a deep and meaningful study between each review".

(b) the test for the issuing of a NJT certificate is very low (see Lord Kerr at paragraph 15.5 above) and so it is inevitable that some NJTs will have taken place in circumstances where no juror intimidation would, in reality, have taken place. It is clear from the papers that the risk to the administration of justice is much stronger in some cases than others. The DPP could consider using his discretion not to issue a certificate in those cases where the very low threshold is only just met (possibly in conjunction with juror protection measures). This would be an experimental step - but it is worth noting that that if a jury trial did take place in these circumstances and it subsequently emerged that there was **evidence** (as opposed to

mere suspicion) of jury tampering the judge could, under section 46 of the CJA, either continue without a jury or order a new trial to take place. (It should be pointed out that section 46 is only concerned with juror intimidation and would not be triggered by evidence of jury bias).

16.2 I am not recommending that the NJT provisions should not be renewed in 2021. However, if these two suggestions were taken up and, consequently, even fewer NJTs took place, it could, over time, begin to build an evidential base for the removal of NJTs altogether. Whatever the outcome, they would inform any subsequent renewal debates in Parliament and demonstrate that all possibilities within the confines of the existing arrangements had been thoroughly explored. The alternative is, inevitably, the continuance of these provisions for the foreseeable future. Some positive action may be required by those working in the criminal justice system to pave the way for the end of the NJT system.

16.3 In the debate in the House of Commons on 4th June 2019 on the renewal of the NJT provisions, a question was raised about the review of the statutory test for issuing a NJT certificate. The Minister of State replied that –

"..*the independent reviewer of this legislation came up with a series of recommendations in his 11th report which we are in the process of addressing. I cannot see a proposal there to change these four criteria but if the hon Lady has any particular proposals she wants to suggest she should by all means write to me and we will see whether we can address them".*

It should be noted that my terms of reference (see paragraph 14.2 of the 10th Report) are to consider the operation of the existing arrangements and not to propose changes to the legislative framework. Such recommendations as I have made in this Report and the previous two Reports are confined to making the existing statutory arrangements work more effectively. In my view there is little point in legislating for a revised NJT scheme in Northern Ireland as yet another further stepping stone to "normalization". The number of NJTs is small and the issue now is how and when to move to a situation when they can be safely abolished without endangering the administration of justice. As a first step **I recommend that consideration be given to taking forward the two suggestions set out in paragraph 16.1 above.**

16.4 If and when a decision is taken to legislate to remove NJTs then there would be merit in combining that with a provision to reintroduce them quickly by affirmative resolution order if such a move were to prove premature.

ANNEX A – ACRONYMS

ACC – Assistant Chief Constable

BWV – Body Worn Video

CAJ – Committee for the Administration of Justice

CJINI – Criminal Justice Inspectorate (Northern Ireland)

CNR – Catholic/Nationalist/ Republican

Code – Code of Practice under section 34 of the JSA

DoJ – Department of Justice

DR – dissident republican

EOD – explosive ordnance disposal

ECHR – European Convention on Human Rights

GDPR – General Data Protection Regulation

IED – improvised explosive device

HRA – Human Rights Act 1988

JSA – Justice and Security (Northern Ireland) Act 2007

MI5 – Security Service

MLA – Member of the Legislative Assembly

MoD – Ministry of Defence

NGO – Non Governmental Organization

NIO – Northern Ireland Office

NJT – non-jury trial

Ombudsman – Police Ombudsman of Northern Ireland

PACE – Police and Criminal Evidence (Northern Ireland) Order 1989

PPS – Public Prosecution Service

PSNI – Police Service of Northern Ireland

PUL – Protestant/Unionist/Loyalist

TACT – Terrorism Act 2000

TSG –Tactical Support Group

ANNEX B – ORGANIZATIONS AND INDIVIDUALS CONSULTED

In relation to Part 1

Alliance Party

Alyson Kilpatrick BL

British/Irish Intergovernmental Secretariat

College of Policing, London

Donal McKeown, Bishop of Derry

Children's Law Centre

Coiste na nIarchimí (COISTE)

CAJ

CJINI

DoJ officials

DUP

Ex Prisoners Interpretative Centre (EPIC)

Father Gary Donegan

Joanne Hannigan QC

Jonathan Hall QC, Independent Reviewer of Terrorist Legislation

HQ (38) Irish Brigade

Include Youth

MI5

Northern Ireland Commissioner for Children

Northern Ireland Human Rights Commission

NIPB (Independent Members and Performance Committee)

Northern Ireland Youth Forum

Police Federation for Northern Ireland

Ombudsman

Police Superintendents Association

Professor John Topping (Queen's University)

Professor Jonny Byrne, University of Ulster

PUP

PSNI (Chief Constable and officers at all ranks)

SDLP

South Belfast Resource Centre

Sinn Fein

Ulster Unionist Party

John Wadham, Human Rights Adviser, NIPB.

In relation to Part 2

Chief Executive Northern Ireland Bar

Criminal Bar Association

MI5

NIO

Northern Ireland Human Rights Commission

PSNI

PPS

ANNEX C: SUMMARY OF POWERS

Part 1

This summary sets out the powers in the **Justice and Security (Northern Ireland) Act 2007 (2007 Act)** which are used by the PSNI and which are covered in the Code of Practice. For a full description of the powers reference should be made to the relevant section of the 2007 Act. More details on how the powers should be exercised are set out at the relevant sections of the Code.

Section	Power	Overview	Records
21	21(1) A constable may stop a person for so long as is necessary to question him to ascertain his identity and movements.	This power allows a police officer to stop and question a member of the public to establish their identity and movements. People stopped and questioned may be asked for their name, date of birth, and address. They may also be asked for identification. They may be asked to give details of their recent movements. A person commits an offence and may be prosecuted if they fail to stop when required to do so, if they refuse to answer a question addressed to them under this section or if they fail to answer to the best of his ability a question put to him.	A record of each stop and question must be made. The record will include details of the person's name, when they were stopped and questioned, and the officer number of the police officer who conducted the stop and question. Officers should inform those who have been stopped and questioned how they can obtain a copy of the record if required.
23	23(1) A constable may enter any premises if he considers it necessary in the course of operations for the preservation of peace and the maintenance of order.	This power allows a police officer to enter premises to keep the peace or maintain order. If the premises is a building (a structure with four walls and a roof), the police officer generally requires prior authorisation, either oral (from a Superintendent or above) or written (from an Inspector or above). However in circumstances where it is not reasonably practicable to obtain an authorisation (for example, where there is an urgent need to enter a building to preserve peace or maintain order) officers can enter a building without prior authorisation.	A record of each entry into a building must be made. Records are not required for any premises other than buildings. Records must be provided as soon as reasonably practicable to the owner or occupier of the building. Otherwise the officer should inform the owner or occupier how to obtain a copy of the record. The record will include the address of the building (if known), its location, the date and time of entry, the purpose of entry, the police number of each officer entering and the rank of the authorising officer (if any).

Section	Power	Overview	Records
24/ Schedule 3	Paragraph 2: An officer may enter and search any premises for the purpose of ascertaining whether there are any munitions unlawfully on the premises, or whether there is any wireless apparatus on the premises.	This power allows officers to enter and search any premises for munitions or wireless apparatus. For an officer to enter a dwelling, two conditions must be met: (i) he must reasonably suspect that munitions or wireless apparatus are in the dwelling (ii) he must have authorisation from an officer at least the rank of Inspector. Officers may be accompanied by other persons during the course of a search. During the course of a search, officers may make requirements of anyone on the premises or anyone who enters the premises to remain on the premises. For example, movement within the premises may be restricted, or entry into the premises not permitted. A person commits an offence and may be prosecuted if they fail to submit to a requirement or wilfully obstruct or seeks to frustrate a search of premises. A requirement may last up to four hours, unless extended for a further four hours if an officer at least the rank of Superintendent considers it necessary.	A written record for each search of premises must be made, unless it is not reasonably practicable to do so. A copy of this record will be given to the person who appears to the officer to be the occupier of the premises. The record will include the address of the premises searched, the date and time of the search, any damage caused during the course of the search and anything seized during the search. The record will also include the name of any person on the premises who appears to the officer to be the occupier of the premises. The record will provide the officer's police number.
24/ Schedule 3	Paragraph 4: A constable may search a person (whether or not that person is in a public place) whom the constable reasonably suspects to have munitions unlawfully with him or to have wireless apparatus with him.	This power allows officers to search people who they reasonably suspect to have munitions or wireless apparatus. Searches can take place whether or not someone is in a public place. If searches take place in public, officers can only require someone to remove their headgear, footwear, outer coat, jacket or gloves. The person may be detained for as long as is reasonably required for the search to be carried out. The search may be at or near the place where the person is stopped. Searches may also be conducted of people travelling in vehicles.	A written record of each stop and search must be made. The officer should inform the person how to obtain a copy of the record. The record will include details of the person's name, when they were stopped and searched, and the officer number of the police officer who conducted the stop and search.

Section	Power	Overview	Records
24/ Schedule 3	Paragraph 4A(1): A senior officer may give an authorisation under this paragraph in relation to a specified area or place.	This power allows a senior officer to authorise officers to stop and search people for munitions or wireless apparatus in specified locations. A senior officer can only make an authorisation if he reasonably suspects that the safety of any person may be endangered by the use of munitions or wireless apparatus. He must also reasonably consider that the authorisation is necessary to prevent such danger, and that the specified location and duration of the authorisation is no greater than necessary. The authorisation lasts for 48 hours, unless the Secretary of State confirms it for a period of up to 14 days from when the authorisation was first made. The Secretary of State may also restrict the area and duration of the authorisation or cancel it altogether. Whilst an authorisation is in place, officers may stop and search people for munitions and wireless apparatus whether or not they reasonably suspect that the person has munitions or wireless apparatus. Searches may take place in public. Officers may ask the person being searched to remove their headgear, footwear, outer coat, jacket or gloves. The person may be detained for as long as is reasonably required for the search to be carried out. The search may be at or near the place where the person is stopped. Searches may also be conducted of people travelling in vehicles.	A written record of each stop and search must be made. The officer should inform the person how to obtain a copy of the record. The record will include details of the person's name, when they were stopped and searched, and the officer number of the police officer who conducted the stop and search.
26 and 42	A power under section 24 or 25 to search premises also applies to vehicles, which include aircraft, hovercraft, train or vessel. The power includes the power to stop a vehicle (other than an aircraft which is airborne) and the power to take a vehicle or cause it to be taken, where necessary or expedient, to any place for the purposes of carrying out the search.	Section 42 extends the power to search premises to vehicles. Section 26 also gives officers the power to stop a vehicle (other than an aircraft which is airborne) and to take a vehicle, where necessary or expedient, to any place to carry out the search. A person commits an offence and may be prosecuted if he fails to stop a vehicle when required to do so. When an officer is carrying out a vehicle search he may require a person in/on the vehicle to remain with it, or to go to any place the vehicle is taken for a search. An officer may also use reasonable force to ensure compliance with these requirements.	A written record of each stop and search of a vehicle must be made. The officer should inform the person how to obtain a copy of the record. The record will include details of the person's name, when their vehicle was stopped and searched, and the officer number of the police officer who conducted the stop and search.

Part 2

This summary sets out the powers in the **Terrorism Act 2000 (TACT 2000)** which are used by the PSNI and which are covered in the Code of Practice. For a full description of the powers reference should be made to the relevant section of TACT 2000. More details on how the powers should be exercised are set out at the relevant sections of the Code.

Section	Power	Overview	Records
43	A constable may stop and search a person whom he reasonably suspects to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist.	A "terrorist" is defined in section 40 as a person who has committed one of a number of specified terrorist offences or a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. And the definition of "terrorism" is found in section 1 of TACT 2000. A constable may seize and retain anything which he discovers in the course of a search of a person under subsection (1) or (2) and which he reasonably suspects may constitute evidence that the person is a terrorist.	A written record of each stop and search must be made, preferably at the time. The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search. The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the date, time and place of the search, the purpose, grounds and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.
43(2)	A constable may search a person arrested under section 41 of TACT 2000 to discover whether he has in their possession anything which may constitute evidence that he is a terrorist.	A constable may seize and retain anything which he discovers in the course of a search of a person under subsection (1) or (2) and which he reasonably suspects may constitute evidence that the person is a terrorist.	A written record of each stop and search must be made, preferably at the time. The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search. The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the date, time and place of the search, the purpose, grounds and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.

Section	Power	Overview	Records
43(4B)(a)	When stopping a vehicle to exercise the power to stop a person under section 43(1), a constable may search the vehicle and anything in or on it to discover whether there is anything which may constitute evidence that the person concerned is a terrorist.	In exercising the power to stop a person a constable reasonably suspects to be a terrorist, he may stop a vehicle in order to do so (section 116(2) of TACT 2000). The power in section 43(4B)(a) allows the constable to search that vehicle in addition to the suspected person. The constable may seize and retain anything which he discovers in the course of such a search, and reasonably suspects may constitute evidence that the person is a terrorist. Nothing in subsection (4B) confers a power to search any person but the power to search in that subsection is in addition to the power in subsection (1) to search a person whom the constable reasonably suspects to be a terrorist. In other words this power does not allow a constable to search any person who is in the vehicle other than the person(s) whom the constable reasonably suspects to be a terrorist. Where the search takes place in public, there is no power for a constable to require the person to remove any clothing other than their headgear, outer coat, jacket and gloves. The person or vehicle may be detained only for as long as is reasonably required for the search to be carried out. The search should be at or near the place where the person is stopped. A constable may, if necessary, use reasonable force to exercise these powers.	A written record of each stop and search must be made, preferably at the time. The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search. The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the date, time and place of the search, the purpose, grounds and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.
43A	A constable may, if he reasonably suspects that a vehicle is being used for the purposes of terrorism, stop and search (a) vehicle, (b) the driver of the vehicle, (c) a passenger in the vehicle, (d) anything in or on the vehicle or carried by the driver or a passenger to discover whether there is anything which may constitute evidence that the vehicle is being used for the purposes of terrorism.	The definition of "terrorism" is found in section 1 of TACT 2000. A constable may seize and retain anything which he discovers in the course of a search under this section, and reasonably suspects may constitute evidence that the vehicle is being used for the purposes of terrorism. A constable may, if necessary, use reasonable force to exercise this power.	A written record of each stop and search must be made, preferably at the time. The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search. The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the registration number of the vehicle, the date, time and place of the search, the purpose, grounds and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.

Section	Power	Overview	Records
47A	A constable may stop and search a person or a vehicle in a specified area or place for evidence that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism, or evidence that the vehicle is being used for the purposes of terrorism. The specified area or place must be specified in an authorisation made by a senior police officer and where necessary confirmed by the Secretary of State in accordance with section 47A of, and Schedule 6B, to the Terrorism Act 2000.	A senior officer (an assistant chief constable or above) may given an authorisation under section 47A(1) in relation to a specified area or place if that officer (a) reasonably suspects that an act of terrorism will take place; and (b) reasonably considers that the authorisation is necessary to prevent such an act and that the specified area or place and the duration of the authorisation are no greater than necessary to prevent such an act. The authorisation may be given for a maximum period of 14 days, but it will cease to have effect after 48 hours unless the Secretary of State confirms it within that period. The Secretary of State may also restrict the area or duration of the authorisation or cancel it altogether. Whilst and where an authorisation is in place, a constable in uniform may stop and search persons or vehicles for the purpose of discovering whether there is evidence that the vehicle is being used for the purposes of terrorism or that the person is or has been involved in terrorism - whether or not the officer reasonably suspects that there is such evidence. A search may be of a vehicle, the driver, a passenger, anything in or on the vehicle or carried by the driver or passenger, a pedestrian or anything carried by the pedestrian. Where the search takes place in public, there is no power for a constable to require the person to remove any clothing other than their headgear, footwear, outer coat, jacket and gloves. The person or vehicle may be detained only for as long as is reasonably required for the search to be carried out. The search should be at or near the place where the person is stopped. A constable may, if necessary, use reasonable force to exercise these powers.	A written record of each stop and search must be made, preferably at the time. The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search. The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the date, time and place of the search, the fact that an authorisation is in place, the purpose and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.

ANNEX D: Statistics

Table 1: Police Service of Northern Ireland Summary Sheet

Justice and Security Act – 1st August 2018 - 31st July 2019

	Aug-18	Sep -18	Oct-18	Nov-18	Dec -18	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Total
1. JSA Section 21 - Number of persons stopped and questioned	110	108	121	124	100	105	79	100	127	84	77	98	**1,233**
2. JSA Section 23 - Power of Entry	0	0	0	0	0	0	0	0	0	1	2	2	**5**
3. JSA Section 24 (Schedule 3) - Munitions and Transmitters stop and searches													
No. of persons stopped and searched, public place:	514	438	543	660	475	471	471	540	442	308	301	401	**5,564**
No. of persons stopped and searched, private place:	15	9	8	10	5	4	3	4	15	3	4	10	**90**
Persons stopped and searched - total	**529**	**447**	**551**	**670**	**480**	**475**	**474**	**544**	**457**	**311**	**305**	**411**	**5,654**
JSA Section 24 (Schedule 3) - Searches of premises:													
No. of premises searched - Dwellings:	8	14	22	19	16	17	11	3	20	21	30	21	**202**
No. of premises searched - Other:	1	0	1	1	0	0	0	0	1	0	0	0	**4**
No. of occasions firearms, explosives and/or ammunition seized or retained [(a)]	0	1	1	1	1	1	0	0	0	0	1	2	**8**
JSA Section 24 (Schedule 3) Use of Specialists:													
Use of specialists - No. of occasions 'other' persons accompanied police:	0	0	0	0	0	0	0	0	0	0	0	0	**0**
4. JSA Section 26 (Schedule 3) - Search of Vehicles													
(1) (a) Vehicles stopped and searched under section 24	1,299	1,308	1,526	1,446	1,366	1,209	977	1,140	829	699	788	1,160	**13,747**
(1) (b) Vehicles taken to another location for search	3	0	1	1	1	2	0	0	0	0	1	0	**9**

(a) Excludes number of occasions in which replica firearms were seized.

Note*: The above statistics are provisional and may be subject to minor amendment.*

Source: Statistics Branch, Police Service of Northern Ireland, Lisnasharragh

Table 2: Use of Powers by Police in Northern Ireland under the Justice and Security (Northern Ireland) Act 2007 between 1st August 2018 and 31st July 2019

TABLE 2A			TABLE 2B	
Section 21 – Stop and Question			Section 23 – Power of Entry	
Year	**Number of Persons Stopped and Questioned**		**Year**	**Number of Premises Entered**
2018			**2018**	
August	110		August	0
September	108		September	0
October	121		October	0
November	124		November	0
December	100		December	0
2019			**2019**	
January	105		January	0
February	79		February	0
March	100		March	0
April	127		April	0
May	84		May	1
June	77		June	2
July	98		July	2
August 18 - July 19	**1,233**		**August 18 - July 19**	5

Note: The above statistics are provisional and may be subject to minor amendment.
Source: Statistics Branch, Police Service of Northern Ireland, Lisnasharragh

TABLE 2C			
Section 24 (Schedule 3)			
Munitions and Transmitters Stops and Searches			
Year	**Number of Persons Stopped and Searched by Police**		
	Public	**Private**	**Total**
2018			
August	514	15	**529**
September	438	9	**447**
October	543	8	**551**
November	660	10	**670**
December	475	5	**480**
2019			
January	471	4	**475**
February	471	3	**474**
March	540	4	**544**
April	442	15	**457**
May	308	3	**311**
June	301	4	**305**
July	401	10	**411**
August 18 - July 19	**5,564**	**90**	**5,654**

TABLE 2D				
Section 24 (Schedule 3)				
Searches of Premises				
Year	**Searches of Premises by Police**			
	Dwellings	**Other**	**Occasions firearms, explosives and/or ammunition seized or retained**	**Occasions 'other' persons accompanied police**
2018				
August	8	1	0	0
September	14	0	1	0
October	22	1	1	0
November	19	1	1	0
December	16	0	1	0
2019				
January	17	0	1	0
February	11	0	0	0
March	3	0	0	0
April	20	1	0	0
May	21	0	0	0
June	30	0	1	0
July	21	0	2	0
August 18 - July 19	**202**	**4**	**8**	**0**

Note*: The above statistics are provisional and may be subject to minor amendment.*

Source: Statistics Branch, Police Service of Northern Ireland, Lisnasharragh

Table 2E		
Section 26 (Schedule 3) – Searches of Vehicles		
Year	**Searches of Vehicles by Police**	
	Vehicles stopped and searched under JSA Section 24 (Schedule 3)	**Vehicles taken to another location for search**
2018		
August	1,299	3
September	1,308	0
October	1,526	1
November	1,446	1
December	1,366	1
2019		
January	1,209	2
February	977	0
March	1,140	0
April	829	0
May	699	0
June	788	1
July	1,160	0
August 18 - July 19	**13,747**	**9**

Note*: The above statistics are provisional and may be subject to minor amendment*

Source: Statistics Branch, Police Service of Northern Ireland, Lisnasharragh

Table 3

Number of Uses of Each Stop/Search and Question Legislative Power in Northern Ireland (i.e. under PACE, Misuse of Drugs Act, Firearms Order, Terrorism Act and Justice & Security Act)

1 August 2018 – 31 July 2019

Persons stopped and searched under:	Aug-18	Sep-18	Oct-18	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug 18 - Jul 19
PACE / MDA / F Order[b]	1,764	1,776	2,236	1,912	1,675	1,699	1,577	1,870	1,574	1,597	1,563	1,829	**21,072**
TACT S43	3	6	2	9	3	5	6	3	2	2	3	8	**52**
TACT S43A	1	1	0	1	0	2	2	1	0	2	1	3	**14**
TACT S47A	0	0	0	0	0	0	0	0	0	0	0	0	**0**
JSA Section 21	110	108	121	124	100	105	79	100	127	84	77	98	**1,233**
JSA Section 24	529	447	551	670	480	475	474	544	457	311	305	411	**5,654**
Other Legislations[c]	5	7	0	0	5	14	27	4	1	1	0	4	**68**
Total (Powers Used)[a]	**2,412**	**2,345**	**2,910**	**2,716**	**2,263**	**2,300**	**2,165**	**2,522**	**2,161**	**1,997**	**1,949**	**2,353**	**28,093**

(a) Please note that this is not the total number of persons stopped and searched/questioned as a stop and search/question can be carried out under a combination of different legislations e.g. JSA S24 and JSAS21.

(b) PACE, Misuse of Drugs Act (MDA) and the Firearms Order (F Order) figures are combined, as in previous years.

(c) Other Legislative powers' captures stops / searches conducted under the following less frequently used powers: Section 139B of the Criminal Justice Act 1988, Schedule 5 to the Terrorism Prevention and Investigation Measures Act 2011, Article 6 Crossbows (Northern Ireland) Order 1988, Article 25 Wildlife (Northern Ireland) Order 1985, Article 23B of The Public Order (Northern Ireland) Order 1987 and the Psychoactive Substances Act 2016

Note*: The above statistics are provisional and may be subject to minor amendment.*

1 August 2017 – 31 July 2018

Persons stopped and searched under:	Aug-17	Sep-17	Oct-17	Nov-17	Dec-17	Jan-18	Feb-18	Mar-18	Apr-18	May-18	Jun-18	Jul-18	Aug 17 - Jul 18
PACE / MDA / F Order[b]	1,792	2,246	2,204	1,786	1,972	1,676	1,675	1,756	1,628	1,653	1,585	1,687	**21,660**
TACT S43	10	6	3	6	7	5	11	2	5	5	7	4	**71**
TACT S43A	3	0	2	1	3	0	3	0	1	4	2	1	**20**
TACT S47A	0	0	0	0	0	0	0	0	0	0	0	0	**0**
JSA Section 21	145	91	111	124	153	116	118	133	104	155	101	76	**1,427**
JSA Section 24	433	399	457	544	616	659	671	558	462	536	389	478	**6,202**
Other Legislations	10	2	2	0	1	6	2	2	10	3	1	3	**42**
Total (Powers Used)[a,b]	**2,393**	**2,744**	**2,779**	**2,461**	**2,752**	**2,462**	**2,480**	**2,451**	**2,210**	**2,356**	**2,085**	**2,249**	**29,422**

(a) Please note that this is not the total number of persons stopped and searched/questioned as a stop and search/question can be carried out under two different legislations e.g. JSA S24 and JSA S21.

Table 3A

Longer Term Trend Information

Legislation	2004/05	2005/06	2006/07	2007/08	2008/09[1]	2009/10[1]	2010/11[1]	2011/12[1]	2012/13[1]	2013/14[1]	2014/15[1]	2015/16[1]	2016/17[1]	2017/18[1,9]	2018/19[1,9]
PACE / Misuse of Drugs Act / Firearms Order	14,434	16,036	16,174	15,362	20,011	23,990	22,785	20,746	20,910	24,428	22,189	25,151	21,876	22,628	21,062
TACT - Section 84[2]	3,838	3,299	1,576												
- Section 89[2]	2,684	1,906	718												
- Section 44[3]		448	913	3,358	9,548	28,770	9,156								
- Section 43/43A[4]				13	56	97	375	254	186	173	192	344	265	118	74
- Section 47A[5]								0	0	70	0	0	0	0	0
JSA - Section 21[2]				28	112	5,285	5,355	3,511	2,803	2,350	1,922	2,812	2,200	1,505	1,283
- Section 24 [2]				251	372	621	11,721	12,699	7,687	6,239	3,906	6,980	7,935	6,245	6,035
Other legislative powers[6]									294	417	190	97	140	32	79
Total uses of each legislative power[8]	**20,956**	**21,689**	**19,381**	**19,012**	**30,099**	**58,763**	**49,392**	**37,210**	**31,880**	**33,677**	**28,399**	**35,384**	**32,416**	**30,528**	**28,553**
Total no. of persons stopped and searched/questioned[7,9]	*20,956*	*21,689*	*19,381*	*19,012*	*30,099*	*53,885*	*45,394*	*35,268*	*30,502*	*32,590*	*27,539*	*34,171*	*31,274*	*29,882*	28,116

PACE / Misuse of Drugs Act / Firearms Order	*69%*	*74%*	*83%*	*81%*	*66%*	*41%*	*46%*	*56%*	*66%*	*73%*	*78%*	*71%*	*67%*	*74%*	*74%*
All Terrorism Act Powers	*31%*	*26%*	*17%*	*18%*	*32%*	*49%*	*19%*	*1%*	*1%*	*1%*	*1%*	*1%*	*1%*	*<0.5%*	*<0.5%*
All JSA Powers	*0%*	*0%*	*0%*	*1%*	*2%*	*10%*	*35%*	*44%*	*33%*	*26%*	*21%*	*28%*	*31%*	*25%*	*26%*
Other legislative powers	*0%*	*0%*	*0%*	*0%*	*0%*	*0%*	*0%*	*0%*	*1%*	*1%*	*1%*	*<0.5%*	*<0.5%*	*<0.5%*	*<0.5%*
All Powers[8]	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***	***100%***

Source: Statistics Branch, Police Service of Northern Ireland, Lisnasharragh

(1) Combinations of powers were not counted pre-08/09 therefore these figures are a count of the number of persons stopped. Figures from 08/09 are a count of the number of times each individual power was used.

(2) Part VII of the Terrorism Act lapsed from midnight on the 31st July 2007. As a result Section 84 of TACT was replaced by Section 24 of the Justice and Security Act (JSA) and Section 89 of TACT was replaced by JSA Section 21 (power to stop and question).

(3) Statistics Branch started collating TACT Section 44 data in July 2005. TACT Section 44 ceased on 7th July 2010.

(4) Statistics Branch started collating TACT Section 43 and 43A during quarter 3 of 2007/08.

(5) TACT Section 47A has been in place since March 2011 although the power has only been authorised for use during one period in May 2013.

(6) On the 31st October 2012 changes were made to the PSNI's STOPS database to ensure that stop/searches conducted under less frequently used powers would be captured under an 'Other legislative powers' category. 'Other legislative powers' captures stops / searches conducted under the following less frequently used powers: Schedule 5 to the Terrorism Act 2000, Section 139B of the Criminal Justice Act 1988, Schedule 5 to the Terrorism Prevention and Investigation Measures Act 2011, Article 6 Crossbows (Northern Ireland) Order 1988, Article 25 Wildlife (Northern Ireland) Order 1985, Article 23B of The Public Order (Northern Ireland) Order 1987 and the Psychoactive Substances Act 2016. Searches under Schedule 5 to the Terrorism Act 2000, which are searches under warrant, are excluded from 2017/18 figures onwards. Further details can be found under Comparability on page 3.

(7) The difference between total use of each power and total no. of persons stopped/searched will be due to persons stopped under combinations of powers being counted under each legislation used (i.e. someone stopped under JSA S21 and JSA S24 will have a count of one under each of these powers).

(8) Percentages may not sum to 100% due to rounding.

(9) An internal review was carried out to assess the PSNI's compliance with PACE legislation governing the recording of stop and searches under Articles 3-5. The review found that searches under the authority of a warrant and searches carried out after an arrest had been recorded, and subsequently reported, as searches under Articles 3–5 when in fact they are governed by other articles of PACE. In order to fully comply with PACE legislation and more accurately report the usage of stop and search powers, searches under the authority of a warrant and searches that have been carried out after an arrest have been excluded from the 2017/18 figures onwards. Figures reported for the period pre-2017/18 still contain such searches. The impact is an approximate 2.5% reduction in the total number of persons stopped and searched/questioned from 2017/18 onwards.

Explosive Ordnance Disposal (E.O.D) Activity in Support of the Police

Table 4

EOD Call Outs: 1 August 2018 to 31 July 2019

DATE	IED	EXPLOSION	HOAX	FALSE	INCENDIARY	FINDS	TOTAL
August 18	2	0	4	2	0	10	18
September 18	1	0	1	0	0	10	12
October 18	2	0	0	1	0	10	13
November18	4	0	3	1	0	12	20
December 18	1	1	1	1	0	10	14
January 19	0	1	4	3	0	13	21
February 19	2	1	2	0	0	14	19
March 19	0	3	0	4	0	10	17
April 19	2	1	4	3	0	21	31
May 19	1	0	2	2	1	10	16
June 19	3	1	2	2	0	16	24
July 19	1	0	14	1	0	8	24
TOTAL	19	8	37	20	1	144	229

ANNEX E – AUTHORISATION FORM

Reference Number:

Authorisation to Stop and Search – Para 4A, Schedule 3 under the Justice and Security Act (Northern Ireland) 2007

Applicants should retain a completed copy of this form for their own records

1) **Name of Applicant:**

2) **Length of Authorisation:**
For the purposes of calculating a 14 day period (**the maximum period available**), the day on which an authorisation is given is deemed to constitute a full day, regardless of the time it is authorised. For example, an authorisation given at 08.00hrs on 1 November must end no later than 23.59hrs on 14 November. It cannot run until 07.59hrs on 15 November (Please see Explanatory Notes for details).Please note that the duration of an authorisation should be "**no longer than is necessary**".

Authorisations must not be for the full 14 day period unless this is necessary.

Start date:	Number of days :
End date:	End time (if not 23.59):

3) **Location where powers to apply** (please specify):

Entire Area of Northern Ireland	[ ]	Map Attached	[ ]
Specific Area	[ ]	Map Attached	[ ]

4) **Reason for exercising Para 4A, Schedule 3 powers:**
Authorising Officers should only use the power when they **reasonably suspect** that the safety of any person might be endangered by the use of munitions or wireless apparatus, and he / she reasonably considers the authorisation **necessary** to prevent such danger (Please see Explanatory Notes for more detail).

5) **Authorising Officer:**
Authorising Officers must hold **substantive or temporary ACPO rank.** Officers **acting** in ACPO ranks may **not** authorise the use of **Para 4A, Schedule 3 powers**.

Signature.....	Date/Time
Print Name/Rank.....	Of Oral Authorisation (If applicable)
Date Signed.....	.....
Time Signed/Authorised from.....	Authorising Officer
	Of Oral Authorisation.....

Reference Number:

Authorisation to Stop and Search – Para 4A, Schedule 3 under the Justice and Security Act (Northern Ireland) 2007

1) Authorising Officers Rationale

2) Authorising Officer Contact and Telephone Number:

3) PSNI Human Rights Legal Advice

Authorising officers should confirm that they sought legal advice from the Human Rights Legal Adviser that the authorisation complies with the legislative provisions and the Statutory Code of Practice, and should provide a summary below to that effect.

4) **Assessment of the threat:**

Authorising Officers should provide a detailed account of the intelligence which has given rise to reasonable suspicion that the safety of any person might be endangered by the use of munitions or wireless apparatus. This should include classified material where it exists (Please see Explanatory Notes for more details).

5) **Relevant Information and/or circumstances over recent period:**

If an authorisation is one that covers a similar geographical area to the one immediately preceding it, information should be provided as to how the current situation has changed, or if it has not changed that it has been reassessed and remains relevant (Please see Explanatory Notes for more details).

6) **The use of Para 4A, Schedule 3 powers of the Justice & security Act (Northern Ireland) 2007 rather than other powers of stop and search:**

Authorising Officers should explain how the use of **Para 4A, Schedule 3** powers is an appropriate response to the circumstances and why powers under S.43 and S.43A of the Terrorism Act 2000 or other PACE powers are not deemed sufficient (Please see Explanatory Notes for more details).

7) **Description of and reasons for geographical extent of authorisation:**

Authorising Officer should identify the geographical extent of the Authorisation and should outline the reasons why the powers are required in a particular area. A map should be provided (Please see Explanatory Notes for more details).

The geographical extent of an authorisation should be "**no greater than necessary**"

8) **Description of and reasons for duration of authorisation:**
Authorising Officer should identify the duration of the Authorisation and should outline the reasons why the powers are required for this time.
The duration of an authorisation should be "**no greater than necessary**"

9) **Details of briefing and training provided to officers using the powers:**

Authorising Officers should demonstrate that all officers involved in exercising **Para 4A, Schedule 3** powers receive appropriate training and briefing in the use of the legislation and understand the limitations of these powers (Please see Explanatory Notes for more details).

10) **Practical Implementation of powers:**

The Authorising Officer should provide information about how the powers will be used and why. This may include the use of vehicle checkpoints, stops and searches of individuals operating in the area of the residences of security force members or security force establishments or other recognised targets of terrorist attack (depending on the nature of the threat). The authorising officer should indicate whether officers will be instructed to conduct stops and searches on the basis of particular indicators (e.g. behavioural indicators, types of items carried or clothes worn, types of vehicles etc), or whether the powers will be exercised on a random basis. If the powers are to be exercised on a random basis, the authorising officer should indicate why this is necessary and why searches based on particular indicators are not appropriate.

11) **Community engagement:**
The Authorising Officer should provide a detailed account on the steps that have been taken to engage those communities that will be affected by the authorisation. Where it has not been possible to carry out community engagement prior to authorisation, the Authorising Officer should carry out a retrospective review of the use of the powers (Please see Explanatory Notes for details).

12) **Policing Board engagement:**
Authorising Officers making **Para 4A, Schedule 3** authorisations should notify and engage with the Policing Board (Please see Explanatory Notes for details).

13) **(If applicable) Senior Officer Cancellation / Amendment:**
If at any stage during an authorisation the authorising officer ceases to be satisfied that the test for making the authorisation is met, they must cancel the authorisation immediately and inform the Secretary of State. A Senior Officer may also amend an authorisation by reducing the geographical extent of the authorisation or the duration or by changing the practical implementation of the powers. Where an authorisation is so amended, the Secretary of State must be informed.

Cancellation / Amendment Signature..... Print Name/Rank.....	Date signed..... Time signed.....
Details of cancellation / amendment:	

Explanatory Notes to Authorisation to Stop and Search under Para 4A, Schedule 3 of the Justice & Security Act (Northern Ireland) 2007

JSA 1

Point 2	**Length of authorisation** Start time is the time and date at which the authorising officer gives an oral authorisation or signs a written authorisation, whichever is earlier. The **maximum** period for an authorisation is **14 days**, and authorisations should **not** be made for the maximum period unless it is necessary to do so based on the intelligence about the particular threat. Authorisations should be for no longer than necessary. Justification should be provided for the length of an authorisation, setting out why the intelligence supports amount of time authorised. If an authorisation is one which is similar to another immediately preceding it, information should be provided as to why a new authorisation is justified and why the period of the initial authorisation was not sufficient. Where different areas or places are specified within one authorisation, different time periods may be specified in relation to each of these areas or places – indeed the time period necessary for each will need to be considered and justified. For the purposes of calculating a 14 day period, the day on which an authorisation is given is deemed to constitute a full day, regardless of the time it is authorised. For example, an authorisation given at 08.00hrs on 1 November must end no later than 23.59hrs on 14 November. It cannot run until 07.59hrs on 15 November. Authorising officers **must** assure themselves that the Authority does **not** run for more than the statutory 14 day limit. In the case of a new authorisation, an authorisation can be given before the expiry of the previous one if necessary. PSNI may authorise the use of section Para 4A, Schedule 3 powers for less than forty-eight hours, however, **continuous use of 48 hour-long authorisations, whereby the powers could remain in force on a "rolling" basis is not justifiable and would constitute an abuse of the provisions.**

Point 4	**Reason for exercising Para 4A, Schedule 3 powers** The test for authorising JSA powers is that the person giving it: must reasonably suspect that the safety of any person might be endangered by the use of munitions or wireless apparatus and reasonably considers the authorisation necessary to prevent such an act and that the area(s) or place(s) specified in the authorisation are no greater than is necessary and the duration of the authorisation is no longer than is necessary to prevent such an act.

JSA 2

Point 1	If an authorisation is one which covers a similar geographical area to one which immediately preceded it, information should be provided as to how the intelligence has changed since the previous authorisation was made, or if it has not changed, that it has been reassessed in the process of making the new authorisation, and that it remains relevant, and why. **Whilst it is possible to issue a successive authorisation for the same geographic areas, this will only be lawful if it is done on the basis of a fresh assessment of the intelligence, and if the authorising officer is satisfied that the authorisation is justified.**
Point 4	**Assessment of the threat** The Authorising Officer should provide a detailed account of the intelligence which has given rise to reasonable suspicion that the safety of any person might be endangered by the use of munitions or wireless apparatus. This should include classified material where it exists. Threat Assessments from International Terrorism and Dissident Irish Republican Terrorism are provided by JTAC and Security Service. Assessments of the threat to various aspects of the UK infrastructure, such as aviation, transport, military establishments are available and if necessary should be sought. If reference is made to JTAC or Security Service assessments, Authorising Officers should ensure that these references are to current material. A high state of alert may seem enough in itself to justify an authorisation of powers; however it is important to set out in the detail the relation between the threat assessment and the decision to authorise. Intelligence specific to particular dates may still be included, even if the relevant date has passed, if it is still believed to be current.
Point 5	**Information and/or circumstances over the recent period** Authorising Officers should provide information relating to recent events that are **specific** to the authorisation. Under this section an Authorising Officer should identify any current situations where terrorist activity may have increased **and** there is evidence to suggest this.
Point 6	**The use of Para 4A, Schedule 3 of the Justice & Security Act (Northern Ireland) 2007 rather than other powers of stop and search** Given they require reasonable suspicion in order to be exercised, Authorising Officers should consider the powers under sections 43 and 43A of the Terrorism Act 2000 and PACE for the

	purposes of stopping and searching individuals for the purposes of preventing or detecting an act of terrorism **before** the use of the no suspicion powers under Para 4A, Schedule 3 are considered. The powers authorised by Para 4A, Schedule 3 are only to be considered where it is not sufficient to use the powers in sections 43 or 43A or other PACE powers.
Point 7	**Description of and Reasons for Geographical Extent of an Authorisation** Authorisations which cover all of Northern Ireland should **not** be made unless they can be shown to be necessary. The wider a geographic area authorised, the more difficult it will be to demonstrate necessity. An authorisation should not provide for the powers to be used other than where they are considered necessary. This means authorisations must be as **limited** as possible and linked to addressing the suspected act of endangerment. In determining the area(s) or place(s) it is necessary to include in the authorisation it may be necessary to include consideration of the possibility that offenders may change their method or target of attack, and it will be necessary to consider what the appropriate operational response to the intelligence is (e.g. which areas would be necessary to authorise to intercept a suspect transporting a weapon). However, any authorisations must be as limited as possible and based on an assessment of the existing intelligence. New authorisations should be sought if there is a significant change in the nature of the particular threat or the Authorising Officer's understanding of it (and in such circumstances it will be appropriate to cancel the previous authorisation). Single authorisations may be given which cover a number of potential threats if that situation occurs. Authorisations should set out the nature of each threat and the operational response.
Point 8	**Description of and Reasons for Duration of Authorisation** Authorising Officer should identify the duration of the authorisation and should outline the reasons why the powers are required for this time. The duration of an authorisation should be **"No greater than necessary"**
Point 9	**Details of Briefing and Training provided to Officer using Para 4A, Schedule 3 Powers** Information should be provided which demonstrates that all officers involved in exercising Para 4A, Schedule 3 powers receive appropriate briefing and training in the use of the powers, including the broad reason for the use of the powers on each relevant occasion.
Point 10	**Practical Implementation of Powers** The Authorising Officer should provide information about how the powers will be used and why. This may include the use of vehicle checkpoints, stops and searches of individuals operating in the area of the residences of security force members or security force establishments or other recognised targets of terrorist attack (depending on the nature of the threat). The authorising officer should indicate whether officers will be instructed to conduct stops and searches on the basis of particular indicators (e.g. behavioural indicators, types of items carried or clothes worn, types of vehicles etc), or whether the powers will be exercised on a random basis. If the powers are to be exercised on a random basis, the authorising officer should indicate why this is necessary and why searches based on particular indicators are not appropriate.
Point 11	**Community engagement**

	Authorising Officers should demonstrate that communities have been engaged as fully as possible throughout the authorisation process. When using the power, PSNI may use existing community engagement arrangements. However, where stop and search powers affect sections of the community with whom channels of communication are difficult or non existent, these should be identified and put in place. Independent Advisory Groups (IAGs) should be as fully engaged as possible at all stages of an authorisation.
Point 12	**Policing Board engagement** Authorising Officers should notify and engage with the Policing Board. The Policing Board has an essential role in working with the PSNI to build community confidence in the appropriate use of stop and search, and can provide practical advice and guidance to help raise awareness of stop and search.

ANNEX F – NJT STATUTORY PROVISIONS

Sections 1-9 of JSA 2007

Trials on indictment without a jury

1 Issue of certificate

(1) This section applies in relation to a person charged with one or more indictable offences ("the defendant").

(2) The Director of Public Prosecutions for Northern Ireland may issue a certificate that any trial on indictment of the defendant (and of any person committed for trial with the defendant) is to be conducted without a jury if –

(a) he suspects that any of the following conditions is met, and

(b) he is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

(3) Condition 1 is that the defendant is, or is an associate (see subsection (9)) of, a person who –

(a) is a member of a proscribed organisation (see subsection (10)), or

(b) has at any time been a member of an organisation that was, at that time, a proscribed organisation.

(4) Condition 2 is that –

(a) the offence or any of the offences was committed on behalf of a proscribed organisation, or

(b) a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.

(5) Condition 3 is that an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and—

(a) the attempt was made on behalf of a proscribed organisation, or

(b) a proscribed organisation was otherwise involved with, or assisted in, the attempt.

(6) Condition 4 is that the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.

(7) In subsection (6) "religious or political hostility" means hostility based to any extent on—

(a) religious belief or political opinion,

(b) supposed religious belief or political opinion, or

(c) the absence or supposed absence of any, or any particular, religious belief or political opinion.

(8) In subsection (6) the references to persons and groups of persons need not include a reference to the defendant or to any victim of the offence or offences.

(9) For the purposes of this section a person (A) is the associate of another person (B) if—

(a) A is the spouse or a former spouse of B,

(b) A is the civil partner or a former civil partner of B,

(c) A and B (whether of different sexes or the same sex) live as partners, or have lived as partners, in an enduring family relationship,

(d) A is a friend of B, or

(e) A is a relative of B.

(10) For the purposes of this section an organisation is a proscribed organisation, in relation to any time, if at that time—

(a) it is (or was) proscribed (within the meaning given by section 11(4) of the Terrorism Act 2000 (c. 11)), and

(b) its activities are (or were) connected with the affairs of Northern Ireland.

2 Certificates: supplementary

(1) If a certificate under section 1 is issued in relation to any trial on indictment of a person charged with one or more indictable offences ("the defendant"), it must be lodged with the court before the arraignment of—

(a) the defendant, or

(b) any person committed for trial on indictment with the defendant.

(2) A certificate lodged under subsection (1) may be modified or withdrawn by giving notice to the court at any time before the arraignment of—

(a) the defendant, or

(b) any person committed for trial on indictment with the defendant.

(3) In this section "the court" means—

(a) in relation to a time before the committal for trial on indictment of the defendant, the magistrates' court before which any proceedings for the offence or any of the offences mentioned in subsection (1) are being, or have been, conducted;

(b) otherwise, the Crown Court.

3 Preliminary inquiry

(1) This section applies where a certificate under section 1 has been issued in relation to any trial on indictment of a person charged with one or more indictable offences.

(2) In proceedings before a magistrates' court for the offence or any of the offences, if the prosecution requests the court to conduct a preliminary inquiry into the offence the court must grant the request.

(3) In subsection (2) "preliminary inquiry" means a preliminary inquiry under the Magistrates' Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I. 26)).

(4) Subsection (2)—

(a) applies notwithstanding anything in Article 31 of that Order,

(b) does not apply in respect of an offence where the court considers that in the interests of justice a preliminary investigation should be conducted into the offence under that Order, and

(c) does not apply in respect of an extra-territorial offence (as defined in section 1(3) of the Criminal Jurisdiction Act 1975 (c. 59)).

4 Court for trial

(1) A trial on indictment in relation to which a certificate under section 1 has been issued is to be held only at the Crown Court sitting in Belfast, unless the Lord Chief Justice of Northern Ireland directs that—

(a) the trial,

(b) a part of the trial, or

(c) a class of trials within which the trial falls,

is to be held at the Crown Court sitting elsewhere.

(2) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under subsection (1)—

(a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002 (c. 26);

(b) a Lord Justice of Appeal (as defined in section 88 of that Act).

(3) If a person is committed for trial on indictment and a certificate under section 1 has been issued in relation to the trial, the person must be committed—

(a) to the Crown Court sitting in Belfast, or

(b) where a direction has been given under subsection (1) which concerns the trial, to the Crown Court sitting at the place specified in the direction;

and section 48 of the Judicature (Northern Ireland) Act 1978 (c. 23) (committal for trial on indictment) has effect accordingly.

(4) Where—

(a) a person is committed for trial on indictment otherwise than to the Crown Court sitting at the relevant venue, and

(b) a certificate under section 1 is subsequently issued in relation to the trial,

the person is to be treated as having been committed for trial to the Crown Court sitting at the relevant venue.

(5) In subsection (4) "the relevant venue", in relation to a trial, means—

(a) if the trial falls within a class specified in a direction under subsection (1)(c) (or would fall within such a class had a certificate under section 1 been issued in relation to the trial), the place specified in the direction;

(b) otherwise, Belfast.

(6) Where—

(a) a person is committed for trial to the Crown Court sitting in Belfast in accordance with subsection (3) or by virtue of subsection (4), and

(b) a direction is subsequently given under subsection (1), before the commencement of the trial, altering the place of trial,

the person is to be treated as having been committed for trial to the Crown Court sitting at the place specified in the direction.

5 Mode of trial on indictment

(1) The effect of a certificate issued under section 1 is that the trial on indictment of—

(a) the person to whom the certificate relates, and

(b) any person committed for trial with that person,

is to be conducted without a jury.

(2) Where a trial is conducted without a jury under this section, the court is to have all the powers, authorities and jurisdiction which the court would have had if the trial had been conducted with a jury (including power to determine any question and to make any finding which would be required to be determined or made by a jury).

(3) Except where the context otherwise requires, any reference in an enactment (including a provision of Northern Ireland legislation) to a jury, the verdict of a jury or the finding of a jury is to be read, in relation to a trial conducted without a jury under this section, as a reference to the court, the verdict of the court or the finding of the court.

(4) No inference may be drawn by the court from the fact that the certificate has been issued in relation to the trial.

(5) Without prejudice to subsection (2), where the court conducting a trial under this section—

(a) is not satisfied that a defendant is guilty of an offence for which he is being tried ("the offence charged"), but

(b) is satisfied that he is guilty of another offence of which a jury could have found him guilty on a trial for the offence charged,

the court may convict him of the other offence.

(6) Where a trial is conducted without a jury under this section and the court convicts a defendant (whether or not by virtue of subsection (5)), the court

must give a judgment which states the reasons for the conviction at, or as soon as reasonably practicable after, the time of the conviction.

(7) A person convicted of an offence on a trial under this section may, notwithstanding anything in sections 1 and 10(1) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47), appeal to the Court of Appeal under Part 1 of that Act—

(a) against his conviction, on any ground, without the leave of the Court of Appeal or a certificate of the judge of the court of trial;

(b) against sentence passed on conviction, without that leave, unless the sentence is fixed by law.

(8) Where a person is convicted of an offence on a trial under this section, the time for giving notice of appeal under section 16(1) of that Act is to run from the date of judgment (if later than the date from which it would run under that subsection).

(9) Article 16(4) of the Criminal Justice (Northern Ireland) Order 2004 (S.I. 2004/1500 (N.I. 9)) (leave of judge or Court of Appeal required for prosecution appeal under Part IV of that Order) does not apply in relation to a trial conducted under this section.

6 Rules of court

(1) Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of sections 1 to 5.

(2) Without limiting subsection (1), rules of court may in particular make provision for time limits which are to apply in connection with any provision of sections 1 to 5.

(3) Nothing in this section is to be taken as affecting the generality of any enactment (including a provision of Northern Ireland legislation) conferring powers to make rules of court.

7 Limitation on challenge of issue of certificate

(1) No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision or purported decision of the Director of Public Prosecutions for Northern Ireland in relation to the issue of a certificate under section 1, except on the grounds of—

(a) dishonesty,

(b) bad faith, or

(c) other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law).

(2) Subsection (1) is subject to section 7(1) of the Human Rights Act 1998 (c. 42) (claim that public authority has infringed Convention right).

8 Supplementary

(1) Nothing in sections 1 to 6 affects—

(a) the requirement under Article 49 of the Mental Health (Northern Ireland) Order 1986 (S.I. 1986/595 (N.I. 4)) that a question of fitness to be tried be determined by a jury, or

(b) the requirement under Article 49A of that Order that any question, finding or verdict mentioned in that Article be determined, made or returned by a jury.

(2) Schedule 1 (minor and consequential amendments relating to trials on indictment without a jury) shall have effect.

(3) The provisions of sections 1 to 7 and this section (and Schedule 1) apply in relation to offences committed before, as well as after, the coming into force of those provisions, but subject to any provision made by virtue of—

(a) section 4 of the Terrorism (Northern Ireland) Act 2006 (c. 4) (transitional provision in connection with expiry etc of Part 7 of the Terrorism Act 2000 (c. 11)), or

(b) section 53(7) of this Act.

(4) An order under section 4 of the Terrorism (Northern Ireland) Act 2006 may make provision disregarding any of the amendments made by Schedule 1 to this Act for any purpose specified in the order.

9 Duration of non-jury trial provisions

(1) Sections 1 to 8 (and Schedule 1) ("the non-jury trial provisions") shall expire at the end of the period of two years beginning with the day on which section 1 comes into force ("the effective period").

(2) But the Secretary of State may by order extend, or (on one or more occasions) further extend, the effective period.

(3) An order under subsection (2)—

(a) must be made before the time when the effective period would end but for the making of the order, and

(b) shall have the effect of extending, or further extending, that period for the period of two years beginning with that time.

(4) The expiry of the non-jury trial provisions shall not affect their application to a trial on indictment in relation to which—

(a) a certificate under section 1 has been issued, and

(b) the indictment has been presented,

before their expiry.

(5) The expiry of section 4 shall not affect the committal of a person for trial in accordance with subsection (3) of that section, or by virtue of subsection (4) or (6) of that section, to the Crown Court sitting in Belfast or elsewhere in a case where the indictment has not been presented before its expiry.

(6) The Secretary of State may by order make any amendments of enactments (including provisions of Northern Ireland legislation) that appear to him to be necessary or expedient in consequence of the expiry of the non-jury trial provisions.

(7) An order under this section—

(a) shall be made by statutory instrument, and

(b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

Section 44-46 of the CJA 2003

44 Application by prosecution for trial to be conducted without a jury where danger of jury tampering

(1) This section applies where one or more defendants are to be tried on indictment for one or more offences.

(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

(3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial

as to make it necessary in the interests of justice for the trial to be conducted without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place—

(a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial.

45 Procedure for applications under sections 43 and 44

(1) This section applies—

(a) to an application under section 43, and

(b) to an application under section 44.

(2) An application to which this section applies must be determined at a preparatory hearing (within the meaning of the 1987 Act or Part 3 of the 1996 Act).

(3) The parties to a preparatory hearing at which an application to which this section applies is to be determined must be given an opportunity to make representations with respect to the application.

(4) In section 7(1) of the 1987 Act (which sets out the purposes of preparatory hearings) for paragraphs (a) to (c) there is substituted—

"(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,

(b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,

(c) determining an application to which section 45 of the Criminal Justice Act 2003 applies,".

(5) In section 9(11) of that Act (appeal to Court of Appeal) after "above," there is inserted "from the refusal by a judge of an application to which section 45 of the Criminal Justice Act 2003 applies or from an order of a judge under section 43 or 44 of that Act which is made on the determination of such an application,".

(6) In section 29 of the 1996 Act (power to order preparatory hearing) after subsection (1) there is inserted—

"(1A) A judge of the Crown Court may also order that a preparatory hearing shall be held if an application to which section 45 of the Criminal Justice Act 2003 applies (application for trial without jury) is made."

(7) In subsection (2) of that section (which sets out the purposes of preparatory hearings) for paragraphs (a) to (c) there is substituted—

"(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,

(b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,

(c) determining an application to which section 45 of the Criminal Justice Act 2003 applies,".

(8) In subsections (3) and (4) of that section for "subsection (1)" there is substituted "this section".

(9) In section 35(1) of that Act (appeal to Court of Appeal) after "31(3)," there is inserted "from the refusal by a judge of an application to which section 45 of the Criminal Justice Act 2003 applies or from an order of a judge under section 43 or 44 of that Act which is made on the determination of such an application,".

(10) In this section –

"the 1987 Act" means the Criminal Justice Act 1987 (c. 38),

"the 1996 Act" means the Criminal Procedure and Investigations Act 1996 (c. 25).

46 Discharge of jury because of jury tampering

(1) This section applies where –

(a) a judge is minded during a trial on indictment to discharge the jury, and

(b) he is so minded because jury tampering appears to have taken place.

(2) Before taking any steps to discharge the jury, the judge must –

(a) inform the parties that he is minded to discharge the jury,

(b) inform the parties of the grounds on which he is so minded, and

(c) allow the parties an opportunity to make representations.

(3) Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied –

(a) that jury tampering has taken place, and

(b) that to continue the trial without a jury would be fair to the defendant or defendants;

but this is subject to subsection (4).

(4) If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial.

(5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled.

(6) Subsection (5) is without prejudice to any other power that the judge may have on terminating the trial.

(7) Subject to subsection (5), nothing in this section affects the application of section 43 or 44 in relation to any new trial which takes place following the termination of the trial.

ANNEX G – PPS GUIDANCE ON NJTs

Introduction

1. The decision that a trial should be conducted without a jury is taken by the Director under the provisions of section 1 of the Justice and Security (Northern Ireland) Act 2007. The 2007 Act replaced the former arrangements whereby certain offences were "scheduled" and trials on indictment proceeded without a jury unless the Attorney-General "de-scheduled" them (on the basis that the offences were not connected to the emergency situation within Northern Ireland). Section 1 requires an examination of circumstances potentially pertaining to the accused, the offence and / or the motivation for the offence. Whereas in the past the presumption was that a trial would be a non-jury trial unless the Attorney General certified otherwise, the presumption now is that a trial will be by jury unless the Director takes the positive step of issuing a certificate for a trial to proceed without a jury.

2. Section 1 of the 2007 Act provides for the Director to issue a certificate that any trial on indictment is to be conducted without a jury if he suspects that one or more of four statutory conditions are met and he is satisfied that, in view of this, there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

3. The decision to issue a certificate can be challenged by way of judicial review. By virtue of section 7 of the 2007 Act the scope of any such challenge is limited to grounds of dishonesty, bad faith, or other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law). See also the case of Arthurs [2010] NIQB 75.

4. The decision to issue a certificate is an extremely important one and prosecutors must ensure that applications to the Director contain all relevant details and are accurate. This document is intended to provide some practical guidance in this regard. Whilst there are a number of themes and issues that tend to recur in these applications they often give rise to their own specific issues and it is important that the information and evidence relevant to each particular application is carefully considered and analysed and that recommendations are based upon the merits of the individual case. I set out below what experience indicates are some of the main considerations that most frequently arise.

Condition 1 - the defendant is, or is an associate of, a person who is a member of a proscribed organisation, or has at any time been a member of an organisation that was, at that time, a proscribed organisation.

5. It is important that the information from police makes it clear which sub-condition of Condition 1 is relied upon. On occasion it is not apparent whether police consider that the intelligence indicates that a defendant is a member of a proscribed organisation, or merely an associate. If reliance is placed upon the defendant's association with a member, or members, of a proscribed organisation then that other person should, if possible, be identified. It may be important, for example, to know whether a defendant is an associate of a senior member of a proscribed organisation as this may make it more likely that the proscribed organisation would seek to influence the outcome of the trial than if the defendant is only an associate of a low-ranking member. Police and prosecutors should also be cognisant of the definition of "associate" provided for by section 1(9) of the 2007 Act:

For the purposes of this section a person (A) is the associate of another person (B) if –
(a) A is the spouse or a former spouse of B
(b) A is the civil partner or a former civil partner of B
(c) A and B (whether of different sexes or the same sex) live as partners, or have lived as partners, in an enduring family relationship,
(d) A is a friend of B, or
(e) A is a relative of B.

6. Whilst the term "associate" might normally be considered to include a broad range of persons including, for example, acquaintances, the definition in section 1(9) requires that the two individuals are in fact "friends" or have one of the other specific relationships referred to therein.

7. If possible, the information provided by police should also identify the particular proscribed organisation involved, rather than simply refer, for example, to "dissident republicans".

8. It is important also that the application is clear as to whether a defendant is a current or past member of a proscribed organisation. In the case of historical membership it will be important to ascertain, to the extent possible, when such membership ceased. Cases of historical membership can give rise to difficult issues in respect of whether a proscribed organisation is likely to seek to interfere with the administration of justice in respect of a past member. There have been cases in which condition 1 (ii) has been met but no risk to the administration of justice has been assessed as arising therefrom. This may be the case, for example, where the suspect is a former member of PIRA but has not subsequently associated himself with any organisation that is actively conducting a terrorist campaign. If these cases relate to overtly terrorist offences, it is often the position that Condition 4 is met; and that, whilst no risk to the administration of justice arises from a possibility of jury intimidation, it does arise from the possibility of a fearful or partial jury (see below).

Condition 2 - the offence or any of the offences was committed on behalf of the proscribed organisation, or a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.

9. There will be cases where there is specific intelligence that the offences were carried out on behalf of a proscribed organisation and this can obviously be relied upon. There will be cases in which such specific intelligence does not exist. However, in light of the information available in relation to Condition 1 and the nature of the offences being prosecuted, it may still be possible to be satisfied that Condition 2 is met. For example, if there is intelligence that D is a member of the "new IRA" and he is caught in possession of explosives, there is likely to be a proper basis for the Director to be satisfied that the offence of possession of explosives was committed by, or on behalf, of the new IRA. However, care must be exercised in this regard and an automatic assumption should not be made.

Condition 3 - an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and the attempt was made on behalf of a proscribed organisation or a proscribed organisation was otherwise involved with, or assisted in, the attempt.

10. It is rare that there is information that provides a basis for relying upon Condition 3. The cases in which it should be relied upon are usually readily apparent. The most obvious form

of an attempt to prejudice the investigation or prosecution would be the intimidation of a witness. In one previous case Condition 3 was satisfied by the involvement of a proscribed organisation in assisting the defendant to escape from lawful custody after he had been previously charged (in the 1970s) with the same offences.

Condition 4 - the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one group of persons towards another person or group of persons.

11. The scope of Condition 4 has been considered by the Divisional Court in the case of *Hutchings* [2017] NIQB 121 in which it was held that:

a. In principle there is a need to narrowly and strictly construe Section 1 of the 2007 Act in light of the strong presumption in favour of jury trial.

b. Nevertheless, it is important to remain faithful to the wording of the statute and its context notwithstanding the need to narrowly construe Section 1 of the Act and the statutory conditions are expressed in clear and unambiguous terms.

c. Condition 4 has to be read in its full context, set as it is in close juxtaposition to subsections (7) and (8).

d. In relation to the wording of Condition 4 itself the Court noted that:

i. It is couched in wide terms;
ii. It is not confined to the circumstances of Conditions 1, 2 and 3. The wording moves beyond the confines of the accused person being within a paramilitary organisation. It clearly envisages looking at the circumstances leading up to the offence being considered;
iii. The significance of the wording that the offence "was committed to any extent (whether directly or indirectly)" cannot be underestimated. This clearly widens the bracket of connective circumstances that can be embraced between the offence itself and the religious or political hostility;
iv. Political hostility can apply to "supposed" political opinion, again widening the reach of the section: para 38.

e. The phrase "political hostility" is in use daily in Northern Ireland and is easily understood. The most obvious examples of the situation arising out of Condition 4 may be incidents with a sectarian background but the wording of the statute is manifestly wide enough to embrace the scenario of the British Army engaging with suspected members of the IRA.

f. The wording of Condition 4 is such that Parliament clearly intended to include a broad reach of circumstances whilst at the same time recognizing that any legislation removing jury trial needs to be tightly construed.

12. Advice was previously sought from Senior Counsel in relation to the scope of Condition 4 in the context of dissident republicans being prosecuted for possession of firearms or explosives. In relation to the dissident republican organisations (ONH, RIRA and CIRA) referred to in a number of examples considered by Senior Counsel, he noted that "they all have, as one of their aims, the removal of the British presence in Northern Ireland. All have used, and continue to use, violent methods to further that aim and such methods have involved attacks on the security forces, i.e. members of the British army and members of the

PSNI. The use of such violent attacks has regularly and routinely involved the possession of firearms and explosive substances by members/associates of such organisations." In Senior Counsel's view, "such actions directed against members of the security forces, and the associated possession of prohibited items, are connected to political hostility."

13. It is often possible for the Director to be satisfied that Condition 4 is met in light of the nature of the offences, the evidence in the case and the information provided 96 by police in relation to conditions 1 and 2. In terrorist cases it is usually more appropriate to rely upon the connection to political, rather than religious, hostility.

Risks to the Administration of Justice

14. There are three main risks to the administration of justice that regularly arise as a result of one or more of the Conditions being met. They are:

a. The risk of a proscribed organisation intimidating the jury;
b. The risk of a fearful jury returning a perverse verdict;
c. The risk of a partial/hostile jury returning a perverse verdict.

15. Risk (a) will have to be considered in circumstances where any of Conditions (i) – (iii) are met. In advising PPS in relation to this risk police should provide an assessment of the threat currently posed by the relevant proscribed organisation. Formerly this was done by reference to the reports of the Independent Monitoring Commission. For some time these have been recognised as outdated and police will provide their own assessment. It is often helpful if police refer to recent incidents for which the particular proscribed organisation is believed to be responsible.

16. Risk (b) tends to be related to Condition 4 and the evidence in the case. The jury will not, of course, be made aware of the intelligence that forms the basis of the assessment in relation to Conditions 1 and 2. However, in many cases it will be apparent to the jury from the facts of the case and the evidence to be adduced that a proscribed organisation was involved. This is likely to generate fear for their personal safety and/or the safety of their families that may impact upon their verdict.

17. Risk (c) also tends to be related to Condition 4 and the facts of the case. It will often be the case that it will become apparent to the jury that the offences were committed by or on behalf of a republican or loyalist paramilitary organisation. There is a risk that certain members of the jury would be so influenced by hostility towards the defendant and/or his associates such that their ability to faithfully return a verdict based upon the evidence would be compromised. There may also be a risk that a juror would be biased in favour of the defendant and/or his associates.

18. The risk of jury bias can also arise in cases involving military shootings of suspected terrorists. In the Hutchings case referred to above, the Court found no reason to dispute the Director's conclusion that, where the context is of a soldier shooting an innocent bystander against the background of an IRA attack a short time before, this circumstance carries in its wake the risk of a partisan juror or jurors in at least parts of this province with all the attendant dangers of impairment of the administration of justice if that trial were to be conducted with a jury.

19. It should always be remembered that there needs to be a link between the Condition(s) that is satisfied and the risk to the administration of justice before the Director can issue a certificate.

Jury Measures

20. The Justice and Security (Northern Ireland) Act 2007 does not specifically refer to the potential for jury measures as a means of mitigating the risk posed to the administration of justice that arises from the circumstances in which the statutory conditions are met. However, it has been the practice of police and the Director to assess whether any such risk can be adequately mitigated by either (a) transferring the trial, or (b) screening or (c) sequestering the jury. It is helpful to consider how each of the jury measures might assist in relation to the various risks identified above.

Risk of jury intimidation

21. The transfer of the trial may be helpful if the proscribed organisation only has a very limited geographical reach. However, it is often the case that one is dealing with proscribed organisations with an ability to operate throughout the province and the ability to transfer the trial may be of little assistance in mitigating this risk.

22. Police and prosecutors should also be aware that an application to transfer the trial can be made in the Magistrates' Court at the committal hearing, although the matters which can be considered by the Court at that stage are specified by s.48(1) of the Judicature (Northern Ireland) Act 1978 as: (a) the convenience of the defence, the prosecution and the witnesses; (b) the expediting of the trial; and (c) any directions given by the Lord Chief Justice. Pursuant to s.48(2) of the 1978 Act the Crown Court has broader powers to give direction in relation to the place of trial and may have regard to considerations other than those contained in s.48(1): R v Morgan & Morgan Fuels and Lubes Limited [1998] NIJB 52. There is a strong presumption that a trial before a jury should be heard in the division in which the offence was committed, unless there is a statutory or other reason why this should not be the case: R v Grew & Ors [2008] NICC 6 at para 47 and R v Lewis & Ors [2008] NICC 16 at para 18. The onus will be on the prosecution to adduce evidence in support of an application to transfer. Furthermore, the courts may be reluctant to accept that any risk of intimidation can be materially alleviated by transferring the trial: R v Grew & Ors [2008] NICC 6 at para 50 referring to R v Mackle & Ors [2007] NIQB 105. Police and prosecutors therefore need to carefully consider the nature of any material that can be placed before a court in support of a potential application to transfer and the likelihood of a successful application in light of same.

23. Screening the jury prevents them from being seen by the public but does not prevent them from being seen by the defendant who could make a record of their appearance and pass that to his associates. Police have highlighted the further risk that jurors may be recognised by others called for jury service but not sworn on to the particular jury and there is a risk that these others could either deliberately or inadvertently pass on details of the jurors which would enable them to be targeted.

24. Sequestering the jury is a very draconian measure and police have often pointed out the potential for this to impact upon the jurors' lives and thereby impair their judgment, either in favour of or, more likely, against the defendant. In addition, police have advised that the

parochial nature of Northern Ireland would create a unique difficulty in the provision of anonymity and security of a jury.

Risk of a perverse verdict

25. In general terms it is difficult to see how any risk of a perverse verdict arising from a fearful or hostile jury could be mitigated by any of the available jury measures. Transferring the trial would not address any issues of partiality unless, perhaps, the partiality arises from feelings confined to a local community. This possibility was noted by Stephens J in the context of inquests in Jordan [2014] NIQB 11 when he pointed out that the community divisions in our society are such that the exact nature of the danger of a perverse verdict is influenced by the geographic location of an inquest.

26. A transfer of the trial may also be unlikely to address any issue of fear, as the jury would most likely not consider themselves (or their families) to be safe from a proscribed organisation even if the offence happened in another part of the province. Screening may provide some re-assurance but this is imperfect for the reasons referred to above (they can be seen by the defendant and others called for jury service but not sworn). There is also a risk that the highly unusual measure of screening the jury would in fact exacerbate any disposition to be fearful or partial because it would be such an unusual measure and suggest that the defendant and / or his associates are dangerous people who would seek to intimidate the juror or his / her family. The same can be said, perhaps with even greater force, in relation to the sequestration of the jury.

27. In relation to this latter point prosecutors should note two judgments delivered in the context of the power to order non-jury trial under section 44 of the Criminal Justice Act 2003. The first is R v Mackle and others [2007] NICA 37. When considering whether to order a non-jury trial in a case of jury tampering a court is enjoined to consider what steps might reasonably be taken to prevent jury tampering before deciding whether the likelihood of it occurring is so great that the order should be made. The Court of Appeal held that a consideration of what was reasonable extends to an examination of the impact any proposed step would have upon the jury's fair and dispassionate disposal of the case. The Court held that the steps proposed in that case (round the clock protection of the jury or their being sequestered throughout its duration) would lead to an incurable compromise of the jury's objectivity which could not be dispelled by an admonition from the trial judge.

28. The decision in Mackle & Ors was subsequently approved by the English Court of Appeal in R v Twomey & Ors [2009] EWCA Crim 1035 where the court agreed that if a misguided perception is created in the minds of the jury by the provision of high level protection, then such a step would not be reasonable. It was also relevant to consider the likely impact of measures on the ordinary lives of the jurors, performing their public responsibilities, and whether, in some cases at any rate, even the most intensive protective measures for individual jurors would be sufficient to prevent the improper exercise of pressure on them through members of their families who would not fall within the ambit of the protective measures.

29. The particular facts and circumstances of the Mackle and Twomey cases should be noted. In both cases the Court was considering very extensive and expensive measures designed to protect the jury. However, the general point about the potential for measures to undermine the objectivity of the jury is an important one that should be weighed in any

assessment of their potential to mitigate the risk to the administration of justice in any particular case.

Part 7 of the Criminal Justice Act 2003

30. When considering the risk of intimidation of jurors and whether a certificate for non-jury trial should issue, police and prosecutors should also note the powers contained within Part 7 of the Criminal Justice Act 2003 (referred to above) which allow the Judge, in certain circumstances where there has been jury tampering, to discharge the jury and direct that the trial be heard by a judge alone, or continue without a jury to hear the trial. However, this potential “safety net” does not relieve the Director from his responsibility to apply the statutory test set out in the 2007 Act based upon the information that is available to him at the time of his decision.

ANNEX H – NJT SAMPLED CASES

There were 14 certificates considered by the DPP between 1st August 2018 and 31st July 2019. The cases are listed below together with the DPP's decision; the date of that decision and a description of the offence.

R v Coleman; certificate granted in August 2018; supply of Class A drugs and possession of criminal property.

R v Johnston and Hutchinson; certificate granted in August 2018; possession of firearms and ammunition.

R v Lundy; certificate granted in August 2018; assault and aggravated burglary.

R v McLoughlin; certificate granted in September 2018; possession of explosives and firearm.

R v Crawford; certificate granted in October 2018; GBH, assault and possession of firearm.

R v McCormac; certificate granted November 2018; possession of firearms, robbery and arson.

R v Burke; certificate granted in January 2019; possession of explosives.

R v Lanigan; certificate granted in April 2019; murder and possession of firearm.

R v Sweeney; certificate refused in April 2019; blackmail.

R v Gillan and others; certificate granted April 2019; brothel keeping etc

R v Gillan; certificate granted April 2019; demanding money with menaces.

R v Majury and others; certificated granted May 2019; affray and unlawful assembly.

R v Murphy; certificate granted June 2019; firearms and possession of ammunition.

R v Lundy and Dean; certificate granted June 2019; membership of proscribed organization and possession etc.

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