



# The Policing You Don't See

Covert policing and the accountability gap:  
Five years on from the transfer of 'national security' primacy to MI5

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## What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

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

CAJ has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize. The organisations' activities include publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework, and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

However, CAJ would not be in a position to do any of this work without the financial help of its funders, both individual donors and charitable trusts, since CAJ does not accept government funding. We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Esmee Fairbairn Foundation, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON for their support.

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## Preface

The participants believe it essential that policing structures and arrangements are such that the police service is professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it polices, and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms. (*The Belfast/Good Friday Agreement*)<sup>1</sup>

The programme of police reform ushered in by the peace settlement placed great emphasis on accountability and transparency. As this report details, the Patten Report explicitly recommended that these principles should apply to covert policing. Despite this the British Government, in a paper appended to the 2006 St Andrews Agreement, set out “future national security arrangements in Northern Ireland” which shifted the most sensitive areas of covert policing in the opposite direction, effectively ring fencing them *outside* the post-Patten accountability arrangements.

The policy formalised the previously largely undeclared role of the Security Service (MI5) in covert policing in Northern Ireland and actually transferred primacy to MI5 over ‘national security’ policing, with the PSNI playing a seemingly subordinate role. The transparency in covert policing policy, codes of practice, legal and ethical standards envisaged by Patten and provided for in international standards sit uncomfortably with an agency which has a culture of operating entirely in secret. Not only is the Security Service not answerable to the accountability bodies set up to scrutinise the PSNI, but the agency is also exempt from freedom of information and even apparently fair employment monitoring requirements. MI5’s own oversight arrangements, which include a Tribunal which has never upheld a single complaint against the agency, have been heavily criticised by human rights groups.

October 2012 marks five years since the formal transfer of primacy for ‘national security’ policing from the PSNI to MI5 on the 10 October 2007. Ten years have elapsed since the post-Patten creation of the PSNI, almost fifteen years since the Belfast/Good Friday Agreement and over two years since the 2010 transfer of most – but clearly not all – policing and justice powers to the devolved institutions. It is an opportune moment to take stock of these developments.

CAJ has fought for reform of and accountability for all aspects of policing since our foundation. The 1998 Belfast/Good Friday Agreement and the resultant Independent Commission on Policing for Northern Ireland (the Patten Commission) brought about extensive reforms designed to enhance the accountability of policing. These included the reform of the Royal Ulster Constabulary (RUC) into the Police Service of Northern Ireland (PSNI), an independent police complaints mechanism (the Office of the Police Ombudsman for Northern Ireland), the establishment of an independent policing authority (the Northern Ireland Policing

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<sup>1</sup> Multi-Party Agreement, 1998, Policing and Justice, para 2.

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Board) composed of 19 political and independent members, as well as the establishment of local council based District Policing Partnerships to enhance local oversight. More recently in 2010 the devolution of most policing and justice powers took place to the power-sharing Executive and Assembly in Belfast. Although CAJ still has concerns about limitations and retrogression in this framework it is undeniable that there has been significant and substantial change for the better in the oversight of policing since the Agreement.

The question this report explores is the extent to which a gap has emerged in the accountability framework in relation to the most controversial, risk-laden area of policing: covert policing – ‘the policing you don’t see.’ In relation to defining covert policing the Patten Report indicates it includes: “interception, surveillance, informants and undercover operations.”<sup>2</sup> The Regulation of Investigatory Powers Act 2000 (RIPA) covers matters including the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, and the use of agents and informants. In the past and current context of Northern Ireland, a great deal of covert policing is focused on what St Andrews described as ‘national security’ policing. This is the area of policing and security policy which gave rise to many of the most serious human rights concerns during the conflict relating to ‘collusion’, the State otherwise acting outside of the rule of law and impunity for unlawful State actions. This, in particular, included the controversial role of agents and informants. In this context policy, oversight and accountability arrangements for covert policing have profound implications for the administration of justice and human rights. Such reflections are particularly judicious given pending legislation to establish the ‘National Crime Agency’<sup>3</sup> and introduce it into Northern Ireland, a move that will further widen the emerging policing accountability gap.

This report contends that in contradiction to the Patten vision of a police service unfettered by direct political control and able to ensure accountability, since the St Andrews Agreement what has emerged is a parallel police force answerable to ‘direct rule’ Ministers and concentrated on perhaps the most sensitive area of policing. The transfer of policing and justice powers has made it even more obvious that a raft of ‘national security’ powers are in fact retained and exercised by the Northern Ireland Office (NIO). The St Andrews Agreement did promise additional ‘safeguards’ in relation to the MI5 transfer. However, as this report will show, at best it is not possible to tell if such safeguards are actually effective in practice. Even worse it will document how other promised safeguards have already been reneged on and others actually appear to have been used as a mechanism to further rollback accountability measures.

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<sup>2</sup> ‘A New Beginning: Policing in Northern Ireland’, The Report of the Independent Commission on Policing in Northern Ireland, September 1999 (Patten Report) para. 6.43.

<sup>3</sup> A ‘British FBI’ which under current UK government plans will have police powers and intelligence gathering functions. The Crime and Courts Bill which will establish the agency if it completes legislative passage was introduced in the House of Lords on 10 May 2012.

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The first chapter of this report will draw on international standards and the recommendations of Patten to elaborate a human rights framework for covert policing. By this we mean the principles, methods of operation, and accountability mechanisms which can ensure that covert policing is human rights compliant.

The second chapter examines the evidence of past human rights abuses in covert policing in Northern Ireland. This does not pretend to be a comprehensive review of the subject. The chapter refers almost exclusively to official independent investigations by Stevens, the Police Ombudsman, Justice Cory and public inquiries. These investigations demonstrate both the need for a radical break with the past and the continuing importance of applying a human rights framework to covert policing for the present and future. The focus of these reports, and hence of chapter two and much of what follows in this report, is the element of covert policing which involves the running of what are called 'agents', 'informers,' 'informants' or, in some official documents 'CHIS' (Covert Human Intelligence Sources). These terms will be used interchangeably throughout the report.

The third chapter examines the specific role of MI5 during the conflict, as far as it is known from official reports and other sources, and what little we know of its operations since the St Andrews Agreement. This includes the impact of MI5 on the 'counter-insurgency' model of policing adopted in Northern Ireland, particularly following the 1981 Walker report, as well as the Security Service's relationship with Government and other agencies. In relation to the current role of MI5 the limited information emerging from court cases and media reports is analysed.

The fourth chapter outlines and analyses the mechanisms that exist to officially provide accountability in respect of MI5. This includes the general UK-wide mechanisms such as the Intelligence Service Commissioner and Investigatory Powers Tribunal. It also includes analysis of the arrangements and safeguards envisaged in the St Andrews Agreement in relation to the transfer of primacy to MI5.

The final chapter provides a critique of the application and impact in practice of the St Andrews safeguards. It also benchmarks the arrangements following the transfer of primacy over 'national security' policing to MI5 against the human rights and Patten frameworks for covert policing outlined in the first chapter. This chapter examines the breadth of the accountability gap which has emerged since the transfer and concludes by exploring the question of who is running the most sensitive area of policing in Northern Ireland.

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## Acknowledgements

The initial impetus for this report evolved from a conversation between CAJ and Professor Paddy Hillyard which was shaped by a growing unease over the 'rollback' of reforms evident in a variety of ways across the policing and justice sector.

Originally a pamphlet was envisioned but it quickly became clear that a review of how the regulatory framework was working in Northern Ireland, particularly with respect to covert policing, would provide more than enough material for a book, rather than a report.

CAJ would particularly like to thank those individuals for sharing their expertise, concerns and ongoing experiences which informed this research. The research was also greatly enhanced by the comments and suggestions of Mike Tomlinson, Head of School, Sociology, Social Policy & Social Work, Queen's University Belfast; Paddy Hillyard, Professor Emeritus, Queen's University Belfast; and Mark McGovern, Professor of Sociology, Edge Hill University in Lancashire.

In this part of the world conducting any research on policing evokes an awareness of 'standing on the shoulders of giants' and, in addition to the individuals mentioned above, the researchers gratefully acknowledge the contributions of the many human rights activists, practitioners, and solicitors who work determinedly on behalf of building a more just and humane society.

The research was conducted by Ms. Mick Beyers, PhD, MSW, Policing Programme Officer for CAJ and Daniel Holder, LL.M, Deputy Director of CAJ. The report would not have been possible without the support and contribution of Brian Gormally, Director; Gemma McKeown, Solicitor; and Donal Lyons, Public Affairs Officer.

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## Executive Summary

The question this report explores is the extent to which a gap has emerged in the accountability framework in relation to the most controversial, risk-laden area of policing in human rights terms: covert policing – ‘the policing you don’t see’ and in particular the running of agents and informers (also known as ‘Covert Human Intelligence Sources’ – CHIS).

The programme of police reform ushered in by the peace settlement placed great emphasis on accountability and transparency. The Report of the Independent Commission on Policing in Northern Ireland (the Patten Report) which flowed from the Belfast/Good Friday Agreement explicitly recommended that these principles should apply to covert policing. For example, the Patten Report advocated that “Codes of Practice on all aspects of policing, including covert law enforcement techniques, should be in strict accordance with the European Convention on Human Rights” and that such codes of practice should be publicly available.

Despite this the British Government, in a paper appended to the 2006 St Andrews Agreement, set out “future national security arrangements in Northern Ireland” which shifted the most sensitive areas of covert policing *outside* the post-Patten accountability arrangements. The policy formalised the previously largely undeclared role of the Security Service (MI5) in covert policing in Northern Ireland and actually transferred primacy to MI5 over ‘national security’ policing.

October 2012 marks five years since this transfer on the 10 October 2007. Ten years have elapsed since the post-Patten creation of the PSNI, almost fifteen years since the Belfast/Good Friday Agreement and over two years since the 2010 transfer of most – but significantly not all – policing and justice powers to the devolved institutions. It is a critical and opportune moment to take stock of these developments. It is critical not least given the current plans to legislate to set up the ‘National Crime Agency’ and introduce it into Northern Ireland with full policing powers and a remit for covert intelligence gathering, further widening the emerging policing accountability gap.

The first chapter of this report draws on international standards and the recommendations of Patten to elaborate a human rights framework for covert policing. The second chapter examines the evidence of past human rights abuses in covert policing in Northern Ireland. The third chapter examines the specific role of MI5 during the conflict, as far as it is known from official reports and other sources, and what little we know of its operations since the St Andrews Agreement. The fourth chapter outlines and analyses the mechanisms that exist to officially provide accountability in respect of MI5, and outlines the arrangements promised at St Andrews. The final chapter provides a critique of the application and impact in practice of the St Andrews safeguards. It also benchmarks the arrangements

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following the transfer of primacy over 'national security' policing to MI5 against the human rights and Patten frameworks for covert policing outlined in the first chapter.

## 1. Covert policing, a human rights framework and the Patten Commission

There are a number of concepts in human rights law, including the European Convention on Human Rights (ECHR), relevant to covert policing and the running of agents. Under the 'right to life' in ECHR Article 2 there are duties to take reasonable steps to prevent threats to a person's life, which should not be set aside to protect the identity of agents. There are duties on the State and its agents not to take life and there is the procedural obligation to conduct full, effective investigations into deaths which do occur. Surveillance and other covert policing also by their nature involve interference in private and family life which is protected by Article 8. The use of 'agent provocateurs' for 'entrapment' has been considered to breach the right to a fair trial under Article 6. Non-discrimination in the exercise of ECHR rights is protected by Article 14.

In relation to non-discrimination there is also the human rights principle of the State protecting all persons from attacks. It would, for example, conflict with this if the State sought to infiltrate and 'manage' the activities of paramilitary groups so that they are less of a threat to the 'State' but, to protect the identities of agents, permitted attacks on others (punishment shootings and other 'vigilante' attacks, racist/sectarian violence etc).

The UN have developed a set of Principles in relation to preventing impunity – a concept relating to circumstances where there is no effective oversight capable of holding perpetrators of human rights violations accountable. This is particularly relevant to covert policing given concerns about the use of undercover agents and informants in collusion with paramilitary groups. Among other matters the Principles set out a duty on the State to preserve archives and other evidence and call for sanctions for any "removal, destruction, concealment or falsification" of records, particularly if this is done with a view to ensuring the impunity of perpetrators of human rights violations. There are also responsibilities for: "prompt, thorough, independent and impartial investigations" of human rights violations; obligations to undertake "institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights"; and to ensure adequate "representation of women and minority groups" in justice institutions. The Principles also provide that "Parastatal or unofficial armed groups shall be demobilized and disbanded" and that their position in or links with State institutions (including the intelligence services, police and army) "should be thoroughly investigated and the information thus acquired made public."

In 2010 the UN Special Rapporteur on "the promotion and protection of human rights and fundamental freedoms whilst countering terrorism" issued a "compilation

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of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies whilst countering terrorism, including their oversight” which include the following recommendations:

- clearly define ‘national security’ in legislation, which in many countries includes the protection of the population and its human rights;
- all powers and competencies of intelligence services should be outlined in law and the use of subsidiary regulations which are not publically available should be strictly limited;
- oversight institutions should have the power, resources and expertise to initiate and conclude their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfil their mandates, and receive full cooperation in hearing witnesses and obtaining documents and other evidence, including legal authority to view all relevant files and documents;
- intelligence services should operate to protect the human rights of all and, are bound by principles of non-discrimination;
- intelligence services and their oversight institutions take steps to foster an institutional culture of professionalism based on respect for the rule of law and human rights.

The Patten Report made recommendations to mainstream human rights within policing and to make the PSNI more representative through ‘50:50’ recruitment of Catholics and Protestants/others. The Belfast/Good Friday Agreement promised professional policing ‘free from partisan political control’ and the Patten Report reflected the anxiety over both the role of the Minister of Home Affairs in the former Stormont Parliament and the role of the Northern Ireland Secretary of State during direct-rule, with Patten recommending the PSNI be accountable to the Policing Board rather than a Government minister.

An independent complaints mechanism was also established in the Office of the Police Ombudsman. Patten recommended legislation and the adoption of domestic standards for covert policing. In advocating published written policy Patten stated:

...this does not mean, for example, that all details of police operational techniques should be released – they clearly should not – but the principles, and legal and ethical guidelines governing all aspects of police work should be, including such covert aspects as surveillance and the handling of informants...***The presumption should be that everything should be available for public scrutiny unless it is in the public interest – not the police interest – to hold it back...*** [emphasis in original].

Patten further recommended the establishment of a “*Commissioner for Covert Law Enforcement in Northern Ireland*” overseeing surveillance and the use of informants, with inspection and disclosure powers over the police and other agencies “to ascertain if covert policing was being used within the law and only when necessary.”

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Patten recommended the downsizing, deinstitutionalisation and integration of RUC Special Branch within the PSNI commenting that it did not regard it as healthy to have, in either reality or perception, 'a force within a force' - a term used to refer to RUC Special Branch in the Stalker inquiries of the 1980s.

CAJ at the time of Patten suggested further measures, including significantly, if other agencies outside the PSNI were to continue to have a role in policing that they should be subject to similar controls, training and accountability as their police counterparts. Some commentators were critical that the Patten reforms were insufficient to ensure the reorientation away from a 'counterinsurgency' policing culture of Special Branch primacy towards a conventional law enforcement and community based model.

From the international standards and the Patten Report a human rights framework can be developed against which to measure mechanisms of covert policing under the following headings:

1. Clear published written policy on covert policing
2. Developing a human rights culture
3. Personnel, structure and composition
4. Oversight and control

## 2. Official investigations into covert policing

There have been a number of official enquiries into collusion and related matters which have had a substantive focus on covert policing. These include the three police enquiries by John Stevens (for which only the summary of the third enquiry was published); the Collusion Inquiry Reports by Justice Cory (resulting from the UK-Ireland Weston Park Agreement 2001) and subsequent public inquiries; and the investigation reports by the Police Ombudsman into the Omagh Bombing and into collusion by Royal Ulster Constabulary (RUC) Special Branch with paramilitaries in an area of north Belfast (Operation Ballast), and subsequent HM Inspector of Constabulary (HMIC) reports.

There are a number of recurring practices that emerge from these reports, encompassing the State operating outside the rule of law, 'collusion' and facilitating impunity for the same, namely:

- agents operating outside the law and being involved in serious criminality, including killings;
- the lack of a clear binding enforceable policy framework to set boundaries and regulate the activities of agents;
- a culture of not keeping proper records and concealing evidence to afford 'plausible deniability' of activities;

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- the obstruction of proper investigations and inquiries into covert policing practices, including attitudes that agencies should be able to set the terms of what information is given to bodies entrusted with holding them to account;
  - the institutionalisation, primacy and power of 'counterinsurgency' type policing led by RUC Special Branch, above normal police law enforcement (i.e. protecting persons equally from threatened attacks or criminal investigations), including the issues of sharing intelligence for this purpose and sectarian bias in decision making.

Stevens defined collusion as "the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, the extreme of agents being involved in murder" and concluded:

My three Enquiries have found all these elements of collusion to be present. The co-ordination, dissemination and sharing of intelligence were poor. Informants and agents were allowed to operate without effective control and to participate in terrorist crimes. Nationalists were known to be targeted but were not properly warned or protected. Crucial information was withheld from Senior Investigating Officers. Important evidence was neither exploited nor preserved.

In relation to proper record keeping while giving evidence to the Billy Wright Inquiry a former Assistant Chief Constable spoke of operational 'plausible deniability' within RUC Special Branch involving "...a practice or culture that existed in an organisation where the members did not keep records, so there was no audit trail... at times it would appear that it allowed people at a later date to have amnesia." Such a policy facilitates impunity and Stevens concluded in incidents examined that the absence of records made it impossible to sustain criminal allegations against State actors.

Judge Cory concluded there was an attitude which persisted within RUC Special Branch and the British Army's Force Research Unit (FRU) "that they were not bound by the law and were above and beyond its reach." Cory also concluded it was "disturbing" to learn RUC Special Branch and FRU "seem to have taken active and deliberate steps to obstruct the progress of the Stevens Inquiry". The Billy Wright Inquiry dealt with difficulties, resistance and delays in obtaining intelligence documents as well as the request that the Inquiry only be given documents once it had signed a PSNI-drafted Memorandum of Understanding. Such practices are indicative of a culture of primacy over, rather than subordination to, accountability bodies.

In 2001 the Police Ombudsman produced an investigative report into shortcomings in intelligence sharing relating to the Omagh Bomb. The reports recommended two HMIC investigations including a review of Special Branch, known as the 2002 Crompton Report, now released under freedom of information to CAJ. Crompton references tensions within policing in relation to the priority given to protecting informers over allowing the intelligence taken from them to inform criminal

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investigations. The report provides some evidence of ongoing relative isolation and institutionalisation of Special Branch contrasting its covert capability and “total unfettered control of resources” with concerns that CID had “limited intelligence resources, a substantial shortfall in staffing, inadequate training and equipment...”

In 2007 covert policing practice was brought into sharp focus again by the Police Ombudsman’s Operation Ballast investigation into the death of Raymond McCord Jr. The report uncovered collusion between RUC Special Branch officers and a unit of a loyalist paramilitary group, and concluded “as a consequence of the practices of Special Branch the UVF particularly, in North Belfast and Newtownabbey were consolidated and strengthened.” It revealed that police intelligence reports and other documents, mostly rated as “reliable and probably true” linked police agents and one informant in particular to ten murders. Among other matters Ballast reported:

- failure to arrest informants for crimes to which those informants had allegedly confessed, or to treat such persons as suspects for crime;
- concealment of intelligence indicating that on a number of occasions up to three informants had been involved in a murder and other serious crime;
- arresting informants suspected of murder, then subjecting them to lengthy sham interviews at which they were not challenged about their alleged crime, and releasing them without charge;
- creating interview notes which were deliberately misleading; failing to record and maintain original interview notes and failing to record notes of meetings with informants;
- not adopting or complying with the United Kingdom Home Office Guidelines on matters relating to informant handling and further, not complying with the Regulation of Investigatory Powers Act when it came into force in 2000.

Whilst Operation Ballast only analysed a small part of the informant handling of RUC/PSNI Special Branch it emphasised there was no reason to believe that the findings were isolated but rather were highly likely to be systemic. The reports consistently advocate the adoption of domestic standards and clear written policy guidelines setting parameters on the use of paramilitary informants, as well as dealing with training and record keeping issues. In 2001 the Police Ombudsman recommended that the Patten recommendations on Special Branch should be further considered warning that “mere structural change, departmental re-design and presentation will not be sufficient” and advocating organisational and cultural change. Operation Ballast reports that in October 2003 the PSNI instigated a ‘major review’ (the CRAG review) of all their informants, which resulted in around a quarter of them being let go, half of them as they were deemed “too deeply involved in criminal activity.” CRAG also established policy that involvement of informants in criminal activity beyond membership or support of a paramilitary organisation had to be approved at a senior level and that all criminal activity by paramilitary

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informants had to be strictly documented and controlled. New procedures, training requirements and written policy standards by the PSNI are also referenced.

There has also been evidence of a 'rollback' in recent years with respect to mechanisms which could address the above problems. In relation to inquiries into covert policing Parliament passed the Inquiries Act 2005 which the Northern Ireland Human Rights Commission regards as making it impossible to set up truly independent inquiries. The British Government reneged on international commitment to hold a public inquiry into the murder of Pat Finucane. In relation to oversight there was the controversial 'lowering of independence' of the Police Ombudsman's office during the tenure of the second Ombudsman, with the Criminal Justice Inspector concluding that reports into historic cases were "altered or rewritten to exclude criticism of the RUC with no explanation." There is also the PSNI 're-hiring scandal' which regressed compositional reform through re-hiring former RUC officers who had left following the Patten reforms, including a high proportion of intelligence officers.

The problems identified by Stevens, Cory, the first Police Ombudsman Nuala O'Loan, and the post-Cory public inquiries provide an evidential basis of the enormous challenges to any reforms which seek to bring covert policing practice within international standards and the rule of law.

### 3. MI5 and national security policing

Prior to the 2007 transfer to MI5 a policy of 'police primacy' existed in which the RUC officially took the lead over other agencies with MI5 playing a small, strategic and subordinate role. However from the limited information which has become subsequently available there are indications MI5 played a much more influential role in practice and in effect dictated the terms of the overall security strategy in Northern Ireland.

In 2001 the media revealed the existence of what had been the confidential 1981 'Walker Report' named after a senior MI5 official. This reportedly contained what became high level policy that priority was to be given to RUC Special Branch intelligence gathering over normal law enforcement. The *Sunday Times* reported that the Walker Report specified "that records should be destroyed after operations, that Special Branch should not disseminate all information to Criminal Investigations Detectives (CID) and that CID should require permission from Special Branch before making arrests, or carrying out house searches in case agents were endangered." Effectively, normal policing appears to have been subordinated to a 'counter insurgency' approach based on intelligence and espionage involving much of the practices subsequently criticised in the reports of Stevens, Justice Cory and the first Police Ombudsman. During this time human rights NGO British Irish Rights Watch expressed concern that upholding the rule of law had been distorted, felt the report explained "why we have watched bemused as perpetrators of crimes as serious as murder have gone free" and asked "If Special Branch was running the

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RUC, was MI5 running Special Branch? [and at]... what political level were these arrangements sanctioned?" The policy shift was in fact not announced or debated in Parliament, but was presumably agreed at the most senior levels of Government. In relation to other areas where the Security Service played a significant role MI5 appears to have controlled monies paid to RUC Special Branch informants, an arrangement which may continue with the PSNI. MI5 also participated in 'Tasking and Coordinating Groups' which could include special forces units, such as the SAS which, in at least one high profile operation, appeared to have been tasked by MI5.

Any commentary on the current role of MI5 following the 2007 transfer needs to repeat the caveat that little information is publicly available. The (redacted) Annual Reports of the Intelligence and Security Committee do state that MI5 dedicates 17% of its resources to Northern Ireland and overall MI5 has a staffing level of just over 3,600 full time equivalents. A crude pro rata calculation on the basis of 17% of this would mean around 600 staff in Northern Ireland, which would be around 70% of the numbers in RUC Special Branch at the time of the Belfast/Good Friday Agreement. MI5 has constructed an extensive regional headquarters building outside Belfast.

The devolution of justice powers in 2010 has also made clear there are a range of 'national security' powers which were not devolved but rather retained by the Northern Ireland Office. Defining MI5's role in 'national security' policing is complex given that there is no official definition of the term. As the MI5 website makes clear, "It has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances." In the run up to the St Andrews Agreement the PSNI Chief Constable stated MI5's national security policing would only focus on republicans and not loyalists.

Beyond the meagre content of official information on MI5 in Northern Ireland, some material that has come to light in court cases, media reports and individual allegations which include:

- *Concerns over practices used to recruit informers:* including attempts to recruit informers placing persons at risk, allegations of threats, harassment and misuse of police powers;
- *Spectre of MI5 use of 'agent provocateurs':* in 2006 a series of fire bombings led to a prosecution which was then dropped on the day of the trial after prosecutors, without explanation, decided not to give evidence. The accused maintained he had been framed for the attacks by an MI5 agent who had actually carried out the firebombing campaign;
- *The murder of Kieran Doherty:* the Real IRA murdered Mr Doherty in 2009, stating he was a member of the organisation. His family have maintained he was set up by MI5, who had tried to recruit him as an informer, in order to protect someone else. There were concerns the PSNI would not be able to properly investigate MI5, and the NIO commissioned Lord Carlile to look into the matter;

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- *Stop and Search*: questions have been raised as to the extent MI5 is directing the usage of emergency type stop and search powers which do not require individual reasonable suspicion;
  - *MI5 and special forces*: in 2009 the PSNI announced they were calling in the British Army's Special Reconnaissance Regiment (SRR). However an earlier court case indicates the SRR were operating some time before this date and there have been claims that the SRR report to MI5 and not the PSNI;

#### 4. MI5 oversight and accountability

The Security Service was not formally set on a statutory footing until the Security Services Act 1989 when it was formally placed under the authority of the Home Secretary, although the Northern Ireland Secretary of State also has a role in relation to MI5 activity in this jurisdiction.

MI5 is not answerable to the accountability bodies set up to scrutinise the PSNI and is also exempt from freedom of information and even apparently fair employment monitoring and other equality requirements. MI5 own oversight arrangements, which include the Investigatory Powers Tribunal which has never upheld a single complaint against the agency, have been widely criticised by human rights NGOs and parliamentarians. There is an Intelligence and Security Committee which contains parliamentarians, but is not actually a parliamentary committee, in that it does not have the powers of a parliamentary committee and does not report to Parliament.

There is an Intelligence Services Commissioner, with a restricted role focusing on verifying authorisations and warrants. The fate of the Commissioner for Covert Law Enforcement in Northern Ireland recommended by Patten is more of a mystery. The Regulation of Investigatory Powers Act 2000 (RIPA) did introduce an 'Investigatory Powers Commissioner for Northern Ireland;' however when CAJ enquired it appeared that no one was currently doing the job with the powers of the post being discharged by other Commissioners. In any case the post appears to focus on non-policing devolved bodies and is different to that envisaged by Patten. RIPA has also led to a code of practice on CHIS, but this focuses on RIPA authorisation processes rather than the acceptable boundaries of CHIS activity.

Whilst reform is now proposed to MI5 oversight it is limited and presented as a trade off to proposals to allow further provisions for 'secret evidence', largely based on security service intelligence, to be used in secret closed proceedings in court, which would further close off opportunities to hold MI5 accountable.

##### *The transfer of 'national security policing' to MI5 in 2007*

The intention to transfer the "lead responsibility for national security intelligence work" in Northern Ireland from PSNI to MI5 was first announced to Parliament in 2005. This made clear there would be no oversight powers for the post-Patten Policing Board and Police Ombudsman over MI5. It appears the motivation was in

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part to prevent Sinn Féin having a role in oversight and accountability with respect to 'national security' policing once justice powers were devolved. In 2006 the issue was one of the topics dealt with by the UK-Ireland St Andrews Agreement, Annex E of which contained "A Paper by the British Government" on "Future National Security Arrangements in Northern Ireland." It is this international agreement which set out the arrangements, including proposed additional accountability measures, being put in place for the transfer to MI5 "in late 2007".

In terms of a written policy framework 'Annex E' commits the British Government to, "publish high-level versions of Memorandums of Understanding (MoUs) being developed between MI5, PSNI and others, as appropriate" and also to the development of protocols to underpin and ensure implementation of 'five principles' developed by the PSNI (including all MI5 intelligence being visible to the PSNI and the PSNI being informed of all MI5 'counter-terrorist' investigations and operations in Northern Ireland). Annex E also sets out that the majority of 'national security agents' would be run by the PSNI under the 'strategic direction' of MI5 and that MI5 would have "no executive policing responsibilities" but would provide strategic direction to the PSNI. In relation to accountability, Annex E references the generic accountability mechanisms for MI5 and states that PSNI officers working with MI5 would still be subject to Police Ombudsman oversight, albeit that MI5 would have a role in deciding which information the Police Ombudsman actually obtains.

The DUP welcomed the new arrangements regarding them as "a further entrenchment of the British State in Northern Ireland." By contrast there was considerable disquiet from the nationalist parties which led to a Parliamentary Statement from Prime Minister Tony Blair MP in January 2007 setting out further provisions. These included that rather than PSNI secondments to MI5, all interaction with MI5 would instead be by 'liaison' by a small number of 'PSNI Headquarters staff'. Lord Carlile, the then Independent Review of Terrorism Acts, was appointed to conduct an annual review of the arrangements, and the Prime Minister told Parliament that all PSNI officers would be 'solely accountable' to the Chief Constable and Policing Board, along with, on devolution, the Justice Minister.

## 5. Conclusions: the accountability gap

The final chapter of this report critiques the St Andrews Safeguards in practice under the four headings derived from the human rights framework developed in the first chapter.

### *Clear published written policy on covert policing*

Both international standards and the Patten Report place considerable emphasis on the importance of clear written published policy which sets definitive parameters on the permitted actions of agencies and their agents (encompassing law, codes of practice, arrangements with other agencies etc). Past investigations into covert policing uncover a culture of either not having written guidance, codes of practice etc. setting the legitimate boundaries of agent activity or ignoring such rules when

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they were set out. Such reports also repeatedly recommend the adoption of written policy frameworks and standards. International standards also stipulate the law should clearly define 'national security'.

The main commitments to a written policy framework at St Andrews centred on MoUs and Protocols. Remarkably, despite the commitment in an international agreement to publish them, and the generally mundane nature of MoUs, Government has in fact decided to keep St Andrews MoUs confidential. The existence of one such MoU was printed in the press shortly after the transfer but both the NIO and PSNI would not release any St Andrews MoUs to CAJ under freedom of information, citing the absolute exemption under legislation for matters relating to MI5. In response to Parliamentary Questions on the fate of the commitment to publish the MoUs the Northern Ireland Secretary of State declared he had "no plans" to publish any further MoUs. The answer did however reveal the existence of two further NIO held documents which were then obtained by CAJ under freedom of information.

The first document is an NIO protocol for managing national security issues sent to an Assembly Committee in March 2010 which relates not to the MI5-PSNI arrangements but rather a set of stipulations as to how arrangements on 'national security matters' are to be handled post-devolution of policing and justice powers to the Northern Ireland Executive. The tone and content of the protocol appear designed not to set out safeguards or accountability but rather to set out rules preventing the devolved institutions and their oversight mechanisms having control and access to matters to which the 'national security' label is attached. The Protocol sets out that:

- the devolved Minister of Justice and Northern Ireland Assembly have no responsibility for any PSNI functions (past, present or future) that have any national security element or dimension, this responsibility falls to the NIO Secretary of State;
- "UK government will determine what information pertaining to national security can be shared [with the devolved Minister of Justice] and on what terms" and that information on the modus operandi of MI5 and other agencies "will not be shared";
- "The NIO will retain ownership and control of access to all pre-devolution records..." Department of Justice will have no access to records relating to 'national security';
- the Police and Prisoner Ombudsman will report to the NIO Secretary of State on 'national security' matters;
- when the Minister of Justice or Policing Board set up a Panel to adjudicate on misconduct by a police officer, if the case relates to national security information the "UK government will decide what information can be passed on to the panel and, if information is withheld, whether the panel can be informed of that fact."

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The second document is a MoU on 'National Security and the Policing Board'. This is neither signed nor dated and the NIO were unaware of when it was actually given to the Policing Board. The document, rather than being a safeguard, contains a list of restrictions on the Policing Board's role including listing the types of information the Chief Constable should not tell the Policing Board, even in confidential sessions. The MoU stipulates:

- the Policing Board "has no role in National Security matters or related executive policing decisions."...but given the Board's role in police efficiency and effectiveness it "needs to understand how National Security issues are handled";
- Policing Board members questions on matters that "indirectly touch upon National Security" should not be answered if it might damage national security interests;
- the Chief Constable should refer any such requests relating to "past, present or future" national security to MI5 or the NIO, and the Chief Constable must consult with the Secretary of State if in any doubt whether information falls into this category;
- the Chief Constable must not tell the Policing Board any information from or relating to MI5 without MI5's authority to do so.

The MoU also enumerates categories of information the Chief Constable is allowed to tell the Policing Board in relation to the PSNI's operational involvement in national security policing including 'broad definitions' of PSNI structures and functions and 'the total numbers of police personnel' within intelligence branch.

The Prime Minister's assurance that PSNI officers working with MI5 would be 'solely accountable' to the Chief Constable and Policing Board therefore appears contradicted by the above Protocol and MoU. These in effect stipulate that PSNI officers, up to and including the Chief Constable, working on national security matters are not accountable to the Policing Board but rather to the NIO.

In relation to the PSNI-MI5 written protocols the Policing Board Annual Reports do report their evolution but in a cryptic manner. The protocols have not been published and the Reports cite ongoing unspecified 'issues' with them that have led to the protocols being under seemingly continuous review.

In summary, beyond the stipulations of RIPA it is not clear which publicly available written standards and parameters MI5 is to abide by, if any, in relation to agent handling and the scope of their remit. 'National security' also remains undefined and to be interpreted 'flexibly'. Commitments to publish policy have been reneged on and the MoU and protocol which have been issued to CAJ under freedom of information actually seek to *limit* accountability. Given the secretive nature of the Security Service it is unlikely to be possible to scrutinise written policy in future. This position falls woefully short of human rights standards.

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### ***Developing a human rights culture***

Similar deficiencies are found in assessing whether the provisions in Patten and international standards for the development of a human rights culture in policing have been met. In the case of MI5 it is not possible to tell what steps, if any, are being taken to foster a human rights culture within MI5 in relation to their role in national security policing in Northern Ireland.

A human rights culture also involves tackling impunity through an emphasis on the duty to maintain records and to conduct independent and impartial investigations of alleged human rights violations, including collusion with paramilitary groups. It is again not possible to test which record keeping regime a secretive body like MI5 operates under. Post St Andrews the aforementioned MoU and Protocol appear designed to *restrict* accountability given their stipulations that any 'national security' records will not be made available to the devolved institutions in addition to powers for the NIO to redact material from the official reports of oversight bodies.

A further area is the principle of equality before the law and non-discrimination. A situation has arisen, where despite ongoing paramilitary activity by both republican and loyalist groups, MI5 may only be tasked to deal with the former. The scenario, in effect, would amount to two separate police agencies, with a considerable gulf in accountability between them, effectively policing paramilitaries on different sides of the community.

### ***Personnel, structure and composition***

The Patten reforms envisaged compositional and cultural change in policing as well as the effective downsizing and break up of RUC Special Branch and its integration within the rest of the police service to avoid it continuing to be, in perception or reality, a separate force.

As well as being exempt from freedom of information, MI5 also appears to be exempt from significant duties under equality legislation, including fair employment monitoring. It is therefore not possible to verify if it is representative of the community or how many members of RUC Special Branch who left under the Patten severance arrangements, have taken up similar roles with the Security Service. The above crude estimate of MI5 numbers in Northern Ireland puts its strength at around 70% of that of RUC Special Branch at the time of Patten, and contrary to the vision in the Patten report, 'national security' covert policing is now less mainstreamed than previously. In essence it has become 'a force *outside* a force'.

Whether the stipulations for intelligence services having a restricted role and the assurance MI5 would have 'no executive policing functions' have been met is not possible to assess in the absence of publicly available protocols. MI5 do not have arrest and detention powers, but their actual structural relationship with the PSNI remains complex and unclear. There are some indications that their primacy in 'national security policing' may lead to what is in practice tasking the PSNI in certain operational areas, as well as a potential relationship with the SRR. In addition whilst

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the Prime Minister's statement restricted MI5 liaison to PSNI 'Headquarters Staff' it transpires that over 2,500 PSNI staff based in multiple locations are considered headquarters staff.

### ***Oversight and control***

There has also been significant importance attached to policing in Northern Ireland not being subject to partisan political control. However, the transfer to MI5 ensured however that this area of policing remains directly answerable to London Ministers rather than the Policing Board. The devolution statute has also laid bare that a broad range of policing and other areas of criminal justice powers are retained by the NIO.

Contrary to official assurances it does appear that both the role of the Policing Board and Police Ombudsman have been diminished by the transfer. Individuals cannot complain to the Police Ombudsman about the actions of MI5 officers and consequently, passing primacy to MI5 means the Ombudsman's role is clearly reduced. It is still possible to complain about PSNI officers working under the 'strategic direction' of MI5. However the provision of information to the Police Ombudsman by MI5 is subject to their agreement— unlike, in theory, disclosure to the Police Ombudsman of PSNI information. The extent that types of information previously in the hands of the PSNI are now in the hands of MI5 would also limit the Ombudsman's role. It may have previously been the case that the Chief Constable had to report to the NIO Secretary of State and not the Policing Board on 'national security' matters. However, designating an entire area of policing work as 'national security' and transferring it to another agency outside of the PSNI was always going to further limit the role of the Board. The assurance given at St Andrews was that MI5 would participate in closed session briefings to the Board. It is questionable whether 'briefings' by MI5 in themselves afford effective scrutiny over its work given the Board has no powers over the organisation; it also transpires that these briefings have happened on only three occasions since St Andrews.

The final safeguard is the Annual Review by Lord Carlile. Despite Government's eagerness to cite it as an endorsement of the arrangements, it appears to be more of a limited internal review rather than a detailed safeguard. Lord Carlile notes in his first report that he had spent, "approximately six working days during the past year on activities connected with this report, including the time needed to write it" and for example, in questioning whether the lessons of Operation Ballast have been learned, seems content to simply accept an MI5 assurance that they have. The role of a time-limited internal review is of course a valid mechanism for ensuring effective working. However, it would appear misleading for Government to seek to present the review as a robust safeguard or oversight mechanism.

### ***Conclusions: who is running policing?***

The transfer to MI5 has ensured that policy on 'national security' covert policing remains largely secret, under the direct political control of London Ministers, and subject to very limited oversight. The transfer of policing and justice powers has made it even more obvious that a raft of powers under the deliberately vague cloak

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of 'national security' are in fact retained and exercised by the Northern Ireland Office. Since the St Andrews Agreement arguably the most sensitive area of policing is in effect being run by a parallel police force answerable to 'direct rule' Ministers and subject to separate and ineffective oversight arrangements. If the then Chief Constable's assertion that MI5 would focus only on dissident republicans remains true, the practical impact of this would be that two different covert policing regimes, in terms of operational techniques, standards and oversight, are potentially now in place for republicans and loyalists.

Some may argue that a 'counterinsurgency' approach to policing could disrupt attacks and hence protect life in circumstances when it was difficult to secure convictions. However to the extent this involves selective 'impunity' for police agents and others, such policy could be characterised as the State taking an approach of 'conflict management' rather than upholding and administering the law. Should intervention decisions on intelligence threats to life be acted upon on the basis of selective criteria, the State is effectively managing or even directing the activities of other protagonists in the conflict, as well as being a protagonist itself. CAJ has always taken the view that the State acting outside of the law fuelled and exacerbated the conflict. Justice Cory also argued that allowing agents to get away with criminal acts "will increase, not decrease, the level of homicidal violence".

Policing reform was intended to re-orientate policing away from 'counterinsurgency' approaches and end the primacy, power and isolation of 'Special Branch' within the policing architecture. However, the transfer of powers to MI5 presently makes it impossible to determine the policy approach to covert policing and its compliance with human rights standards. A key question, relating to broader questions of who is determining policing priorities, is whether 'national security' is still given the primacy to 'trump' other policing considerations.

CAJ's main recommendation, given the magnitude of the issues uncovered in this research, is to call for a full review of the entire post-St Andrews arrangement. Such a review should be comprehensive, genuinely independent, and undertaken with a view to the reform of covert policing responsibility which will meet both the stipulations by the Patten Commission and international human rights standards.

How a society is policed is one of its defining characteristics. With the monopoly of the legal use of force comes the capacity to define a society based on repression and fear or one based on consensus and respect for the human rights of all. A human rights framework makes clear that those charged with implementing law are also subject to the law and that '*national security*' is not a trump card that allows the rule of law to be set aside. The issue of policing has been a pivotal aspect of the violent political conflict Northern Ireland suffered and one of the most difficult elements of the peace process. If the transition to a peaceful society is our goal it is clear that such change will be hampered if past practices which caused the legitimacy of policing to be called into question are allowed to continue.



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# 1. Covert policing, a human rights framework and the Patten Commission

## Covert policing and the rule of law

It is a central proposition of this report that the fundamental purpose of policing should be, in the words of the Agreement, the protection and vindication of the human rights of all... We cannot emphasize too strongly that human rights are not an impediment to effective policing but, on the contrary, vital to its achievement. Bad application or promiscuous use of powers to limit a person's human rights – by such means as arrest, stop and search, house searches – can lead to bad police relations with entire neighbourhoods, thereby rendering effective policing of those neighbourhoods impossible. In extreme cases, human rights abuses by police can lead to wrongful convictions, which do immense damage to the standing of the police and therefore also to their effectiveness. Upholding human rights and upholding the law should be one and the same thing.<sup>1</sup>

The above quotes from the Patten Report argue the centrality of human rights to effective policing. They vindicate the position of an organisation such as CAJ which seeks to improve the human rights compliance of policing in order to make it more effective, thereby strengthening the rule of law and hence better protecting the human rights of all. The 'rule of law' should not be limited to the domestic standards in place at a given time but also refers to the internationally agreed standards incumbent on democratic societies. Covert policing cannot be allowed to be an exception to this principle. The first head of the Northern Ireland Human Rights Commission, established following the Belfast/Good Friday Agreement, was of the view that:

It is essential to have informers and to have covert policing. But what is also essential is that the covert policing should not itself subvert the rule of law and that law-breakers should not be able to get away with the crimes they have committed. So what we need is a much more effective system for policing the police who conduct this kind of covert policing, better accountability systems, better complaint systems.<sup>2</sup>

By its nature, covert policing requires an element of secrecy and so special arrangements are necessary to ensure that it is compliant with human rights standards. Whilst it is the case that most police services run informers and have a 'special branch' it is also evident from the human rights framework which binds all elements of the State that there are parameters around what can and cannot be

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<sup>1</sup> Patten Report. paras 4.1 & 4.3.

<sup>2</sup> Brice Dickson, Chief Commissioner Northern Ireland Human Rights Commission, Quoted on UTV Insight documentary 'Policing the Police', 01 May 2001.

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done in the world of covert policing and these parameters extend to the running of 'Covert Human Intelligence Sources'.<sup>3</sup>

In recent years the United Nations has taken on the task of working out principles for human rights compliance when intelligence agencies are countering terrorism – much of this activity will be necessarily covert – and we draw on these later in the chapter. Patten also laid down principles and local structures for human rights compliance, including in relation to covert policing. There are, however, basic principles of law and human rights that constitute the foundation of a human rights framework for covert policing and we turn to these first.<sup>4</sup>

There are a number of concepts in human rights law relevant to covert policing. First, there is no provision in human rights law for 'impunity' for State actors complicit in violations.<sup>5</sup> Second, there is the right to fair trial which can be infringed by the use of 'agent provocateurs'. Third, there are duties to take reasonable steps to protect life and there appears to be no provision allowing these to be set aside to protect the identity of agents. In addition, surveillance and other covert policing by its nature involves interference in private and family life.

The prohibition of impunity is relevant to the running of police agents and informers in a number of ways. First, it relates to any practice of State agents using others to carry out serious crimes (whether directed, facilitated or permitted), which brings such actions within the scope of human rights violations. Second, it relates to any practice of subsequently obstructing effective police investigations, conducting 'sham' investigations, dropping prosecutions when agents are involved or other methods of preventing officers, agents and their handlers being held to account. Similar principles apply to the actions of undercover officers. Such practices with agents in paramilitary groups in Northern Ireland have been generally referred to as 'collusion.'

The term 'agent provocateur' can refer to an agent who entices, encourages or provokes other persons into committing illegal acts so they can then be charged and convicted. As such acts would have not taken place without the instigation of the agent, such convictions are considered the result of 'entrapment' and hence miscarriages of justice.<sup>6</sup> The risks around miscarriages of justice are also heightened

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<sup>3</sup> Under RIPA, a person is a CHIS if: a) he (or she) establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph b) or c); b) he (or she) covertly uses such a relationship to obtain information or to provide access to any information to another person; or c) he (or she) covertly discloses information obtained by the use of such a relationship or as a consequence of the existence of such a relationship.

<sup>4</sup> One text argues, "There are two broad justifications for placing human rights and freedom at the centre of securing intelligence: it is right *in principle*, as enshrined in the UN Charter and ECHR. Also, it is right on a *pragmatic* level: states cannot achieve long-term democratic legitimacy unless they respect human rights and freedoms" Gill, Peter and Phythian, Mark (2006/2012) 'Intelligence in an Insecure World', Polity Press: Cambridge: p 178, (italics in original).

<sup>5</sup> In his inquiry into the Brixton disorders Lord Scarman once dramatically warned that, "The police officer must act within the law: abuse of power by a police officer, if it is allowed to occur with impunity, is a staging post to the police state." 'The Brixton Disorders – Report of an Inquiry' HMSO, London 1981.

<sup>6</sup> For a recent high profile example which may lead to further cases see, 'Miscarriage of Justice decision Unprecedented', *Irish News*, 7 September 2012. This refers to the convictions of five republicans, including former Sinn Féin 'director of publicity' Danny Morrison. The convictions were overturned by the Court of Appeal in 2008, although the Court kept confidential its reasons for doing so. The convictions centred around the abduction of an alleged informer in 1990 by an IRA

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by the practice of offering financial rewards to informers for information, given the incentive this provides to 'come up' with information which may not be accurate.

In a general sense it is important to recall that the internationally agreed first responsibility of Governments is the protection and promotion of human rights. This is set out in the first article of the Vienna Declaration adopted by the international community at the UN World Conference on Human Rights.<sup>7</sup> On occasions the British Government seems to have overlooked this in that, for example, the very first sentence of the recent Justice and Security Green paper states "The first duty of government is to safeguard our national security."<sup>8</sup> A 'national security' approach to intelligence work has the potential to conflict with human rights duties to equally protect the human rights of all. This would be the case for example if paramilitary groups are infiltrated and interventions are made to only prevent attacks on State institutions, yet attacks on others (punishment shootings and other 'vigilante' attacks, racist/sectarian violence etc) are in effect 'tolerated' to protect the identity of informers.<sup>9</sup>

Human rights standards, whilst recognising the concept of 'national security', also indicate the concept is not to be interpreted broadly. The UN Siracusa Principles in relation to limitations on rights contained in the International Covenant on Civil and Political Rights (ICCPR) recommend limitations to the concept. They state national security "cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order" nor should it be "used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse."<sup>10</sup>

There is an overarching principle that those charged with implementing and enforcing the law are also subject to the law. Running covert policing in a human rights compliant manner involves adequate accountability and control including written guidance defining the parameters of legitimate agent/informant activity. In the course of his collusion inquiries Justice Cory both advocated such an approach, and also cautioned against the consequences of not doing so:

Ideally those systems of intelligence would be required to abide by specific guidelines that would set out the limits of permitted intrusiveness and the requisite degree of control of agents. If agents are not adequately controlled and prohibited from committing

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member who himself was later linked to being a state agent. In 2012 the Northern Ireland Office accepted the cases constituted a miscarriage of justice which the *Irish News* reports is likely to be the first time the use of informers in 'entrapment' cases has been officially recognised as such.

<sup>7</sup> Vienna Declaration, UN doc A/CONF.157/23 12 July 1993.

<sup>8</sup> Justice and Security Green Paper, October 2011 Cm 8194, Executive Summary, para 1.

<sup>9</sup> These principles are also set out in the UN Code of Conduct for Law Enforcement Officials (Adopted by General Assembly resolution 34/169 of 17 December 1979) Article 1 states, "Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts". The associated commentary sets out that 'law enforcement officials' includes state security bodies in countries where they exercise police powers.

<sup>10</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, principles 30-31.

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criminal acts they will increase, not decrease, the level of homicidal violence.<sup>11</sup>

The following sections in this chapter set out a number of key human rights standards which relate to covert policing, beginning with the critical issue of impunity.

## The UN Principles on combating impunity

The UN has developed a detailed 'Set of Principles for the Protection and Promotion of Human Rights through action to combat impunity'.<sup>12</sup> The principles define impunity as:

...the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.<sup>13</sup>

The Principles contend that impunity arises from a failure by States to meet their obligations to investigate human rights violations and to take appropriate measures in respect of perpetrators, particularly through the justice system ensuring those suspected of criminal responsibility are prosecuted, tried and duly punished. In addition they include the principle of ensuring the inalienable right to know the truth about violations.<sup>14</sup> Among other matters the Principles set out a duty on the State to preserve archives and other evidence which may concern human rights violations, and call for sanctions for any "removal, destruction, concealment or falsification" of records, particularly if this is done with a view to ensuring the impunity of perpetrators of human rights violations.<sup>15</sup> There are also responsibilities for "prompt, thorough, independent and impartial investigations" of human rights violations, with justifications relating to "acting under orders" neither exempting perpetrators nor those who colluded with them from responsibility (including criminal liability). In particular officers are liable "if they knew or had at the time reason to know that the subordinate was committing or about to commit such a crime and they did not take all the necessary measures within their power to prevent or punish the crime."<sup>16</sup> In relation to preventing violations the Principles note that States:

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<sup>11</sup> 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.29.

<sup>12</sup> UN Commission on Human Rights, 'Set of Principles for the Protection and Promotion of Human Rights through action to combat impunity' (UN Impunity Principles) Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher UN Doc E/CN.4/2005/102/Add.1, 08 February 2005. These principles were updated from an earlier version from 1997.

<sup>13</sup> UN Impunity Principles, definitions A.

<sup>14</sup> UN Impunity Principles, principle 1.

<sup>15</sup> UN Impunity Principles, principles 3 & 14.

<sup>16</sup> UN Impunity Principles, principles 19 & 27.

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...must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions. Adequate representation of women and minority groups in public institutions is essential to the achievement of these aims.<sup>17</sup>

The Principles further advocate that such institutional reform should be developed through public and civil society consultation, inclusive of victims and advance objectives including consistent adherence by public institutions to the rule of law; the enactment of legislative and other measures to ensure respect for human rights and the “civilian control of military and security forces and intelligence services and disbandment of parastatal armed forces”. With respect to institutional reform States are to take all necessary measures “to ensure that public institutions are organized in a manner that ensures respect for the rule of law and protection of human rights” including the removal, following due process, of officials responsible for past gross human rights violations (in particular in “military, police, security, intelligence and judicial sectors”), civilian control of the intelligence agencies through effective oversight institutions, effective civil complaints procedures, and human rights training for those in the intelligence (and other security) sectors.<sup>18</sup> The Principles also provide that, “Parastatal or unofficial armed groups shall be demobilized and disbanded” and that their position in or links with State institutions (including the intelligence services, police and army) “should be thoroughly investigated and the information thus acquired made public.”<sup>19</sup>

These Principles provide an authoritative ‘soft law’ statement of international standards applicable to the UK and are binding where they are otherwise reflected in customary international law. The next section will outline a number of similar and additional provisions contained in the European Convention on Human Rights whose incorporation into Northern Ireland law was guaranteed by the Belfast/Good Friday Agreement and is presently directly accessible in the domestic courts by virtue of the Human Rights Act 1998.

## The European Convention on Human Rights (ECHR)

Among the most relevant ECHR rights relating to the recruitment and use of ‘covert human intelligence sources’ in the Northern Ireland context is the ‘right to life’ found in Article 2. This is relevant in the duty not to take lives, the positive obligation to take reasonable steps to prevent threats to a person’s life, and in the procedural obligation to conduct full, effective investigations into those deaths which do occur.

Being revealed or even suspected of being an informer has put individuals’ lives in real and imminent danger with paramilitary organisations often ‘executing’ persons

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<sup>17</sup> UN Impunity Principles, principle 35.

<sup>18</sup> UN Impunity Principles, principle 36.

<sup>19</sup> UN Impunity Principles, principle 37.

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suspected of being informers. There is an onus on the State to take reasonable steps to protect the life of its agents. However, there is also an obligation to take reasonable steps to protect the lives of those who the State is aware are under threat, which clearly may involve acting on the information provided by an agent.<sup>20</sup> Equally it could be determined there is a duty not to place persons' lives in danger by actions which would make paramilitaries suspect they are informers – which could include crude attempts to recruit or otherwise associate with them.

Under Article 2 the State is not allowed to kill except under strictly defined conditions when it is absolutely necessary. Put simply State actors are not allowed to commit murder- nor are their agents allowed to do so.

In instances when deaths do occur there is a procedural obligation on the State to provide a prompt and effective investigation. In instances where State actors may be directly or indirectly implicated in a death there is an obligation that the investigation be impartial and duly independent from those involved. Article 2 also requires that the law provides for the possibility of criminal prosecution of those State actors who are suspected of having acted unlawfully. Additionally, there are a number of similar duties under ECHR Article 3, and the UN Convention Against Torture, which outlaw State complicity in torture or inhuman or degrading treatment.

The use of 'agents provocateurs' has been considered to breach the right to a fair trial under the ECHR when persons were convicted for offences that were instigated by police agents. The Court has developed case law on the concept of 'entrapment' breaching ECHR Article 6(1) in that undercover techniques are permissible only insofar as they do not involve inciting the commissioning of an offence, for which they have set out a detailed test.<sup>21</sup> There is also the question of whether the system of offering considerable financial rewards to informers for information carries a heightened risk of corrupting the system. An incentive of rewards for information could lead to unreliable confession or other intelligence-gathered data from agents being used as evidence against suspects.

In relation to other ECHR rights, Article 8, the right to private and family life, can clearly be engaged by surveillance, intelligence gathering and other similar policing activity. Interference in Article 8 rights by public authorities is permitted, provided there is a clear legal basis for it ("in accordance with the law") and it is "necessary in a democratic society" (i.e. needed and proportionate to the objective pursued) for

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<sup>20</sup> For example see the recent case of *Colin James Keys v the PSNI* [2012] NIMaster 7 whereby a former RUC officer includes in this action a claim for negligence, "that on 28 November 1983 an armed robbery occurred at Pomeroy Post Office when the [Officer] was exposed to an exchange of gunfire with armed terrorists and during which an elderly woman was killed and others were injured. The allegation is that the [RUC] knew about this armed robbery in advance and did not provide proper warning of the imminent attack... because the [RUC] wished to protect the identity of a police informant. The [Officer Keys] claims that as a result he suffered psychiatric injury", para 3.

<sup>21</sup> See *Bannikova v Russia* (App no. 18757/06) 4 November 2010 [33-65].

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one of a number of legitimate aims, which include “the interests of national security” and the prevention of disorder or crime.<sup>22</sup>

## The Special Rapporteur’s compilation of standards on intelligence agencies

In 2010 the UN Special Rapporteur on “the promotion and protection of human rights and fundamental freedoms whilst countering terrorism” issued a “compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies whilst countering terrorism, including their oversight.”<sup>23</sup> The elements of good practice which are identified include:

- Restrict the role of intelligence services to collection, analysis and dissemination of information, rather than broader security tasks performed by other bodies, given that the risk to human rights is greater if performed by intelligence services;
- Clearly define ‘national security’ in legislation, which in many countries includes the protection of the population and its human rights;
- As a fundamental tenet of the rule of law all powers and competencies of intelligence services are outlined in law and the use of subsidiary regulations which are not publically available should be strictly limited;
- Intelligence services are prohibited from undertaking any actions which would violate the State’s international human rights obligations;
- Intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialised oversight institutions, including at least one civilian institution independent of the intelligence services and government;
- Oversight institutions have the power, resources and expertise to initiate and conclude their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfil their mandates, and receive full cooperation in hearing witnesses and obtaining documents and other evidence, including legal authority to view all relevant files and documents;
- A right to take individual complaints to a court or wholly independent oversight mechanism (e.g. ombudsman), and an effective remedy for victims of illegal actions of intelligence services;

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<sup>22</sup> European Convention on Human Rights, CETS no 5, Article 8(2).

<sup>23</sup> Human Rights Council ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin’ (SR Intelligence agencies standards), UN Doc A/HRC/14/46, 17 May 2010.

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- Intelligence services operate to protect the human rights of all and are bound by principles of non-discrimination;
  - States ensure intelligence services, particularly in counter-terrorism work, undertake activities on the basis of individuals behaviour and not on the basis of ethnicity, religion etc;
  - Intelligence services remain politically neutral and are prohibited by law from acting in the interests of any religious, ethnic, political or other group, and are prohibited from using their powers to target lawful political activity;
  - Constitutional, statutory and international criminal law are applied to members of intelligence services and any exceptions allowing officials to violate national law are strictly limited, clearly proscribed by law, and do not include any actions which would violate the human rights obligations of the State;
  - Members of intelligence services be legally obliged to refuse orders which would violate national law or international human rights law, and appropriately protected when they do so;
  - Intelligence services and their oversight institutions take steps to foster an institutional culture of professionalism based on respect for the rule of law and human rights;
  - Any measures taken by intelligence services which restrict human rights must: be set out in publicly available law, be proportionate to the objective; have clear authorisation, monitoring and oversight arrangements; and, be compatible with international human rights standards;
  - The law outlines the types of intelligence collection measures available to intelligence services including the threshold of suspicion used to justify their use;
  - Intelligence services are not given powers of arrest and detention if this duplicates the powers of law enforcement agencies mandated to address the same activities;
  - Intelligence sharing with other agencies is clearly set out in law with clear parameters and safeguards.

This section has briefly outlined a number of the human rights standards pertaining to intelligence agencies and covert policing. The next section will examine the content and context of reforms to covert policing promised at the time of the 1998 Belfast/Good Friday Agreement and the resultant Patten Commission on policing.

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## The Patten Commission and the politics of police reform

### Democratic Oversight of the Intelligence Services

The gathering and use of intelligence is perhaps the most sensitive aspect of security work and little information is available on the subject. The RUC's Special Branch (SB) employs a range of special investigative measures such as the running of informants and police officers working undercover... This intelligence-gathering is of paramount importance to all security related activities, and it is most relevant from a civil liberties point of view, as it can intrude deeply into the private lives of large segments of the population in Northern Ireland. Whether it be the RUC's Special Branch, the army's intelligence network, Government Communications Headquarters, or MI5, they all exercise extensive powers of information-gathering regarding individuals in Northern Ireland, and any discussion of police accountability is meaningless without addressing the activities of these groups also. *CAJ Human Rights on Duty Report 1997*<sup>24</sup>

As demonstrated in the above paragraph, prior to the 1998 Agreement CAJ had identified both the high risk nature of covert policing in human rights terms and the importance of ensuring accountability across all the agencies which exercised such powers. The above citation also references the breadth of the agencies involved in covert policing during the conflict. At the time of the 1998 Agreement the Royal Ulster Constabulary (RUC) Special Branch (which was referred to by John Stalker during his investigation of 'shoot to kill' allegations as "a force within a force"), consisted of about 850 officers, around 10% of the regular RUC numbers. There were also covert units within the British Army engaged in running agents including the Force Research Unit (FRU), and Special Forces units such as the 14<sup>th</sup> Intelligence Company were engaged in surveillance operations. As outlined in the next chapter, within this mix of agencies was also the Security Service, MI5.

It is important not to underestimate the scale of the challenge and the degree of resistance to reforming policing in transitional environments. One analysis notes there are additional difficulties in achieving policing change "when emotions run high in post conflict societies", not least as it is possible for 'those in control' to resist change, a scenario:

...particularly likely when change is deemed to denigrate an organizational and policing past of which they are immensely proud. Given the fragility of any peace process emerging from years of violent conflict, this mitigates against a holistic strategy and the

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<sup>24</sup> O'Rawe, Mary & Moore, Linda 'Human Rights on Duty: Principles for better policing – International Lessons for Northern Ireland', Belfast CAJ, 1997, p 66.

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potential of human rights to move organizations, institutions, and communities forward where policing is concerned.<sup>25</sup>

In this text, attention is given to the empirical experience of short-term political imperatives unduly influencing the details of implementation, even once a broad framework appears secure. By extension, even when new leaders are brought into a process they often inherit structures and personnel which can inhibit change. It is argued a particular impediment in relation to reform of the RUC was the view of the conflict from the force itself and the State which did not acknowledge or accept police involvement in human rights violations and hence the need for “strong, consistent and coherent action to eradicate them from new policing arrangements.”<sup>26</sup>

The Patten Commission released its report in September 1999. The report was to herald “a new beginning to policing” and regarded the establishment of robust accountability mechanisms and oversight as being essential to institute a human rights-based approach throughout policing. It is worth noting in particular that the theme of human rights does run throughout all 175 recommendations made by the Commission. Considered broadly a number of principles to facilitate sustainable policing reform can be drawn from Patten including:

1. Mainstreaming Human Rights: The opening chapter of the Patten Report is explicitly devoted to human rights and sets out a comprehensive programme to establish a rights-based approach throughout policing including a new oath; a new Code of Ethics; human rights legal expertise; and human rights monitoring and accountability.
2. Accountability: A crucial principle in the Report and absolutely central to human rights is the importance of effective, independent accountability. Specific mechanisms were established to help ensure far greater accountability than in the past and include three specific bodies, the Northern Ireland Policing Board, the District Policing Partnerships and the Office of the Police Ombudsman for Northern Ireland.
3. Representative: The Patten Commission noted, “If all communities see the police as their police, there will be a better, cooperative partnership between community and police, and therefore more effective policing.”<sup>27</sup> As CAJ noted at the time there was a considerable under representation of nationalists/Catholics and women in the RUC and a concurrent overrepresentation of male Protestants.<sup>28</sup> At the time of the Agreement

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<sup>25</sup> O’Rawe, Mary ‘Human Rights and Police Training in Transitional Societies: Exporting the Lessons of Northern Ireland’, *Human Rights Quarterly*, 27:3 (2005) pp943-968; p950-1.

<sup>26</sup> O’Rawe, 2005, p953-5.

<sup>27</sup> Patten Report, para 14.3.

<sup>28</sup> This was not just an issue of fair participation in employment. In the context of a divided society the resultant predominance of a unionist ethos (rather than a more pluralist ethos) in policing could be characterised in perception or reality as a situation where one community effectively ‘policed’ the other.

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Catholics made up only 7.5% of the force, despite being around 45% of the population. Women were only 10.5% of regular officers meaning there was also a male-dominated ethos. In order to address the former Patten proposed a temporary special measure ensuring that the appointment of police officers should be made on a 50:50 Catholic: Protestant/Other basis, drawn from a pool of qualified potential recruits. The goal was to change the composition of the service over the course of ten years. The main objective – and indeed the principle behind a representative service – was to create a policing service that was socially representative of the wider population and to create a “critical mass” to change the internal culture of the organization. There was no similar temporary special measure on grounds of gender.

In relation to independent accountability Patten also reflected on concerns that policing should not be subject to partisan political control, the Report noted:

The anxiety to avoid political direction of the police is strong in Northern Ireland...This view was put to us by both communities and by police themselves. Many respondents to our consultation exercise warned against a return to the situation before 1969, when the RUC was in practice subject to direction by the Minister of Home Affairs in the former Unionist Government, a state of affairs which many regard as a contributing factor to the outbreak of the Troubles of the past thirty years. Several people also commented unfavourably on the present relationship between the Secretary of State and the RUC, and saw the police as an instrument of British Government policy rather than a service meeting local priorities.<sup>29</sup>

Critically, the PSNI were therefore to be accountable to the Policing Board rather than a government minister. The Patten Commission also made recommendations regarding reform to policy and the legislative framework covering covert policing, including:

- Codes of Practice on all aspects of policing, including covert law enforcement techniques, should be in strict accordance with the ECHR; (para 4.8)
- That the ACPO [Association of Chief Police Officers] Codes of Practice into covert policing in force across England & Wales and Scotland should also apply to Northern Ireland; (para 4.8)
- Police Codes of Practice should be publicly available; (para 6.38)
- Legislation to ensure that covert law enforcement techniques employed by police and other security agencies – including interception, surveillance, informants and undercover operations – are fully compliant with the ECHR should apply to Northern Ireland as well as Great Britain. (para 6.43)

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<sup>29</sup> Patten Report, para 5.9.

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Notably in relation to police Codes of Practice being publicly available Patten stated:

...this does not mean, for example, that all details of police operational techniques should be released – they clearly should not – but the principles, and legal and ethical guidelines governing all aspects of police work should be, including such covert aspects as surveillance and the handling of informants... ***The presumption should be that everything should be available for public scrutiny unless it is in the public interest – not the police interest – to hold it back...*** Transparency is not a discrete issue but part and parcel of a more accountable, more community-based and more rights-based approach to policing (emphasis in original).<sup>30</sup>

Patten specifically addressed the issue of reform of Special Branch. Commenting that it did not regard it as healthy to have, in either reality or perception, 'a force within a force' Patten recommended as a first step that Special Branch should be amalgamated with Crime Branch and brought under the command of a single Assistant Chief Constable. Patten also recommended a substantial reduction in the number of officers in the successor unit of Special Branch, that the support units of Special Branch be amalgamated into the wider police service, a requirement for 'Special Branch' officers to inform police district commanders of their activities in their districts, and that there be a 'tenure policy' introduced to post 'Special Branch' officers elsewhere in the police service after approximately five years, to prevent officers, as had happened in the past, remaining for long periods only within Special Branch in light of the institutional culture this developed.<sup>31</sup>

Patten also recommended:

- A *Commissioner for Covert Law Enforcement in Northern Ireland* – a senior judicial figure with a remit to oversee surveillance, use of informants and undercover operations; with powers to inspect the police and other agencies acting in their support and compel disclosure of documents; responding to direct representations or referrals from the Police Ombudsman or Policing Board, and powers to act on their own initiative to ascertain if covert policing was being used within the law and only when necessary; (para 6.44)
- A Complaints Tribunal comprising senior members of the legal profession with powers to investigate complaints involving covert law enforcement operations; (para 6.45)

The extent to which these two bodies were established under the Regulation of Investigatory Powers Act 2000 is examined later in this report.

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<sup>30</sup> Patten Report, para 6.38.

<sup>31</sup> Patten Report, recommendations 98-102; and paras 12.10 - 12.16.

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## Limitations and Implementation

In this chapter we are using the Patten recommendations as a locally grounded contribution to the development of a human rights framework for covert policing. However, to contextualise the report and also as a guide to some of the issues which are still preoccupying us today, it is important to record what CAJ and others saw as the limitations of Patten and also the resistance to the implementation of its recommendations.

First, despite the welcome focus on human rights analysts note that in spite of the access to some material gathered by the Stalker 'shoot to kill' investigations the Patten Report "clearly decided not to present any history."<sup>32</sup> Hence the Report was not explicitly grounded in specifically addressing past human rights abuses, appearing, with respect to the political context, to prefer an implicit or more cryptic approach. Whilst this may have been done to make reform more palatable, or at least less contested, by not stating explicitly what the proposed reforms intended to address a situation was created whereby reform measures could be more easily sidestepped.

Although broadly supportive of the Patten reforms, CAJ argued that they needed to go further to ensure a complete transformation of policing. Whilst welcoming the initiatives to improve representation within the police service, CAJ expressed concerns in our response to Patten that:

...no mechanism was proposed to help identify past human rights abusers so that they are neither recruited nor retained in the new police service ...If there is to be no major change in current personnel, despite the fact that few, if any officers have been held accountable for offences ranging from harassment, ill-treatment, collusion, falsification of evidence to unlawful killing, we are left with an appalling lack of accountability at the heart of policing. To permit this culture to permeate the new policing service promised by the Good Friday Agreement is to court failure. Leaving the current command structure of the RUC intact could well undermine the process of change, since experience from elsewhere suggests that officers in senior and middle ranks can become the locus for sustained resistance to change over the longer term.<sup>33</sup>

CAJ also raised concerns that whilst the remit of the Patten Commission had been on 'policing' it had largely focused on the 'civilian' police force and had less to say regarding other bodies carrying out policing roles. CAJ specifically raised concerns

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<sup>32</sup> Hillyard, Paddy & Tomlinson, Mike 'Patterns of Policing and Policing Patten' *Journal of Law and Society* 27:3 (2000) p 398.

<sup>33</sup> CAJ Submission S091 'Commentary on recommendations in the Patten report', September 1999, p 2. This submission set out proposals for how screening of past human rights abusers could be undertaken.

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about the potential for accountability gaps when there were agencies other than the PSNI involved in policing:

It is clearly illogical to strengthen civic oversight of policing, emphasise community-police partnership arrangements, and tighten up police complaints mechanisms, and yet allow the regular army, the RIR,<sup>34</sup> and other security forces which are not subject to such controls, to regularly act in lieu of the police. Insofar as these organisations continue to perform a policing function, they should be made subject to similar controls and training to that of their police counterparts.<sup>35</sup>

CAJ also noted, “many had argued for the disbandment of the Special Branch given repeated allegations in relation to human rights abuses” and expressed disappointment that this option appeared not to have been considered. CAJ noted that it may be that the Patten Commission assumed that the command merger, break up of Special Branch and its scattering throughout the PSNI would produce the same result, and hoped such measures could ensure long-term Special Branch officers could not undermine the process of change as had been the case in other police forces undergoing major transition.<sup>36</sup>

The concerns of CAJ and others that there would be significant resistance to the Patten reforms were quickly borne out. The draft legislation and implementation plan proposed by the British Government in 2000 to give effect to the proposals were so emasculated they bore little relation to the original Patten recommendations. In response one of the Patten commissioners, Clifford Shearing claimed, “The Patten Report has not been cherry-picked, it has been gutted.”<sup>37</sup> It took international pressure and a commitment in the 2001 UK-Ireland Weston Park Agreement for a new implementation plan and legislation in 2003 to take forward many of the Patten recommendations.<sup>38</sup>

In relation to the restructuring and reduction in size of Special Branch recommended by Patten, a 2002 report from Her Majesty’s Inspectorate of Constabulary (HMIC) noted that whilst the Chief Constable had moved half of the Special Branch staff placed within specialised units to the command of the Assistant Chief Constable for Crime:

This action was seen by some members in the service as a cosmetic exercise to comply with the recommendation whilst still maintaining

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<sup>34</sup> Royal Irish Regiment, a locally recruited regiment of the British Army.

<sup>35</sup> CAJ Submission S091, p 13.

<sup>36</sup> CAJ Submission S091, p 18.

<sup>37</sup> “Ministers ‘gutted’ Patten report on Ulster policing” *The Guardian* 14 November 2000.

<sup>38</sup> The Police (Northern Ireland) Act 2003.

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the strength and capability of Special Branch under a disguised structure.<sup>39</sup>

Whilst the proposed reforms to policing, including covert policing, were far-reaching in the context of what had preceded them, some academic commentators did not feel the reforms went far enough to successfully transform the policing culture of the RUC in the face of considerable establishment resistance. One analysis points in general terms to the impact on the peace process of a power base reflecting “two decades of a particular policy of conflict management thoroughly institutionalised within the ‘permanent government’ of the intelligence world, the upper ranks of the British Army and RUC as well as the NI civil service”.<sup>40</sup> The authors argue that the proposed ‘new’ policy for the RUC, which “had been given full support in its counterinsurgency role”, of being restructured, downsized and reformed into ordinary policing faced considerable challenges in the context of what they refer to as a ‘security state’:

...underpinned by numerous personal relationships between the Northern Ireland Office and the Home Office, the RUC and British police forces, and very close working relations between MI5 operatives working in Ireland and those in Britain. Behind the scene and directly responsible to the Prime Minister is the Cabinet Office Joint Intelligence Committee on which sit the heads of GCHQ, MI5, MI6 and the Defence Intelligence Staff... All of these groups have a material interest in the problem of policing being defined in traditional security terms rather than being recast as a partnership with communities.<sup>41</sup>

In the context of this ‘web of relations’ the analysis concluded that the Patten Commission “underestimated the problems involved in confronting entrenched interests within the matrix of the Northern Ireland state”, that it “contained no plan for transforming either the occupational or political culture of a counterinsurgency oriented RUC into a community safety, human rights oriented policing service” and ultimately its “adventurous blueprint for a new and radical conceptualization of policing in Northern Ireland” had “fallen foul of entrenched interests”.<sup>42</sup>

Two broad lessons can be drawn from the early experience of Patten. The first is that repositories of power (police or government) can be the most significant obstacle to developing rights-based policing. The second lesson is that police reform, like political transformation, necessitates changes to vested interests. Nevertheless, it is the case that whatever the issues around the implementation of

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<sup>39</sup> HMIC ‘A Review of Special Branch in the PSNI’ 2002 (the ‘Crompton Report’), para 4.16. The ‘50:50’ temporary special measure on recruitment did proceed but not without serious political resistance. It was expeditiously done away with by the NIO when the numbers of Catholic police officers approached the Patten target of 30% despite concerns at the time that the numbers might regress.

<sup>40</sup> Hillyard, Paddy & Tomlinson, Mike ‘Patterns of Policing and Policing Patten’ *Journal of Law and Society* 27:3 (2000), pp 394-415; p396.

<sup>41</sup> Hillyard & Tomlinson, 2000 p 405-6.

<sup>42</sup> Hillyard & Tomlinson, 2000 p 415.

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its principles the Patten Commission did provide a base template for policing reform, including that of covert policing, in the local context. The following section further examines how this interfaces with human rights standards and draws out resultant key elements of a framework by which to benchmark present day covert policing.

## **Developing a framework to measure human rights compliance**

The beginning of this chapter looked at a number of 'rule of law' frameworks within which covert policing should operate. Matters drawn from the human rights framework include principles on impunity which do not afford an exemption from the criminal law for covert police activities (including those undertaken by informers/agents) so as to enjoy *de facto* immunity from investigation and prosecution. There are also prohibitions on practices such as entrapment, as well as a duty to take reasonable steps to protect real threats to life which cannot be simply set aside to protect the identity of informers.

Creating systems of accountability and control are critical to guarding against such practices and a number of recurring themes emerge across both the human rights standards and Patten Commission proposals that can be summarised under four main headings:

### ***1: Clear published written policy on covert policing***

The law should clearly define 'national security' and security policy limit the role of intelligence agencies to analysis and dissemination of intelligence rather than broader policing tasks; both international standards and the Patten Report place considerable emphasis on the importance of clear written published policy which sets definitive parameters on the permitted actions of agencies and their agents (encompassing law, codes of practice, arrangements with other agencies etc);

### ***2: Developing a human rights culture***

Both Patten and the international standards refer to institutional reform in order to foster a human rights and rule of law culture. This would include human rights training and adherence to principles of non-discrimination. A human rights culture also involves tackling impunity through an emphasis on the duty to maintain records and to conduct independent and impartial investigations of alleged human rights violations, including collusion with paramilitary groups.

### ***3: Personnel, structure and composition***

As well as principles recommending the removal following due process of human rights abusers from the ranks of the police, reform to ensure institutions are representative and therefore reflect community demographics, particularly with respect to ethnic and gender dimensions, are also emphasised. In the Northern Ireland context there were specific

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recommendations to downsize and integrate 'Special Branch' within the broader police force to avoid the spectre of a 'force within a force'.

#### ***4: Oversight and control***

Both Patten and the international standards recommend the establishment of effective and independent oversight mechanisms, including complaints mechanisms. There has also been significant importance attached to policing not being subject to partisan political control.

There is a significant degree of complementarity between the international standards and the Patten recommendations. The four tier framework above is therefore grounded in both international standards and the local reality. From a human rights perspective it is therefore an appropriate yardstick against which to measure the extent of human rights compliance of contemporary covert policing in Northern Ireland.

Before we look specifically at MI5, the next chapter will summarise the main concerns about the operation of covert policing in Northern Ireland set out in official (yet independent) investigations and inquiry reports in recent decades. The problems which have been identified will provide further indicators as to the state of play of accountability for covert policing in relation to the above headings in the time running up to the transfer of primacy to MI5.

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## 2. Official investigations into covert policing

This chapter brings together some of the evidence of human rights abuses and other wrongdoing within the sphere of covert policing. This data has come to light through a range of official investigations over the past two and a half decades. Space does not permit a comprehensive account of the vast amount of evidence already in the public domain. However it should also be remembered that an enormous amount of evidence remains hidden or has been destroyed. Therefore what is summarised in this chapter could be likened to the proverbial 'tip of the iceberg'. Our purpose is to demonstrate what has happened within covert policing in the past (some of it in the quite recent past) and to therefore quantify what we have to expect (and fear) in the future if proper regulatory and accountability mechanisms are not put in place.

### The Stevens, Cory and Judicial Inquiries into collusion

On three occasions from 1989 to 2003 John Stevens, who became Commissioner of the Metropolitan Police and is now a member of the House of Lords, led separate police investigations into allegations of RUC collusion with loyalist paramilitaries.<sup>43</sup> The reports produced by Stevens remain classified, although a summary and recommendations from the third were published.

The 2001 UK-Ireland Weston Park Agreement aimed at taking forward the peace settlement led to the appointment of Justice Peter Cory, a retired Canadian supreme court judge, to conduct independent inquiries into allegations of paramilitary collusion by British and Irish security forces in six particular cases. Given that many aspects of these inquiries relate directly to covert policing they have provided a fascinating glimpse into the activities of officers and agents. Two of the cases relate to allegations of collusion by the Garda Síochána, one of which relates to the killing of two RUC officers in 1989 by the Irish Republican Army (IRA). In the latter case, Cory concluded that certain evidence, if accepted, could be found to constitute collusion and recommended a public inquiry.<sup>44</sup> This inquiry, known as the Smithwick Tribunal is currently hearing evidence in Dublin. In relation to allegations of RUC collusion public inquiries into the killings of loyalist paramilitary leader Billy Wright in the Maze prison by republicans, and human rights solicitor Rosemary Nelson by loyalists have taken place and reported. Hearings into the sectarian killing of Catholic Robert Hamill against the backdrop of the 'Drumcree' parading dispute have taken place, although a final report has been held back awaiting pending prosecutions. In relation to the final case on the Weston Park list the Prime Minister, David Cameron, publicly apologised for State collusion in the murder of

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<sup>43</sup> The enquiries were concerned with aspects of covert policing activities namely: Stevens I dealt with 'allegations of collusion between members of the security forces and loyalist paramilitaries'; Stevens II focused on allegations raised in Stevens I relating specifically to 'Brian Nelson and the security forces/services'; and, Stevens III investigated the circumstances surrounding the murder of Patrick Finucane. See 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.265 & 1.266.

<sup>44</sup> In the other case, the 1987 killing of Lord Justice and Lady Gibson by the IRA, Cory did not find evidence of collusion and hence did not recommend a public inquiry.

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Pat Finucane but refused an inquiry, instead settling for a review of case papers by a senior lawyer.

### *Human rights violations by security agencies*

The various inquiries have found evidence of failing to prevent murders, sectarian motivation in the levels of protection given to potential targets, facilitating or permitting the commission of crimes by agents and then covering them up, in addition to the failure to use available intelligence to protect people in order to protect agents. Stevens concluded that murders, including that of Pat Finucane “could have been prevented”<sup>45</sup> and that, “the RUC investigation of Patrick Finucane’s murder should have resulted in the early arrest and detection of his killers”.<sup>46</sup> Stevens also assessed whether sectarian motivation played a role in determining whether persons were warned they were potentially in danger:

A further aspect of my Enquiry was how the RUC dealt with threat intelligence. This included examination and analysis of RUC records to determine whether both sides of the community were dealt with in equal measure. They were not.<sup>47</sup>

Cory also identified a, “selective bias that governed the RUC Special Branch.”<sup>48</sup> There are concerns that exchange of intelligence information including threats, both to agencies with a ‘duty of care’ for individuals and to individuals whose own lives are at risk, has been compromised historically and made a second priority to protecting either the intelligence agent’s cover or an individual working as an informer. As Cory noted with respect to the death of Pat Finucane:

Similarly a much earlier document records the failure of SB [Special Branch] to act on a threat made on Patrick Finucane’s life in 1981, when the Security Service learned that a loyalist gunmen was intent on killing Patrick Finucane in his home. At a meeting held with officials from SB, various courses of action were discussed, but were rejected. On the question of issuing a warning, it was thought that “it was very unlikely that Patrick Finucane could be trusted to keep his own counsel if warned that he was a target”. Those present wished to preserve, at all costs, the security of the agent who had furnished the intelligence.<sup>49</sup>

In the case of Billy Wright who was killed in prison by Irish National Liberation Army (INLA) prisoners, Cory noted the documentation did not make it clear whether

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<sup>45</sup> ‘Stevens Enquiry 3: Overview and Recommendations, 17 April 2003’ (Stevens III) Sir John Stevens, Commissioner of the Metropolitan Police Service, paras 4.6 & 4.7. Stevens is referring to the killing of both Pat Finucane and Brian Adam Lambert, a student, by William ‘Billy’ Stobie who was a loyalist paramilitary and informer for the RUC Special Branch.

<sup>46</sup> Stevens III, para 4.6.

<sup>47</sup> Stevens III, para 2.18.

<sup>48</sup> ‘Cory Collusion Inquiry Report: Pat Finucane’ HC470, 2004, para 1.263.

<sup>49</sup> ‘Cory Collusion Inquiry Report: Pat Finucane’ HC470, 2004, para 1.254.

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threats to Wright were passed on to the prison service by the police. Cory noted, "... the RUC had primary responsibility for taking executive action on intelligence, including warning prison authorities where appropriate."<sup>50</sup> Cory also found a similar culture reflective of a "more general attitude toward intelligence gathering in Northern Ireland" in the British Army's covert intelligence body, the FRU:

Within FRU, there also existed attitudes which led to breaches of policies governing agent handling.... For example, FRU appeared to countenance the commission of crimes by its agents, perhaps perceiving this to be a necessary evil in the fight against terrorism. In the case of Brian Nelson, FRU did little, if anything, to control his activities, although his handlers were well aware of his criminal acts. Secondly, FRU's primary concern appeared to be agent security. This is, of course, a laudable and important goal, essential to maintaining an efficient intelligence network.... However, in the case of FRU, agent security was sometimes emphasised to the exclusion of other overriding objectives, such as preventing attacks on persons targeted by the UDA.

It appears from the CFs [Contact Forms] that Nelson's involvement in violent activities was of concern to his handlers only to the extent that this exposed him to the risk of apprehension by the police. In addition, Nelson often requested and received information from his handlers. This was another example of conduct that flouted recognised policy. Taken together, these examples could be seen to symbolize a more general attitude toward intelligence gathering in Northern Ireland, namely, that FRU considered the normal rules – including the rule of law – to be suspended and the gathering of intelligence to be an end that was capable of justifying questionable means. Indeed, this attitude was essentially confirmed by the CO [Commanding Officer] FRU, when he gave his testimony at Brian Nelson's trial.<sup>51</sup>

At the conclusion of his three inquiries Stevens noted in the summary of his findings that deficits in intelligence sharing were a form of collusion. Stevens also prefigures Cory's finding of 'selective bias' by noting that nationalists were not properly warned or protected:

My three Enquiries have found all these elements of collusion to be present. The co-ordination, dissemination and sharing of intelligence were poor. Informants and agents were allowed to operate without effective control and to participate in terrorist crimes. Nationalists were known to be targeted but were not properly warned or

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<sup>50</sup> 'Cory Collusion Inquiry Report: Billy Wright' HC472, 2004, para 3.122.

<sup>51</sup> 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, paras 1.260-1.

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protected. Crucial information was withheld from Senior Investigating Officers. Important evidence was neither exploited nor preserved.<sup>52</sup>

Among the recommendations of the Stevens 3 enquiry were:

- PSNI should adopt the 'National Intelligence Model';
- There should be Service Level Agreements between all departments and external partner agencies to clarify roles;
- Senior murder detectives should receive full cooperation and relevant intelligence from Special Branch, particularly when informers are suspects for murder or other serious crime;
- Conflicts between the investigation of crime and protection of agents to be resolved by regional Assistant Chief Constables;
- Guidelines on the use of informers in counter-terrorism should be completed as a matter of urgency, and must take account of the Regulation of Investigatory Powers Act 2000;
- An internal strategic review to ensure informers are only employed to achieve proportional coverage of the terrorist threat;
- Full training for all agent handlers, including integrity issues and keeping records;
- An internal investigation department should be established in PSNI to deal with allegations or suspicions of collusion and corruption.

### ***Cover-ups and resistance to accountability***

CAJ has long commented on a pattern of resistance to accountability among the security forces, in particular to inquiries or other independent investigation into conflict-related deaths in which the State is implicated. The analysis of the inquiries and investigations covered in this chapter indicates that there appears to be particular resistance to accountability where covert policing activities are concerned. The Billy Wright Inquiry chaired by Lord MacLean provides some evidence of this including:

- Difficulties, resistance and delays in obtaining intelligence documents from the PSNI, including the inquiry addressing the unacceptable request that the police service would only supply intelligence documents to a judicial inquiry after, "...the Inquiry had signed a Memorandum of Understanding (MoU) that the PSNI had drafted". The Inquiry "considered that the conditions suggested [in the MoU] by the PSNI could be seen as interfering with the independence of the Inquiry."<sup>53</sup>

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<sup>52</sup> Stevens Enquiry 3, para 4.9.

<sup>53</sup> 'The Billy Wright Inquiry – Report', HC431 2010 (Billy Wright Inquiry), para 6.65.

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- The concept of 'plausible deniability', used by former Assistant Chief Constable Sam Kinkaid in his testimony to describe the system in Special Branch that accounted for the overall lack of policing documentation. As defined by ACC Kinkaid this refers to, "...a practice or culture that existed in an organisation where the members did not keep records, so there was no audit trail. Nothing could be traced back, so that if they were challenged they denied it, and that denial, being based on no documentation, would become 'plausible deniability'." The system in Special Branch was such "that it didn't give proper audit trails and proper dissemination, and at times it would appear that it allowed people at a later date to have amnesia, in the sense that they couldn't remember because there was no data on the system."<sup>54</sup> The Inquiry concluded that the failure of the PSNI to produce "hard copy intelligence documents, such as intelligence logs and surveillance registers" meant "...the Inquiry's work has been very considerably frustrated, and that the task of tracing a decision-making process, or assessing individual responsibility for action (or lack of it), has been made much more difficult, and sometimes impossible."<sup>55</sup>

At the conclusion of his three enquiries Stevens commented on the utility of missing or withheld intelligence documentation, the outworking of what ACC Kinkaid referred to as 'plausible deniability'. Stevens stated, "The absence of any record means that this criminal allegation cannot be substantiated against any RUC officer."<sup>56</sup> Such practices clearly frustrate accountability; arguably they are also indicative of a deliberate cover up. Judge Cory, who commented extensively on the obstructions encountered during the course of the Stevens enquiries, considered whether the wide-ranging obstructions by the police service revealed an "attitude and course of conduct that should be taken into account in determining whether they were acts of collusion."<sup>57</sup> He went on to comment on the public interest represented by the inquiries and the responsibilities of Government:

The mandate of the various Stevens Inquiries has been to determine the truth in matters of vital importance to the people of Northern Ireland. The public has a very real interest in ensuring that state security forces and their agents function within the law. Moreover, it is equally important that those in Government be made aware of any deficiencies or improprieties on the part of agencies that are charged with the duty of maintaining law and order. In this context it was disturbing to learn that RUC SB and FRU seem to have taken active and deliberate steps to obstruct the progress of the Stevens Inquiry from the time of its inception.<sup>58</sup>

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<sup>54</sup> Billy Wright Inquiry, para 5.141.

<sup>55</sup> Billy Wright Inquiry, para 5.142.

<sup>56</sup> Stevens Enquiry 3, para 2.16

<sup>57</sup> 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.265.

<sup>58</sup> 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.267.

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Contrary to the above experience Cory's comments regarding the participation of the police service during the Robert Hamill Inquiry are markedly different. Cory notes, "The Police Ombudsman's office has been extremely helpful and the Police Service of Northern Ireland (PSNI) has cooperated fully. I would like to particularly thank Acting Detective Superintendent [name redacted] for his exemplary cooperation."<sup>59</sup> It is difficult to avoid the conclusion that this willingness is linked to the fact that the Hamill Inquiry did not involve any investigation of covert policing. In fact, in the report document there is no mention of RUC Special Branch, the Force Research Unit or MI5, or any discussion of intelligence documents or national security.

Significantly Cory links the withholding of information from the Stevens inquiry to collaboration at the most senior levels of the RUC and military:

I have reviewed a document which would appear to lend strong support to the allegation that RUC SB and FRU consciously set out to withhold pertinent information from the Stevens Inquiries. It sets out the minutes of various meetings attended by senior officials, including the former GOC NI (General Officer Commanding, Northern Ireland). This document confirms that the GOC NI had discussed the Stevens Inquiry with the Chief Constable of the RUC before the Inquiry team even arrived in the province. The document states that: "The CC (Chief Constable) had decided that the Stevens Inquiry would have no access to intelligence documents or information, nor the units supplying them". The document also asserts that, in delaying delivery of Nelson's intelligence dump, the Army was acting "under the instructions of the RUC throughout". Ultimately, in January 1990 following Nelson's arrest, it was determined that it was becoming "increasingly difficult to keep the Stevens Inquiry away from intelligence information". It was only then that the dump was turned over.<sup>60</sup>

This led Cory to his final conclusion that covert policing units in both the British Army and the police service take the position that they are not 'bound by the law':

The wilful concealment of pertinent evidence, and the failure to cooperate with the Stevens Inquiry, can be seen as further evidence of the unfortunate attitude that then persisted within RUC SB and FRU. Namely, that they were not bound by the law and were above and beyond its reach. These documents reveal that Government agencies (the Army and RUC) were prepared to participate jointly in collusive acts in order to protect their perceived interests. Ultimately the relevance and significance of this matter should be left for the

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<sup>59</sup> 'Cory Collusion Inquiry Report: Robert Hamill', HC471, 2004, para 2.7.

<sup>60</sup> 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.269.

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consideration of those who may be called upon to preside at a public inquiry.<sup>61</sup>

Stevens experienced the 'above and beyond the law' culture during his inquiries into aspects of covert policing. Throughout his enquiries Stevens encountered a concerted campaign to obstruct his investigations of which he stated, "Throughout my three Enquiries I recognised that I was being obstructed. This obstruction was cultural in its nature and widespread within parts of the Army and the RUC."<sup>62</sup> This obstruction also extended to ministerial level in the Ministry of Defence with Stevens stating that it was not until November of 2002 that his team were finally given a "considerable amount of additional documentation from the Minister of Defence, giving rise to several new and major lines of enquiry". He notes this late disclosure with "considerable disquiet." It was not the first time this had occurred as Stevens states, "I had encountered the same problem of late disclosure during my two previous enquiries and expressed then my strong concerns surrounding the issue."<sup>63</sup> In fact during the first enquiry Stevens received written statements that the particular documents he requested did not exist although subsequent enquiries uncovered all the requested documents. A further three major disclosures by the Army and the Ministry of Defence prompted Stevens to begin an investigation as to "whether the concealment of documents and information was sanctioned and if so at what levels of the organisations holding them." He noted further that, "It has been necessary to interview the same witnesses a number of times because of the failure to provide complete information at the first time of asking."<sup>64</sup> At the conclusion of his three investigations Stevens stated succinctly:

My enquiries have highlighted collusion, the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, and the extreme of agents being involved in murder. These serious acts and omissions have meant that people have been killed or seriously injured.<sup>65</sup>

### ***Influence on and protection by Government***

There are indicators in the public inquiry reports of a cultural tendency within Government to protect the reputation of the security forces and prevent disclosure of their activities over and above ensuring accountability.

For example, a partially redacted British intelligence document (dated 15 August 2002) read into the record of the Smithwick Tribunal reported that a senior security official or civil servant had sought to keep the murders of RUC officers Breen and Buchanan outside the matters to be examined by Justice Cory. Reportedly this was

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<sup>61</sup> 'Cory Collusion Inquiry Report: Pat Finucane', para 1.270.

<sup>62</sup> Stevens Enquiry 3, chapter 3.

<sup>63</sup> Stevens Enquiry 3, para 1.11.

<sup>64</sup> Stevens Enquiry 3, para 3.5 & 3.6.

<sup>65</sup> Stevens Enquiry 3, para 1.3.

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on the grounds of being aware of evidence that the alleged Garda-IRA collusion in the murder could be traced back to a senior RUC officer, and the consequences this could have for the PSNI if this was to emerge in the Cory report.<sup>66</sup> Should this document be accurate it would be indicative of a culture of 'closing ranks' at Government level rather than ensuring accountability. Issues around the culture of civil servants within the Northern Ireland Office (NIO) were raised in the Rosemary Nelson Inquiry. Rather than the NIO regarding its role as ensuring effective police accountability the Inquiry report recorded civil servants and Ministers effectively dismissing complaints as being simply anti-police. The Inquiry concluded:

The attitude we saw among senior managers – deference towards the RUC; irritation caused by the volume of correspondence from the NGOs; and lack of real appreciation of the considerable danger that Rosemary Nelson faced – explains why the NIO failed to take proactive steps to deal with the threat to Rosemary Nelson's life.<sup>67</sup>

The influence of Special Branch on political officials and the deference extended to intelligence agents was further evidenced in the briefing given to Douglas Hogg MP which apparently led him to comment in the House of Commons in 1989, shortly before the murder of Pat Finucane, that "I have to state as a fact, but with great regret, that there are in Northern Ireland, a number of solicitors who are unduly sympathetic to the cause of the IRA..."<sup>68</sup> In 2000 Mr Hogg noted that these comments were based on "advice received from senior police officials, including a briefing by Special Branch" attended by the Chief Constable, Deputy Chief Constable and other senior officers.<sup>69</sup>

Another outworking of the 'protectionist' culture in Government are the difficulties encountered to establish independent inquiries. Whilst the commitments to hold inquiries were contained in Intergovernmental Agreements which resulted from the peace negotiations their progress has not been straightforward. Following Cory's recommendations to hold inquiries in four UK cases, the Inquiries Act 2005 was passed through Westminster. This legislation, which replaced previous statutory basis for inquiries, provided for wide-ranging powers to subordinate control of key aspects of the inquiry to a government minister. The Northern Ireland Human Rights Commission, which regarded the 2005 Act as incompatible with the ECHR, wrote to the UN Human Rights Committee stating it considered that the legislation:

...makes it impossible to set up truly independent inquiries into deaths (and other serious issues) by virtue of an unprecedented

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<sup>66</sup>'Smithwick Tribunal: Intelligence report pointed finger at RUC officer' *BBC News Northern Ireland*, 20 July 2012 [available at <http://www.bbc.co.uk/news/uk-northern-ireland-18928471> accessed 20 July 2012].

<sup>67</sup>'The Rosemary Nelson Inquiry – Report' HC947, 2011, para 25.32.

<sup>68</sup>'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.257. Also see reference to the document on Patrick Finucane, SB 20836, from Special Branch file.

<sup>69</sup>'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.258. Mr Hogg's statements dated 28-29 September 2000. Sir John Stevens also concluded that information passed to Douglas Hogg MP, then Under Secretary of State for the Home Office, which led to his statement was "not justifiable" and had "compromised" the Minister (See Stevens Enquiry 3, Overview & Recommendations, para 2.17).

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subordination of the inquiry process to the control of Government ministers at every stage, even though the actions of the executive may, more often than not, be the very subject of investigation.<sup>70</sup>

A Judicial Review into the decision to convert the Billy Wright inquiry into one conducted under the Inquiries Act also questioned the independence of inquiries under its provisions, in particular the Ministerial powers to bring inquiries to an end. Mr Justice Deeney asked “whether an inquiry conducted under a sword of this nature, which was perhaps not Damoclean but still rested in the scabbard of the Minister, would or could be perceived to be truly independent.”<sup>71</sup> The United Nations Human Rights Committee also expressed its concerns at both delays to holding inquiries and the use of the Act:

The Committee remains concerned that, a considerable time after murders (including of human rights defenders) in Northern Ireland have occurred, several inquiries into these murders have still not been established or concluded, and that those responsible for these deaths have not yet been prosecuted. Even where inquiries have been established, the Committee is concerned that instead of being under the control of an independent judge, several of these inquiries are conducted under the Inquiries Act 2005 which allows the government minister who established an inquiry to control important aspects of that inquiry.<sup>72</sup>

The Committee urged “independent and impartial inquiries in order to ensure a full, transparent and credible account of the circumstances surrounding violations of the right to life in Northern Ireland” be conducted “as a matter of particular urgency.”<sup>73</sup> One of the cases of human rights defenders the UN referred to was that of Pat Finucane. Despite all of this, in October 2011 the British Prime Minister informed the Finucane family that his administration would not deliver on the commitment to conduct a public inquiry into the 1989 killing. The family and their representatives present have publicly stated that they were told by Mr Cameron that “There are people in buildings all around here who won't let it happen.”<sup>74</sup> It is hard to see how this statement can be interpreted otherwise than that those who may have been implicated in the murder had, in effect, blocked the inquiry. Such actions would give a strong indication that those at the top of the security establishment still have the power to unduly determine Government policy. It also provides an indication of the

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<sup>70</sup> Northern Ireland Human Rights Commission correspondence to Professor Yuji Iwasawa Chairperson, UN Human Rights Committee, 24 August 2009.

<sup>71</sup> Mr Justice Deeney *In the matter of an application by David Wright for Judicial Review of a decision of the Secretary of State for Northern Ireland*, 22 December 2006 NIQB 90.

<sup>72</sup> UN Human Rights Committee (ICCPR Concluding Observations on the UK) CCPR/C/GBR/CO/6/CRP.1 21 July 2008, para 9.

<sup>73</sup> ICCPR Concluding Observations on the UK, 2008, para 9.

<sup>74</sup> See for example: ‘Finucanes’ bid to question PM blocked’ *UTV News Online*, 24 April 2012.

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continuing concerns about what truly independent inquiries could expose in relation to covert policing and the actions of the security forces during the conflict.<sup>75</sup>

The following section examines two landmark reports by the Police Ombudsman which focus on covert policing. First, the Omagh Bomb report relating to issues of sharing intelligence data; and second, the 'Operation Ballast' report into allegations of RUC Special Branch collusion between a Loyalist paramilitary group in north Belfast.

## The Police Ombudsman's Omagh Bomb report

On 15 August 1998 a bomb exploded in Omagh, County Tyrone killing twenty nine people, one of whom was pregnant with twins. Over 200 others were injured. It was the single worst atrocity of the conflict, and occurred in the months after the Belfast/Good Friday Agreement.

In 29 July 2001, the *Sunday People* newspaper reported allegations made from a man described as a former 'British security force agent', given the name of Kevin Fulton, who suggested that the Omagh bombing could have been prevented.

The Police Ombudsman decided to make enquiries into these allegations and later decided to use her powers to carry out a formal investigation into: 1) whether information of relevance was available to the RUC prior to the bombing; 2) whether any such information had been responded to appropriately by the RUC; 3) whether intelligence held by the RUC was given and used by those investigating the bombing; 4) whether the evidential opportunities uncovered by an RUC-conducted review of their original Omagh bomb investigation had themselves been investigated.

Published in December 2001, the report found very serious shortcomings in the RUC's handling of intelligence information prior to the Omagh bombing, as well as the investigation of the incident by the RUC and later, the PSNI.<sup>76</sup> The Police Ombudsman found that intelligence indicating an attack would take place in Omagh on the date of the explosion was not adequately analysed or acted upon, that this intelligence was not passed on to the police in Omagh and that Special Branch did not share most of its intelligence with the police team investigating the bombing. In her conclusions the Police Ombudsman noted that notwithstanding the cooperation of some police officers, "At senior management level the response to this enquiry has been defensive and at times uncooperative."<sup>77</sup> With respect to reforming Special Branch the investigation led the Police Ombudsman to warn:

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<sup>75</sup> See also for example a recent Parliamentary Question by Jeffery Donaldson MP, at which he raises, following a briefing from senior retired police officers, concerns about "the threat to national security from evidence that is being given in inquests in Northern Ireland that opens up the whole modus operandi of our security forces and security services." Hansard HC Debates, 4 July 2012, c907.

<sup>76</sup> Office of the Police Ombudsman for Northern Ireland, 'Statement by the Police Ombudsman for Northern Ireland on her investigation of matters relating to the Omagh Bombing on August 15 1998' (Police Ombudsman Omagh Bomb Report 2001), para 3.4.

<sup>77</sup> Police Ombudsman Omagh Bomb Report 2001, para 7.2.

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The proposed plans for the implementation of the Patten Report in respect of Special Branch require further consideration. Mere structural change, departmental re-design and presentation will not be sufficient, unless there is other organisational and cultural change which offers better integration, more cohesive working and a positive strategic approach to the whole process of gathering, managing and disseminating information.<sup>78</sup>

There was strong reaction to the Ombudsman's report from the political and policing establishment. In December 2001, having received an advanced draft of the report, the RUC Chief Constable Ronnie Flanagan (himself a former head of Special Branch) asked for additional time before publication to respond to the report alleging it contained "many significant factual inaccuracies, unwarranted assumptions, misunderstandings and material omissions." In an indication of how upset the Chief Constable was in response to the Police Ombudsman's findings, he insensitively went as far as saying he would "commit suicide in public" if the conclusions in the report were correct.<sup>79</sup> He also raised the prospect of suing the Police Ombudsman for libel. The Police Association for Northern Ireland did take a judicial review in response to the report, but it was eventually withdrawn, a decision the Police Ombudsman welcomed as vindication of the report.<sup>80</sup>

Of particular concern to many observers was the fact that after the Police Ombudsman's report was released Prime Minister Tony Blair came to the immediate defence of the Chief Constable when his spokesperson stated, "Sir Ronnie has the Prime Minister's full support." In contrast, despite the highly personalised nature of the dispute, the spokesperson did not simultaneously offer full support to the Police Ombudsman or welcome the report, but merely noted the Police Ombudsman had done her job.<sup>81</sup> Then Northern Ireland Secretary of State Peter Mandelson went much further describing the report as a "very poor piece of work indeed" arguing that it fell "below the quality and standards of objectivity and rigour required in a report of this kind."<sup>82</sup> Some local Ulster Unionist politicians also criticised the Police Ombudsman. John Taylor (Lord Kilclooney, then a member of the Policing Board) stated the Police Ombudsman had overstepped her responsibilities and called for her resignation.<sup>83</sup> More shocking was the response of (Lord) Ken Maginnis who likened Ms O'Loan to a suicide bomber and claimed she had "outlived her usefulness."<sup>84</sup> The Police Federation also called on her to "consider her position."<sup>85</sup>

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<sup>78</sup> Police Ombudsman Omagh Bomb Report 2001, para 7.1

<sup>79</sup> 'Emotional Flanagan in "suicide" outburst' *The Guardian* 14 December 2001.

<sup>80</sup> The Office of the Police Ombudsman for Northern Ireland, 'Police Ombudsman statement following the withdrawal of a judicial review brought by the Police Association for Northern Ireland to quash her report into the events surrounding the Omagh Bombing' 23 January 2003.

<sup>81</sup> "PM backs Ulster Police Chief" *The Guardian*, 14 December 2001.

<sup>82</sup> 'Mandelson attacks O'Loan' *Belfast Telegraph*, 14 December 2001.

<sup>83</sup> 'Policing Board attempts to end Omagh Impass' *The Irish Times*, 6 February 2002.

<sup>84</sup> 'Maginnis accused of putting O'Loan in danger', *The Irish Times*, 17 December 2001.

<sup>85</sup> 'Row rages over tip-off given to Special Branch', *Belfast Telegraph*, 7 December 2001.

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One interpretation of this level of opposition would be that such responses evidence a reluctance or opposition to light being shed on covert policing practices. The Police Ombudsman stood behind her report and ultimately key recommendations were accepted by the Policing Board.<sup>86</sup> These included two recommendations for reviews by Her Majesty's Inspector of Constabulary (HMIC), the first into the effectiveness of PSNI murder investigations – including the issue of Special Branch-CID intelligence sharing – and the second a review into the role and function of Special Branch itself. This was to include structures and procedures for the management and dissemination of intelligence and examination of whether Special Branch would be 'fully and professionally integrated' into the PSNI.<sup>87</sup>

## The HMIC Crompton and Blakey Reports and further investigations

The Ombudsman's recommendations were taken forward by HMIC and two reports, the Blakey Report of May 2003 and the Crompton Report of October 2002, were produced. CAJ has obtained copies under the Freedom of Information Act.<sup>88</sup> Both HMIC reports begin by praising the dedication of RUC/PSNI officers, including the courage and professionalism of Special Branch officers, and emphasise that their comments and recommendations should not be seen as 'criticism or blame' but rather should be viewed positively.<sup>89</sup> Such caveats are unusual for inspectorate reports and are perhaps indicative of the sensitivities or pressures the HMIC, as a policing body, felt in relation to critiquing RUC/PSNI covert policing. Notably also the Crompton review into Special Branch emphasised that "the Terms of Reference are specific and not retrospective... [the inspection] ...represents an informed assessment of the current situation within Special Branch."<sup>90</sup> The reports do go on to provide an important insight and critique of the institutional policy framework under which Special Branch were operating.

The Blakey Report, whilst positive on some aspects of intelligence dissemination did express concerns that a 'rigorous process' did not exist for senior detectives to examine the relevance of intelligence within C3 Intelligence Branch (the successor unit to Special Branch). HMIC recommended the adoption of a UK standard – the National Intelligence Model (NIM) – in relation to intelligence cells in murder investigations.<sup>91</sup>

The Crompton Report made reference to a 2002 internal PSNI review recommending the restructuring of Intelligence Branch which committed itself to the implementation of the NIM.<sup>92</sup> The report does address tensions between

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<sup>86</sup> Northern Ireland Policing Board, 'Specially Convened Meetings to Discuss the Omagh Reports', 5 & 7 February 2002 [available at: <http://cain.ulst.ac.uk/issues/police/policingboard/nipb050202omagh.htm> accessed 15 June 2012].

<sup>87</sup> As above, para 8.1, recommendations 4 & 5 respectively.

<sup>88</sup> 'A thematic Inspection of Murder Investigation in the PSNI' (Blakey report) HMIC May 2003; 'A Review of Special Branch in the PSNI' (Crompton Report) HMIC October 2002.

<sup>89</sup> Blakey report, preface; Crompton Report, paras 1-3.

<sup>90</sup> Crompton report paras 2.2 & 2.6. Emphasis in original.

<sup>91</sup> Blakey Report, para 4.119.

<sup>92</sup> Crompton Report, para 4.19.

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Special Branch and CID in relation to the priority given to protecting informers over allowing the intelligence taken from them to inform criminal investigations. The HMIC characterises this as a tension between the two competing human rights of protecting the right to life of a source and the duty to conduct an effective and thorough investigation.<sup>93</sup> HMIC recommends the adoption of an ‘intelligence cell’<sup>94</sup> approach which could comply with domestic policing standards including the ACPO Murder Investigation Manual and national guidelines for Special Branch work.<sup>95</sup>

The Crompton Report’s 2002 assessment of the then ‘current situation’ in the PSNI depicts a service which appeared to be adhering to a counterinsurgency footing. The report provides some evidence of ongoing relative isolation and institutionalisation of Special Branch. It further contrasts Special Branch covert capability and “total unfettered control of resources” with concerns that CID had “limited intelligence resources, a substantial shortfall in staffing, inadequate training and equipment...”<sup>96</sup>

The Crompton report also contrasts the more closed Special Branch-led role of the multi-agency Tasking and Coordinating Groups (TCG) which undertakes the task of “managing and coordinating covert activity on the ground” with the more open pre-operations TCG process envisaged by the National Intelligence Model which allows broader police participation. To this end HMIC concludes, “Whilst it is essential to maintain the capacity and ability of Special Branch, it is desirable that a more transparent and auditable decision-making process is introduced to ensure equity and accountability within the PSNI.” The report recommends resources are deployed via an open tasking and coordinating process led by regional PSNI police commanders, with decisions recorded on “service approved documentation.”<sup>97</sup>

It is important to emphasise that the HMIC is a formal inspectorate body for the PSNI and previously the RUC, and there is clearly no exemption for the covert or intelligence gathering function. Indications exist in the Crompton report however of a culture within RUC Special Branch of not paying due regard to the HMIC. Declassifying sections of a prior 1987 inspection of RUC Special Branch the HMIC laments that the failure to implement previous recommendations, which in this instance largely focused on officers spending too long in Special Branch and being isolated from the rest of the force, as a contributing factor in the present difficulties faced by the PSNI.<sup>98</sup> Clearly effective oversight is a core part of a human rights culture and any disregard for the views of an inspectorate would be a source of concern.

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<sup>93</sup> Crompton Report, para 4.30.

<sup>94</sup> This approach is set out in detail in Appendix A of the Crompton Report.

<sup>95</sup> Crompton Report, para 4.34.

<sup>96</sup> Crompton Report, para 4.35.

<sup>97</sup> Crompton Report, para 5.72-8, & 6.9-10.

<sup>98</sup> Crompton Report, para 5.2-5.5.

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## *Omagh: further controversy and questions*

Following the Ombudsman's report into Omagh and the subsequent HMIC reports, the controversy over withheld intelligence data in the case did not abate and continued with growing MI5 connections. The Police Ombudsman's report referenced Fulton as an RUC agent but also noted he had "participating informant" status with "another agency."<sup>99</sup> Recently legal representatives of 'Fulton', also known as Peter Keeley, told the Smithwick Tribunal their client operated inside the IRA for MI5 with 'Kevin Fulton' being a name "given to him for newspaper reports when he spoke about the Omagh bombing."<sup>100</sup>

Claims involving other agents and allegations about MI5 involvement have been around for a number of years. In early 2006, the year that would later see the St Andrews Agreement, allegations emerged as part of an investigation into an FBI agent who had infiltrated the real IRA that MI5 had withheld vital intelligence from RUC Special Branch about the bomb plot.<sup>101</sup> In March 2006 then PSNI Chief Constable Hugh Orde reportedly told the Policing Board that the head of the Omagh bomb investigation was satisfied that the Security Service did not withhold relevant intelligence which would have *progressed the investigation* into the bombing, but did not deny MI5 may have held back information *prior* to the bombing.<sup>102</sup>

In May 2006 the British Government faced parliamentary questions as to whether: "some of the information gathered by MI5 on a possible bomb attack in Omagh prior to 15 August 1998 was only passed to the PSNI in 2006"; whether the Government would meet with the Omagh families "to discuss the statement by the Chief Constable of the PSNI that MI5 had threat information on a possible bomb attack on Omagh prior to the 15 August 1998"; and whether Government would "establish a public inquiry into MI5's handling of threat information" about the Omagh bomb. The Government response was limited to reiterating that the Chief Constable had stated MI5 had not withheld evidence to the inquiry, only further adding that "governments neither confirm nor deny matters relating to intelligence information" and that there would not be a public inquiry.<sup>103</sup>

In September 2008 a BBC Panorama documentary reported vital intercept intelligence gathered by Government Communications Headquarters (GCHQ) had not been passed to police promptly to prevent the bombing or assist the investigation.<sup>104</sup> This led to Government appointing the Intelligence Services Commissioner to review these allegations (and others made in the *Sunday Times*). Although this report was not published for reasons of 'national security' extracts from it, with a view that the intelligence services were innocent from any

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<sup>99</sup> Police Ombudsman Omagh Bomb Report 2001, para 6.3.

<sup>100</sup> 'Tribunal hears RUC officer 'set himself up'', *RTE News Online*, 27 July 2011.

<sup>101</sup> 'MI5 withheld intelligence ahead of Omagh', *RTE News Online*, 24 February 2006.

<sup>102</sup> 'MI5 "did not retain Omagh advice"', *BBC News Online*, 1 March 2006.

<sup>103</sup> Written Answer, 03 May 2006, Shaun Woodward MP, Secretary of State for Northern Ireland, PQs06/1916-20.

<sup>104</sup> 'Omagh: what the police were never told' *BBC Panorama*, broadcast 15 September 2008.

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wrongdoing, were published.<sup>105</sup> Further developments are expected via an ongoing campaign for a cross-border public inquiry. In early 2012 Omagh relatives told the Northern Ireland Affairs Committee that new, disturbing significant information was coming to light, which would strengthen demands for such an inquiry.<sup>106</sup>

## The Police Ombudsman's Operation Ballast Report

In 2007 covert policing practice was brought into sharp focus by the Police Ombudsman's investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters (Operation Ballast).<sup>107</sup> The report uncovered incidents of collusion between RUC Special Branch officers and a unit of the UVF loyalist paramilitary group.<sup>108</sup> The investigation revealed that police intelligence reports and other documents, most of which were rated as "*reliable and probably true*", linked police agents and one informant in particular to ten murders.<sup>109</sup> The key findings of the Operation Ballast Report included that a police agent was a suspect in the murder which had triggered the Police Ombudsman's investigation but that police had failed to carry out a thorough investigation into the murder and had continued to use the agent despite extensive intelligence indicating his alleged serious criminality. Additionally, following a further murder in which the agent was implicated, the subsequent Special Branch written assessments of the agent made no reference to his alleged involvement in the murder. Unsurprisingly the Police Ombudsman's report noted "grave concerns about the practices" of some police officers, including:

- Failure to arrest informants for crimes to which those informants had allegedly confessed, or to treat such persons as suspects for crime;
- The concealment of intelligence indicating that on a number of occasions up to three informants had been involved in a murder and other serious crime;
- Arresting informants suspected of murder, then subjecting them to lengthy sham interviews at which they were not challenged about their alleged crime, and releasing them without charge;
- Creating interview notes which were deliberately misleading; failing to record and maintain original interview notes and failing to record notes of meetings with informants;

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<sup>105</sup> 'Review of Intercepted Intelligence in Relation to the Omagh Bombing of 15 August 1998', Sir Peter Gibson, Intelligence Services Commissioner, 16th January 2009 (published extracts).

<sup>106</sup> "Disturbing' evidence on Omagh bombing found', *Irish Times*, 4 February 2012.

<sup>107</sup> 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters' (Operation Ballast Report), Nuala O'Loan, Police Ombudsman for Northern Ireland, 22nd January 2007.

<sup>108</sup> Namely the Ulster Volunteer Force in the Mount Vernon Estate, North Belfast. 'Loyalist' refers to loyalty to the British Crown.

<sup>109</sup> Operation Ballast Report, para 9. There was also less reliable intelligence information implicating an informant in five other murders, and other intelligence information linking informants to 10 attempted murders, in addition to a significant number of others in a significant number of crimes "in respect of which no action or insufficient action was taken".

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- Not recording in any investigation papers the fact that an informant was suspected of a crime despite the fact that he had been arrested and interviewed for that crime;
  - Not informing the Director of Public Prosecutions that an informant was a suspect in a crime in respect of which an investigation file was submitted to the Director;
  - Withholding from police colleagues intelligence, including the names of alleged suspects, which could have been used to prevent or detect crime;
  - An instance of blocking searches of a police informant's home and of other locations including an alleged UVF arms dump;
  - Providing at least four misleading and inaccurate documents for possible consideration by the Court in relation to four separate incidents and the cases resulting from them, where those documents had the effect of protecting an informant;
  - Finding munitions at an informant's home and doing nothing about that matter;
  - Withholding information about the location to which a group of murder suspects had allegedly fled after a murder;
  - Giving instructions to junior officers that records should not be completed, and that there should be no record of the incident concerned;
  - Ensuring the absence of any official record linking a UVF informant to possession of explosives which may, and were thought according to a Special Branch officer's private records, to have been used in a particular crime;
  - Cancelling the "wanted" status of murder suspects "because of lack of resources" and doing nothing further about those suspects;
  - Destroying or losing forensic exhibits;
  - Continuing to employ as informants people suspected of involvement in the most serious crime, without assessing the attendant risks or their suitability as informants;
  - Not adopting or complying with the United Kingdom Home Office Guidelines on matters relating to informant handling and further, not complying with the Regulation of Investigatory Powers Act when it came into force in 2000.<sup>110</sup>

Drawing on the definitions of "collusion" provided by Stevens ("the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, the extreme of agents being involved in murder...")<sup>111</sup> and Judge Cory,<sup>112</sup>

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<sup>110</sup> Operation Ballast Report, para 11.

<sup>111</sup> Stephens 3 Enquiry, para 4.7.

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the Police Ombudsman concluded there had been a range of counts of collusion between police officers running police agents. The Ombudsman also concluded that “as a consequence of the practices of Special Branch the UVF particularly, in North Belfast and Newtownabbey were consolidated and strengthened.”<sup>113</sup>

Whilst Operation Ballast only analysed a small part of the informant handling of RUC/PSNI Special Branch it emphasised there was no reason to believe that the findings were isolated, recording that, on the contrary, they were highly likely to be “systemic” and the implications hence “very serious.”<sup>114</sup> The Ballast report was produced in the run up to the transfer of national security policing to MI5 in the context of which the Police Ombudsman recommended a thematic inspection by HMIC. The HMIC inspection would review the new PSNI processes for informant handling, controlling and management to in particular, identify legislative or administrative changes which are required to enable the effective handling of Covert Human Intelligence Sources (CHIS). This recommendation was accepted and a ‘summary for publication’ was produced by HMIC in July 2008, with the full inspection report remaining classified. The summary notes that the inspection was undertaken in 2008 to allow the PSNI-MI5 transfer to bed in. Curiously, the terms of reference were to “provide reassurance to the people of Northern Ireland” that following transfer to MI5 the work arrangements within PSNI for running CHIS “in terrorist networks are robust, effective and comply with all necessary legislation.”<sup>115</sup>

The inspection did not extend to MI5 and like previous HMIC reports it opens by stressing, “It is important to clearly articulate” that the report was about current arrangements and does not seek to “pass judgement on arrangements in place prior to this date.”<sup>116</sup> Beyond setting out the background and methodology the public report does not discuss either findings or recommendations beyond being ‘reassuring’ that arrangements are now “robust, effective and comply with all the necessary legislation.”<sup>117</sup> It makes passing reference to protocols being in place to manage informers, that some undefined “minor areas of improvement” have been suggested to both PSNI and MI5, in addition to cryptically referenced concerns relating to “clarification that is needed in some areas of legislation regarding participation” that HMIC regards as being dealt with satisfactorily.<sup>118</sup> This 2008 inspection fits into a pattern of ‘trust us’ reports which effectively articulate ‘most things are fine but we can’t tell you how or why’. This trend of reporting has

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<sup>112</sup> For the purposes of his inquiry reports Judge Cory states that: “the definition of collusion must be reasonably broad... That is to say that army and police forces must not act collusively by ignoring or turning a blind eye to the wrongful acts of their servants or agents, or supplying information to assist them in their wrongful acts, or encouraging them to commit wrongful acts. Any lesser definition would have the effect of condoning or even encouraging state involvement in crimes, thereby shattering all public confidence in these important agencies.” See ‘Cory Collusion Inquiry Report: Pat Finucane’ HC470, 2004, para 1.274.

<sup>113</sup> Operation Ballast Report, para 33.4.

<sup>114</sup> Operation Ballast Report, para 33.2.

<sup>115</sup> HMIC Inspection Report, summary for publication ‘PSNI Management and Handling of Covert Human Intelligence Sources in Terrorist Networks’ (HMIC CHIS Inspection, 2008) July 2008.

<sup>116</sup> HMIC CHIS Inspection, 2008, para 1.10.

<sup>117</sup> HMIC CHIS Inspection, 2008 para 4.6.

<sup>118</sup> HMIC CHIS Inspection, 2008, para 4.6.

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emerged in relation to reporting on covert policing arrangements in Northern Ireland.

More enlightening is an appendix to the Police Ombudsman's Operation Ballast report which details changes which have taken place in PSNI working practices since 2003. This includes details of structural changes and information that the PSNI in October 2003 created a CHIS Risk Analysis Group and instigated a 'major review' of all the informants they employed known as the CRAG review. The CRAG review resulted in around a quarter of all informants being let go, half of them as they were deemed "too deeply involved in criminal activity".<sup>119</sup> This level of CHIS involvement in criminality is cited by the Ombudsman as further corroborating evidence of her conclusion that the specific problems identified in her investigation were not isolated.<sup>120</sup> The CRAG review also established policies that the involvement of informants in any criminal activity beyond membership or support of a paramilitary organisation had to be approved by the ACC of Crime Operations and that all criminal activity by paramilitary informants had to be strictly documented and controlled.<sup>121</sup> The adoption of a significant number of new procedures, training requirements and written policy standards by the PSNI is also referenced in the appendix.<sup>122</sup>

### ***Evidence of recent resistance to accountability for past abuses***

In CAJ's view, since around the time of the Operation Ballast report there have been new and significant changes which have effectively regressed the ability of mechanisms established to investigate the role of the State during the conflict to provide accountability. These include the Police Ombudsman's Office itself wherein the first Police Ombudsman finished her term of office shortly after the Ballast report and a second Police Ombudsman was appointed. Subsequent evidence emerged of political and police interference in historic investigations into police misconduct during the conflict, much of which would engage the activities of police agents and irregularities in the appointment of the Second Ombudsman.<sup>123</sup>

A CAJ investigative report into the Police Ombudsman was published in June 2011, and among the main findings were concerns surrounding the Office's independence from the PSNI, in addition to the access to intelligence documents the Office was

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<sup>119</sup> Operation Ballast Report, Appendix A, paras 8-10.

<sup>120</sup> Operation Ballast Report, para 11.

<sup>121</sup> Operation Ballast Report, paras 14-15.

<sup>122</sup> Including issued internal guidance in April 2004 which emphasised that officers should conduct proper Risk Assessments of informants, in line with the ACPO Manual of Minimum Standards. In August 2004 PSNI also introduced stricter guidelines around obtaining information from members of the public who were not registered informants. PSNI also introduced a Manual for the Management of CHIS, which covered the use of informants both for the investigation of crime and in the interests of National Security, and applied similar principles to each type of informant. In December 2005 PSNI set out new guidelines in relation to the management of informant payments and financial records, also in December 2005, PSNI issued a Policy Directive to implement the National Intelligence Model. Also, "The PSNI have now adopted the principles of the ACPO, HM Revenue and Customs, SOCA and Centrex guidance on the Management of Covert Human Intelligence Sources", paras 22-40.

<sup>123</sup> For the latter see CAJ Correspondence to NIO in Appendix C 'CAJ's submission no. S386 to the Department of Justice's consultation on the Future Operation of the Office of the Police Ombudsman for Northern Ireland' June 2012.

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receiving for its investigations. The report raised concerns of the potential for 'gatekeepers' within the police to significantly limit and control the Office's access to intelligence without detection. In particular the report raised the spectre that former RUC Special Branch officers may be in control of the provision of information, despite potentially being implicated in the matter being investigated.<sup>124</sup>

The CAJ report and resignation of the Chief Executive triggered further investigations and reports by the Department of Justice (DoJ)<sup>125</sup> and the Criminal Justice Inspector (CJI).<sup>126</sup> The CJI report recommended the suspension of the examination of historic cases by the Police Ombudsman's office due to a 'lowering of independence' of the Office concluding, among other matters that, "[Police Ombudsman] Staff investigating some of the worst atrocities of the conflict believe police have acted as 'gatekeepers' to withhold key intelligence from them" and that "Reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation." The Second Ombudsman subsequently resigned, a successor was appointed and a process of reform of the Office has now been instigated.

At around the same time there were substantive changes to the PSNI Historical Enquiries Team (HET) assigned to reinvestigate all unsolved killings during the conflict. CAJ has concerns that changes to the HET have lessened its ability to conduct effective investigations.<sup>127</sup> This includes concerns over independence, impartiality and potential conflicts of interests in relation to HET access to intelligence data with academic research concluding "all aspects of intelligence are managed by former RUC and Special Branch officers" and further noting that "intelligence is more often available for incidents carried out by paramilitary groups than for incidents attributed to the Security Forces."<sup>128</sup>

Nevertheless it is notable that HET were originally assigned to re-investigate the linked series of cases referenced in the Ballast report. However in 2009 these investigations, now known as 'Operation Stafford', were actually transferred from the HET to the PSNI Crime Operations department, which contains the C3 successor department to Special Branch. There is a view that that decision may have been taken as the HET were about to move in on the Special Branch handlers.<sup>129</sup> A

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<sup>124</sup> Human Rights and Dealing with Historic Cases: A Review of the Office of the Police Ombudsman for Northern Ireland, CAJ (2011). The report recommended, "In light of the legal and human rights obligations of the Office of the Police Ombudsman, it would seem appropriate for the Office to adopt a robust position, and ensure that 'gatekeepers' are not limiting access to intelligence. Our attempts to establish how independence around intelligence was ensured in theory and in practice in this regard were inconclusive. However, it is the responsibility of the Police Ombudsman's Office to develop safeguards to ensure independence around intelligence, to be transparent about what these safeguards are, and to subject them to independent scrutiny."

<sup>125</sup> McCusker, Tony 'Police Ombudsman Investigation Report', Office of the Minister of Justice, 16 June 2011.

<sup>126</sup> 'An Inspection into the independence of the Office of the Police Ombudsman for Northern Ireland', Criminal Justice Inspector Northern Ireland, September 2011.

<sup>127</sup> For further information see the 'Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) & the Pat Finucane Centre (PFC) in relation to the supervision of Cases concerning the action of the security forces in Northern Ireland.' CAJ/PFC, February 2012.

<sup>128</sup> Lundy, Patricia 'Can The Past Be Policed?: Lessons from the Historical Enquiries Team Northern Ireland', *Law and Social Challenges*, Vol.11, Spring/Summer, 2009. p 30-31.

<sup>129</sup> See Moore, Chris 'The state and Northern Ireland's past', *The Detail*, 19 December 2011.

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second follow-up investigation to Ballast by the Police Ombudsman into police misconduct has also barely progressed. This lack of progress was exposed in a BBC *Spotlight* documentary on 13 March 2012 in which CAJ participated.

Also exposed by the BBC was the rehiring, apparently as an advisor to the Chief Constable on legacy matters, of a former Acting Assistant Chief Constable and Special Branch head who had previously inappropriately lobbied the Police Ombudsman to encourage this office to desist from using the term 'collusion' arguing that its use "undermined the credibility of RUC Special Branch."<sup>130</sup>

At the time of the Crompton report in 2002 HMIC noted that the Patten severance arrangements had had a 'significant and disproportionate' effect on Special Branch with 13% of officers departing.<sup>131</sup> Whilst this may be indicative of Patten achieving organisational and cultural change, it has been tempered in recent times by revelations of the PSNI 'rehiring scandal', whereby the PSNI has rehired officers who took such Patten severance packages into senior 'civilian' positions. In early 2012 the BBC uncovered that over 300 former RUC officers had been rehired, often to work in the most sensitive parts of the service, including 63 in the C3 Intelligence Branch which succeeded Special Branch.<sup>132</sup>

CAJ's key concern about this practice is the potential 'conflict of interest' of former Special Branch officers being in a position to control intelligence information or otherwise influence conflict-related investigations in which their former units may be implicated. In October 2012 the Northern Ireland Audit Office produced a report into the practices. CAJ had given evidence to the watchdog and its report addresses the issue of 'conflicts of interest' of rehired officers in relation to the HET. The Audit Office recommends further measures are introduced, including that all members of an investigative team are required to formally 'declare their independence' at the outset of an investigation. The Audit Office report finds of all PSNI Departments the Crime Operations Branch, which includes C3 Intelligence Branch (formerly Special Branch), has the second highest number of rehired officers. Of those persons rehired to work as 'Intelligence Officers' 97% were former retired officers.<sup>133</sup>

The rehiring practice also drew criticism from the main public sector trade union NIPSA as a "jobs for the boys" culture with NIPSA also noting members had come "under pressure by the police not to raise their concerns".<sup>134</sup> In August 2012 the mother of Raymond McCord Jr whose murder was the trigger for the Operation Ballast report instigated legal proceedings against the PSNI's rehiring policy. This was reportedly in light of her concerns that former Special Branch officers rehired

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<sup>130</sup> Kearney, Vincent 'PSNI officer who protested use of term 'collusion' re-employed', *BBC News Online*, 29 November 2011.

<sup>131</sup> Crompton Report, para 4.23.

<sup>132</sup> Kearney, Vincent "Ex-RUC officers in 'sensitive' policing jobs", *BBC news online*, 17 January 2012.

<sup>133</sup> 'Police Service of Northern Ireland: Use of Agency Staff Report to the Assembly by the Comptroller and Auditor General for Northern Ireland, 02 October 2012, para 3.18; figure 7 & figure 14.

<sup>134</sup> 'NIPSA brands PSNI rehiring policy as 'jobs for the boys'', *BBC News Northern Ireland*, 24 May 2012.

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into the PSNI “may be in a position to mislead or hamper” any future investigation into her son’s murder.<sup>135</sup>

## Conclusions: the challenge of reform

The problems identified by Stevens, Cory, the first Police Ombudsman Nuala O’Loan, and the post-Cory public inquiries provide an evidential basis of the enormous challenges to any reforms which seek to bring covert policing practice within international standards and the rule of law.

In contrast to the stipulations of international standards and Patten for clear published written policy on covert policing, the reports demonstrate a culture of either not having written codes of practice etc. which set legitimate boundaries of agent activity, or simply ignoring such rules when they were set out. Recommendations of the reports analysed repeatedly urge the adoption of written policy frameworks based on domestic policing standards – such as the ‘National Intelligence Model’, as well as the adoption of agreements between police departments and other agencies. It is difficult to avoid the conclusion that the stipulation in international standards of roles and permitted activities being clearly set out in publicly available law and policy was clearly a long way from being met.

Reports such as those produced by Justice Cory highlighted a culture which was the antithesis of a human rights culture. This included examples of contempt for both human rights defenders and oversight. There was evidence of a policy of protecting agent identities over protecting life and stopping the commission of serious crimes as well as, in relation to the requirement of non-discrimination in the duty to protect life, issues of ‘selective bias’.

The investigations highlighted a culture and practice which sharply diverges from duties in international standards to keep records and effectively investigate collusion, exposing policies of ‘plausible deniability’, sham investigations and the obstruction of inquiries. Evidence from investigations and their context appear to illustrate stiff resistance to independent investigation and reveal a culture resistant to reform measures underpinned, at least in part, by long standing interpersonal and structural relationships between senior policing officials, civil servants, and other figures.

In relation to structural change and the recommendations of Patten for reform of Special Branch and the PSNI role, there are indications in a HMIC report in 2002 that the PSNI was still very much on a counter-insurgency footing with Special Branch/C3 given clear resourcing priority over other policing. The report also indicated the unit continued to operate in relative isolation and officers continued to be institutionalised within it. Compositional reforms were also undermined by practices such as those exposed in the subsequent PSNI ‘rehiring scandal’ whereby

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<sup>135</sup> Kearney, Vincent ‘Vivienne McCord in legal challenge to PSNI’s rehiring policy’, *BBC News Northern Ireland*, 30 August 2012.

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RUC officers who had taken Patten severance packages were simply rehired into sensitive areas such as covert policing work.

Returning to the role of the intelligence services, chapter three examines what is known about the role of MI5 in covert policing before and after the St Andrews Agreement.

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### 3. MI5 and national security policing

#### Overall role of the Security Service / MI5

The official role of the Security Service, also known as MI5 (from Military Intelligence, Section 5) is set out in legislation as:

...protecting the UK against threats to national security from espionage, terrorism and sabotage, from the activities of agents of foreign powers, and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.<sup>136</sup>

MI5, whose functions also include countering threats to the 'economic wellbeing' of the UK and supporting law enforcement bodies in tackling serious crime, is responsible for 'internal security'. MI6 (the "Secret Intelligence Service") is responsible for operating internationally (defined in its legislation as 'outside the British Islands').<sup>137</sup> The third main arm of the UK intelligence agencies is the Government Communications Headquarters (GCHQ) with a role of monitoring and intervening in communications.

Prior to 1989 the UK had no statutory or judicial controls over the Security Service, and routinely denied its existence. The first legislation which afforded an - albeit limited - regulatory framework was the Security Service Act 1989 which defined the functions of MI5, the responsibilities of the Director General, and placed MI5 under the authority of the Home Secretary. A new Official Secrets Act was also introduced in 1989, which outlawed the unauthorised disclosure of information held by the security and intelligence services and a broad range of civil servants. This was followed by the Intelligence Services Act 1994, which gave statutory recognition to the existence of MI6 and GCHQ, and established the Intelligence and Security Committee. Prior to the Regulation of Investigatory Powers Act 2000 (RIPA) the UK had no statutory or judicial controls over the use of informers.<sup>138</sup> As well as covering matters such as the interception of communications, RIPA provided a framework for the use of 'Covert Human Intelligence Sources' (CHIS). RIPA also established further regulatory mechanisms for the intelligence services. These bodies are examined in the next chapter. This chapter will focus on what is known about MI5's past and present role in Northern Ireland.

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<sup>136</sup> S 1(2) Security Service Act 1989.

<sup>137</sup> S 1(1)(a) Intelligence Services Act 1994.

<sup>138</sup> Hillyard, Paddy 'Regulating state political violence: Some reflections on Northern Ireland', February 2009. p 4.

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## MI5 during the conflict

Given the secretive nature of its activities there is little available information about the full extent of MI5's role in Northern Ireland up until the St Andrews Agreement. The information which has come to light has often depended on subsequent investigative reports. Human Rights groups have tried to document activities, including the Pat Finucane Centre, which has among the information resources on its website a repository of media and other reports on MI5.<sup>139</sup>

St Andrews itself speaks of the passing of "lead responsibility" for national security intelligence to MI5, and that MI5 will "continue to run directly a small number of agents", giving some official acknowledgement of the agency's role prior to this date.<sup>140</sup>

In the early stages of the conflict Government policy took a predominantly military approach following the deployment of British troops in 1969. The 'Hunt Report' of the same year recommended: the disarmament of the RUC; the disbandment of the special constabulary and its replacement with a police reserve and local British Army regiment; and, relieving the RUC of "all duties of a military nature as soon as possible", albeit the force would retain its intelligence gathering role.<sup>141</sup> Despite no derogation from the ECHR seeking the application of International Humanitarian Law (the laws of war), the British Army's official review of its 'Operation Banner' describes the period until the mid-1970s as 'classic insurgency'.<sup>142</sup> Recently released declassified official documents, published by Relatives for Justice, speak of the British Government's intention "to carry out the war with the IRA with upmost vigour" and that "the Army should not be inhibited from its campaign by the threat of court proceedings and should therefore be suitably indemnified."<sup>143</sup> MI5 was operating in Northern Ireland at the time, as evidenced by its officers giving evidence to the Saville Inquiry into Bloody Sunday.<sup>144</sup>

Following this period however, in the thirty years until the transfer of primacy to MI5 for national security policing in 2007, official policy changed to that of 'police primacy'. Officially, under the 'Ulsterisation' policy, the RUC led operations with the military acting in support of the police as the civil power.<sup>145</sup> In relation to Great Britain, primacy over operations against the IRA was passed from the Metropolitan Police to MI5 in 1992. However in Northern Ireland primacy remained with RUC Special Branch with MI5 officially playing a small, strategic and subordinate role.

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<sup>139</sup> [www.patfinucanecentre.org](http://www.patfinucanecentre.org) [accessed September 2012].

<sup>140</sup> UK-Ireland St Andrews Agreement 2006, Annex E.

<sup>141</sup> 'Report of the Advisory Committee on Police in Northern Ireland' (The Hunt Report), HMSO 1969, CM535, para 183.

<sup>142</sup> 'Operation Banner: An analysis of Military Operations in Northern Ireland', Chief of General Staff, July 2006. p 1-3.

<sup>143</sup> 'Conclusions of Morning Meeting held at Stormont Castle on Monday 10 July 1972', Secretary of State William Whitelaw MP. Those present included the Army Chief of General Staff and RUC Deputy Chief Constable.

<sup>144</sup> For example, see evidence given to the Bloody Sunday Inquiry on 6-9 May 2003.

<sup>145</sup> For a more detailed appraisal of these two phases of official policy see: Ní Aoláin, Fionnuala 'The Politics of Force' Belfast: Blackstaff Press 2000, chapter 1.

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This position is reflected in official reports such as the 'Gibson review'. This references MI5 being led by a Director and Coordinator of Intelligence strategically advising Government, with the assistance of an Assessments Group composed of a small team of MI5 desk officers. Gibson also refers to MI5 providing 'specialist support' requested by the RUC through its operational branch in Britain and a 'small team' of locally based MI5 officers.<sup>146</sup> A Cory Report similarly refers to MI5 running its own agents and providing "overall direction for and coordinated intelligence initiatives carried out by other agencies" such as RUC Special Branch and the FRU, yet stating it did not play an active role in the day-to-day operations of these agencies, although it did act in a 'supervisory' capacity.<sup>147</sup> Information given to the Billy Wright Inquiry emphasises police primacy noting that in "Northern Ireland the Security Service and the Ministry of Defence (MOD) were subordinate to the SB" in the intelligence role and that its agent running operation "was small compared with those of the SB and the Army, and was primarily concerned with strategic issues". The MI5 role is described as "predominantly to provide strategic advice to Ministers on threats from paramilitary organisations"<sup>148</sup> There would be questions about how such a role would operate in practice given it would conflict with the prerogative of law enforcement if intelligence was solely used to provide strategic briefings, rather than being acted on to prevent threats. The Billy Wright Inquiry also noted the secondment of MI5 personnel to RUC Special Branch HQ in 1997 following changes introduced further to *A Review of Special Branch* known as the Warner Report. The purpose of the secondments, referred to as Embedded Security Service Officers (ESSOs), was "to improve the processes by which political and strategic intelligence was collected and analysed."<sup>149</sup>

Whilst much of this information points to a limited remit, other sources of information point to a much more powerful role played by MI5 in practice. The Rosemary Nelson Inquiry, whilst noting the 'formal role' of MI5 was subordinate to RUC Special Branch, argued "in practice it was highly influential" and that despite police primacy MI5 "maintained a highly significant presence in Northern Ireland."<sup>150</sup> The Inquiry Report also references the 'heavy dependency' of RUC Special Branch on MI5 to supply surveillance devices, which the former had no independent capability for, and also identifies a role for the local MI5 director in overseeing the funding of monies for RUC run agents.<sup>151</sup>

Other information supports the suggestion that while RUC Special Branch held primacy for such activities, meaning officially that both MI5 and the British Army were subordinate to Special Branch, the Security Service in practice dictated the terms of the overall security strategy.

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<sup>146</sup> 'Review of Intercept evidence in relation to the Omagh Bomb' (published extracts) (Gibson review), January 2009, paras 18,19,21.

<sup>147</sup> 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.172.

<sup>148</sup> The Billy Wright Inquiry Report HC 431, HMSO, September 2010, paras 5.38,5.146 & 5.150.

<sup>149</sup> As above, para 5.48 5.62 & 5.100

<sup>150</sup> The Rosemary Nelson Inquiry Report, HC974, HMSO, 23 May 2011, para 14.5.

<sup>151</sup> As above, paras 12.8 & 14.11.

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## Walker Report 1981

In 2001 the media revealed the existence of what had been the confidential 1981 'Walker Report' authored by Patrick Walker, reportedly then deputy head of MI5's Belfast station. He later became head of MI5's 'counter-terrorism directorate' which "evenly divided its time between Irish and international terrorism."<sup>152</sup> He subsequently became MI5 Director General. The Walker Report contained what became high-level policy that priority was to be given to RUC Special Branch intelligence gathering over normal law enforcement. As one analysis succinctly noted, "Its focus was on making it absolutely clear that all decisions about arrest, the investigation of particular activities and the responsibility for the circulation of intelligence all rested with Special Branch."<sup>153</sup> The same commentator goes on to argue that the result of this was the subordination to counterinsurgency of the primary policing function of detecting and investigating crime.<sup>154</sup>

In relation to Walker *The Guardian* reported "MI5 gave the RUC Special Branch wide-ranging powers stipulating that the force could give priority to recruiting terrorist informers over solving crime... the report shows how the agency [MI5] dictated security policy in Northern Ireland during the 80s and 90s."<sup>155</sup> A UTV documentary broadcast the views of a 'very senior RUC source' that "Special Branch ran the RUC, but it was MI5 pulling their strings behind the scenes".<sup>156</sup> Human rights groups expressed their concern about the report and British Irish Rights Watch (BIRW) stated the policy document exposed what they had long suspected:

The RUC has never been an ordinary police force. Its role in keeping the peace, the prevention and detection of crime and upholding the rule of law has been distorted by the primacy given to the collation of intelligence by special branch. These guidelines explain why we have watched bemused as perpetrators of crimes as serious as murder have gone free. If Special Branch was running the RUC, was MI5 running Special Branch? At what political level were these arrangements sanctioned?<sup>157</sup>

Attention has also been drawn to the covert manner in which such a fundamental shift in strategy took place, the senior level at which it was agreed and, it is argued, the ongoing level of influence it granted the Security Service:

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<sup>152</sup> <https://www.mi5.gov.uk/home/mi5-history/mi5-today/the-terrorist-threat-in-the-1980s.html> [accessed 11 September 2012]

<sup>153</sup> Hillyard, Paddy 'Regulating state political violence: Some reflections on Northern Ireland', February 2009. p 4

<sup>154</sup> Hillyard cited in McGovern, M. (2010) 'Ignatieff, Ireland and the Lesser Evil: Some Problems with the Lessons Learnt', in B. Brecher, M. Devenney & A. Winter (eds) *Discourses and Practices of Terrorism: Interrogating Terror*, London: Routledge, 135-150.

<sup>155</sup> Norton-Taylor, Richard and Hopkins, Nick 'Security Service Told RUC That It Could Put Spying on Terrorists Ahead of Solving Crimes' *The Guardian*, June 14, 2001.

<sup>156</sup> UTV Insight programme 'Policing the police' broadcast 01 May 2001, transcript published by Pat Finucane Centre at: <http://www.patfinucanecentre.org/pf/pf04052001a.html> [accessed September 2012].

<sup>157</sup> BIRW Director Jane Winter quoted in 'Security Service told RUC that it could put spying on terrorists ahead of solving crimes' *The Guardian*, 14 June 2001.

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What was so extraordinary about this fundamental change in policing was that it was never announced in a Green or White paper, let alone debated in Parliament. It was devised and implemented in secret, by the secret service. Parliament and the general public never knew of such a crucial change... However, the reforms, which subverted the normal democratic process must have been discussed at the highest level in the Northern Ireland Office and, in particular, in the Joint Intelligence Committee – the intelligence steering group at the heart of government in the Cabinet Office, which Mrs Thatcher chaired at the time. All subsequent Prime Ministers and Secretaries of State for Northern Ireland would also have been aware of this fundamental change in policing... MI5 was, therefore, centrally involved in developing the new policy and determining its own role within it... Although Special Branch was given the lead role, MI5, having devised the strategy, played a significant role behind the scenes. They pulled the strings.<sup>158</sup>

In addition, evidence has also emerged of significant levels of control exercised by MI5 over monies to pay Special Branch informers. In 2007 the *Sunday Times* carried claims from a former senior RUC Special Branch officer arguing that in effect MI5 controlled all monies for running 'national security' agents:

...there was no budget in the old Police Authority for payments to Special Branch informants. There was an amount for your average CID drugs tout but that was audited by the Northern Ireland Office. The Security Service funds all security intelligence budgets...<sup>159</sup>

The *Sunday Times* cited senior security sources as confirming that this system remained in place with the current Policing Board having no oversight or control of payments to PSNI Intelligence Branch informants. The Rosemary Nelson Inquiry also concluded that it "might be said" MI5 had a "measure of control" over Special Branch after the Belfast-based head of MI5 confirmed that among the "blunt instruments" he had at his disposal were powers to withhold payments to agents, although they were "used rarely."<sup>160</sup>

As well as highlighting MI5 training of Special Branch the *Sunday Times* reported that the Walker Report specified "that records should be destroyed after operations, that Special Branch should not disseminate all information to Criminal Investigations Detectives (CID) and that CID should require permission from Special Branch before making arrests, or carrying out house searches in case agents were endangered."<sup>161</sup> It is notable that it is exactly this type of policy and

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<sup>158</sup> Hillyard, Paddy 'Perfidious Albion: Cover up and Collusion in Northern Ireland' *Statewatch Bulletin*, forthcoming.

<sup>159</sup> Clarke, Liam 'MI5 pays for murder in Northern Ireland' *Sunday Times*, 28 January 2007.

<sup>160</sup> The Rosemary Nelson Inquiry Report, Para 14.6 & 14.11.

<sup>161</sup> Clarke, Liam 'MI5 pays for murder in Northern Ireland' *Sunday Times*, 28 January 2007.

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practice which was subsequently criticised in the investigations by Stevens, Justice Cory, and the first Police Ombudsman.

One former member of the Policing Authority publicly argued, in fairly damning terms, that this type of MI5-backed policing culture had also been instrumental in creating a power base which could provide a focus of resistance to police reform:

There's no doubt that this culture of secrecy, of unaccountability, of doing things behind closed doors which was often necessary to protect the lives of informers above all, fostered this arrogance and fostered a belief that somehow, the Special Branch enjoyed special powers... There's no doubt at all that with the backing of the Security Service and the government, it was very difficult for even successive Chief Constables to break the firm within a firm. There was always that inner core, that inner sanctum of Special Branch which was surrounded by excessive secrecy, excessive expulsion (sic) of outsiders and an excessive arrogance.<sup>162</sup>

An academic analysis examining the extent of the transformation of the 'counter-terrorism' policing model raised concerns about "the defence of past practices through strategies of denial, obfuscation and contestation by agencies themselves."<sup>163</sup> However, the study argues that in instances where it appears strategies of informant protection were given precedence over life protection responsibility for the same lay "with the highest levels of government" which raises "fundamental constitutional issues" about the rule of law.<sup>164</sup> Links are also made between failing to deal effectively with accountability for past policing and the legitimacy of current policing with the author arguing:

...the intelligence led-policing practices which allowed people to commit murder with impunity remain a significant source of political contention. As such, they present barriers to the building of confidence in the PSNI and the implementation of the policing principles articulated in the Agreement and the Patten Report... within a framework of accountability and human rights.<sup>165</sup>

Within policing there appear to be advocates of the appropriateness and success of placing the RUC on a 'counterinsurgency' rather than criminal justice footing during the conflict. In 2002 an HM Inspector of Constabulary report stated:

The particular circumstances of policing in Northern Ireland makes it especially difficult to secure convictions from post incident

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<sup>162</sup> Chris Ryder, Former member of Police Authority, speaking on UTV Insight 'Policing the Police' May 1 2001, transcript published by Pat Finucane Centre at: <http://www.patfinucanecentre.org/pf/pf04052001a.html> [accessed September 2012]

<sup>163</sup> Tomlinson, Mike 'From Counter-terrorism to criminal justice: Transformation or Business as Usual?' *The Howard Journal*, Vol 51, No 5. December 2012, p442-457; p 453.

<sup>164</sup> Tomlinson, 2012.

<sup>165</sup> Tomlinson, 2012 p 448.

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investigations. For this reason, the majority of Special Branch work has concentrated on pro-active disruption operations. This approach has proved very successful with an estimated four out of five intended terrorist attacks being frustrated.<sup>166</sup>

Taking this claim at face value it could be argued that thwarting attacks demonstrates the State is taking the most effective proactive steps to protect life. Viewed more critically however, to the extent this involves selective 'impunity' for police agents and others, it could be characterised as the State taking an approach of 'conflict management' rather than upholding and administering the law. For example, should intervention decisions on intelligence threats to life be acted upon on the basis of selective criteria, the State is effectively managing or even directing the activities of other protagonists in the conflict, as well as being a protagonist itself. As recorded above, Stevens concluded that RUC Special Branch did not deal in equal measure with threat information in relation to both sides of the community.<sup>167</sup> In his collusion report Justice Cory found that MI5 on three separate occasions obtained threat information that the UDA intended to kill Pat Finucane which appears not to have been acted on. In relation to the first threat in 1981, which was the only one for which adequate records were kept, Cory found that MI5 agreed with RUC Special Branch not to take any action, despite the threat being 'very real and imminent', to prevent compromising the identity of the agent.<sup>168</sup>

Whilst there are persons who argue that State collusion and similar practices created the circumstances for the ceasefires, CAJ has taken the opposite view that the State acting outside of the law fuelled and exacerbated the conflict.<sup>169</sup> Justice Cory for one also argued that allowing agents to get away with criminal acts "will increase, not decrease, the level of homicidal violence".<sup>170</sup>

### ***MI5 and the armed forces***

As mentioned earlier in this report the RUC and the Security Service were not the only agencies involved in covert operations and running agents. There were also covert units within the British Army engaged in running agents, including the Force Research Unit (FRU). The FRU Commander told a court during the trial of one of its agents that FRU had "no guidelines for the undercover agents' activities" whom it had infiltrated within both republican and loyalist paramilitary groups.<sup>171</sup> Special Forces units such as the 14<sup>th</sup> Intelligence Company were also deployed to engage in surveillance operations.

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<sup>166</sup> HMIC 'A review of Special Branch in the PSNI' (the Crompton Report) October 2002, para 4.27

<sup>167</sup> Stevens Enquiry 3, Overview and Recommendations, para 2.18

<sup>168</sup> 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.173-4.

<sup>169</sup> For the former position take for example comments in a journalistic piece analysing collusion in the 1994 Loughinisland massacre that 'many in Northern Ireland are convinced' that 'the large number of killings' of civilians by loyalists using weapons imported with alleged state collusion contributed to the eventual ceasefire decision (Cobain, Ian 'Northern Ireland loyalist shootings: one night of carnage, 18 years of silence' *The Guardian*, 15 October 2012.

<sup>170</sup> 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.29.

<sup>171</sup> Statement of 'Colonel J' during the Trial of Brian Nelson 29 January 1992, cited in Lawyers Committee for Human Rights 'Beyond Collusion: the UK security forces and the murder of Pat Finucane' 2003.

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The activities of FRU are particularly controversial, especially the activities of their agent Brian Nelson. Stevens states that his first enquiry “uncovered the criminality of the Army’s agent Brian Nelson” who, despite continued support from the British Army in court, was eventually sentenced in 1992.<sup>172</sup> Justice Cory records that FRU were aware of Nelson’s illegal activities, which included an active role in targeting individuals. At Nelson’s trial the British Army argued that Home Office Guidelines stating agents were not to be involved in criminality were ‘inappropriate’ for the Northern Ireland situation. There is also the question of FRU support for Nelson in procuring arms from apartheid South Africa for loyalist paramilitaries.<sup>173</sup> British Irish Rights Watch expressed concern that, “After 1988 [loyalist paramilitaries’] capacity for murder increased dramatically and their targeting of victims became very much more precise. There seems to be very little doubt that FRU played a systemic role in this.”<sup>174</sup> Whilst the *Lawyers Committee for Human Rights* cites journalistic claims that FRU reported to Downing Street’s Joint Intelligence Committee, the role of MI5 is particularly controversial given, in theory, MI5 is to regularly brief Ministers.<sup>175</sup> Justice Cory stated it was “clear that MI5 was aware of all FRU activities and had access to all FRU documentation.”<sup>176</sup> This therefore prompts the outstanding question as to how much Ministers were briefed by MI5 about covert activities which were outside the law.

As noted earlier interagency covert operations were coordinated by Tasking and Coordinating Groups (TCGs) led officially by RUC Special Branch with the involvement of other agencies including MI5, but also military units such as the SAS. The SAS, as well as the RUC, were involved in a number of high-profile and controversial ‘shoot-to-kill’ incidents. According to one study between 1981 and 1988 the SAS shot dead 37 people.<sup>177</sup> The shooting of three members of the IRA in Gibraltar in March 1988 provided some indication of the relationship between MI5 and the SAS. After Gibraltar several British newspapers, including *The Sunday Telegraph* and *The Observer*, reported MI5 and Ministers were involved in the decision to send the SAS into Gibraltar.<sup>178</sup> The *Guardian* reported that MI5 were responsible for the surveillance and intelligence for the operation and in effect ‘tasked’ the SAS to undertake it:

MI5 officers visited Gibraltar and briefed military authorities, including the Governor-General...The key decision was then taken to draw up a contingency plan to bring in the SAS. The SAS Counter Revolutionary Warfare (CRW) team and its commanders, chosen to keep on standby for a possible operation, was detached from the

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<sup>172</sup> Stevens Enquiry 3, Overview and Recommendations, para 4.3.

<sup>173</sup> Cory Collusion Inquiry Report: Pat Finucane’ HC470, 2004, paras 1.14-1.64.

<sup>174</sup> BIRW ‘Justice Delayed: alleged state collusion in the murder of Pat Finucane’ para 1.2.

<sup>175</sup> Lawyers Committee on Human Rights ‘Beyond Collusion: the UK security forces and the murder of Pat Finucane’, 2003, p 30.

<sup>176</sup> ‘Cory Collusion Inquiry Report: Pat Finucane’ HC470, 2004, para 1.172.

<sup>177</sup> Murray, R ‘The SAS in Ireland’ Mercier Press Ltd: Dublin, 1990, p 274.

<sup>178</sup> See O’Dwyer-Russell, S., D. Macintyre & W. Ellis, ‘A Job for the SAS’, *Sunday Telegraph*, 13 March 1988; Holland, M., S. de Bruxelles & I. Mather, ‘So who did sign the “death warrant”?’ *The Observer*, 13 March 1988, cited in Murray, 1990.

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rest of the SAS – which is technically under the command of the conventional Ministry of Defence military structure. From then on the SAS team in effect became an instrument of the Security Service. MI5 officers were directly involved in the operation and it is understood drove the Gibraltar police cars which took the SAS to the scene of the shooting on March 6.<sup>179</sup>

The implications of the *Guardian's* claims are that MI5 moved from providing intelligence to taking direct control of the SAS and the subsequent military operation. In fact this version of events now appears to be confirmed by MI5 itself. On its web-site the following account appears:

Though the MPSB [Metropolitan Police Special Branch] retained the lead intelligence role against PIRA [Provisional IRA] in Britain, MI5, somewhat illogically, had responsibility for monitoring its 'overseas links and source of [arms] supply'. The Security Service's biggest deployment against an expected PIRA attack during the later Cold War was thus, paradoxically, not in London but in Gibraltar, where the weekly changing of the guard which marched down a route lined with parked cars offered an ideal location for a car bomb attack. In March 1988 the three members of a PIRA active service unit (ASU), who had been identified by MI5 and were preparing an attack, were shot dead in Gibraltar by military personnel in civilian clothes who said they believed that the ASU was about to detonate a car bomb by remote control and/or to draw their weapons. The ASU turned out to be unarmed.<sup>180</sup>

It appears that procedures were in place to facilitate this kind of deployment and hence this may not be an isolated incident of, in effect, the SAS operating as an executive branch of MI5.

### **Summarising the role of MI5 during the conflict**

We do not know the full extent of the role of MI5 during the conflict. Even at so long a remove, its operations continue to be shrouded in secrecy.<sup>181</sup> However, the above evidence suggests that the Security Service worked closely with RUC Special Branch and directed it strategically and perhaps on occasion tactically. It appears to have been the author of the policy which not only consolidated the role of Special Branch as a 'force within a force' but also gave it primacy over any other aspect of policing. It would also appear that the agency was at least aware of the illegal activities of the FRU and that it used not only police officers as its executive arm but also, on occasions at least, special forces. All this amounts to evidence that the

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<sup>179</sup> 'Power behind the scene' *The Guardian*, 5 September 1988.

<sup>180</sup> <https://www.mi5.gov.uk/home/mi5-history/mi5-today/the-terrorist-threat-in-the-1980s.html> [Accessed 03 Oct 2012]

<sup>181</sup> Even a report as recent and forthright as that of the Police Ombudsman's inquiry into the handling of the Omagh bombing uses the euphemism of 'another agency' when presumably referring to MI5. Omagh Bomb Report 2001, para 6.3.

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Security Service was implicated in many of the human rights violations committed in the sphere of covert policing during the conflict.

## MI5 role post St Andrews

Any commentary on the current role of MI5 is to be accompanied with a repeat of the caveat that little information is publicly available. What is known of the past activities of the agency has generally only come to light subsequently, and in the case of human rights concerns, largely as a result of independent inquiries which have taken place many years later. Beyond the meagre content of official information we have drawn on material that has come to light in court cases, media reports, and allegations from individuals. We cannot say that this material amounts to conclusive evidence of consistent wrongdoing but there are very disturbing indications.

### Official Information on MI5 activity

Some limited official information is available from the Annual Reports of the *Intelligence and Security Committee*, although sensitive content in these reports is redacted in their published editions. The most recent annual report does state that MI5 dedicated 17% of its resources to Northern Ireland in 2010/11.<sup>182</sup> The report redacts MI5's overall budget so what this represents in monetary terms is not clear the figure for the overall budget of all Security and Intelligence Agencies is given at around £2 billion. The figure for the overall staffing of MI5 is given at just over 3,600 full time equivalents. A crude pro rata calculation on the basis of 17% of this would mean around 600 staff in Northern Ireland, which would be around 70% of the numbers in RUC Special Branch at the time of the 1998 Belfast/Good Friday Agreement.<sup>183</sup> MI5 has constructed an extensive regional headquarters building in Palace Barracks outside Belfast (known as Loughside) which is second only in capacity to its London headquarters located in Thames House, London which MI5 shares with the Northern Ireland Office. Loughside is the contingency back up headquarters for MI5 in the event of a calamity at Thames House.<sup>184</sup>

The *Intelligence and Security Committee* Annual Reports have included Northern Ireland sections but contain very limited information about MI5 activities here since the transfer of the lead role in 'national security' policing. This in part reflects the limited role of the Committee which does not have an operational oversight role and cannot compel information from MI5. There is some financial information, although the figures are redacted. It appears at least in the interim phase following the transfer MI5's running costs were funded by the NIO.<sup>185</sup>

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<sup>182</sup> Intelligence and Security Committee Annual Report 2011-12, July 2012, CM8403, para 87.

<sup>183</sup> Intelligence and Security Committee Annual Report 2011-12, para 215.

<sup>184</sup> Intelligence and Security Committee Annual Report 2006-7, January 2008 CM7299, para 26.

<sup>185</sup> Intelligence and Security Committee Annual Report 2005-6, June 2006 CM6864, para 38.

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The reports tend to include reference to the general threat level from dissident republicans. General reference is made to republican attacks on 'national security targets' and specific reference is given to the four fatal attacks on soldiers and PSNI officers which have occurred since the transfer. Only in the most recent annual report is any information provided on actual MI5 operations. This references MI5 'successes and setbacks.' The information on successes covers MI5 playing a role in the conviction of a Real IRA member in Lithuania, in assisting in the convictions of those involved in the murder of PSNI Constable Carroll, and the conviction of Brian Shivers for the Massereene Barracks attack. It lists its setbacks as the acquittal of Colin Duffy over the Massereene attack (which the Director General laments will be good for dissident morale) and the acquittal on grounds of entrapment by MI5 of Desmond Kearns for weapons smuggling for the Real IRA.<sup>186</sup> Only once in the Committee's reports is passing reference made to 'some loyalists' continuing to engage in violence and other forms of serious crime.<sup>187</sup>

### Defining MI5's 'national security' role

There have been questions raised as to whether MI5's role in 'national security' policing involves an exclusive concentration on 'dissident republicans' or whether it has also sought to infiltrate loyalist groups. A useful starting point would be the official definition of national security, as to whether loyalists as 'pro-State' paramilitaries fall under its scope. Unfortunately, as the MI5 website makes clear:

The term "national security" is not specifically defined by UK or European law. It has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances.<sup>188</sup>

There are some peripheral definitions; for example the Independent Reviewer of the Justice and Security Act 2007 notes that Government classifies attacks 'on police officers and State institutions' as 'national security attacks'.<sup>189</sup> This would indicate more of a 'defence of the realm' approach to the concept with 'national security' referring to the security of the State and its institutions rather than the safety of persons from the actions of any unlawful armed group. Alternatively a view of threats to 'national security' could be spaces where the State's institutions are unable to normally operate. Such a definition could encompass for example, paramilitary involvement in sectarian or other racist intimidation from houses when the State, rather than tackling the perpetrators, tends to simply 'evacuate' the victim. Clearly if MI5 continues to have a role in providing the funding for 'covert sources', regardless of whether these agents are run by the PSNI or MI5 itself, then the organisation would maintain a role in policing loyalism, albeit not as directly as

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<sup>186</sup> Intelligence and Security Committee Annual Report 2011-12, July 2012 CM8403, para 88.

<sup>187</sup> Intelligence and Security Committee Annual Report 2007-8, July 2008, CM7542, para 55.

<sup>188</sup> See [www.mi5.gov.uk/home/about-us/what-we-do/protecting-national-security.html](http://www.mi5.gov.uk/home/about-us/what-we-do/protecting-national-security.html) [accessed November 2012].

<sup>189</sup> 'Fourth Report of the Independent Reviewer Justice and Security' (Northern Ireland) Act 2007 (2010-2011), Robert Whalley CB, November 2011, para 93.

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directly running agents itself. This may not be the case if such funding is restricted to 'national security' informants and this in practice is taken to mean republicans.

In the run up to the St Andrews Agreement the PSNI Chief Constable, Hugh Orde, appeared to confirm an approach of MI5 only focusing on republicans. Orde told the *Irish Times* he would have "sole responsibility for loyalist agents as they were solely involved in crime." But he added that in relation to republican agents there would be a division of responsibilities, "with MI5 responsible for national security issues and the PSNI dealing with republican criminality."<sup>190</sup>

Chapter one examined international standards which set out parameters for 'national security'. Within the human rights community and beyond there are concerns that a malleable and undefined concept of 'national security' is often abused by States to avoid closer legislative scrutiny and oversight of State agencies and to create a parallel justice system whereby matters of 'national security' are not subject to the usual due processes. Certainly in the case of the St Andrews Agreement the result of particular undefined matters being explicitly designated as 'national security' has in effect moved them further beyond the policing accountability mechanisms established for the PSNI. The practical impact of this appears to be that two different policing regimes, in terms of operational techniques, standards and oversight, are potentially now in place for republicans and loyalists.

Outside policing there are examples of the impact of matters being drawn within the 'national security' framework in other areas of the criminal justice system, for example prisons. The devolution of justice powers in 2010 has led to an understanding that prisons, prison rules and prisoners' welfare are now the responsibility of the devolved administration, and hence prison officers are ultimately accountable to the Minister of Justice. Whilst this is generally the case it is not the full picture. Prison matters designated as 'national security' (such as the rules for who should be held in 'separated' [paramilitary] wings, surveillance and intelligence gathering regulated by the Regulation of Investigatory Powers Act 2000 and the use of such information) are retained by the Secretary of State. Furthermore when prison staff are deemed to be engaging in such 'national security' related activity they cease to be accountable to the devolved administration and instead become 'officers of the Secretary of State' and hence answerable to the NIO. Clearly there are practical management issues when prison officials cease for part of their work to be accountable to their usual employer, and hence oversight framework.

This arrangement was set up under a renewable legal direction at the time of the devolution of powers. Officials have put on record that the rationale for making prison service staff dealing with 'national security' information about 'separated' or other prisoners temporarily answerable to the NIO and not the devolved service was to give MI5 "confidence" that prison service staff could handle such

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<sup>190</sup> Moriarty, Gerry 'Concern over MI5 expanded role' *Irish Times*, 15 February 2006.

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information. Officials indicate that if this legislative direction granting such control over officials had not been agreed, MI5 and the NIO would have refused to allow any prison service staff to handle any such information.<sup>191</sup> It appears apparent therefore that at the behest of MI5 and the NIO a 'separate' system has been set up whereby prison officials no longer remain answerable and accountable in the usual way when they are deemed to be dealing with 'national security' matters and their chain of command switches to the Secretary of State. We will return to this subject in relation to PSNI officers in the next chapter.

Beyond the questions of defining 'national security' a further issue which conflicts with human rights obligations is if the State seeks to 'manage' the activities of groups so that they are less of a threat to the 'State' but at the expense of permitting other activities – such as vigilante attacks – to protect the identities of informers. If groups were infiltrated and 'managed' in a manner which reduces their 'military' capacity but involves tolerance of other unlawful activities such as punishment shootings it would conflict with the duty to protect all persons within the jurisdiction equally.

The next section will look at a number of particular themes relating to MI5 which have been exposed in the media or judicial proceedings since the transfer namely: the manner of MI5 recruitment of informers; the prosecution of Anton Craig; the murder of Kieran Doherty; the role of MI5 in stop and search operations; and, MI5 engagement with the military.

### **Recruitment of Informers**

In the run up to the Belfast/Good Friday Agreement, CAJ noted that the area of covert policing that attracted 'numerous complaints' were the attempts to recruit persons who had been detained under the Prevention of Terrorism Act.<sup>192</sup> Rather than relying on persons who volunteer their services, agencies try and proactively recruit informers and there are significant human rights issues in relation to practices which can be used in such recruitment. Above all, any attempt to recruit an individual which gives the impression they are working for or with the Security Service or police as an agent could not only lead to interference in their private and family life but could put an individual's life in danger.

Some methods used to recruit persons also lead to questions about misuse of police powers, for example if persons are stopped, questioned, arrested or detained under legislation which is meant to be used for another purpose, but in fact is being used in an attempt to recruit an individual.

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<sup>191</sup> See Hansard, Committee of Justice, Northern Ireland Assembly, 'Prison Service: Secretary of State's Directions on National Security Functions' 14 June 2012; functions are set out in Northern Ireland (Devolution of Policing and Justice Functions) Order 2010 (Schedules 4,5,&8); the Secretary of State's 'direction' is provided under s1A(7) of the Prisons Act (Northern Ireland) 1953.

<sup>192</sup> O'Rawe, Mary & Moore, Linda 'Human Rights on Duty' CAJ, 1997, p 166.

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There are also significant ethical questions about the high payments or other inducements offered to informers, particularly those who are in a financially vulnerable position. Such financial inducements to provide information may lead to a person providing seemingly useful but ultimately fabricated information which is then used for targeting an individual for surveillance or as evidence against them in court.

A separate and very serious issue is the practice of an intelligence agency resorting to threats in an attempt to ensure collaboration. At its most serious this could be threats to life or the safety of an individual or their family members, threats to livelihoods, or threats of the instigation or ending of police harassment or prosecution to ensure collaboration.

There have been concerns raised about the present day tactics of MI5 in Britain in relation to attempts to recruit informers in the Muslim community, including comparisons with the past experiences of Irish communities.<sup>193</sup> In 2009 *The Independent* covered the case of five community workers who had gone public accusing MI5 of using a “campaign of blackmail and harassment” to attempt to recruit them as informers. This included threats to face detention and harassment in the UK or overseas if they did not collaborate. Three of the five stated that they were “detained at foreign airports on the orders of MI5” whilst on family holidays. The threats they alleged included being treated as terror suspects, travel restrictions, detention, and threats to family members.<sup>194</sup> Similar stories have emerged from unsuccessful MI5 attempts to recruit informers in Northern Ireland when such persons have also publicly vented their experiences through the media. These include approaches made by MI5 to persons at airports or when they are on family holidays, at airports abroad, or under arrest for other reasons.<sup>195</sup> The Government’s response to the media is usually limited to stating that it does not comment on intelligence/national security matters.

The most serious incident in Northern Ireland publicised to date involves the allegation from a publican that he had a gun held to his head by MI5 and was threatened with ‘execution’ if he did not become an informer. He reports that this happened when he was stopped at a vehicle checkpoint and threatened, as well as receiving the ‘offer’ that MI5 could end police harassment of him if he agreed to collaborate.<sup>196</sup> In addition to the issue of threats, such an incident also raises the issue of MI5 tasking the PSNI to assist them in informer recruitment. This issue also emerged in interviews CAJ conducted with two individuals who stated they had

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<sup>193</sup> For analysis see: McGovern, Mark (2010) *Countering Terror or Counter-productive: Comparing Irish and British Muslim Experiences of Counter insurgency Policy and Law*, Ormskirk: Edge Hill University; and Choudhury, Tufyal and Fenwick, Helen (2011) *The impact of counter-terrorism measures on Muslim communities*, Equality and Human Rights Commission Research Report 72.

<sup>194</sup> Verkaik, Robert ‘Exclusive: How MI5 Blackmails British Muslims’ *The Independent*, 21 May 2009.

<sup>195</sup> See for example recent cases in “Secret service ‘tried to recruit’ Belfast man in Anne Frank museum” *Belfast Telegraph*, 06 April 2012; Brinkley, Gráinne “MI5 approach West Belfast man on holiday” *Andersonstown News*, 17 August 2012.

<sup>196</sup> Morris, Alison ‘Turn informer or we will execute you’ *Irish News*, 01 February 2012.

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been approached by intelligence bodies.<sup>197</sup> One of these individuals relates how PSNI officers facilitated the work of the intelligence agency:

I was just leaving work and a PSNI officer on a motorcycle, with the blue light flashing, signalled me to pull over. He asked me for my driver's licence, clearly to confirm my identity, and walked to the back of the car. As he did this a [car] pulled in behind and as the PSNI officer handed back my licence two men in their mid-thirties jumped into my car, one in the passenger's seat and one in the back. One was English and one had a northern accent.

As well as raising issues of MI5 tasking executive policing, the use of police powers in this way also raises questions of legal compliance given that there appears to be no provision either in the law governing stop and question or in road traffic legislation for powers to be used for this purpose. Both of the interviewees expressed concern about "ongoing harassment by MI5 and Special Branch [sic]" who they claim used intimidating tactics to try to recruit them as informers. One of these individuals relates how an intelligence agent referred to the fact that he was working outside of his own community by asking, "Do people know who you are?" a reference that was taken to indicate the individual was vulnerable in the area because he is a nationalist. After the individual called out to passersby, "Do you want to see the face of MI5 and Special Branch? Here they are now," an agent with an English accent told the individual who was walking away "Watch your back". Another individual recounts when he asked why he was continually being stopped the agent responded "Your vehicle and you are of interest... you are a person of interest." The communities where this appears to be occurring with regularity are often those nationalist communities with a history of antagonistic relations with the police. This also raises the question of 'counter-productivity' presuming that official 'policing with the community' policy is to engender as much support as possible for the PSNI, given that such actions appear to be undermining confidence and support for policing in the areas in which they are occurring.

### **The prosecution of Anton Craig**

In 2006 there were a series of firebombings including those which destroyed large premises such as Sainsbury's Homebase and other stores at a retail park on Belfast's Boucher Road. This blaze, which was dealt with by over 70 fire fighters at its height, followed a number of other similar attacks. At the time Prime Minister Tony Blair and Secretary of State Peter Hain had no doubt that this action had been conducted to destabilise the peace process and to derail what was then the recent St Andrews Agreement. At the time Government blamed 'dissident Republicans' for the attacks.<sup>198</sup> However subsequent events involving a mysteriously aborted prosecution have pointed the finger at MI5.

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<sup>197</sup> Interviews conducted by CAJ, June & July 2012.

<sup>198</sup> Dissidents Behind Bomb Attacks' *BBC News Online*, 01 November 2006.

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Following the firebombings a young politics graduate, Anton Craig, was arrested and charged in relation to the attacks. He spent 17 months in custody and a further 2½ years on conditional bail including curfew conditions. He was refused High Court bail on strong opposition from the PSNI and Public Prosecution Service (PPS), usually an indicator there was a strong case against him. However on the day of the trial he was acquitted, on direction of the judge, following the last minute decision of the PPS not to offer any evidence against him. The PPS also declined to publicly give any reasons for this decision.

Mr Craig maintained he had been set up by an MI5 agent. He maintained the MI5 agent had “commissioned, prepared and instigated...[a] dissident republican firebombing campaign” and then deliberately attempted to frame him for the attacks. The implication therefore would be that the prosecution was dropped to avoid disclosure in court of the role of the alleged agent. According to UTV news the Judge stated that the information on which the decision was based, which it reports was apparently contained in a confidential PPS letter, had to remain “cloaked in confidentiality.” At the time of the trial Mr Craig’s solicitor Niall Murphy stated that the case raised the “spectre of state sponsored terrorism”<sup>199</sup> The law firm issued a press statement elaborating this position:

The terrifying circumstances of this case have witnessed the State become the terrorist. The line between the legitimate use of covert human intelligence, has blurred and has been broken. Through its paid agent, the State has commissioned, prepared and instigated acts of terrorism, causing millions of pounds worth of damage to dozens of businesses and perhaps much more to the economy in terms of trade lost. The State has in fact, sponsored a terrorist campaign.<sup>200</sup>

Mr Craig has taken proceedings since this time seeking to make the information about the decision not to prosecute public. This has not happened to date.

This case raises the spectre of the Security Service running ‘agents provocateurs’ in an attempt to destabilise the peace process.

### **Murder of Kieran Doherty**

In November 2009 Kieran Doherty, in an interview to the *Derry Journal*, claimed that he was being approached by MI5 and had been contacted on multiple occasions by an MI5 agent. Three months later Kieran Doherty was found murdered following an ‘execution’ type killing. The *Belfast Telegraph* reported that the “Real IRA admitted to the killing and claimed Mr Doherty was a member of the organisation.” The Real IRA reportedly went on to claim Kieran Doherty had involvement in the drugs trade (which his family denied) and “The Real IRA said he had denied working for MI5 but they believed MI5 had played some role in the

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<sup>199</sup> ‘Derry Bomb charge case dropped’ *UTV News*, 20 October 2010.

<sup>200</sup> Anton Craig, Press Release, Kevin R Winters and Co Solicitors, Wednesday, 20 October 2010.

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drugs factory to 'blacken the IRA's name and link us to the drugs trade'...'<sup>201</sup> Mr Doherty's family have maintained that Kieran was 'set up' by MI5 in order to protect someone else. The family have claimed:

Kieran was under continuous harassment by MI5 in the months before his death. Repeated attempts were made to recruit him as an informer. Kieran was constantly followed. He believed that his phone calls and letters were being monitored. He wasn't given a moment's peace and was under 24/7 surveillance by MI5. We would like to know where were the MI5 people who were monitoring his every movement on the night he was brutally murdered?<sup>202</sup>

The family, with the backing of the SDLP and Sinn Féin, were then to call for an inquiry into the MI5 role. Subsequently the family, later assisted by the NGO British Irish Rights Watch (BIRW), were concerned that the PSNI would not be able to properly investigate the MI5 connection and met with the NIO Secretary of State to seek assurances that MI5 would cooperate with the police investigation.<sup>203</sup> The Government response was for the NIO to commission Lord Carlile to look into the matter. Fitting into the pattern of 'trust me' reports, Lord Carlile concluded MI5 had no connection to the death, but reportedly declined to give his reasons on grounds of 'national security.' The report was also not published. The family were dissatisfied with this response and wanted the police investigation to question MI5 officers who allegedly tried to recruit Kieran Doherty as an informer. BIRW subsequently reported there had been little progress on the police investigation, stating the exact nature of the relationship between MI5 and the PSNI was still unclear as was the extent to which MI5 shares intelligence with the PSNI.

BIRW also stated that the position of Lord Carlile in relation to Northern Ireland remained confusing. Carlile was both Independent Reviewer of Counter-terrorism legislation and reviewer of the St Andrews PSNI-MI5 transfer arrangements at the time of his appointment.<sup>204</sup> The SDLP also questioned the status of Lord Carlile's intervention noting it had been described as an 'investigation' and latterly an 'inquiry' in correspondence but a 'review' or latterly 'advice' by the NIO who had refused to publish it. In light of this the SDLP concluded "neither Lord Carlile's role nor any other procedure offered the sort of scrutiny or accountability for the Security Services in Northern Ireland that apply to the Police Service."<sup>205</sup>

## Stop and search

The area of policing powers which CAJ is currently receiving the most complaints and representations about is the use of stop, question and search powers under

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<sup>201</sup> McDaid, Brendan 'Murder victim Kieran Doherty's relatives' demand answers from MI5' *Belfast Telegraph*, 29 September 2010.

<sup>202</sup> 'RIRA victim's family demand MI5 inquiry' *Derry Journal*, 01 March 2010.

<sup>203</sup> McDaid, Brendan 'Murder victim Kieran Doherty's relatives demand answers from MI5' *Belfast Telegraph*, 29 September 2010.

<sup>204</sup> British Irish Rights Watch, Monthly Updates online, March, September & December 2011.

<sup>205</sup> 'Gov't won't reveal Carlile report', *Derry Journal*, 29 April 2011.

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ongoing emergency-type legislation which does not require the threshold of individual reasonable suspicion to be met. Stop, question and search powers when used for good reason are an effective, essential and necessary law enforcement tool. However, when such powers are used in an arbitrary or discriminatory manner they become an ineffective and alienating tool of harassment. These concerns are widespread internationally making stop and search one of the most controversial areas of policing.

The PSNI relied heavily on the UK-wide 'section 44' powers contained within the Terrorism Act 2000 until they were repealed following the *Gillan and Quinton v the UK* decision in the European Court of Human Rights. This found that the powers were so broadly drafted they were not 'in accordance with the law' (and hence could be used in an arbitrary or discriminatory manner). One 'safeguard' of the 2000 Act was the requirement of an authorisation procedure signed off by a senior police officer under the supervision of a Government minister. This 'safeguard' proved ineffective however when it emerged almost the whole of Northern Ireland and London had been permanently designated, and ministers had never questioned police decisions. The replacement power for 'section 44' introduced by the Protection of Freedoms Act 2012, meant a higher threshold for an authorisation to be granted, relating to a situation when there is good reason to believe an act of terrorism will be committed. The most recent report of the Independent Review of the power states the new power is yet to be used.<sup>206</sup>

Stop, question and search powers specifically introduced in this jurisdiction by the Justice and Security (Northern Ireland) Act 2007 ('JSA') have, however, continued in use and, whilst there was some overall reduction, the PSNI effectively switched reliance to this power away from 'section 44' following repeal of the power. The 2007 JSA contains powers to stop and question about 'identity and movements' and also to search individuals or vehicles for munitions and transmitters. All of this can be conducted in a public place without reasonable suspicion, and until the commencement of the Protection of Freedoms Act 2012, did not require an authorisation. However, following the 2012 Act use of the JSA search power does require an authorisation by a senior police officer to be in place.

CAJ continues to receive complaints about these types of stop, question and search powers being used in an arbitrary manner. Such random searches appear to rarely turn up the items they are supposed to be searching for and cause significant alienation from the police. CAJ is aware that the police at times argue the power is being used in a preventative manner to deter and 'disrupt' potential dissident republican activity.<sup>207</sup> However, such an approach does not appear to be explicitly

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<sup>206</sup> 'The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' David Anderson Q.C. Independent Reviewer of Terrorism Legislation, June 2012, para 8.12.

<sup>207</sup> See for example statements of PSNI Chief Constable at policing board public meeting reported in "Orde defends stop and search rise" BBC News Online, 18 February 2009.

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provided for in the legislation.<sup>208</sup> Exercise of the power in this manner risks being counterproductive to officially stated objectives of building confidence in policing. This is particularly salient as use of the power appears targeted on some working-class nationalist communities at a time when precisely those who have not recognised the police as a legitimate body in the past are being asked to do so. Clearly such a task will be more difficult if the main interface of individuals with policing is being subjected to or witnessing seemingly unnecessary stop and search operations. During 2012 CAJ has received complaints about the use of stop and search powers in what is perceived to be an arbitrary or discriminatory manner which is the subject of a separate CAJ report.

Whilst the above stop and search powers are vested in the PSNI, CAJ has picked up a number of indications from senior police officers that MI5 has considerable involvement in their direction and deployment. Whilst anecdotal, what we have heard appears to go beyond the PSNI relying on MI5 intelligence to make their own decisions on counter terrorism stop and search policy and could even involve, in effect, MI5 tasking of TSG units in such operations. One PSNI District Commander at a recent policing conference openly remarked that he regularly attended MI5 headquarters to be briefed on how stop and search was to be operated in his area. Another senior police officer remarked that MI5 requests the granting of stop and search 'authorisations', on the basis of intelligence but that such intelligence data is not necessarily disclosed to the senior officer.

This would not sit well with the legislative requirements given that the role of granting authorisations is not vested in MI5 but in senior PSNI officers of at least the rank of Assistant Chief Constable. If MI5 is not disclosing the rationale for the request it is difficult to see how the senior officer is complying with the legislation which advocates that an authorisation can only be granted when there is generalised reasonable suspicion that the safety of persons may be endangered by munitions and transmitters, and that the authorisation must be restricted to what the senior officer reasonably considers a specified area and timeframe necessary to prevent such danger.<sup>209</sup> Whilst a Code of Practice for the JSA powers is still awaited the equivalent Code for the revised Terrorism Act 2000 powers states that authorisations can only be made by an Assistant Chief Constable or above and must be presented with "a detailed account of the intelligence which has given rise to reasonable suspicion that an act of terrorism will take place. This should include classified material where it exists."<sup>210</sup>

### **Current MI5 engagement with military units**

Explicitly contained within the peace settlement was the concept of security 'normalisation'. This included commitments to the removal of emergency type

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<sup>208</sup> Justice and Security (Northern Ireland) Act 2007 (as amended by Protection of Freedoms Act 2012) para 4A (3) "A constable may exercise the power conferred by an authorisation under this paragraph only for the purpose of ascertaining whether the person has munitions unlawfully with that person or wireless apparatus with that person."

<sup>209</sup> Justice and Security (Northern Ireland) Act 2007 (as amended by Protection of Freedoms Act 2012) paragraph 4A.

<sup>210</sup> Code of Practice (Northern Ireland) for the Authorisation and Exercise of Stop and Search Powers Relating to Section 47a of Schedule 6b to the Terrorism Act 2000 (Northern Ireland Office, 2011), paras 6.1; 6.8; 6.18.

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powers and the phased scaling down of the role of the army in internal policing. For example, Annex 1 of the 2003 Joint Declaration of the British and Irish governments, sets out a number of detailed annual targets for the closure of military bases and withdrawal of troops. In July 2007 the British Army's 'Operation Banner', which commenced in 1969, was formally ended. It was replaced by 'Operation Helvetic', in which the role of the British Army was to be reduced to a 'residual level' with involvement only in bomb disposal and in extreme public order situations (the retention of the latter situation having been envisaged explicitly by the Patten Commission). At the same time the British Government brought in legislation, under the aforementioned Justice and Security (Northern Ireland) Act 2007, to grant soldiers a range of stop, question, search, entry, arrest and other powers on a permanent basis. In the absence of the routine deployment of uniformed soldiers in the envisaged public order or other situations, such powers are not being used. However evidence has emerged of army activity outside the scope of the two areas envisaged above – namely in the field of covert surveillance operations.

As recorded by *The Detail* website on the 7 March 2009 the then Chief Constable Hugh Orde publicly revealed that he was requesting the assistance of the British Army's Special Reconnaissance Regiment (SRR) to engage in surveillance activities against dissident republicans. This revelation caused considerable controversy among members of the Policing Board who questioned both the decision and crucially, who was really in control of intelligence gathering operations. *The Detail* reports the SRR was established in 2005 to replace the 14<sup>th</sup> Intelligence Unit and Force Research Unit (FRU) which had been created explicitly for Northern Ireland specific operations.<sup>211</sup> The SRR quickly became embroiled in controversy over its reported role in the surveillance operation that led to the shooting dead of Brazilian electrician Jean Charles de Menezes at a London Underground station on the 22 July 2005.<sup>212</sup>

More recently a member of the SRR gave evidence in January 2011 during the murder trial of Constable Stephen Carroll, who was killed in March 2009.<sup>213</sup> The SRR confirmed they had a suspect under surveillance on the night of the murder. There was public controversy when it emerged the SRR claimed to have "inexplicably destroyed" the data gathered from a tracking device containing potentially incriminating evidence which was then not available to the police.<sup>214</sup> In addition the Court heard there were tensions between the SRR and the police as the SRR had been 'very reluctant' to hand over any data. The SRR eventually did provide material to detectives but only after negotiations involving the Chief Constable and a PSNI threat to seize material under warrant.<sup>215</sup>

The MI5 angle in this matter emerges from evidence given in October 2008 by members of the SRR at the trial of three persons charged with possession of a

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<sup>211</sup> McCaffery, Barry 'PSNI gets limited access to army intelligence says former soldier' *The Detail*, 14 March 2011.

<sup>212</sup> Norton-Taylor, Richard 'New special forces unit tailed Brazilian' *The Guardian*, 04 August 2005.

<sup>213</sup> McCaffery, Barry 'PSNI gets limited access to army intelligence says former soldier' *The Detail*, 14 March 2011.

<sup>214</sup> McCaffery, Barry 'Security Services questioned over missing evidence in Carroll Murder' *The Detail*, 14 March 2011.

<sup>215</sup> 'The Story of the Stephen Carroll Murder trial' *BBC News Online*, 30 March 2012.

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mortar bomb near Lurgan in March 2007. Notably this incident occurred two years before the Chief Constable 'invited in' the SRR. *The Detail* cites a former senior 'intelligence whistleblower' who claims the SRR are responsible to and report solely to MI5, not to the PSNI.<sup>216</sup> Should this prove to be the case, it indicates that MI5 continue to task 'executive policing' functions to special forces units.

### **Assessing the role of MI5 post St Andrews**

There is some evidence of continuing malpractice in MI5's covert operations in Northern Ireland. We cannot pronounce definitively on much of this since it has not been tested through the courts or judicial or other inquiries, though if some of the accusations were taken at face value it would include conspiracy to murder and instigating acts of terrorism. We do believe, however, that there are sufficient indications of possible wrongdoing to make all the more urgent the development of human rights compliant mechanisms for oversight and accountability.

The ongoing relationship between MI5 and the PSNI will be examined in more detail when we analyse the St Andrews provisions and subsequent developments in terms of their human rights compliance. The following chapter examines MI5's general accountability framework and the framework envisaged for the transfer of primacy for 'national security' policing to MI5.

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<sup>216</sup> McCaffery, Barry 'PSNI gets limited access to army intelligence says former soldier' *The Detail*, 14 March 2011. In this instance the Secretary of State issued Public Interest Immunity (PII) certificates to prevent the soldiers being identified.

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## 4. MI5 oversight and accountability

### Generic MI5 oversight

As detailed in chapter one the UN Special Rapporteur's recommendations for intelligence agencies include oversight by a combination of "internal, executive, parliamentary, judicial and specialised oversight institutions". Such oversight institutions are to have the "power, resources and expertise" to initiate, conduct and conclude their own investigations with unhindered access to documents and officials.

Tailoring measures to the local post-conflict scenario, Patten recommended similar provision including: ECHR-compliant legislation on covert law enforcement techniques (by police and other agencies) covering informers, undercover operations and other areas; a complaints tribunal comprised of senior members of the legal profession with powers to investigate covert policing complaints; and, a 'Commissioner for Covert Law Enforcement in Northern Ireland' whereby a senior judicial figure with full inspection powers over the PSNI and other agencies would oversee surveillance, use of informants and undercover operations to ensure such operations complied with the law and were only being used when necessary. CAJ and others have long campaigned for accountability for covert policing, including complaints mechanisms which were genuinely effective and independent. Given that it is impossible for any organisation to be infallible, a usually reliable indicator of effectiveness is a complaints mechanism which actually upholds a reasonable proportion of complaints.

Further to MI5 'coming out' and being placed on a statutory footing under the Security Services Act 1989 some oversight mechanisms were put into place. Before this there was no legal accountability framework as the agency received its powers under the Royal Prerogative (residual executive powers theoretically attached to the Crown). The Security Services Act 1989 put the Security Service formally under the British Home Secretary (who appoints MI5's Director General) with the Prime Minister appointing, from persons who had held senior judicial office, a 'Security Services Commissioner' and a tribunal to investigate complaints—whose decisions "shall not be subject to appeal or liable to be questioned in a court".<sup>217</sup>

The Intelligence Services Act 1994 set up similar oversight bodies for MI6 and GCHQ and also established the *Intelligence and Security Committee* composed of members of both houses of the Westminster Parliament to examine the 'expenditure, administration and policy' of all three intelligence agencies.<sup>218</sup> Other relevant legislation at this time includes the Security Services Act 1996 which extended MI5's functions to deal with 'serious crime', the Human Rights Act 1998 in that it gave further effect to the ECHR on public authorities, and the Official Secrets

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<sup>217</sup> Security Services Act 1989 s5(4). Subsequently repealed by RIPA.

<sup>218</sup> Intelligence Services Act 1994, s10(1).

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Act 1989 (and its predecessors) which prohibit officials from disclosing information without MI5's consent.

These Tribunals and Commissioners were to be superseded further to the Regulation of Investigatory Powers Act 2000 (RIPA). RIPA also provided, for the first time, a legislative framework for areas of covert policing including the running of informants (Covert Human Intelligence Sources—CHIS). This Act set up an overarching *Investigatory Powers Tribunal* which can investigate complaints about MI5 and the other intelligence services. The Tribunal is the only forum to which complaints about MI5 can be directed, including proceedings against breaches of ECHR rights.<sup>219</sup> The Tribunal can also investigate complaints against other public authorities on more limited grounds related to their usage of surveillance type powers. There is no right to appeal from the Tribunal nor can its decisions be questioned in court, unless the Secretary of State expressly decides otherwise.<sup>220</sup>

The Commissioners established by RIPA are appointed by the Prime Minister from persons who have held senior judicial office. They are to advise the Tribunal on complaints and other matters it is considering. The Commissioners have staff appointed by the Home Secretary, and are to produce annual reports. They are:

- Interception of Communications Commissioner: To review the exercise of intercept and acquisition and disclosure of communications data powers;
- Intelligence Services Commissioner: To review the activities of MI5 and the other intelligence services – except those already under the remit of the Interception of Communications Commissioner; also to review use of covert powers by the Ministry of Defence and armed forces in places other than Northern Ireland;
- Investigatory Powers Commissioner for Northern Ireland: To review the use of RIPA surveillance and CHIS powers in Northern Ireland by designated bodies.<sup>221</sup>

When RIPA was first introduced it had contained a 'Covert Investigations Commissioner' who was to oversee the surveillance and CHIS actions of public authorities other than the police and intelligence services under the RIPA. Subsequently Parliament determined this role would be bound up with the existing *Office of the Surveillance Commissioner* which had been introduced a few years earlier under the Police Act 1997 to deal with police use of such powers.<sup>222</sup> The Office consists of a *Chief Surveillance Commissioner* and assistant Commissioners. RIPA then extended the role of the Office to review the use of CHIS and surveillance powers that were not already being looked at by the other RIPA Commissioners. In

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<sup>219</sup> See RIPA 65(2)(a), Human Rights Act 1998, s7. And Investigatory Powers Tribunal 'about us' <http://www.ipt-uk.com/sections.asp?sectionID=22&type=top> [Accessed 25 September 2012]

<sup>220</sup> RIPA s67(8).

<sup>221</sup> RIPA s57-64.

<sup>222</sup> Hansard (Regulation of Investigatory Powers Bill) HL Deb, 28 June 2000, vol 614 cc1044-5; in Police Act 1997 s91.

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practice this largely means that the *Intelligence Services Commissioner* is the body overseeing MI5.

Under RIPA there is now a published Home Office Code of Practice on the use of Covert Human Intelligence Sources.<sup>223</sup> The Code of Practice deals largely with the authorisation processes as well as covering record keeping and retention of information. Chapter six of the Code does cover the management of CHIS but this brief section focuses on ensuring information gathering is adequately covered in CHIS 'authorisations', establishing who is responsible for handling the CHIS, and taking into account the safety and welfare of the CHIS. There is no framework setting out the acceptable boundaries of CHIS activity or procedures when CHIS are involved in unlawful activity within the Code. The Code does set out who is authorised to recruit CHIS but does not appear to regulate matters such as the methods used for such recruitment nor payments to CHIS.

Post-RIPA and the other Acts there are now an array of Commissioners, a complaints Tribunal and the *Intelligence Services Committee*. The MI5 website emphasises that the agency is therefore subject to 'constant oversight' at ministerial, parliamentary and judicial levels - others including human rights groups and parliamentarians have been less impressed. Amnesty International has assessed the arrangements as 'inadequate' as the bodies have failed to provide adequate scrutiny or accountability for the actions of the security or intelligence agencies or prevent their involvement in unlawful conduct."<sup>224</sup> These bodies are critiqued in turn below.

### **The Intelligence Services Committee**

The first thing of note about the *Intelligence Services Committee (ISC)* is that it is not actually a Westminster Parliamentary committee, it is merely a group composed of parliamentarians. As CAJ has pointed out the 'Committee' cannot call witnesses, is not empowered to examine actual operations, and its members are not appointed by Parliament but by the Prime Minister.<sup>225</sup>

The Westminster Joint Committee on Human Rights (JCHR) has drawn attention to the differences between the ISC and a proper Parliamentary Select Committee, including that it reports to the Prime Minister rather than to Parliament, is staffed by Government employees (including Government lawyers) not Parliamentary staff, and its reports are only published after redaction "which is often substantial." JCHR states that because the ISC meets in private and its reports are redacted it is actually difficult to follow its work and understand its reports. In one high profile case the JCHR is particularly critical that the ISC allowed the MI5 account of its treatment of Binyam Mohamed to be presented "without challenge" and presented MI5 evidence in such a "heavily redacted" form it was "incomprehensible."

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<sup>223</sup> 'Covert Human Intelligence Sources Code of Practice: Pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000' Home Office, 2010.

<sup>224</sup> Amnesty International UK 'Response to the Justice and Security Green Paper' January 2012, p 18.

<sup>225</sup> O'Rawe, Mary & Moore, Linda 'Human Rights on Duty' CAJ, 1997 p 167.

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In relation to broader complicity in torture the JCHR doubts Parliament and the public would be “convinced by the ISC that the security services always operate within the law and that transgressions of the law are appropriately dealt with.” It concluded that the ISC has failed to provide “proper ministerial accountability to Parliament” over MI5 activities, a matter JCHR feels can be achieved, if the political will existed, without compromising individual operations. JCHR denounces the current situation of Ministers refusing to answer general questions about MI5 and the MI5 Director General himself refusing to attend Parliamentary Committees. JCHR proposes the ISC is set up as a “proper Parliamentary Committee... with an independent secretariat... including independent legal advice.”<sup>226</sup>

Human rights groups *Liberty* and *Reprieve* have also argued that the ISC has “consistently failed in its duty to provide effective oversight” noting the “ease by which it has been misled and its failure to challenge information put before it by the [intelligence] agencies is of serious concern” and also calls for reform to make it a proper parliamentary committee where evidence is usually heard in public and has independent staffing.<sup>227</sup>

*Amnesty* voiced long-term concerns about the lack of independence of the ISC from Government and its limited remit, resources and powers which for example, include not being able to compel MI5 to provide the Committee with information. *Amnesty* argues that the ISC assessment of UK involvement in torture, rendition and secret detention “keenly demonstrate” its weakness and lack of capacity to detect “let alone remedy” security service failings – given that the ISC as late as 2007 reported it had found “no evidence” of complicity in rendition – despite credible evidence emerging to the contrary.<sup>228</sup>

It is notable that by 2011 the ISC itself had got round to criticising its own lack of powers, proposing reform and recognising that being hosted by the Cabinet Office was “clearly not right.” The ISC itself proposed it become a Parliamentary committee, have its remit extended to the broader work of MI5 and the other intelligence agencies, and be granted powers to compel evidence from them.<sup>229</sup>

## The Tribunals

CAJ was not overly impressed by the complaints Tribunal originally established under the Security Services Act 1989, finding that it did not uphold a single one of the 175 complaints studied in 1994.<sup>230</sup> The *Investigatory Powers Tribunal* set up under RIPA appears to have started little better, not upholding any of the 380 complaints it received in its first four years nor, as permitted under RIPA, were any

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<sup>226</sup> Joint Committee on Human Rights ‘Twenty-third Report Allegations of UK complicity in Torture’ 04 August 2009, HL 152/HC 230, paras 57-66.

<sup>227</sup> *Liberty and Reprieve* ‘Second Reading briefing on the Justice and Security Bill in the House of Lords’ June 2012, para 58.

<sup>228</sup> *Amnesty International UK* ‘Response to the Justice and Security Green Paper’ January 2012, p 18.

<sup>229</sup> Intelligence and Security Committee ‘Annual Report 2010–2011’ CM8114 July 2011.

<sup>230</sup> O’Rawe, Mary and Moore, Linda ‘Human Rights on Duty’ CAJ, 1997, p167.

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reasons given for its decisions.<sup>231</sup> A more recent Annual Report of the Intelligence Services Commissioner notes that the Tribunal has now upheld ten complaints, however none relate to the security services. Half relate to a local council's use of surveillance powers in relation to a school catchment area.<sup>232</sup>

The Tribunal has also faced criticisms from human rights groups and the JCHR as to its operation. JCHR has voiced concerns about a lack of transparency and narrow remit of the Tribunal which cannot investigate systemic issues nor (unlike the Police Ombudsman<sup>233</sup>) investigate known incidents when the individual is reluctant, due to fears for their safety, to lodge a complaint.<sup>234</sup> Amnesty also notes the remit of the Tribunal (and indeed Commissioners) is insufficient to consider systemic issues relating to policy and practice which it argues, when seen alongside the ineffectiveness of the ISC, compounds the gap in the type of oversight required to ensure the prevention of human rights violations.<sup>235</sup>

### The Commissioners

The *Interception of Communications Commissioner and the Intelligence Services Commissioner* share a website outlining their role and publishing redacted versions of their annual reports. The fate of the *Investigatory Powers Commissioner for Northern Ireland* has become somewhat of a mystery. This office does not share the above website, nor does it appear to have its own webpage. What is clear is that this office is not the type of 'Commissioner for covert law enforcement for Northern Ireland' recommended by Patten, with full powers over the PSNI and other agencies carrying out policing functions. Rather it was established only to overview the surveillance and CHIS powers of specified non-policing devolved bodies such as the Department of Agriculture and Rural Development and health service bodies. Secondly, despite RIPA stipulating the Prime Minister must appoint the Commissioner, when CAJ enquired it appeared that no one was currently doing the job. The Investigatory Powers Tribunal confirmed that some of the powers of the post were being held by the Interception of Communications Commissioner and others by the Chief Surveillance Officer.<sup>236</sup> The functions of this post therefore appear to have little relevance to oversight of covert policing by the PSNI or MI5.

The *Chief Surveillance Commissioner* is tasked to undertake an annual inspection of the PSNI (and Police Ombudsman) in relation to their use of surveillance, agents, informants, undercover officers, and decryption. The Commissioner's annual reports focus more on their general workload rather than inspection outcomes. The Commissioner delivers the PSNI inspection reports to the Chief Constable and does not publish them. However there is a level of coverage of their outcomes in the

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<sup>231</sup> WPQ Home Office Minister of State HC Deb, 30 October 2006, c194W.

<sup>232</sup> Report of the Intelligence Services Commissioner for 2010, (HC1240, June 2011), paras 55-56; see also annual reports of 2005-6, para 38; & 2009, para 44).

<sup>233</sup> Police (Northern Ireland) Act 1998, s55(6).

<sup>234</sup> Joint Committee on Human Rights 'Twenty-third Report Allegations of UK complicity in Torture' 4 August 2009, HL 152/HC 230, paras 68-70.

<sup>235</sup> Amnesty International UK 'Response to the Justice and Security Green Paper' January 2012, p 19.

<sup>236</sup> E-mail correspondence to CAJ from Assistant Tribunal Secretary, Investigatory Powers Tribunal, 15 June 2012.

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Policing Board Annual Human Rights reports. This is general coverage on progress as the content of reports is considered too sensitive for publication, but they are given to the Board's human rights advisors and Chair and Vice Chair. This means the Board's reports can be quite cryptic. For example in 2005 the Board reports the Commissioner had a mixed view, being satisfied with progress being made on some fronts but retaining areas of concern, including on this occasion failure to respond expeditiously to previous Commissioner recommendations, a problem it now reports as remedied. It is not clear to which areas of policy these recommendations related.<sup>237</sup> There is more detailed information in other reports, however, relating to training initiatives, structural matters and publishing his view, for example, that there were now "clear and compliant guidelines in place for the use of CHIS, and that officers were well-versed in their responsibilities and the legal boundaries within which they operate."<sup>238</sup>

Particularly relevant to the present report is the critique of the Surveillance Commissioner inspections of the PSNI implicit in the Police Ombudsman's Operation Ballast report. The report records that enquiries by the Ombudsman had indicated that "previous inspections by the Surveillance Commissioner had not identified significant non-compliance by the Police Service of Northern Ireland". This appears to have led to the Commissioner having to undertake a further inspection in October 2003 which is followed by the reforms detailed in chapter one of this report.<sup>239</sup>

In relation to its role in inspecting authorisations for covert sources there is some criticism of the Office of the Surveillance Commissioner, or at least its lack of resourcing, from human rights groups. *Justice* raises concerns that the inspectors (who themselves are not legally trained) only 'dip-sample' a relatively small number of authorisations. The Surveillance Commissioner does not have the same oversight of authorisations in respect of MI5 which *Justice* notes falls to the Intelligence Services Commissioner for whom 'even less' information is available as to methodology, although the NGO argues there is nothing to suggest the approach over authorisations is any more robust.<sup>240</sup> It is also the case that whatever oversight, if any, the Intelligence Services Commissioner undertakes in relation to their use of agents and informants, in the absence of an equivalent body to the Policing Board, not even limited local information reaches the public domain about their conclusions.

The Intelligence Services Commissioner does publish annual reports but these focus largely on issues of operational workload rather than issues of substance. The reports do however highlight the ongoing role of the Northern Ireland Office, post-policing devolution, in 'national security' policing given its role in approving covert operations requiring authorisations under RIPA. In the face of criticism the Commissioner has been keen to highlight that his role is in fact not to provide

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<sup>237</sup> Northern Ireland Policing Board, Human Rights Annual Report 2005, p 125.

<sup>238</sup> NI Policing Board, Human Rights Annual Report 2011, p 77.

<sup>239</sup> Operation Ballast report, paras 5.1-3.

<sup>240</sup> Justice 'Freedom from Suspicion, Surveillance Reform in the Digital Age' 2011, paras 299 & 296.

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oversight to MI5 but is limited to checking RIPA authorisations by the agency. The most recent Intelligence Services Commissioner redacted annual report states:

... some people think that the role is one which has blanket oversight of all the activities of the intelligence agencies. This is simply not the case... The role is essentially to keep under review the exercise by the Secretaries of State of their powers to issue warrants and authorisations.<sup>241</sup>

## Reform of MI5 oversight

It is notable that Government, having long defended the virtues of the oversight system for MI5, has now conceded it is in need of reform. However this has only been done in the context of trying to make the introduction of provisions whereby evidence based on security service intelligence can be heard in secret in civil proceedings more palatable, presenting reform as a 'trade off'. The 2012 Justice and Security Green Paper proposed reform to the Committee and Commissioner but not the Tribunal.

Subsequently the Justice and Security Bill was introduced into Westminster in May 2012. Should it become law it will add an additional function, allowing the Intelligence Services Commissioner to review other aspects of MI5 (and MI6, GCHQ, army intelligence) work, albeit only when directed to do so by the Prime Minister with the Prime Minister retaining control over what, if anything, is published as a result. The Bill would also reform the Committee allowing: Parliament to appoint its members (albeit after being nominated by the Prime Minister); the provision for the potential to extend its remit to review operational issues (albeit if agreed in a memorandum of understanding with the Prime Minister); the Committee to report to Parliament (albeit the Prime Minister can redact material out of the report first); and, powers to compel disclosure of information (albeit subject to ministerial veto).

These proposals clearly fall short of the types of powers and reforms which had been hoped for. Worse still, legislating for 'Closed Material Procedures' (i.e. secret evidence in closed session from which the other parties are excluded) to be introduced into civil proceedings in the same bill will have the effect of making the Security Service (and other intelligence agencies) much less accountable. CAJ in commenting on the original proposals expressed our concerns that:

The Green Paper proposes a raft of reforms to allow evidence, presumably based on Security Service intelligence data, to be given in secret in relation to a whole range of civil court cases. Government argues this is to allow information too sensitive to be seen in open court to be used in such cases in order for the judiciary (but not the other party) to get a full picture of the evidence. Clearly hearing evidence in this way will also reduce the potential for such

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<sup>241</sup> Intelligence Services Commissioner, 2011 Annual Report, 13th July 2012, HC 497, p 3.

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evidence to be subject to challenge, including of its origins and source, which could also reduce the potential to uncover and hold the Security Services accountable for malpractice or human rights abuses in which they are involved.<sup>242</sup>

Effectively the proposals are designed to curb judicial scrutiny of the activities of the security services, in light of their implication in 'rendition' (i.e. kidnap, torture and unlawful detention) of persons. The Ministerial Forward in the Green Paper concedes that the proposals are a response to the "increasing numbers of cases challenging Government decisions and actions in the national security sphere." Concerns are then expressed regarding increased use of judicial review and specifically that an increasing number of court cases have affected the Security Services with Government contrasting the 14 cases against the Security Services which have reached the UK's highest court in the last decade, compared with none in the first 90 years of its (largely undeclared) existence.<sup>243</sup> In this context the closing down of judicial scrutiny will clearly make MI5 less accountable than at present.

In summary, since 1989 the British Government has put in place oversight bodies to oversee MI5 but there is broad consensus among human rights groups that such mechanisms are limited in scope and woefully inadequate in relation to the challenge of accountability. Concerns have also been expressed by parliamentarians, and the bodies themselves have pointed out limitations in their powers and remit. The British Government has only responded by proposing limited reform to their role. The next section will examine how the 2006 St Andrews Agreement, and its 'Annex E,' which set out the new role of MI5 in Northern Ireland, impacted on this accountability framework.

## The transfer of primacy for 'national security policing' to MI5

In early 2005 the British Government made a formal statement to Parliament announcing their intention that MI5 would assume the "lead responsibility for national intelligence work" in Northern Ireland. Stretching beyond credibility interpretation of the general statement in the Patten Report that national security was a central government matter Government argued that the transfer to MI5 was compatible with Patten.<sup>244</sup> The statement set out that the move would "in no way diminish the role of the PSNI in intelligence gathering in areas *other than* national security," that the PSNI and MI5 would continue to work together with PSNI "providing the operational police response in countering terrorism."

Making evident that there would be no oversight powers for the post-Patten bodies over MI5 and that therefore the power and responsibilities of the Policing Board

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<sup>242</sup> CAJ Submission (S374) to the Ministry of Justice 'Justice and Security' Green Paper on extending 'secret justice' provisions, January 2012, p 2.

<sup>243</sup> Justice and Security Green Paper 2012, paras 1.15-7.

<sup>244</sup> The British government further stated this position in response to a Parliamentary Question (PQ/06/9124), 02 May 2006.

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and Ombudsman “would not be affected by the change,” Government announced that the intention was for the arrangements, together with unspecified “associated safeguards”, to be operational during 2007. In an indication that the British Government was not prepared to allow control of covert policing to be passed to the local institutions, the statement argued that the move would “facilitate the devolution of justice and policing.”<sup>245</sup> This appears also to be a reference to clear unionist opposition to Sinn Féin having a role in oversight and accountability with respect to ‘national security’ policing.<sup>246</sup>

In spring 2006 a number of Parliamentary Questions were asked by Mark Durkan MP relating to the transfer. First, he asked how many agents made redundant by the RUC/PSNI had subsequently been employed by MI5. Government responded it would not comment.<sup>247</sup> Second, he enquired what arrangements were in place to ensure PSNI-MI5 information sharing and how they had been tested, to which the Government simply responded it was “satisfied” the arrangements “work well.”<sup>248</sup> Finally, he asked whether Government would “review plans to give MI5 primacy on national security in Northern Ireland following confirmation by the Chief Constable of the PSNI that MI5 did not pass on to the PSNI threat information relating to Omagh prior to the 1998 Omagh bombing.” Government responded there was no case for a review.<sup>249</sup>

## The St Andrews Agreement 2006

National security arrangements were one of the key topics of the UK-Ireland St Andrews Agreement which was negotiated with political parties on the 11-13 October 2006. The Agreement – made between the two sovereign Governments included in Annex E, “A Paper by the British Government” on “Future National Security Arrangements in Northern Ireland.” The Annex is not alluded to in the actual text of the Agreement. The purpose, “building on useful discussions which had already taken place with the political parties on the issue,” was to set out the arrangements being put place for the transfer to MI5 “in late 2007” of lead responsibility for “national security intelligence” and related “accountability measures.” It is therefore this International Agreement which is the primary source of the oversight framework Government was to put in place. In summary the paper sets out:

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<sup>245</sup> Written Ministerial Statement, National Security Intelligence Work, Paul Murphy MP, Secretary of State for Northern Ireland, House of Commons Official Record, 24 February 2005, column 64WS.

<sup>246</sup> See for example comments of DUP MLA Ian McCrea MLA, “I am not saying that everything that was done in respect to national security in the past was done right, but it would be wrong for us to bring elements of national security and terrorism and have them devolved to the Assembly, given that there are — I am not sure what to call them — former, or to some extent, terrorists who could have control, or some part to play, in the functions of that system. I could not agree to that. My party has made that clear and will remain strong on that position.” Hansard Northern Ireland Assembly, Assembly and Executive Review Committee, 9 October 2007, para 556.

<sup>247</sup> Written Answer no 364, 26 April 2006, Home Secretary, Charles Clarke MP.

<sup>248</sup> Written Answer no 366, 26 April 2006, Home Secretary, Charles Clarke MP.

<sup>249</sup> Written Answer 3 May 2006, Northern Ireland Secretary, Shaun Woodward MP.

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- MI5-PSNI etc Memorandums of Understanding: Government will publish high-level versions of MoUs being developed between MI5, PSNI and others, as appropriate.
  - Chief Constable's five principles: Government accepts "and will ensure that effect is given" to five key principles the PSNI Chief Constable has identified as crucial to the effective operation of the new arrangements, in summary:
    - a. All MI5 intelligence on NI will be visible to PSNI;
    - b. PSNI to be informed of all MI5 'counter-terrorist' investigations and operations in NI;
    - c. MI5 intelligence will be disseminated in PSNI as per PSNI policy and procedures;
    - d. PSNI officers will run the 'great majority' of national security CHIS under existing police handling protocols
    - e. No diminution in PSNI ability to comply with HRA or Policing Board's scrutiny of same.

The Policing Board's Human Rights advisors should have a role in human rights proofing the relevant protocols which underpin the five principles and in confirming satisfactory arrangements are in place to implement the principles.

- Co-working arrangements: "New integrated working arrangements" between PSNI and MI5, with PSNI officers co-located with MI5 personnel as intelligence analysts/ advisors and to "translate intelligence into executive action." The arrangement, it states, is "designed precisely" to counter concerns that intelligence wouldn't be shared with PSNI.
- Running 'national security agents': The great majority of agents will be run by PSNI "under the strategic direction" of MI5. But MI5 will continue to run a small number of agents. Both PSNI and MI5 will observe the principles of RIPA.
- MI5 executive policing powers: MI5 will have "no executive policing responsibilities" and PSNI contribution to countering terrorism will remain with MI5 providing "strategic direction".
- Police accountability: Role of Policing Board and Ombudsman remain the same. PSNI officers working with MI5 still accountable to Chief Constable and Ombudsman. MI5 and Ombudsman to agree Ombudsman's access to "sensitive information." Continued discussion on "comprehensive accountability mechanisms" will continue.
- National security accountability: PSNI Chief Constable accountable to Secretary of State for policing that touches on National Security. MI5 accountable to Westminster Intelligence and Security Committee, the Intelligence Services Commissioner, Interception of Communications

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Commissioner, Surveillance Commissioner and Investigatory Powers Tribunal.

- Policing Board closed MI5 sessions: To ensure Chief Constable fully accountable to Board MI5 will participate in closed sessions of the Board “to provide appropriate intelligence background about national security related policing operations.”
- Employment of ex-RUC/PSNI Special Branch: There shall be ‘no bar’ on former officers being employed by MI5 but they “need to have working experience of the arrangements under which PSNI currently operates.”

The main written safeguards are therefore the MoUs and protocols to underpin the Chief Constable’s five principles. Whilst former Special Branch officers can be re-employed by MI5, in a seeming nod to ‘old school’ practices no longer being permitted, they must have experience of the practices the PSNI had adopted.

The Annex makes reference to MI5 running CHIS but also uses the term ‘agents’. Whilst the two terms can be interchangeable the latter may have greater scope. Agents can refer to Security Service personnel who infiltrate paramilitary organisations, as well as existing members of paramilitary groups who provide information.

‘National security’ was not defined in the document. According to the SDLP it was “officially confirmed” that the ‘national security’ focus of MI5 meant it would only focus on dissident republicans and not loyalists.<sup>250</sup> Annex E also seeks to present the transfer as “bringing Northern Ireland into line with the rest of the UK” in affording Security Service primacy to threats, including those from “international terrorist groups such as Al Qaeda [sic]”. This misspelling does not inspire confidence that this issue was a significant factor in the decision to transfer primacy to MI5.

The main unionist party welcomed the move. The DUP believed that the building of a new MI5 headquarters near Belfast and the provisions of Annex E marked “a further entrenchment of the British State in Northern Ireland” and regarded the proposed nomination of a DUP MP to the Intelligence and Security Committee as a key product of the St Andrews negotiations.<sup>251</sup> Despite different approaches there was shared opposition from nationalist parties over the arrangements.

Sinn Féin argued that PSNI should concentrate on civic policing and that MI5 should be entirely firewalled away from the police service. Contextually, this was at a time when Sinn Féin was trying to persuade its base post-St Andrews to recognise the PSNI. The decision to do so was taken at a special Ard fheis on the 28 January 2007. There was significant critical engagement over the arrangements by both

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<sup>250</sup> ‘MI5 Blind to Loyalists like Stone’ SDLP Press Release, Alex Attwood MLA, 29 November 2006.

<sup>251</sup> ‘DUP claims MI5 building entrenches UK presence’ *Irish Times*, 10 Oct 2006. The DUP are not presently represented on the Committee.

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parties following the Agreement, the SDLP seeking unsuccessfully to amend the St Andrews Agreement Bill to give the Police Ombudsman powers over MI5 as it went through Parliament. The SDLP published a response paper to Annex E welcoming the acceptance of the five principles and “the SDLP demand” that the MoUs are published, but setting out outstanding “serious concerns” about the lack of jurisdiction of the Police Ombudsman, that former RUC Special Branch officers could go on to serve in MI5, and the view that MI5 should not be running agents in NI at all.<sup>252</sup>

## The Prime Minister’s Statement 2007

On 10 January 2007 Prime Minister Tony Blair made a formal statement relating to the proposals in the context of there being “some concern over the arrangements set out in Annex E.”<sup>253</sup> This statement set out a number of matters including:

- The PSNI and Security Service (MI5) will be “completely distinct and entirely separate bodies”;
- All MI5-PSNI interaction will, as directed by the Chief Constable, be by way of liaison;
- No police officers will be seconded to or under the control of MI5;
- The small number of police officers who act in a liaison capacity with MI5 will be “PSNI headquarters staff” acting in the role for fixed-time periods;
- “Policing is the responsibility solely of the PSNI,” MI5 will have “no role whatsoever in civic policing”;
- Chief Constable responsible for leadership and direction of all police work;
- All PSNI officers to be employed by PSNI and solely accountable to Chief Constable, Policing Board and Department of Justice. Patten reforms maintained and “there will be no diminution in Police accountability”;
- Police Ombudsman will have statutory powers to hold to account all police officers and access all information held by police; MI5 and the Police Ombudsman will agree arrangements for Ombudsman access to sensitive MI5 held information where necessary for Ombudsman’s duties;
- Lord Carlile (Independent Review of Terrorism Acts) “and any successor” will review annually the operation of the arrangements;

Sinn Féin responded by stating “our objective has been to firewall local policing from the malign and corruptive control of MI5... the St Andrews Proposals would have embedded MI5 into civic policing with the real potential of again creating a

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<sup>252</sup> SDLP Response to British Government Paper “Future National Security Arrangements in Northern Ireland”.

<sup>253</sup> Written Ministerial Statement Tony Blair MP ‘National security in Northern Ireland’ Official Report, House of Commons, 10 January 2007.

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force within a force.”<sup>254</sup> The SDLP responded expressing concerns that the new arrangements would not prevent the effective secondment of PSNI officers to MI5, control of national security policing by MI5, and that MI5 would not be accountable to the Police Ombudsman.<sup>255</sup>

The following and final chapter of this report will draw conclusions as to the extent an additional accountability gap over covert policing has emerged with the transfer of ‘national security’ policing to MI5. The chapter will also explore the question of who is controlling this area of policing.

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<sup>254</sup> ‘Sinn Féin secure reversal of proposal to integrate PSNI and MI5’ Sinn Féin Press Release, 10 January 2007.

<sup>255</sup> ‘The truth about MI5: What they don’t want you to know’ SDLP Briefing Paper, January 2007.

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## 5: Conclusions: the accountability gap

This final chapter will examine the extent to which the arrangements and safeguards set out in Annex E and the Prime Minister's Statement have been put into place. Following this the question will be addressed as to who is really running what has always been the most sensitive area of policing in Northern Ireland and the implications of this in the future.

### The St Andrews Safeguards in practice

This section assesses the St Andrews safeguards against the four human rights compliance and accountability headings which were developed earlier in this report, namely 'clear published written policy on covert policing', 'developing a human rights culture', 'personnel, structure and composition' and 'oversight and control'.

#### *Clear published written policy on covert policing*

International standards and the Patten report provided for publicly available information, including Codes of Practice, legislation and policy which clearly set out policies and procedures in relation to the operation of covert policing.

Memorandums of Understanding (MoU) along with human-rights proofed written 'protocols' to cover the Chief Constables five principles were the main written safeguards agreed at St Andrews. Given the explicit scope of the five protocols, in practice these procedures should cover MI5-PSNI intelligence sharing and dissemination, arrangements to inform PSNI of all MI5 operations, and the policy framework by which agents will be run. Given that MoUs were to be completed between MI5 and PSNI and undisclosed other agencies it is reasonable to presume they would cover many of the above matters as well as the 'co-working' or liaison arrangements governing interaction between the two organisations. In relation to the MoUs Annex E stated:

Government will publish in due course high level versions of the MoUs currently being developed between the Security Service and the PSNI and others...

Remarkably, despite the above commitment in an international agreement, and the generally mundane nature of MoUs, Government has in fact decided to keep MoUs secret. Shortly after the transfer the *Belfast Telegraph* did report the production of one PSNI-MI5 11page MoU apparently focusing on intelligence sharing, printing some general extracts from it, and indicating it was being published.<sup>256</sup>

CAJ requested the titles and copies of all MoUs referred to in the St Andrews Agreement through the Freedom of Information Act 2000 (FoI). Both the NIO and PSNI would not release any MoUs (which would include that referred to by the *Belfast Telegraph*) under FoI referencing the absolute exemption under section 23

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<sup>256</sup> 'PSNI sets up new unit to work with MI5' *Belfast Telegraph*, 17 October 2007.

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of the legislation for matters relating to MI5. Both organisations did however confirm they held such documents. Interestingly, giving an insight into how the devolved administration is treated, both the Department of Justice and Office of the First and deputy First Minister confirmed that they did not even have copies of the MoUs.<sup>257</sup> Turning to Parliament we asked an MP to raise the fate of the commitment to publish the MoUs. On 16 January 2012 Mark Durkan MP asked the Secretary of State for Northern Ireland Owen Patterson firstly which high level MoUs between MI5 and PSNI or others had been published since the St Andrews Agreement. The Secretary of State limited his response to stating the MoUs 'exist'.<sup>258</sup> Given this, a follow up question was asked as to when the MoUs would be published in accordance with the commitment made in the St Andrews Agreement. In response the Secretary of State declared he had "no plans" to publish any further MoUs.<sup>259</sup>

Lord Carlile's first Annual Report states that a MI5-PSNI MoU was signed off on 18th September 2007. It also states that in addition thirteen Service Level Agreements between MI5 and the PSNI were set up to deal with "matters of operational and administrative detail, for example financial investigation, and records management and access." The report also makes reference to a 'developing relationship' between MI5 and the Public Prosecution Service, due to 'particular concerns' the Security Service has that sensitive information revealing MI5 techniques may be exposed in court.<sup>260</sup>

In his response to Parliament the Secretary of State set out that a protocol for managing national security issues had been shared with the Assembly and Executive Review Committee of the Northern Ireland Assembly in March 2010. It is notable that this is around four years after St Andrews. This NIO protocol was released to CAJ under freedom of information and relates not to the MI5-PSNI arrangements but rather a set of stipulations as to how arrangements on 'national security matters' are to be handled post-devolution of policing and justice powers to the Northern Ireland Executive.<sup>261</sup> The tone and content of the protocol appear designed not to set out safeguards or accountability but rather to set out rules preventing the devolved institutions and their oversight mechanisms having control

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<sup>257</sup> MI5 itself has an absolute exemption from the Freedom of Information Act. CAJ nevertheless wrote to MI5, outside Fol, simply requesting copies of the documents. The agency responded that our letter 'looked like an Fol request' and as MI5 was exempt from Fol, the information would not be provided.

<sup>258</sup> Hansard WPQ 16 Jan 2012: column 445W.

<sup>259</sup> Hansard WPQ 15 March 2010: column 254W "A protocol setting out arrangements for managing issues which are national security related was shared with the Assembly and Executive Review Committee in March 2010. In addition, a high-level memorandum of understanding governing the handling of National Security matters by the Chief Constable and his reporting of such matters to the Policing Board was circulated to the Policing Board. I have no plans to publish further memoranda of understanding; the memoranda already in circulation, together with the assurances provided in Annex E of the St Andrews Agreement, the statement in January 2007 by the then Prime Minister and the regular reports I receive from Lord Carlile, strike the right balance between being open, transparent and accountable while protecting national security interests and assets."

<sup>260</sup> First Annual Review of Arrangements for National Security in Northern Ireland, Lord Carlile QC, paragraph 17, 33 & 52-3. There is no reference to a MoU being developed to this regard, rather it is suggested that a successful relationship will be dependent on a sufficient number of vetted prosecution lawyers being available.

<sup>261</sup> NIO Protocol on 'Handling Arrangements for National Security Related Matters After the Devolution of Poling and Justice to the Northern Ireland Executive' – sent to Assembly and Executive Review Committee on 16 March 2010.

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and access to matters to which the 'national security' label is attached. The Protocol and related documents were received and noted by the Committee but not discussed, beyond them being noted and an agreement made to forward them to a future Justice Committee.<sup>262</sup> Among the stipulations of the Protocol are:

- "UK government will determine what information pertaining to national security can be shared [with devolved Minister of Justice] and on what terms" and that information on the modus operandi of MI5 and other agencies "will not be shared" (para 5)
- "The NIO will retain ownership and control of access to all pre-devolution records..." and the NIO will provide access to Department of Justice (DoJ) officials to such records only on devolved matters and only when they are needed to carry out post-devolution functions. DoJ officials will have no access to records "that relate to matters of national security" (paras 10-11)
- The Minister of Justice and Northern Ireland Assembly will be responsible for "all policing functions" except "those aspects of the PSNI's work – past, present and future – that have a national security element or dimension." (Annex A, para 3.1)
- The Police and Prisoner Ombudsman will normally report to the Minister of Justice but will report to the NIO Secretary of State on 'national security' matters who may issue the Ombudsman with 'guidance' on "matters relating to national security." (Annex A, paras 4.1 & 6.1)
- The Chief Inspector of Criminal Justice will be appointed by the Minister of Justice but insofar as their work "touches on national security issues" the NIO Secretary of State will have a "consultative role" in the development of the Chief Inspectors workplan and the Chief Inspector is required to obtain the Secretary of State's permission for publishing any reports which contain "national security information" (Annex A, para 9.1)
- When the Minister of Justice or Policing Board set up a Panel to adjudicate on misconduct by a police officer, if the case relates to national security information the "UK government will decide what information can be passed on to the panel and, if information is withheld, whether the panel can be informed of that fact." (Annex A, para 11.2)

As per Government policy the protocol does not define 'national security' although does note it relates to the "safety and security of the State and its people" (paragraph 3). The only apparent safeguards set out in the protocol are that the Secretary of State commits to "declaring publicly" and allowing Lord Carlile to review any occasion in which powers are used to redact information from HM

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<sup>262</sup> Hansard Northern Ireland Assembly, Assembly and Executive Review Committee, 16 March 2010, para 3.2. Other related documents which correspondence to the Committee Clerk of 16 March 2010 indicated had been shared with "OFM&dFM" included Concordats on Judicial and Prosecutorial Independence, Intergovernmental Agreements on Police and Criminal Justice Cooperation. A Protocol on Policing Architecture was also referenced with the indication it had not been shared.

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Inspector of Constabulary, Police or Prisoner Ombudsman, or Criminal Justice Inspector reports.<sup>263</sup> There are also to be “regular meetings” between the DoJ and NIO in relation to the above division of responsibilities.

The NIO Secretary of State’s response to the Parliamentary Question in March 2012 makes reference to a “high-level memorandum of understanding governing the handling of National Security matters by the Chief Constable and his reporting of such matters to the Policing Board was circulated to the Policing Board.” This was subsequently released to CAJ by the NIO under freedom of information.<sup>264</sup> This MoU is neither signed off nor dated and the NIO were unaware of when it was actually given to the Policing Board.<sup>265</sup>

There is reference in the minutes of a Policing Board committee in December 2011 to a member querying the status of a ‘classified letter’ and ‘attachment’ recently received from the PSNI relating to the Policing Board and national security matters.<sup>266</sup> Following this the Committee’s subsequent meeting makes reference to the Chair and Vice-Chair having met with the PSNI Chief and Deputy Chief Constables and agreeing to review the document. This is followed by discussion on the Board’s ‘Special Purposes Committee’ taking forward the matter with the Committee resolving the Special Purposes Committees terms of reference themselves be reviewed.<sup>267</sup> Whilst this document appears to have been sent to the Policing Board on the 30 November 2011 it is not clear if its existence substantially predates this. It also not clear if the Policing Board actually considered or approved the document before it was notified of it. It would appear it did not, considering the questioning of its status, and, presuming it is the same document as the MoU issued to CAJ, the Secretary of State’s assertion it had merely been ‘circulated’ to the Board. Also unclear is what legal status, if any, such a document has and hence the extent it is actually in any way binding on the Chief Constable and Board.

The MoU released to CAJ makes reference to, and hence came after, the transfer of primacy for national security policing to MI5 in 2007, but is not the MoU between MI5 and the PSNI. Rather the MoU effectively sets out restrictions on what the Policing Board’s role is including the types of information the Chief Constable should not tell the Policing Board. The MoU states:

- The PSNI Chief Constable “is and will remain directly responsible to the Secretary of State for Northern Ireland...for any aspect of PSNI’s work (past, present or future) with a national security element.” (para 2)
- The Policing Board “has no role in National Security matters or related executive policing decisions.”...but given the Board’s role in police efficiency

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<sup>263</sup> NIO Protocol on ‘Handling Arrangements for National Security Related Matters After the Devolution of Poling and Justice to the Northern Ireland Executive, para 8-9

<sup>264</sup> The Policing Board and National Security Matters MoU (undated, held by the Northern Ireland Office).

<sup>265</sup> NIO Freedom of Information Team correspondence to CAJ, 20 July 2012, reference FOI 12/117.

<sup>266</sup> Policing Board, Minutes of Corporate Policy, Planning and Performance Committee, 15 December 2011, Item 4.2

<sup>267</sup> As above, meeting of 19 January 2012, Item 3.4.

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and effectiveness it “needs to understand how National Security issues are handled.” (para 4)

- When Policing Board members ask questions on matters that “indirectly touch upon National Security” they should not be answered if it might damage national security interests. (para 6)
- The Chief Constable should refer any such requests relating to “past, present or future” national security to MI5 or the NIO, and the Chief Constable must consult with the Secretary of State if in any doubt whether information falls into this category. (paras 7-8)
- The Chief Constable must not tell the Policing Board any information from or relating to MI5 without MI5’s authority to do so. (para 9)
- Should local District Policing Partnerships ask such questions they must be referred to the Policing Board to ensure they are dealt with as above. (para 10)
- Any ‘special purposes’ committee set up by the Board (to meet privately to discuss the above type of matter) will abide by the same rules. (para 11)
- The Chief Constable will be allowed to tell the Board, on request, national security related matters in a number of limited areas including: “broad definitions of structures and functions”; the “accountability” arrangement from PSNI management to the Chief Constable and then Secretary of State; “general information” about PSNI compliance with RIPA; the “total number” of police personnel in C3 intelligence branch; procurement “principles”; “total expenditure...headline budgets...auditing procedures”; “general headline statements of personnel policy”; “acknowledgement that the PSNI runs CHIS and arranges surveillance”; “acknowledgement that the PSNI have working arrangements with other agencies including MI5.”

The MoU also contains reference to the written protocols which were to underpin the Chief Constable’s five principles. This position does echo the statement in Annex E that on national security the “Chief Constable’s main accountability will be to the Secretary of State”. The Chief Constable himself speaking at a recent Policing Conference appeared to indicate accountability channels in reference to CHIS were to the Joint Intelligence Committee and on security matters to the National Security Council.<sup>268</sup> In relation to the powers of the Policing Board and the duties of the Chief Constable to it, general matters relating to CHIS have been dealt with by the Board. However, the legislation does provide exemptions to the duty of the Chief Constable to report to the Board on grounds inclusive of ‘national security’. These provisions also include significant powers for the Secretary of State to “exempt the Chief Constable from the obligation to report information” to the Board.<sup>269</sup>

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<sup>268</sup> Change and Challenge: A New Conversation for Policing in Northern Ireland, University of Ulster, PSNI and Northern Ireland Policing Board, 17-18 November 2011.

<sup>269</sup> See in particular sections 33A & 59 of the Police (Northern Ireland) Act 2000 (as amended by the Police (Northern Ireland) Act 2003).

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The Joint Intelligence Committee is located within the British Cabinet Office, includes MI5, MI6 and GCHQ heads and is “responsible for providing Ministers and senior officials with regular intelligence assessments on a range of issues of immediate and long-term importance to national interests, primarily in the fields of security, defence and foreign affairs.” The Chair of the Committee reports to the Prime Minister.<sup>270</sup> The National Security Council “is the main forum for collective discussion of the Government’s objectives for national security.”<sup>271</sup> The NSC meets weekly and is composed of Ministers, is chaired by the Prime Minister and is attended by the heads of the intelligence agencies and other senior officials as required. The PSNI Chief Constable is not listed as a permanent member of either body although could potentially be called to attend on an ad hoc basis.

The progress of the development of PSNI-MI5 policy is recorded in the Policing Board’s Human Rights Annual Reports. Pre-St Andrews in 2006 the Annual Report expresses concern that the proposed transfer to MI5 not affect the PSNI’s ability to comply with the Human Rights Act 1998 nor the Policing Boards ability to monitor it, and recommends a framework be established to ensure this.<sup>272</sup> In 2007 following St Andrews the Annual Report regards the ‘five principles’ drafted by the PSNI and committed to in Annex E as fulfilling this requirement. The Board’s Human Rights Advisors confirm they have commented on a PSNI-MI5 “overarching protocol” which will be supplemented by a series of MI5-PSNI service level agreements. They state the ‘five principles’ are reflected in the protocol but have raised “several issues” about their practical implementation.<sup>273</sup> Subsequent reports continue with cryptic references to “issues” and a need to “review” the protocols on an ongoing basis.

In 2008 the Human Rights Advisors report that they have been given access to the Memorandum of Understanding and service level agreements, and that they are satisfied PSNI staff working ‘in liaison’ with MI5 still remain subject to PSNI policy and practice. Despite this general satisfaction it does record “certain issues” have arisen since the transfer to MI5 requiring “further discussion and clarification.”<sup>274</sup> In 2009 it is again reported that “some issues” have arisen, which do not affect the ability of the PSNI itself to comply with the HRA, but that the Advisor has been revisiting whether the arrangements are satisfactory and will be carrying out a further review in the next six months.<sup>275</sup> The 2010 report states a “further review” of the protocols will be conducted over the next reporting period, and in 2011 it also notes the policies and practice were under review, and a further review would be carried out once the policies were updated further. Clearly it is not possible to

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<sup>270</sup> National Intelligence Machinery, Cabinet Office, November 2010 p 22-23, see p 26 for the Terms of Reference of the Committee.

<sup>271</sup> <http://www.cabinetoffice.gov.uk/content/national-security-council/> [accessed November 2012].

<sup>272</sup> NI Policing Board, Human Rights Annual Report 2006, recommendation 34.

<sup>273</sup> NI Policing Board, Human Rights Annual Report 2007, covert policing.

<sup>274</sup> NI Policing Board, Human Rights Annual Report 2008, covert policing.

<sup>275</sup> NI Policing Board, Human Rights Annual Report 2010, p133.

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determine from these reports which 'issues' have arisen in relation to the protocols nor their content given they are not publicly available.

This state of affairs is greatly removed from the vision and spirit of Patten. Whilst being clear that police operational techniques on covert policing had to be kept confidential, Patten made explicit reference to policy in the area being made publicly available. All that can be determined from the above is that some protocols have been drafted and the Policing Board Human Rights Advisors have had some unspecified 'issues' with them which have led to them being kept under continual 'review' in every year since the transfer.

In relation to the PSNI the Policing Board Annual Human Rights Reports do document the adoption of policies and procedures. For example in 2005 the report documents the adoption, in July 2004, of a "Manual for the Management of Covert Human Intelligence Sources" and other documents. The reports and work of the Advisors provides an assessment of such policies in relation to compliance with standards such as the Human Rights Act 1998, which is not the case with MI5. It is nevertheless worth noting that these policy documents are not publicly available, with the PSNI declining to issue them under freedom of information, citing both law enforcement and national security grounds, including that information may relate to MI5.<sup>276</sup>

International standards also recommend that the remit of intelligence agencies be restricted and not duplicate policing functions. St Andrews states the "great majority" of "agents" will be run by PSNI under the strategic direction of MI5, assurances are also given that MI5 will have "no executive policing responsibilities" and the PSNI contribution to countering terrorism will remain with MI5 providing "strategic direction." It is the case that the law does not grant MI5 arrest and detention powers. However in the absence of publicly available protocols it is not possible to determine the extent to which "strategic direction" in practice allows MI5 to run and control 'national security' policing. There are also some indicators that MI5 is liaising with or tasking special forces units such as the Special Reconnaissance Regiment. Also unclear are relationships between MI5 and other police services which have been allowed to operate within the PSNI jurisdiction, like the Serious and Organised Crime Agency, and its planned successor body the National Crime Agency. Contrary to international standards, the highly vague concept 'national security' is used to determine when MI5 and the NIO will take primacy from the PSNI or other elements of the criminal justice system, which leads to a much broader potential range of tasks which could engage MI5 involvement.

In summary, beyond the stipulations of RIPA it is not clear which publicly available written standards and parameters MI5 is to abide by, if any, in relation to agent handling and the scope of their remit. 'National security' also remains undefined and to be interpreted 'flexibly'. Commitments to publish policy have been reneged on and the MoU and protocol which have been issued to CAJ under freedom of

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<sup>276</sup> PSNI FoI Request F2011, 01965 "Recruitment of CHIS".

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information actually seek to *limit* accountability. Given the secretive nature of the Security Service it is unlikely to be possible to scrutinise written policy in future. This position falls woefully short of human rights standards.

### ***Developing a human rights culture***

The Patten recommendations foresaw an ambitious programme of instilling a human rights culture within the PSNI. There is no known equivalent policy framework for MI5. The Policing Board Annual Human Rights Reports do contain information as to how the Board's human rights advisors have, for example, assessed training materials or policies relating to PSNI covert policing. This is not the case with Intelligence Services Commissioner nor Committee reports (which in any case do not have the remit of the Policing Board). It is therefore not possible to tell what steps, if any, are being taken to foster a human rights culture within MI5 in relation to its role in 'national security' policing in Northern Ireland.

In terms of duties to keep records and to investigate collusion in relation to the PSNI it is possible for the Policing Board, or at times the public, to examine policy procedures and frameworks relating to matters such as record keeping. However it is not possible to do this in the case of a secretive body such as MI5. There are publicly available Codes of Practice covering limited matters such as those issued by the Home Office on RIPA authorisations. However, given the nature of the agency and its oversight it is not really possible to test whether MI5 operates within such standards or, like RUC Special Branch, it can deliberately set them aside. Whilst the main MoUs and protocols have not been made public the few peripheral MoUs which have been obtained under freedom of information requests appear to be designed to prevent accountability rather than to ensure it. This is the case given their stipulations that any 'national security' records will not be made available to the devolved institutions and powers for the NIO to redact material from the official reports of the Police Ombudsman, Prisoner Ombudsman, Criminal Justice Inspector, and HM Inspector of Constabulary.

In another area the international standards referenced in chapter one stipulate that intelligence agencies should be bound by the principles of non-discrimination and not target particular ethnic groups in their work. A situation has arisen however, when despite ongoing paramilitary activity by both republican and loyalist groups, MI5 may only be tasked to deal with the former. This was confirmed by the PSNI Chief Constable at the time of the transfer and there appears to be no official statement that this situation has changed. The scenario, in effect, amounts to two separate police agencies, with a considerable gulf in accountability between them, effectively policing paramilitaries on different sides of the community.

### ***Personnel, structure and composition***

The Patten reforms, as detailed in chapter one, envisaged compositional and cultural change across the PSNI through a 50:50 recruitment package coupled with a severance scheme, of which there was a relatively high take up among RUC Special Branch. The reforms also envisage the effective downsizing and break up of

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Special Branch and its integration within the rest of the police service to avoid it continuing to be, in perception or reality, a separate force. International standards stipulate that intelligence bodies, in addition to being accountable, should be representative on ethnic and gender grounds.

In relation to the composition of MI5, unlike most other public authorities, there is no method to determine whether it is representative on grounds of 'community background' or gender in part as it is exempt from fair employment monitoring procedures.<sup>277</sup> Such information cannot be obtained under the Freedom of Information Act as MI5 is also subject to a blanket exemption. There was also no 50:50 recruitment scheme in relation to MI5's new role. The Security Service is also apparently not required to implement the statutory equality duty under section 75 of the Northern Ireland Act 1998, despite the duty being applicable to the PSNI, being a key part of the peace agreement, and the Equality Commission advising that the duty should apply to all public authorities operating in Northern Ireland.<sup>278</sup>

Although MI5 has not disclosed how many staff it has at its Belfast Loughside headquarters, the rough estimate in chapter three would mean around 600 staff, about 70% of the numbers RUC Special Branch had at the time of the Agreement, albeit not all such staff may be working on Northern Ireland issues. Annex E of the St Andrews Agreement stated there would be 'no bar' on former RUC Special Branch officers moving over to MI5, although there was a caveat that such officers would need to have working experience of the "arrangements under which PSNI currently operates." However given the secretive manner in which MI5 recruitment takes place it is not possible to verify if even this modest caveat was applied in practice.

There is speculation that former significant numbers of former Special Branch officers have simply moved en masse to MI5 due to the transfer of functions. At a recent policing conference held at the University of Ulster there appeared to be consensus among some commentators that the "force within a force" had in essence just "moved down the road."<sup>279</sup> Whilst it may never be possible to verify this, such a phenomenon would clearly be regressive in relation to the framework provided by Patten. Lord Carlile's reports do confirm, "A significant degree of recruitment has been carried out locally" but do not give details of numbers.<sup>280</sup> The PSNI have faced questions at the Policing Board in relation to these matters. In the run up to the transfer the question was directly posed as to how many ex-RUC Special Branch officers were being recruited to MI5 posts, the PSNI response was limited to stating that they were not responsible for such matters and it was a matter

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<sup>277</sup> By virtue of not being included in the schedules of the Fair Employment (Specification of Public Authorities) Orders.

<sup>278</sup> "The Commission's interpretation of the legislation and intent is that all public authorities with functions in relation to Northern Ireland should be designated." Equality Commission for Northern Ireland, 'Designation of Public Authorities for the purposes of S75 of the Northern Ireland Act 1998', February 2011 EC/11/2/3, para 7.

<sup>279</sup> Change and Challenge: A New Conversation for Policing in Northern Ireland, University of Ulster, PSNI and Northern Ireland Policing Board, 17-18 November 2011.

<sup>280</sup> First Annual Review of Arrangements for National Security in Northern Ireland, Lord Carlile QC, para 24.

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for MI5.<sup>281</sup> In relation to the Patten framework for downsizing the intelligence function the PSNI, at another Board meeting, did make clear however the transfer to MI5 had “brought new resources to bear... and.. in effect it is an increase in capability”.<sup>282</sup>

A number of arrangements were also set out at St Andrews and the Prime Minister’s statement in relation to the structure and engagement of PSNI and MI5. As set out above, Annex E had originally envisaged integration with PSNI officers undertaking national security work being ‘co-located’ with MI5, allowing MI5 to effectively task PSNI to then undertake executive policing operations. The subsequent Prime Minister’s statement retracted from this position emphasising PSNI and MI5 would remain “completely distinct and entirely separate bodies,” no PSNI officer would be seconded or under the control of MI5, with all PSNI-MI5 operations being by way of liaison. Assurances were also given that the “small number” of PSNI officers working in such liaison would be restricted to PSNI “headquarters staff”.

Lord Carlile’s Annual Reviews do comment on the co-operation arrangements. The first reports references ‘a number’ of PSNI personnel being deployed to work in liaison with MI5. It also discusses PSNI and MI5 personnel working together in areas such as interception of communications, and that in relation to agent handling most ‘day to day’ work is handled by PSNI ‘in close cooperation’ with MI5.<sup>283</sup>

Whilst it is the case that the PSNI and MI5 are institutionally separate bodies it appears that a very complex arrangement is in place whereby PSNI officers, up to and through the chain of command to the Chief Constable, are in effect no longer accountable through the PSNI structures to the Policing Board. Rather it appears, in particular from the available MoUs, they are in effect accountable to the NIO Secretary of State who engages with MI5. In the absence of publication of the other MoUs and similar documents it is difficult to discern just exactly the terms of the relationship between MI5 and PSNI. However there is a clear indication of joint operations whereby MI5 appears to play a tasking or strategic role in policing operations around stop and search and recruiting informants. In addition, whilst the term ‘headquarter staff’ may give the impression of a small team of senior officers based at PSNI Knock Headquarters this is not the case. Information published by the PSNI after a freedom of information request revealed that as of June 2005 a total of 2,526 PSNI officers were considered ‘headquarters staff’ with “PSNI headquarters” having “locations across Northern Ireland.”<sup>284</sup> Another Freedom of Information request revealed the complement of PSNI Tactical Support Groups, which have been conducting many of the stop and search operations using emergency type powers under the likely direction of MI5, numbered 449 officers, with particular imbalances on ethnic and gender grounds.<sup>285</sup>

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<sup>281</sup> Minutes of Northern Ireland Policing Board, 2 May 2007, p 36.

<sup>282</sup> Minutes of Northern Ireland Policing Board, 2 September 2010, p 25.

<sup>283</sup> First Annual Review of Arrangements for National Security in Northern Ireland, Lord Carlile QC, paras13, 47-48;

<sup>284</sup> PSNI FoI request F-2009-01903, Police Officers Attached to PSNI Headquarters.

<sup>285</sup> PSNI FoI requests F-2009-01903/F-2008-05046, Tactical Support Group Composition. In 2009 the TSGs were 79% Protestant, 18% Catholic and 92% male, 8% female.

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The St Andrews Agreement stated that “the great majority” of agents will be run by PSNI under the strategic direction of MI5 with MI5 continuing to run a small number of agents.<sup>286</sup> There appears to be no way, however, of verifying if this is the case as this information was not released to us under freedom of information.

### *Oversight and control*

International standards recommend independent accountability mechanisms and the Patten reforms envisaged a range of powerful accountability bodies including the Policing Board and Police Ombudsman’s Office. St Andrews promised the role of the Board and the Ombudsman would “remain the same”. By extension, the Prime Minister told Parliament in 2007 that “all PSNI officers will be employed by the PSNI and will be accountable solely to the Chief Constable and to the Policing Board, and upon transfer, to the Ministers for Justice.” This view is also echoed by Lord Carlile in his first annual review of the arrangements.<sup>287</sup>

This position is flatly contradicted by the aforementioned Protocol and MoU which state that PSNI officers, up to and including the Chief Constable, working on national security matters are not accountable to the Policing Board and Minister of Justice but rather to the NIO.

Turning to the oversight bodies, it is clear that the transfer to MI5 reduced the role of the Police Ombudsman in holding individual State agents involved in covert policing to account on the basis of individual complaints. Individuals cannot complain to the Police Ombudsman about the actions of MI5 officers and consequently, passing primacy to MI5 means the Ombudsman’s role is clearly reduced. It is still possible to complain about PSNI officers working “under the strategic direction” of MI5. However the provision of information to the Police Ombudsman by MI5 is subject to their agreement – unlike, in theory, disclosure to the Police Ombudsman of PSNI information. The extent that the types of information previously in the hands of the PSNI are now in the hands of MI5 would also limit the Ombudsman’s role.

Equally problematic is that it appears the role of the Policing Board has also been diminished. It may have previously been the case that the Chief Constable had to report to the NIO Secretary of State and not the Policing Board on ‘national security’ matters. However, designating an entire area of previously mainstream policing work as ‘national security’ and transferring it to another agency outside of the PSNI was always going to further limit the role of the Board. It has also led to a protocol being drawn up controlling which information should be given to the Board. The assurance given at St Andrews, designed to ensure that the Chief Constable was fully accountable to the Board, was that MI5 would participate in closed session briefings to the Board. It is questionable whether ‘briefings’ by MI5 in

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<sup>286</sup> The term ‘agents’ is used in Annex E. As the term is then linked to the provisions of RIPA it would appear to refer to informants/CHIS rather than undercover officers.

<sup>287</sup> First Annual Review of Arrangements for National Security in Northern Ireland, Lord Carlile QC, para 13.

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themselves afford effective scrutiny over its work given that the Board has no powers over the agency. It also transpires that these briefings are not regular occurrences, but have happened on only three occasions since St Andrews.<sup>288</sup>

In the St Andrews Agreement, Government also highlighted the existence of the Committees, Tribunal and Commissioners which provide existing oversight to MI5 and the other intelligence agencies, as examined in the previous section. However, as we have shown, there are serious question marks over the ability of these bodies to provide effective oversight and accountability.

The additional oversight measure offered in the Written Ministerial Statement by Tony Blair in 2007 was the drafting in of Lord Carlile, then Independent Reviewer of the Terrorism Acts, to conduct an annual review of the St Andrews Arrangements. The undertaking given by the British Prime Minister to Parliament was that:

...the Government will invite Lord Carlile, and any successor, to review annually the operation of the arrangements for handling national security related matters in Northern Ireland. In the course of his review, he will consult the Chief Constable, the Policing Board and the Police Ombudsman, as well as taking into account any views which the First Minister and the Deputy First Minister and, in due course, Justice Ministers may put to him.<sup>289</sup>

To date, since 2007 there have been three annual reviews, the first dated October 2008, the second August 2010, and the third December 2011. All three were conducted by Lord Carlile, including the third which came after he had finished his term of office as Independent Reviewer. A summary report has been published on the Parliament website for the first two reports.

Government has been keen to talk up the role as an oversight mechanism, and the review was subsequently cited by the Secretary of State Owen Patterson as justification for not publishing the MoUs.<sup>290</sup> However, there are a number of question marks about the extent to which the annual review process was designed to afford independent scrutiny or rather, whether it is more of an internal review of the effective administrative workings of the transfer.

Instead of the normative response from Government to an inspectorate type report - that it will 'consider and respond', the Government routinely cites Lord Carlile's review as an endorsement of security service success and seamless working relationships:

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<sup>288</sup> Fol response from Policing Board ref 29/2011, correct as of November 2011. The briefings were received by the Boards Corporate Policy, Planning and Performance Committee on the 21 January 2010, 20 November 2008, and 20 September 2007.

<sup>289</sup> The Written Ministerial Statement by Prime Minister Tony Blair, 10 January 2007.

<sup>290</sup> "The statement in January 2007 by the then Prime Minister and the regular reports I receive from Lord Carlile strike the right balance between being open, transparent and accountable while protecting national security interests and assets."

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Lord Carlile believes that, compared with last year, this year has seen more success in containing and stabilising the threat, and notes that there have been fewer incidents and fewer major attacks. He is also satisfied that there are no difficulties of any significance in the inter-operability between the PSNI and the Security Service and identifies this is a sound working partnership and one that is to be commended.<sup>291</sup>

The 'annual review' function is a non-statutory role neither established nor provided for in legislation. There are indications from the reports the role is more of a limited internal review with Lord Carlile noting in his first report that he had spent "approximately six working days during the past year on activities connected with this report, including the time needed to write it." Lord Carlile himself indicated to CAJ the role was "essentially an internal one at request of MI5 and SoS."<sup>292</sup> The reports do however state that one intended outworking is to assure the public that MI5 has complied with the 'five principles' and operated within the human rights framework. In both published reports the conclusion is reached that Lord Carlile has neither seen nor heard evidence to the contrary, and therefore believes full compliance has been achieved.

However, there are indications that the scope to properly examine issues of substance within the Annual Review process as presently configured does not exist. For example the first review states that the local MI5 director had given assurances that the lessons of the Police Ombudsman's Operation Ballast report had been "digested and reflected in present operational practice" by both MI5 and PSNI. The Review actually states that the events uncovered by Ballast 'occurred long ago' although this is questionable given as the matters covered did run into the new millennium.<sup>293</sup> The critical point is that welcome though it may be, the receipt of an 'assurance' from the head of an agency does not amount to effective scrutiny of current policy against the acute issues identified in Ballast.

In relation to determining the extent of annual consultation with the bodies listed in the Prime Minister's statement, only limited information is available. The reports do reference Lord Carlile's contact with Security Service and PSNI officers, as well as representatives of the main political parties, and the Justice Minister David Ford MLA. The Policing Board has confirmed there have been three meetings with different representatives of the Board. There appears to have been no meeting with the full Board per se although this was agreed in principle in 2007.<sup>294</sup> It is also not clear if any of these meetings, beyond the first meeting with the Chair in 2007, related to Lord Carlile's role as annual reviewer, his role as independent reviewer of terrorism legislation, or another capacity.<sup>295</sup> Correspondence indicates that

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<sup>291</sup> Hansard Written Ministerial Statement by Owen Patterson MP Secretary of State for Northern Ireland, 19 December 2011.

<sup>292</sup> E-mail correspondence, 21 December 2011.

<sup>293</sup> First Annual Review of Arrangements for National Security in Northern Ireland, Lord Carlile QC, para 38.

<sup>294</sup> Minutes of the private session of the Board, 22 March 2007.

<sup>295</sup> Northern Ireland Policing Board response to FoI request reference FOI 24/2012, 26 July 2012.

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meetings with the First Minister and Deputy First Minister and Police Ombudsman were scheduled in 2008.<sup>296</sup> From this it appears annual meetings have not necessarily taken place. This provides a further indication that the nature of the role was not one envisaged to be comparable to an 'inspectorate' type report or detailed safeguard.

The role of a time-limited internal reviewing and reporting on arrangements is of course a perfectly valid mechanism for ensuring effective working. However in such an instance it would appear misleading for Government to seek to present the review as a robust safeguard or oversight mechanism.

## Who is running policing?

The Patten Commission echoes international standards when it envisaged an environment where there would be transparency over policy on covert policing, effective accountability bodies, and policing that was free from partisan political control. Recommending the downsizing, deinstitutionalisation, and integration of RUC Special Branch within the PSNI, Patten also emphasised that it was not healthy to have, in reality or perception, a 'force within a force'.

What this report demonstrates is not only have such goals not been met, but that the last five years since the handover of primacy for 'national security' policing to MI5 have seen significant regression.

The transfer to MI5 has ensured that policy on 'national security' covert policing remains largely secret, under the direct political control of Ministers, and subject to very limited oversight. The transfer of policing and justice powers has made it even more obvious that a raft of powers under the deliberately vague cloak of 'national security' are in fact retained and exercised by the Northern Ireland Office. Since the St Andrews Agreement perhaps the most sensitive area of policing is in effect being run by a parallel police force answerable to 'direct rule' Ministers and subject to separate and ineffective oversight arrangements. If the then Chief Constable's assertion that MI5 would focus only on dissident republicans remains true, the practical impact of this would be that two different covert policing regimes, in terms of operational techniques, standards and oversight, are potentially now in place for republicans and loyalists.

During the conflict there were serious human rights concerns raised in relation to the operation of covert policing, and in particular the running and activities of agents, by RUC Special Branch. There is evidence, particularly following the course set by the then secret 1981 Walker Report, that MI5 were influential in determining such policing policy. The 'primacy' held by Special Branch in practice meant that the police gave the security strategy dictated by MI5 and Whitehall 'legs'. The Security

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<sup>296</sup> Correspondence dated 05 September 2008, Machinery of Government Division, OFMDFM (Response received 21 August 2012 to CAJ FOI request).

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Service set the course whilst Special Branch and other RUC officers, particularly CID, 'rowed'. Normal policing business – protecting the public and the prevention and detection of crime was subsumed by policing based on intelligence and espionage. According to a media report among the stipulations of the Walker Report were "that records should be destroyed after operations, that Special Branch should not disseminate all information to Criminal Investigations Detectives (CID) and that CID should require permission from Special Branch before making arrests, or carrying out house searches in case agents were endangered."<sup>297</sup> It is notable that it is exactly this type of policy and practice which was subsequently criticised in the investigations by Stevens, Justice Cory, and the first Police Ombudsman, with the Stevens enquiry concluding:

My enquiries have highlighted collusion, the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, and the extreme of agents being involved in murder. These serious acts and omissions have meant that people have been killed or seriously injured.<sup>298</sup>

Policing reform was intended to re-orientate policing away from 'counterinsurgency' approaches and end the primacy, power and isolation of 'Special Branch' within the policing architecture. However, the transfer of powers to MI5 presently makes it impossible to determine the policy approach to covert policing and its compliance with human rights standards. A crude estimate of MI5 numbers in Northern Ireland puts its strength at around 70% of that of RUC Special Branch at the time of Patten, and contrary to the vision in the Patten report, 'national security' covert policing is now less mainstreamed than previously. In essence it has become 'a force outside a force'.

Such an arrangement prompts numerous questions. For example, with respect to the controversial use of stop and search powers, in theory all MI5 intelligence relating to Northern Ireland is "visible" to the PSNI. However questions have been raised as to whether this is the case in relation to the duties of senior PSNI officers to grant stop and search 'authorisations' which permit use of the powers without individual reasonable suspicion. In such a case the control of 'national security' intelligence and its use and dissemination by MI5 must surely limit the ability of the PSNI as a whole to contextualise and take informed decisions on a wide range of policing matters. In addition, while it may be the case that MI5 officers do not routinely give commands to individual police officers, their strategic direction of national security policing would mean that tactical police operations respond directly to their instructions. This introduces a potential corruption in the chain of command which could lead to two-tier policing with, in contrast with the rest of the police service, headquarters or specialist units (such as TSGs) operating at the direction of MI5.

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<sup>297</sup> Clarke, Liam 'MI5 pays for murder in Northern Ireland' *Sunday Times*, 28 January 2007.

<sup>298</sup> Stevens Enquiry 3, para 1.3.

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In relation to the running of policing, the key question remains as to whether 'national security' stills 'trumps' other policing considerations. Does the primacy of the concerns of RUC Special Branch, instigated and enforced by MI5, live again in the form of a closed circle of powerful MI5 and PSNI officers who work to a Security Service agenda which takes priority over any other element of policing? This question takes us beyond the question of direct control over covert policing to broader questions of who is determining policing priorities and practices.

Whilst significant policing reform has taken place, at present there exists evidence of a worrying pattern of attempts to regress the Patten reforms. In addition to the transfer to MI5, this is manifested in relation to, for example, the 'lowering of independence' of the Police Ombudsman's office during the tenure of the second Police Ombudsman, and the PSNI rehiring scandal. The transfer of further covert policing functions to the 'National Crime Agency' which Government presently intends to insert into Northern Ireland with full policing powers and be accountable to Ministers and not the Policing Board, would further entrench such developments. Taken in isolation such occurrences could be viewed as anomalies, however when viewed together it is difficult not to conclude that there has been a concerted effort to rollback accountability.

CAJ's main recommendation, given the magnitude of the issues uncovered in this research, is to call for a full review of the entire post-St Andrews arrangement. Such a review should be comprehensive, genuinely independent, and undertaken with a view to the reform of covert policing responsibility which will meet both the stipulations by the Patten Commission and international human rights standards, inclusive of those referenced in this report.

CAJ reiterates the positions we stated in response to the Patten Report. This includes our view that if any agency other than the PSNI is given a role in policing in Northern Ireland it should be subject to the same accountability framework as the PSNI. As an initial step the British Government should discharge its commitment in the St Andrews Agreement to publish the outstanding Memorandums of Understanding. The NIO should also clarify the status of the Memorandum of Understanding and protocol relating to the Policing Board and devolved institutions which have been released to CAJ.

How a society is policed is one of its defining characteristics. With the monopoly of the legal use of force comes the capacity to define a society based on repression and fear or one based on consensus and respect for the human rights of all. A human rights framework makes clear that those charged with implementing law are also subject to the law and that 'national security' is not a trump card that allows the rule of law to be set aside. The issue of policing has been a pivotal aspect of the violent political conflict Northern Ireland suffered and one of the most difficult elements of the peace process. The Patten Report puts it this way: "The consent required right across the community in any liberal democracy for effective policing has been absent. In contested space, the role of those charged with keeping the

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peace has itself been contested."<sup>299</sup> If the transition to a peaceful society is our goal it is clear that such change will be hampered if past practices which caused the legitimacy of policing to be called into question are allowed to continue.

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<sup>299</sup> 'Patten Report' para. 1.3.