Mr David Sterling
Police Division
NIO
Massey House
Stoney Road
Belfast BT 3SX

6th June 1995

Dear Mr Sterling,

Re: Proposal for a Draft Police (Amendment) (Northern Ireland) Order 1995

The Committee on the Administration of Justice (CAJ) welcomes the opportunity to comment on the draft Police (Amendment)(Northern Ireland) Order 1995. Policing issues have long been a matter of concern for CAJ.

The following submission is divided in 3 parts: (1) general comments, (2) the police complaints procedure and (3) changes regarding information gathering and arrest powers.

1. General comments

In relation to the second triennial review the Secretary of State expressed the view, that "(t)he existence of a widely known and trusted system for dealing with complaints makes a major contribution to maintaining and building public confidence in the integrity and probity of the police service." CAJ would strongly endorse this position. Unlike the Secretary of State however, CAJ holds that the system as it stands does not provide for an effective control of police misconduct.

A recent survey undertaken for CAJ by Dr. Robbie McVeigh, entitled *"It's part of life here": The security forces and Harassment in Northern Ireland*, published in December 1994, revealed that only a tiny minority (9%) of the respondents bring their complaint to one of the statutory agencies such as the army complaint procedure or the Independent Commission for Police Complaints. Of those, almost 70% are dissatisfied with the response they receive. These figures suggest a profound lack of confidence in the available mechanisms. They also indicate that, to a large extent people in Northern Ireland perceive harassment as "part of life here" - a worrying example of the normalisation of harassment. Additionally, many young people, particularly nationalists and Catholics, believe that the system is biased against them or that taking steps will only exacerbate the harassment. The report concludes: "Until this perception is removed, considerable reluctance to report harassment will remain". We have enclosed a copy of this report for your information.

We would also direct your attention to comments made by the European Committee for the Prevention of Torture (CPT) in its 1994 report concerning its visits to interrogation centres in Northern Ireland in July 1993. The CPT expressed concern, in particular, about the absence of any disciplinary sanctions in the vast majority of cases. The CPT agreed with the comments made by Lord Colville in paragraph 6.3 of his report on the operation of the EPA in 1992, namely that: `... if a disciplinary system seldom if ever reaches an adverse decision about a person who works, after training, within a disciplined structure, it is more likely that the system is faulty than that nobody in that profession or discipline ever makes even the most minor mistake or commits some foible. The public do not believe it and lose confidence in the system. The profession or discipline loses more in efficiency and usefulness than its individual members by a perceived, or real immunity."

We note that the new draft strengthens the position of the Independent Commission for Police Complaints in various respects. While these developments are certainly welcome, we feel that the proposal does not tackle the major shortcomings intrinsic in the present system. In particular, the new proposals fail to address the profound lack of confidence in the police investigating themselves. The changed political circumstances in Northern Ireland mean that there is an unique opportunity fundamentally to review and reform the whole system. It is our view that such an opportunity, properly seized, could contribute to the establishment of a lasting peace.

Finally, the government still maintains that the distinct political situation in Northern Ireland requires special powers for the police, different from those of other UK police forces. While CAJ has always objected to this rationale for extra powers, as long as the emergency legislation remains intact the converse is true as well: special powers conferred upon the police require special procedures for ensuring public accountability.

2. Comments on proposals or omissions in the draft concerning police complaints procedures

We address the proposals in the draft Order in this section by comparing the proposals against the requests for further powers made by the Independent Commission for Police Complaints in its most recent triennial report.

2.1 Independent investigation

The CAJ has long called for an independent body to investigate complaints about alleged police misconduct. As the survey by Robbie McVeigh (referred to above) shows, the

effectiveness of the police complaints system largely depends on public perception and public trust in the investigation. According to our experience complainants often believe that RUC officers, no matter how professional, lack the requisite impartiality to investigate and evaluate a complaint in an objective manner.

We continue to feel that the changes enumerated in the draft Order fail to take account of the critique which we developed in our publication *"Cause for Complaint: The system for dealing with complaints against the police in Northern Ireland"* (see enclosed copy).

The recent report of the CPT supports our contention that there is a need for an independent and effective police complaints system in an effort to prevent police misconduct. It reads: "the existence of an independent mechanism for examining complaints about treatment whilst in police custody is an essential safeguard against ill-treatment" (See CPT/Inf (94)17, para. 91).

2.2 Standard of proof

The small number of substantiated complaints leads many complainants and those who work with them to conclude that the system is ineffective. Part of the problem is the present standard of proof combined with the lack of tangible evidence available to the complainant. Often the word of an RUC officer stands against the word of the complainant. In this situation the complainant faces a difficult task to convince the investigating police officer beyond reasonable doubt that his or her colleague misbehaved.

The current standard is higher than in wrongful dismissal claims, where the employer must merely show that he or she had reasonable grounds to believe that misconduct was committed. The fact too that civil cases for damages are won while no officer is disciplined reinforces the view that the system tacitly condones illegitimate practices.

We do not suggest a change in the standard of proof lightly. This is something which we considered carefully in our pamphlet entitled A Fresh Look at Complaints Against the Police (see enclosed copy pg. 42-44). In any event, it has already been announced that a lower standard than the current criminal standard will operate in police disciplinary hearings (see NIO press release, 17 February 1995). We look forward to seeing the exact formulation of the draft regulations on this point and very much hope that there will be widespread consultation on such an important issue. We should also appreciate some indication as to when these draft regulations will be available.

2.3 Initiative by the ICPC

The draft Order (Article 20) does not give the Commission the power to call in cases where no complaint has been made but where supervision appears to be necessary in the public interest. In his reply to the ICPC's triennial report the Secretary of State argues that the direct involvement of the Commission would impinge on the statutory responsibilities of the Secretary of State, the Chief Constable or the Police Authority. The ICPC is left with the possibility of raising their concerns with the Secretary of State who might then refer the matter to the Commission for supervision. Article 8 of the 1987 Order provides already for discretionary referral of certain non-complaint matters to the Commission. However, according to the Commission's triennial review only seven non-complaint matters, six of which involved fatalities, have been referred to the Commission by the Chief Constable in the six years since March 1988. This statistic casts doubt on the efficiency of the "referral mechanism". CAJ maintains that the Commission should be able to call in cases

notwithstanding our basic position that, because the investigations are effectively led by the police, mere supervision will not fundamentally improve the situation overall.

By Article 21 it is proposed that the ICPC "shall" supervise some non-complaint matters in cases where this appears necessary either for reasons of gravity or exceptional circumstances. While this development is welcome the question which needs to be addressed is who decides whether or not a case falls into one of the categories. Clearly we feel that it should be for the ICPC to decide.

2.4 Supervision of all cases of death and serious injury

CAJ welcomes the move in Article 21 to inform the Commission of all cases where death or serious injury has occurred even if there is no *prima facie* suspicion of police misconduct. However, rather than requiring the ICPC to supervise *all* cases, which might needlessly tie up resources, it would be better to allow the ICPC to decide which cases it wishes to supervise.

The Commission recommended supervision of cases which involve death or serious injury according to the public interest. According to the new draft the Commission can only relinquish supervision if it appears from the investigation that the case no longer falls into one of the two categories. Mandatory supervision of the most serious cases is certainly a matter for consideration. However, having regard on the one hand to the limited resources and staff of the Commission and on the other to the increasing number of complaints, mandatory supervision easily conflicts with the need for in depth supervision or leads to delays in the overall procedure. Therefore, unless the resources of the Commission are substantially improved, it should be allowed to drop cases where it becomes clear that there is no question of any police misconduct.

2.5 Power to influence the recording of a complaint

The Commission requested the power to direct the Chief Constable to record a complaint. According to the Secretary of State in his response to the triennial review the Chief Constable's authority over the actions and discipline of his officers should not be diminished by an outside agency. The request was therefore dismissed. While as pointed out above thought should be given to a totally independent complaints procedure, at the moment the minimal incursion into operational independence of the Chief Constable will be worth the benefit in community confidence-building. In any case, refusing to record complaints will hide the activities of persistent offenders, a point which has been made by David Hewitt in relation to the army complaints system.

Moreover, the complaints system already recognises the value of an outside agency's involvement by giving a power to the ICPC to direct that disciplinary proceedings be brought in particular cases. It would be totally consistent with this to allow the Commission to direct the Chief Constable to record a complaint in the first place.

2.6 Informal procedures

The Secretary of State is in favour of increasing informal resolution of complaints. While this seems to be a welcome development with respect to the workload of the Commission, certain dangers need to be considered.

Although a police officer is party to the misunderstanding or dispute, another officer - also a member of the police and thereby liable to have a bias towards one of the parties to the

dispute - will be in charge of mediating. This may make a complainant - particularly one who distrusts the police - susceptible to real or perceived pressure to end the complaint before he or she is really satisfied, and perhaps more hesitant to enter into the process at all. Also, the police "conciliator" will be in a better position to understand the perspective of the officer than that of the complainant.

While an informal procedure may be adequate in relation to minor incidents where the complainant wishes an apology or an explanation and where a formal procedure with all its administrative impact and delays may lead to frustration rather than resolution, it is important that an independent body be tasked with the mediation role rather than that it be carried out by a police officer from the Complaints and Discipline branch. The more serious the incident the more vulnerable and pressurised might the complainant feel and the more important to keep a record of the proceedings

2.7 The tribunal

The CPT, at paragraph 32 of its report, criticised the present tribunal arrangements as follows: "At first sight a tribunal which, on the one hand, has as its chairman the head of the police force to which the person facing charges belongs, and on the other hand, has as its other members two persons from the body which has recommended disciplinary charges, is unlikely to be considered as impartial by either complainants or police officers."

Furthermore, the most recent seventh annual report (ICPC) shows that formal or informal disciplinary action has been initiated in 125 of the 2766 cases examined by the Commission. The percentage is therefore 4.5%. In relation to complaints arising out of the operation of emergency legislation, not one of the 390 complaints of assault was substantiated. This is the seventh year in a row that no such complaint has been substantiated. These statistics once again underline the complete inadequacy of the system.

Changes to the set-up of the tribunal are necessary.
In 1994, according to the CPT's report "(t)he ICPC has itself been critical of the present arrangements and recently called for the establishment of "a truly independent tribunal with a legally qualified chairman to hear disciplinary charges. "Subsequent to the Secretary of State's refusal to establish this fully independent tribunal the ICPC called for a body consisting of the Chief Constable as Chairperson, balanced by two independent assessors drawn from an independent panel appointed for the purpose. This modified proposal has been accepted by the Secretary of State and will be provided for in regulations. We should welcome further information on the proposed make-up and selection procedures for the panel. The overall perception that a disciplinary tribunal presided over by the Chief Constable is not seen to be independent remains. We would prefer to see a fully independent tribunal with a legally qualified chairperson, as suggested previously by the ICPC.

Having regard to the fact that this tribunal will take decisions affecting individuals rights and freedoms, it might be preferable to have the matter dealt with in the Order rather than in regulations.

2.8 The end of "double jeopardy"

We welcome the proposal in Article 30 which would allow disciplinary action notwithstanding the failure of a prosecution.

3. Changes regarding information gathering and arrest powers

Overall, CAJ is troubled by the exceptional new powers which are being given to the police in this area. At a time when the government feels the need to retain wide powers contained in the Northern Ireland (Emergency Provisions) Act 1991, it is of concern that further ordinary powers are being given to the police.

3.1 Mouth searches

Article 5 will amend Article 34(4) PACE and authorise a constable to search a person's mouth at a place other than a police station. Article 5 (2) changes Article 53 PACE and redefines an intimate search to exclude the search of a person's mouth.

It appears then that public searches of a person's mouth are now permissible. We would wish to emphasise the potential for harassment and tension contained within this new power. We would also be concerned at how the exercise of this new power will be tied down in the Code of Practice, which would surely require amendment. There is also the possibility that this power may result in danger to the person being searched if, for example, they feel compelled to swallow what they have in their mouth, or accidentally swallow something in a contested search.

3.2 Arrest without warrant

Article 7 (1) will amend Article 47 PACE to allow the arrest of someone without a warrant if the person is on bail subject to a duty to attend at a police station and fails to attend at that station at the time appointed for him/her to do so

We would be interested to know what the figures are for breach of bail conditions and the numbers of warrants currently refused. Anecdotal information received by CAJ indicates that warrants are issued as a matter of course in these circumstances. If this is indeed the case, it is questionable whether the RUC's administrative convenience is an adequate reason for giving them more arrest powers.

Article 7 (2) amends Article 35(8) PACE in similar fashion to the previous paragraph for a person who does attend a police station to answer bail. Once again this appears to be merely administrative convenience for the police. Our concern springs from the fact that someone returning to a police station in these circumstances will now be denied the formal notification of arrest and might therefore not be so aware of what is taking place. Would they be given the relevant cautions? Would they be informed once again of their rights to legal advice?

3.3 Intimate samples

Article 62 PACE will be amended by Article 10 of the draft Order to allow for an intimate sample to be taken from a person under investigation who is *not* in police detention if two or more previously taken non-intimate samples have proved insufficient. While there must be consent and *reasonable grounds* given for suspecting involvement in a "recordable offence" it is, nevertheless objectionable to extend police powers in this way. We would point out that the reasonableness standard is to all intents and purposes a subjective rather than an objective standard in Northern Ireland following case law arising out of the operation of the emergency provisions such as in relation to house searches. Thus the supposed safeguard is not really a safeguard at all.

What this provision will allow is a higher level of evidence gathering with the possibility that pressure might be put on the suspect not to contact his/her solicitor. Further, are any limits intended on where the person must be when such a sample is taken? Will they be cautioned and advised of their right to consult a solicitor? Finally, we are concerned that the legislation be tightly enough drafted to prohibit the use of this power simply when earlier samples have proved negative.

Article 10 (8) will allow the taking of an intimate sample where an officer is satisfied that it is *necessary to do so* to assist in determining whether that person is or has been concerned in "terrorism". This appears to allow an ordinary police officer to take an intimate sample from someone in their house. It is our view that this is a severe incursion into the right to privacy and will provide wide opportunities for harassment. There should at least be the requirement that a senior officer must take the decision when he/she has reasonable grounds for suspecting the person to be searched to be someone who is or has been involved in "terrorism". The samples should only be taken in clinical circumstances with medical personnel in attendance.

3.4 Retention of samples

Article 13 seeks to amend Article 64 PACE. Currently, samples must be destroyed if the person is not suspected of having committed the offence. It is now proposed that samples taken from a number of persons do not have to be destroyed where only one is convicted. According to Article 13 (3 B) if samples (other than fingerprints) have to be destroyed the data deriving from those samples may be retained. In both cases the data may not be used either in evidence or for the purposes of "any investigation of an offence".

In our view these provisions is unjustifiable. One might imagine a widespread arrest operation resulting in one conviction and the retention of samples from all those arrested. Most importantly, will people be allowed to check whether their samples are on record and seek to have them taken off?

A further question arises out of the fact that samples so retained cannot be used for *"any"* investigation. Then what purpose is there for retaining the samples other than information gathering? This moves us into the shady world of intelligence and out of the arena of evidence testing and gathering. It would be helpful to know what mechanisms for independent scrutiny are proposed along with this power, to what extent data protection applies and whether there will be any transparency as to individuals seeking access to information that is being kept about them.