

CAJ's submission no. S402

CAJ's Briefing Paper to MPs on the Second
Reading of the Crime and Courts Bill
on the "National Crime Agency" (NCA) in
Northern Ireland

January 2013

**Briefing Paper to MPs on the Second Reading of the Crime and Courts Bill
on the “National Crime Agency” (NCA) in Northern Ireland**

Committee on the Administration of Justice (‘CAJ’)

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

In July 2012 CAJ produced a Briefing Paper on the NCA in Northern Ireland focusing on the incompatibility of the proposals with the policing structures and accountability framework resulting from the Belfast/Good Friday Agreement. This briefing attached and reflects the Bill as introduced. CAJ is aware a clause which would have provided a power to extend NCA functions to counter terrorism was removed from the Bill in the Lords, but that Government may now seek to reintroduce this provision.

In summary CAJ is concerned the Bill puts significant areas of policing which had been recently devolved, and fall under the accountability structures introduced as a key element of the peace settlement, back under the control of a London-controlled police force accountable to the Secretary of State. CAJ is already concerned there has been considerable rollback on policing accountability in Northern Ireland through the decision to transfer primacy for ‘national security’ covert policing here to the Security Service in 2007. The envisaged operation of the NCA in Northern Ireland would further put some of the most controversial areas of policing (intelligence gathering, surveillance, covert operations) into the hands of another police service (with executive policing powers) outside of the post-Patten accountability framework centred on the Northern Ireland Policing Board.

CAJ is aware that the Northern Ireland Justice Minister has argued that the Police Service of Northern Ireland (PSNI) needs NCA specialist support in investigations of an international reach in areas such as recovery, human trafficking and cyber crime. If this is the case CAJ would not see an issue with PSNI drawing on NCA expertise if and when needed to inform its own operations in a manner which maintain PSNI primacy and hence accountability to the Northern Ireland Policing Board. However such technical support would not require the NCA to be operating as a fully fledged police force in Northern Ireland, with police powers, an intelligence gathering function, a ‘coordinating role’, and powers to place PSNI officers under NCA control as the Bill anticipates. The Bill has serious implications for the post-Belfast/Good Friday Agreement policing dispensation in Northern Ireland for which there is yet to

be legislative consent from the devolved legislature to whom such powers were transferred in 2010.

January 2013

Briefing Paper: the “National Crime Agency” in Northern Ireland and compatibility with the policing structures resulting from the Belfast/Good Friday Agreement, July 2012

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Summary

- **CAJ is concerned that that the proposed ‘National Crime Agency’ (NCA) structure has not been scrutinised for compatibility against the settlement committed to following the Belfast/Good Friday Agreement and the Patten Report;**
- **The Bill would legislate to establish the ‘National Crime Agency’ (NCA) with a remit in one of the most sensitive areas of policing in Northern Ireland – covert intelligence gathering, as well as having executive policing powers over serious, organised and other crime;**
- **The proposals in effect insert another police service into Northern Ireland, accountable to the Home Secretary and largely outside of the reach of the local accountability structures committed to following the Patten Report, in particular the Policing Board. There is some limited role for the local Department of Justice, although as a government department, this is not an oversight body per se;**
- **Whilst the focus of the NCA is serious and organised crime, Government has not been clear whether it will use powers in the Bill to extend its functions to ‘counter terrorism’, and what its relationship will be with the Security Service (MI5) who in 2007 were passed primacy for ‘National Security policing’ in Northern Ireland;**
- **There is no indication of consideration to ensure makeup of the NCA in Northern Ireland is not retrogressive in relation to the initiatives to change the composition of the police service resulting from the Patten Report;**

- **Transparency and accountability in policing are essential to ensure human rights compliance. In the context of broader concerns regarding a ‘rollback’ of the rights protections provided for in the peace settlement, the current NCA proposals can only widen the accountability gap in policing;**

Background: The NCA and the Belfast/Good Friday Agreement

The Bill was recently introduced into the House of Lords and is presently at Committee stage. It is likely to be considered by the House of Commons in the Autumn. Part 1 of the Crime and Courts Bill would legislate to introduce the 'National Crime Agency' (NCA); in effect a federal police service dealing with serious and organised crime with both intelligence gathering and executive policing functions. The NCA will supersede the Serious and Organised Crime Agency (SOCA) and will be accountable to the Home Secretary. The NCA would therefore work in one of the most sensitive and controversial areas of policing in Northern Ireland, that of covert policing.

CAJ urges scrutiny of the NCA proposals in relation to their compatibility with the policing settlement reached further to the 1998 Belfast/Good Friday Agreement. The Agreement, approved by referendum and a bilateral UK-Ireland treaty, established the *Independent Commission on Policing for Northern Ireland* (the Patten Commission) which set out its blueprint for a 'new beginning to policing' in its final report (the Patten Report).¹ In a subsequent international agreement between the UK and Ireland in 2001, the UK reaffirmed its commitment to implementing the Patten Report.² Part of this settlement was local control over policing. A lengthy process, including commitments in further international Agreements (Joint Declaration of the British and Irish Governments 2003 and St Andrew's Agreement 2006) was instigated to devolve powers for policing and justice, which eventually took place in April 2010, further to the 2010 Agreement at Hillsborough Castle.

Transparency and effective accountability are essential elements in ensuring policing bodies comply with human rights. Patten set out a new accountably structure for policing, the centrepiece of which was the Northern Ireland Policing Board made up of representatives of the main political parties and independent members. Patten also placed emphasis on transparency, including in relation to the policy framework for covert policing, stating that "*Transparency is not a discrete issue but part and parcel of a more accountable, more community based, and more rights-based approach to policing.*"³

The parties to the Belfast/Good Friday Agreement set out on the face of the Agreement that they believed it is essential "that policing structures and arrangements" ensure policing is, among other matters, "*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 criminal

¹ 'A New Beginning: Policing in Northern Ireland' The Report of the Independent Commission on Policing for Northern Ireland, (the Patten Report), September 1999.

² Weston Park Agreement 2001, paragraph 8.

³ Patten Report, Paragraph 6.38.

justice system compatible with human rights norms.⁴ The settlement focused on transformation of the RUC into the PSNI rather than advocating ‘tiered’ policing whereby new police bodies were introduced to supplement the existing force, although the transfer of primacy for ‘national security policing’ to MI5 in 2007 regressed from this position. Increasingly some of the most sensitive areas of policing are being kept outside of the accountability and control arrangements established under Patten. This paper outlines areas in which the NCA proposals are likely to be regressive or incompatible with the commitments for a ‘new beginning to policing’ in Northern Ireland.

⁴ Section 9, Policing and Justice, Paragraph 2.
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NCA personnel: composition of the new force and the Patten reforms

A key element of the Patten reforms was compositional change to the police to seek it to be more representative of the community. This involved a system of severance packages for RUC officers and a temporary special measure to redress Protestant-Catholic composition involving 50:50 recruitment. Such measures, as well as making organisations more representative can also ensure changes in organisational culture, a key objective of the policing reforms. There has been rollback of this position, as highlighted by the recent PSNI 'rehiring' scandal, currently being investigated by the Northern Ireland Audit Office. The practice involved several hundred former officers, including those from RUC Special Branch, being rehired as 'associate staff.' Rehired officers were officially civilian staff, but in practice they exercise policing type roles in some of the most controversial areas of policing, including covert policing. A BBC investigation in January revealed that "More than three quarters of civilian staff employed by the PSNI on temporary contracts are former RUC officers who retired under the Patten redundancy scheme." The BBC also revealed "that nearly half of them are involved in the most sensitive areas of policing" including 63 retired and rehired officers located in the successor unit to Special Branch within the PSNI and 59 in the serious crimes branch.⁵ Other justice institutions have also seen measures to ensure compositional change, although this has not always been the case (for example many officials from the present devolved Department of Justice were transferred from the predecessor unit in the Northern Ireland Office).

The present proposals contain no reference to this context in Northern Ireland and ignore the issue of the composition of its local element. The Bill simply provides that the NCA Director General will select persons to be NCA Officers.⁶ There is also provision for arrangements to be made for secondments to the NCA.⁷ CAJ does not hold the view that all former RUC officers are an obstacle to change or police reform. However, it would be a regression from the initiatives taken under Patten to ensure compositional and cultural change if the NCA, with its focus on covert policing and serious crime, becomes disproportionately composed of officers previously with RUC Special Branch and other areas of the former force.

Also notable under the Bill is the proposal to recruit an NCA special constabulary of volunteer officers to complement the full time force. The "NCA Specials" are to be unpaid (with provision made for 'expenses, training and subsistence') and can be granted the powers of a police constable by the Director General, although there are restrictions on exercising these powers in Northern Ireland and Scotland. NCA Specials are to be part-time, or full time in 'exceptional circumstances'.⁸ Reserve

⁵ Kearney, Vincent 'Ex-RUC officers in 'sensitive' policing jobs' BBC News Online, 17 January 2012.

⁶ Crime and Courts Bill (as introduced to Lords), paragraph 9, schedule 1.

⁷ As above, paragraph 13.

⁸ As above, paragraph 14.

police units have been controversial in the Northern Ireland context and while it is the case that UK police forces do make use of part time 'special constables,' the role envisaged for volunteer officers within such a specialist unit as the NCA is unclear.

NCA accountability: broadening the accountability gap?

The anxiety to avoid political direction of the police is strong in Northern Ireland as well. 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.

Patten Report, Paragraph 5.9.

Despite carrying out policing functions, the NCA in Northern Ireland will be, in effect, accountable to the Home Secretary and not the Northern Ireland Policing Board. The intention is for the NCA Director General to be operationally independent, though considerable power is maintained by the Home Secretary, including through secondary legislation. While individual complaints can be lodged over NCA officers to the Office of the Police Ombudsman in Northern Ireland, there are clear gaps in the accountability structures for the NCA elsewhere. There is some limited role for the devolved Department of Justice, although as a government department this is not an oversight or accountability body per se. Other Northern Ireland structures, in particular the Policing Board, are reduced to having a peripheral role. For example:

- The Home Secretary will appoint the NCA Director General, with input from the devolved structures reduced to 'consulting' the Department of Justice;
- The functions of the NCA, which include "criminal intelligence gathering", and "combating serious and organised crime", can be extended to cover "counter terrorism" by Order of the Home Secretary; the only safeguard for this strategic decision being the requirement for the agreement of the PSNI Chief Constable;
- Unlike the PSNI and Police Ombudsman, but like MI5 and SOCA before it, it is planned that the NCA will have a blanket exemption to the Freedom of Information Act 2000;
- A Framework Document which details how the NCA will operate and its governance and accountability arrangements will be issued by the Home Secretary-the Department of Justice will be consulted but agreement is not required;

- The Home Secretary decides on the strategic priorities for the NCA; an ‘annual plan’ on how the functions are to be discharged in Northern Ireland is to be agreed with the Department of Justice;
- The Director General’s powers to designate NCA officers with police powers does not require the consent of the Policing Board but does need a ‘general authorisation’ of the Department of Justice and ‘operational authorisation’ of the PSNI;
- Her Majesty’s Inspectors of Constabulary (HMIC) are empowered to inspect the NCA, however the Home Secretary has wide powers to control what is published;
- PSNI officers can be placed under temporary service with the NCA and will be under the direction and control of the Director General and hence may then cease to be accountable to the PSNI Chief Constable and therefore sit outside the local accountability structures;
- It is notable that the role foreseen for the Policing Board is actually even more limited to than that, in theory, set up in relation to MI5;⁹

NCA functions and the Northern Ireland Assembly

It emerged in the debates on the Bill that to date only the Northern Ireland Minister of Justice has been involved in substantive discussions on the NCA, which it appears initially had even fewer local accountability provisions than are in the present Bill. Whilst Government is pressing ahead with the Westminster legislation, no legislative consent motion or concurrent Northern Ireland Bill has been introduced, let alone debated or passed to date by the Northern Ireland Assembly.¹⁰ The face of the legislation does not mention ‘national security’ nor does it grant the NCA a counter-terrorism function (although this can be changed by Order by the Home Secretary). On all fronts, the response by Lord Henley for the Government during the scrutiny of the Bill is either confused or enlightening as to future intentions:

...As the House will be aware, under the terms of the Northern Ireland Act 1998, national security is an excepted matter and the National Crime Agency will be a reserved matter. A duty to consult on excepted and reserved matters therefore sits uncomfortably with the devolution settlement as it relates to counterterrorism matters. I recognise that counterterrorism policing in Northern Ireland cannot be divorced from the generality of policing which is, of course, a transferred matter. Indeed, the National Crime Agency itself will undertake a mix of reserved and devolved activity in relation to its serious and organised crime remit. That is why the provisions in

⁹ e.g. Annex E of the St Andrew’s Agreement 2006 provided that MI5 would participate in closed briefings with the Policing Board on the background to ‘national security related policing arrangements’. In practice this has occurred only three times since the Agreement (FOI request 39/2011 to Policing Board, until October 2011)

¹⁰ Lord Alderdice: HL 18 June 2012: Column 1607.

Part 1 of the Bill will require the Northern Ireland Assembly to adopt a legislative consent motion....¹¹

We have a number of concerns in relation to this. First, before proceeding with a Bill which grants so much power in secondary regulations, Government should be clear on what its intentions are in relation the counter-terrorism role of the NCA in Northern Ireland. Secondly, we are conscious that should this role be extended, the emerging scenario is that with MI5 having taken on primacy for ‘national security policing’ (which in theory does not involve ‘executive’ policing operations) and the NCA being granted a role in ‘counter terrorism’ policing *with* executive policing powers, the whole of the most sensitive area of policing in Northern Ireland will have been moved outside the reach of the main accountability mechanisms emerging from the peace settlement.

Government should also be clear about the extent the legislation engages transferred powers. In the past, CAJ has had concerns concerning instances whereby the British Government has unduly deferred to the Northern Ireland Executive responsibility to deliver measures which had not been delivered by the devolved legislature, but were international commitments which the UK had entered into for which it had the ultimate responsibility to implement.¹² Paradoxically, at present the above position from Lord Henley indicates the potential for government to effectively designate NCA provisions as ‘national security’ or ‘counter terrorism’ matters to avoid legislative consent of the devolved institutions. Clearly a situation whereby the boundaries of the devolution settlement are shifted for the purposes of political expediency would be a matter of concern.

Finally, CAJ notes the powers of the Director General to grant NCA Officers with immigration powers in Northern Ireland, and the establishment of “Border Control” as one of the four key Command Functions of the NCA.¹³ This will clearly have implications for policing and immigration operations on the Irish land border, as well as in Northern Ireland ports and airports. CAJ draws attention to the concerns of the Northern Ireland Human Rights Commission both in relation to the conflation of immigration control with crime but also in relation to internal immigration controls within the Common Travel Area which have involved concerns relating to racial profiling.¹⁴

¹¹ Lord Henley: HL 18 Jun 2012: Column 1607.

¹² Namely the Northern Ireland Bill of Rights and Irish Language Act committed to in the Belfast/Good Friday Agreement and St Andrew’s Agreements respectively.

¹³ NCA Command Paper, CM8097, June 2011

¹⁴ See NI Human Rights Commission Investigation ‘Our Hidden Borders: the UK Border Agencies Powers of Detention’ April 2009.

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