

CAJ's submission no. S436

CAJ's Commentary on new proposals for operation of the National Crime Agency (NCA) in Northern Ireland (September 2014)

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 (FIDH). Its membership is drawn from across the community.

CAJ seeks to secure 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, the Lawyers Committee for Human Rights and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's areas of work include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award, and in 1998 was awarded the Council of Europe Human Rights Prize.

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General

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.

The Crime and Courts Act 2013 established the NCA. The NCA has operated in Northern Ireland for a year in support of the PSNI, and can exercise a range of reserved powers, including covert policing powers of surveillance and running informants under the Regulation of Investigatory Powers Act (RIPA), as well as customs and immigration and a range of other powers. At present there is no accountability to the Police Ombudsman or Policing Board in the exercise of these powers. The NCA does not have police powers – the powers of a constable (such as arrest, search, detention) which are devolved to Northern Ireland. Such powers were proposed by the UK Home Office but not agreed by the Northern Ireland Executive due to concerns that the Home Office wished the NCA to operate outside the policing accountability arrangements set up further to the Patten Commission. The Home Office had envisaged the NCA would have no accountability to the Policing Board and that the PSNI would play a subordinate role to the NCA, which would have had the ability to place PSNI officers under NCA control.

CAJ's main concern has always been to maintain the integrity of the policing reform process instigated by the Patten Report and based on a robust system of accountability for policing in all its aspects.¹ At the same time CAJ recognises the need for resources to be directed at serious and organised crime, some of which require an international reach. CAJ questions why the Home Office has resisted the idea of the NCA operating in Northern Ireland in a manner compatible with the Patten architecture for policing accountability. We are also concerned that if there genuinely has been a gap in the PSNI having to cover work the NCA would have otherwise undertaken, why the Home Office did not simply transfer the resources allocated to the same to the PSNI in the interim. Whilst the NCA has nevertheless operated in Northern Ireland in support of the PSNI successfully, it has been argued that the lack of powers has inhibited its effectiveness. We regard some discourse to have exaggerated or misrepresented the issue and believe that the case has not been made in general that a crisis has ensued from the NCA not having the powers of a constable. We do

¹ See S390 Briefing Paper: the "National Crime Agency" in Northern Ireland and compatibility with

nevertheless see potential for such issues to be addressed by ensuring the NCA is accountable for its activities in Northern Ireland in a similar manner as the PSNI. To this end this briefing comments on fresh proposals published on the 8 September 2014 by the NI Department of Justice.

Overall we regard the Department of Justice proposals as very much moving in the right direction to ensure the NCA can operate with police powers in NI but with requisite accountability. We have a number of questions and suggestions which would clarify the proposals outlined below. We also feel in certain areas there are limitations which could be addressed, particularly in relation to post-operational accountability for NCA operations.

CAJ is of the view that the framework requires to be set out largely in binding legislation rather than simply policy which could be disapplied or subject to change. To this end we welcome the Department's commitments to enshrine such matters in legislation and we would welcome the opportunity to comment on any draft legislation which is produced.

CAJ is conscious of previous experiences where by matters such as the original Patten Report itself were delivered, yet the initial legislation emerging for its implementation diverged significantly from the recommendations. We are also conscious of the process of transfer of primacy for covert 'national security' policing to MI5, for which additional accountability measures had been agreed in 'Annex E' of the St Andrews Agreement but significant elements of which were not, and still have not, been implemented.²

The relationship between the NCA and the Security Service MI5

A second but fundamental issue in relation to NCA accountability which can only be addressed by the Secretary of State, rather than the DOJ is that of accountability when the NCA is working with the Security Service (MI5) in Northern Ireland.

The existing NCA legislation³ amends the Security Services Act 1989 to establish a formal relationship between the NCA and MI5 to allow the Security Service to 'support' NCAs role in relation to tackling serious crime.⁴ Whilst this is also the case in Great Britain, MI5 has a substantively different and much greater role in Northern Ireland, having taken the role off the PSNI in 2007 of primacy for 'national security' covert policing. No figures are available but there is a rough estimate that MI5 has 600 officers working in this small jurisdiction, who do not themselves have power of constable. At the time of the transfer of primacy to

² See CAJ 'The Policing You Don't See: Covert policing and the accountability gap: Five years on from the transfer of 'national security' primacy to MI5 (2012).

³ Crime and Courts Act 2013, schedule 8 paragraphs 33-35.

⁴ Security Services Act 1989 section 1(4) as amended by the Crime and Courts Act 2013. Similar provisions exist under the 1989 Act for MI5 to support police forces and other law enforcement agencies in the same way

the Security Service it was announced that MI5 would only focus on republicans and not loyalists, although this position may now have changed.⁵

It is therefore a key issue for CAJ that NCA officers in NI will not cease to be accountable to the Policing Board, Police Ombudsman or broader localised accountability mechanisms when they are engaged with MI5. If this is not ensured, in a worst case scenario MI5 could routinely use the NCA to conduct executive policing operations, which would mean that both agencies would then be operating outside the Patten accountability architecture. Once the NCA has been granted powers of constable, the Home Office is also empowered to then extend the NCA's role to cover a 'counter terrorism' role without, as things stand, requiring the agreement of the devolved institutions to extend the remit in this way (although, if this happened, the consent of the PSNI Chief Constable would be required to agree to specific NCA operational activities in this area).

CAJ is conscious of the experience of protracted contestation over the accountability of the PSNI to the Policing Board when it is involved with MI5. We are particularly conscious of an ill-fated NIO-held Memorandum of Understanding drawn up for the Policing Board following the MI5 transfer. This stipulated that the Policing Board had no oversight role into "National Security matters" (set out as 'any aspect of PSNI's work (past, present or future) with a national security' element) and directed the Chief Constable (even within the confines of the confidential special purposes committee) not to answer Policing Board questions which 'indirectly touch upon' National Security matters if there is a 'risk' of damage to the interests of this undefined concept. The MoU also states that the PSNI Chief Constable is "directly responsible to the Secretary of State for Northern Ireland...for any aspect of the PSNI's work (past, present or future) with a national security element."⁶ This assertion notably contrasts with the Policing Board's recent advert for a new Chief Constable for the PSNI which set out that the post-holder will be "accountable to the Board on all aspects of policing in Northern Ireland."⁷

CAJ gave evidence to the Human Rights and Professional Standards Committee of the Policing Board in March 2013 and, among other matters raised the MoU. The Committee informed us that the Policing Board had now been advised that the MoU had no legal standing and that the Board was not bound to operate under its provisions. CAJ was also informed it was not clear if the MoU been circulated to the full Policing Board and the 'MoU' was not formally approved or ratified by the Board but, rather appears to have been the product of an informal 'Gentleman's Agreement'.⁸

⁵ See CAJ 'The Policing You Don't See: Covert policing and the accountability gap: Five years on from the transfer of 'national security' primacy to MI5 (2012).

⁶ The [Policing Board and National Security Matters MoU](#) (undated, held by the Northern Ireland Office).

⁷ NI Policing Board '[final version chief constable advert](#)'

⁸ See CAJ exchange of correspondence with NI Secretary of State 11 March 2013 and 10 April 2013.

Given all of these experiences CAJ would urge that the face of the legislation be clear that the accountability of NCA officers operating in Northern Ireland to the Patten architecture will not be diluted when they are engaged with the MI5.

Detailed Commentary on the Department of Justice Proposals:

CAJ sees effective accountability as requiring, first a detailed set of written standards and regulations, based on human rights principles and open to public scrutiny. Second, there must be independent agencies that can investigate and bring to justice individual police officers guilty of misconduct or criminality. Third, accountability requires effective mechanisms for the public holding to account of policing organisations.

This third level of accountability must be structured as follows: First there should be *Prior Accountability* in the sense of open planning, prioritisation and budget allocation agreed between the police and the appropriate public institution, in our case the Policing Board. Second, the *Operational Independence* of the Chief Constable and his or her officers is a vital part of accountability in preventing any political or other outside interference in the police's engagement with citizens. Third, there is a need for *Post Operational Accountability* in that the police must account to the Policing Board for how they have carried out their functions – how they have exercised their operational independence.

These are the principles that CAJ brings to its analysis of proposals for a new body with policing powers operating in Northern Ireland. We have met with the DOJ on these proposals and this analysis reflects some of the responses given in discussion.

Constabulary powers:

Paragraph 2 of the DoJ document states that the Director General of the NCA will not have policing powers and that he will be unable to direct either the Chief Constable of the PSNI or other PSNI officers. CAJ welcomes this proposal, which maintains PSNI primacy.

Paragraph 3 proposes that legislation would provide that the exercise of police powers by the NCA in NI would be subject to the agreement of the PSNI Chief Constable. The DoJ have informed us that this refers to specific case by case operational agreement rather than agreement relating to a whole area of activity. CAJ welcomes the proposal but we believe that the scope of "an operation" should be more closely defined and any possibility of general authorisations excluded by the legislation or regulation.

Paragraph 3 sets out an exception to this in circumstances in which the NCA would be investigating cases of alleged PSNI corruption. DOJ have assured us that such NCA activity would take place only at the instigation and direction of the Police Ombudsman. This should be made explicit.

Paragraph 4 proposes that NCA Officers would be subject to the Police Ombudsman (OPONI); CAJ welcomes this. DOJ confirmed that OPONI would have the same powers in relation to the NCA as to the PSNI. To action this the Police Act (NI) 2000 would be extended to cover the NCA.

Paragraph 5 sets out that there should be a reciprocal duty on the PSNI to cooperate with the NCA, at present only the NCA has a duty to cooperate with the PSNI. This includes cooperation in the sharing of intelligence. CAJ suggests that there should be further detail on this provision, including incorporation of a published protocol on intelligence sharing by the NCA, which could draw on the principals set out in Annex E of the St Andrews Agreement.

Paragraph 6 sets out that the Justice Minister will not be seeking powers to direct to PSNI to provide specific assistance to the NCA. As the DOJ properly recognise, such a power risks direct political interference in operational policing, and we welcome this proposal.

Paragraph 7 sets out that the designation of NCA officers as constables will require the approval of the Minister of Justice and that the Minister would require appropriate levels of training, including on ethical issues and human rights. We have also been reassured by DOJ that those so designated will still have to seek the agreement of the Chief Constable to use the powers in a specific operation; this should be reflected in the legislation.

Paragraph 8 states that NCA officers will be required to have ‘read and understood’ the PSNI Code of Ethics. CAJ welcomes this but advocates that this is extended so the PSNI Code of Ethics is a standard of conduct for NCA Officers in Northern Ireland, rather than simply understanding it. A significant point here is that failure to abide by the Code can be evidence of misconduct and therefore subject to oversight and investigation by OPONI. DOJ have committed to look further at this point.

RIPA/Police Act Powers:

Paragraphs 10 and 11 set out that the NCA would need the agreement of the PSNI prior to commencing covert operations. Again we questioned whether the “agreement” of the PSNI would be general or on a case by case basis. DOJ assured us that this would be case by case – again we suggest that this be defined and explicit. We understand that the obligations placed on the NCA officer in this paragraph is designed to ensure that the NCA cannot avoid detailed accountability for their actions by simply pointing to the PSNI agreement. It also provides that the Policing Boards Human Rights Advisor can access the Surveillance Commissioners report on the NCA (in NI) in the same way as is presently done for the PSNI. This is welcome and should be provided for in the legislation.

However, as a general point we are not convinced that mechanisms exist to properly hold to account any officers running ‘CHIS’ (informants) under the auspices of RIPA. We also

questioned whether there would be an explicit system for authorising the engagement of a CHIS in a criminal offence as was instituted in the PSNI after the CRAG review. DOJ undertook to investigate this matter.

In addition, CAJ does not regard the supposed accountability mechanisms of RIPA such as the Investigatory Powers Tribunal as either significant or sufficient. However, we accept that this is a broader issue than the operations of the NCA. We do welcome the role of OPONI and in particular that it will refer to all NCA work.

Policing Board

Paragraphs 13-19 set out proposed arrangements for the key issue of the NCA relationship to the Policing Board.

This proposes a statutory obligation on the NCA DG to attend the Policing Board. However, whilst this is welcome there should also be a statutory obligation to report to the Board (i.e. answer questions and provide information) in a similar manner as currently provided for in relation to the PSNI. The Police NI Act 2000 under section 59 sets out the general duty on the Chief Constable to report to the Board subject to necessary caveats (e.g. prejudicing live investigations etc); there are also corresponding inquiry powers under section 60. We believe this would help address the present gap in the proposals whereby there is no framework to require post-operational accountability of the NCA.

The legislation should also provide that the proposed MOUs to complement this shall be published. A MoU could be prepared and made public in draft at the same time as draft legislation is presented. The experience of Annex E of the St Andrew's Agreement, promising publication of MOUs which never happened, is instructive.

Civil Recovery

Paragraphs 20-21 propose extending the NCA role to civil recovery and then, within a year of operation, commissioning research into the role of the NCA in this area, in the context of suggestions that a local approach to civil recovery would be more appropriate. It is not clear if this will be set out in the statute.

Criminal Justice Inspector (CJINI) and HM Inspector of Constabulary (HMIC)

Paragraph 22 would extend CJINI remit to cover the NCA; this is welcome.

Paragraph 23 sets out HMIC's existing role of inspecting the NCA, when directed to do so by the Home Secretary, which if relating to Northern Ireland will require consultation with the NI Justice Minister. DOJ proposes an MoU to allow for any request from DOJ to this end to

be treated positively, which would enable the Board to invite the Minister to request an inspection. CAJ suggests further detail is set out on this proposal.

Equality

Paragraph 24 proposes designation of the NCA, which DOJ has clarified would include all its functions in Northern Ireland, under the statutory Equality Duty under Section 75 of the Northern Ireland Act 1998. CAJ urges that the NCA is also appropriately designated to ensure it will be subject to fair employment monitoring under the Fair Employment and Treatment NI Order 1998.

Counter Terrorism Role

Paragraph 25 reiterates that the Secretary of State can extent the NCAs role to 'counter terrorism' matters by Order. In addition to the Chief Constable's role in operational approvals, CAJ suggests a provision whereby the extension of remit in this field in NI would require consultation with and approval by the Policing Board.

Committee on the Administration of Justice, September 2014