

## PSNI rehiring scandal: update

October saw the much awaited publication of the Audit Office Report (*'The Police Service of Northern Ireland: Use of Agency Staff'*) into the 'rehiring' practices of the PSNI, a matter on which CAJ and others had been asking questions for some time – including, since 2004, the Policing Board itself which has expressed its concerns in no uncertain terms that information has been kept from it.

Just News reported on rehiring in March of this year (see *'PSNI Rehiring Scandal: towards Historical 'Impunity' Teams?'*). CAJ's most urgent human rights compliance concern is the conflict of interests some re-hired staff may have between their past and present roles, in particular in relation to roles in the investigative chain for legacy investigations. As outlined in the previous article the requirements of Article 2 of the European Convention on Human Rights (ECHR) mean police officers or other state agents should not be in a position to influence investigations into matters in which they themselves, their former units or colleagues may be implicated. In particular CAJ has raised concerns about investigations by the Police Ombudsman or Historical Enquires Team (HET) as well as Inquests or other judicial procedures which enquire into the activities of police agents, and yet former special branch officers are involved in providing the intelligence data on which the same investigations are reliant.

CAJ provided evidence to the Audit Office and its report directly addresses the issue. Referring to '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 (paragraph 3.18 audit office report).

The Audit Office indicates that at present procedures are limited to former RUC officers declaring if they had previously been involved in the RUC *investigation* into the same case. This does not extend into examining any conflicts of interest in relation to otherwise being able to influence investigations through control of the intelligence and other records on which they rely. The Audit Office report finds of all PSNI Department's the Crime Operations Branch, which includes the C3 Intelligence Branch, has the second highest number of rehired officers (figure 7; p23) and that of persons rehired to work as 'Intelligence Officers' 97% were former retired officers (figure 14; p35).

From CAJ's perspective, in addition to the broader equality and accountability questions, there are still outstanding questions in relation to conflicts of interests and past and present roles in relation to several units of the PSNI which engage legacy investigations namely:

- the PSNI Legacy Support Unit, which provides information to Inquests and Inquiries;
- the HET (outside participation in direct investigation teams);
- working with or servicing the PSNI Legacy Gold Group;
- other parts of the PSNI who have responsibilities for providing records and other data to inform legacy investigations.

The rehiring scandal itself, as well as its apparent cover up, has shaken confidence in police reform in general. Whilst the practice appears to be being wound down outstanding questions in relation to the level of potential conflicts of interest of some rehired officers remain.

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# The National Crime Agency – More Secret Policing

## Background

The Crime and Courts Bill was introduced into the House of Lords in May and is still at Committee stage, having recently been delayed. The grounds for this delay is that the new Tory Justice Minister did not apparently find the provisions for community sentences (for England and Wales) in the bill tough enough, and has sought to substantively amend this section. It is likely to be considered by the House of Commons in December. Part 1 of the 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 does not believe that the proposals for this new crime agency are compatible with the accountability framework established by the Patten Commission. Transparency and effective accountability are essential elements in ensuring policing bodies comply with human rights. Patten set out a new accountable 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.”*

The current reality is, however, that some of the most sensitive areas of policing have been withdrawn from the accountability and control arrangements established by Patten and subsequent legislation. With the takeover of primacy by MI5 in 2007, “national security” policing was taken out of the accountability structures and now the proposal is to withdraw the policing of serious and organised crime also. There are a number of ways in which CAJ believes these proposals are regressive and incompatible with the commitments for a “new beginning for policing” in Northern Ireland.

## Composition of the new force

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. This system did make some progress although CAJ felt it was ended prematurely. There has also been some rollback from this effort to change the organisational culture of the police service with the “rehiring scandal” reported on elsewhere in this issue.

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. There is also provision for arrangements to be made for secondments to the NCA. 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.

## The accountability gap

*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.*

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These scenarios of political control over policing were what Patten sought to guard against. However, 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 who are “designated as constables” 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 issues include the fact that 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 and that the Agency, unlike the PSNI but like MI5, will have blanket exemption from the Freedom of Information Act 2000. Another concern is that the functions of the NCA, which already include “criminal intelligence gathering”, and “combating serious and organised crime”, can be extended to cover “counter terrorism” by Order of the Home Secretary.

### **NCA functions and the 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. This is interesting because, while the legislation declares that the Agency itself will be a “reserved matter” (relevant powers remaining in Westminster), it is accepted that the Agency itself will “undertake a mix of reserved and devolved activity in relation to its serious and organised crime remit” (Lord Henley for the Government in the House of Lords 18 June 2012). Lord Henley also said that “counterterrorism policing in Northern Ireland cannot be divorced from the generality of policing which is, of course, a transferred matter.” He concluded that, for these reasons, a legislative consent motion by the NI Assembly would be necessary for the legislation to take effect.

We are not sure if this remains the Government’s position and we do not know what negotiations, if any, are currently going on with the Department of Justice. The progress of the Bill has been delayed, ostensibly at least, for reasons connected with other provisions related to community sentences in England and Wales. CAJ believes that local politicians should be very careful before agreeing to pass a legislative consent motion. First, before proceeding with a Bill which grants so much power in secondary regulations, the UK Government should be asked to make clear what its intentions are in relation to the counter-terrorism role of the NCA in Northern Ireland. Second, we should be 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 including executive 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.

CAJ is aware that, in correspondence to an MLA, the Justice Minister David Ford has argued that the 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 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 and an intelligence gathering function as the Bill anticipates.

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# The State's Duty to Protect the Right to Life – the Northern Ireland Experience

This article is based on a presentation made by Gemma McKeown, CAJ's Legal Officer, to a colloquium organised by the Office of the Attorney General for Northern Ireland on Article 2 of the European Convention on Human Rights (ECHR).

Although there has been discussion about whether the ECHR may permit processes which do not lead to prosecutions where there is a transitional justice process, in the absence of any such mechanism at present CAJ re-emphasises that the full investigative obligations on the existing criminal justice mechanisms contained in international and domestic law must be complied with.

Article 2 is one of the fundamental rights under the ECHR and under it the government has both substantive positive obligations and negative obligations to protect life and also a procedural obligation to carry out an effective investigation in prescribed circumstances. Of relevance to this paper and the current discussion is the investigative obligation where the loss of life has occurred in circumstances where the state may be implicated in the death.

The European Court of Human Rights first established this investigative obligation in *McCann & Ors v. UK* stating that Article 2:

'requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by inter alia, agents of the State'. Para 161, [1995] ECHR 31

This was further developed in 6 cases emanating from Northern Ireland known as the 'McKerr group of cases'. The Court held in all cases that there had been a violation of the right to an effective investigation into these deaths which involved the police or security forces or where there were allegations of collusion between the security forces and the killers. CAJ acted for the applicants in *Shanaghan*, *Kelly & Ors* and *McShane v. UK*.

In finding that there had been a violation of Article 2(2) the Court criticised the:

1. Lack of independence of the police investigation;
2. Refusal of the prosecution service (DPP) to give reasons for failing to prosecute;
3. Lack of compellability of witnesses suspected of causing death;
4. Lack of verdicts at the inquest;
5. Absence of legal aid and non-disclosure of witness statements at an inquest – the interests of the next-of-kin were not fairly or adequately protected;
6. Lack of promptness in inquest proceedings;
7. Limited scope of inquest;
8. Lack of a prompt or effective investigation of allegation of collusion.

The Court held that in cases involving the use of lethal force by agents of the State an effective investigation in compliance with the requirements of Article 2 must be carried out and set out the minimum requirements for this. It must be:

- *Independent* – individuals investigating a death must be fully independent of those implicated in a death; this independence must be both practical and hierarchical;
- *Effective* – an investigation must be able to determine the lawfulness of the actions of those responsible for the death and to lead to the identification, and where appropriate, punishment of those responsible. All reasonable steps must be taken to secure evidence concerning the incident, including eye-witness testimony, forensic evidence, and where appropriate an autopsy;
- *Sufficiently open to public scrutiny* – there should be a sufficient element of public scrutiny of the investigation or results to secure accountability in practice as well as in theory and the next-of-kin should be involved to the extent necessary to safeguard their legitimate interests;
- *Prompt and carried out with reasonable expedition* – to maintain public confidence in the maintenance of the rule of law and to prevent any appearance of collusion or tolerance of unlawful acts. Investigations into deaths caused by state agents must be initiated by the state of its own motion and not by the next-of-kin or other concerned parties.

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In response to these judgments the UK government put forward a 'package of measures', which together with further measures taken, were put forward as the necessary steps to remedy the violations found by the ECtHR, these included:

- The 'calling in' of other police forces to investigate deaths –the establishment of a 'Serious Crime Review Team' (2003) replaced with the Historical Enquiries Team (2005);
- The ability of the Police Ombudsman to carry out Article 2 compliant investigations into 'grave or exceptional' matters;
- Reform to inquest proceedings including: establishment of an exceptional legal aid scheme; on the rules of disclosure; compellability of witnesses; new practices relating to verdicts of coroner's juries at inquests;
- Changes to the DPP's giving of reasons not to prosecute and option to judicially review such decisions;
- Establishment of the (heavily criticised) Inquiries Act 2005.

At the outset concerns were raised about the government's piecemeal response to the judgments which could result in a delay in effective implementation of these judgments. This has in fact become a reality – over a decade has passed since these judgments and they still have not been fully executed resulting in further litigation. The Committee of Ministers, the body within the Council of Europe responsible for supervising the execution of judgments, continues to examine the measures put forward by the UK to remedy the breaches of Article 2 as found by the ECHR and will continue to do so until it is satisfied with its response.

The three main mechanisms which families engage with to address the violations of Article 2 are the Historical Enquiries Team (HET), the Police Ombudsman and the inquest system.

**HET:** In October 2005 the HET was established to re-examine all deaths attributable to the security situation in Northern Ireland between 1968 and 1998, with the aim of identifying and exploring any evidential opportunities that exist. It is put forward as a 'family-centred' process to identify and address unresolved issues families have – including investigative issues and wider issues surrounding the death of a relative. While some review summary reports prepared by the HET may provide some families with more knowledge than they previously had about the death of a relative they are only, as the Committee of Ministers stated a 'measure of resolution' (Interim Resolution CM/ResDH(2009)44). In our submission to the Committee in February 2012 we highlighted our concerns that since its assessment of the HET there have been a number of developments which have significantly undermined its capacity to remedy previous violations of Article 2.

**Police Ombudsman:** A Police Ombudsman's investigation focuses on alleged police criminality or misconduct and investigation of an historic case is investigated as a 'grave or exceptional' matter. A number of concerns have been raised concerning the recent ability of the Office to meet the requirements of an Article 2 investigation. In June 2011, CAJ published 'Human Rights and Dealing with Historic Cases - A Review of the Office of the Police Ombudsman for Northern Ireland' which raised serious concerns about political and police interference in the workings of the Office. This report, along with an Investigation Report commissioned by the Department of Justice (McCusker Report) and the subsequent September 2011 Criminal Justice Inspection (CJINI) report into the independence of the Office, have been the catalyst for the current reform process and the investigation of historic cases remains suspended pending the satisfactory conclusion of ongoing reforms to the office.

**Inquests:** An Article 2 compliant inquest will determine: who the deceased was; how, when and where he or she died; and what were the broad circumstances surrounding the death. In determining the scope of the inquest a family should be involved to protect their legitimate interests and therefore they should be provided with all relevant material disclosed to the Coroner.

While there have been reforms to the coronial system in Northern Ireland as noted above, in our view, there are concerns about its functioning in accordance with the requirements under Article 2:

- 'Legacy inquests' are subject to excessive delays and there is a backlog of these inquests within the coronial system (McCaughy & Grew took 22 years and Jordan took 20 years before they were heard);
- An inquest jury in Northern Ireland, unlike elsewhere, needs to reach a unanimous decision;
- That there is inadequate provision for vetting jurors who may have a conflict of interest or potential bias in 'legacy inquests';

*contd...*

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- The inability of inquests in Northern Ireland to issue verdicts of lawful or unlawful killing falls short of international standards;
  - Protracted delays and litigation involving the PSNI and MoD in relation to disclosure to next-of-kin of material that is submitted to be relevant;
  - A failure to effectively investigate the broad circumstances of the death to allay suspicion or rumour, for e.g. details of witnesses involvement in other lethal force incidents;
  - Failing to secure attendance of security force personnel at the hearing.

Despite the availability of these three mechanisms, CAJ has serious concerns about the way they are operating at present, including the co-ordination between them, and we do not regard them as currently satisfying Article 2 individually or collectively.

If the government does not ensure that there is a cohesive and comprehensive system which complies with Article 2, not only is it in a continuing breach of its legal obligations but it cannot expect the affected families and the wider Northern Ireland community to finally resolve its past.

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## Reform of the Police Ombudsman's Office: update

**Whilst internal reform may well be taking place within the Police Ombudsman's office there are signs that the legislative changes needed to improve the running of the office may again be being put on the long finger.**

A Department of Justice consultation ran from March-June 2012 on two matters. The first was a consultation paper entitled "*Future Operation of the Office of the Police Ombudsman for Northern Ireland*" which floated a number of suggestions e.g. merging the Police and Prisoner Ombudsman, which seemed far removed from the reforms required to address the issues facing the office.

The second document put out for consultation was the Police Ombudsman's updated "Statutory Five Year Review Report". The review of powers was originally completed by the first Police Ombudsman and published in 2007 and aimed to address matters such as the lack of powers to ensure the cooperation of retired police officers in investigations. As is now known very few of the review's recommendations were ever implemented following what the McCusker Review referred to as an 'agreement' between the Ombudsman's then senior Director of Investigations and "a middle ranking official of the NIO without either the imprimatur of the Ombudsman or the knowledge of the Chief Executive." What was striking at the time of the March-June Consultation that the Minister of Justice was still to take a position on whether he intended to implement the five year review recommendations.

Recently the Department of Justice published a summary of responses to the consultation (*Future operation of the Office of the Police Ombudsman for Northern Ireland: Summary of consultation responses, September 2012*) which provides analysis as to the views of consultees on the proposals. The Minister's view on the recommendations in the five year review remains unclear. The document states that there will now be further work by the Minister of Justice with the Justice Committee and Ombudsman's Office in relation to considering changes to the Office with the "detailed policy and legislative proposals" to follow for another consultation "probably in the first half of 2013." Although many of the recommendations for legislative change have been around since the first review 2007 there is therefore still no clear decision or timetable as to their implementation.



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## “National Security” – an arbitrary cloak of secrecy?

As this edition of Just News was going to press, news came that the Senior Coroner, John Leckey, had suspended 14 cases of inquests into past deaths where security forces were implicated. The Coroner appears to have decided that “national security” is engaged in all such cases and so it is outside the devolved power of the Northern Ireland Attorney General to order these inquests. This decision has shocked human rights activists, and it is not presently clear how the Coroner arrived at the view that the inquests engaged ‘national security’ matters, nor more importantly what this means. Under the “Right to Life” article of the European Convention on Human Rights, governments are obliged to conduct proper investigations into the use of lethal force. Properly organised inquests are a key mechanism for doing so and in many cases remain the only available way of getting at the truth of how and why people died.

CAJ will continue to monitor the out-workings of this shock decision and will intervene as possible. However, in a statement we also said: “There is no legal definition for ‘national security.’ If we allow all our past to be shrouded in secrecy by the cloak of ‘national security’ we will never be able to leave it behind.” The arbitrary use of the term ‘national security’ both to withhold extensive powers from our devolved institutions and to keep the ways they are used secret is rapidly becoming a scandal and a standing invitation to substantive human rights violations. We have investigated some of these matters in a report into covert policing, which we will publish before Christmas.

Despite international standards (recommending ‘national security’ should be clearly defined in law – see UN Special Rapporteur standards for intelligence agencies) and not be “used as a pretext for imposing vague or arbitrary limitations” (UN Siracusa Principles) we have no legal definition for ‘national security’ and the vagueness of the term is deliberate. The MI5 website says:

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.

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 through the usual channels and instead become ‘officers of the Secretary of State’ and hence answerable to the NIO. This arrangement was set up to give MI5 “confidence” that prison service staff could handle ‘national security’ information. Officials indicate that had that not been agreed, MI5 and the NIO would have refused to allow any prison service staff to handle any such information (see minutes of Assembly Justice Committee 14 June 2012). 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.

CAJ believes that both the refusal to properly define ‘national security’ in law and the use of the term to avoid proper accountability, is not only a recipe for continued cover up of the past but, one that is increasingly leaving gaps in our present day framework for human rights compliance.

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## Civil Liberties Diary - September 2012

### 4 September

A report released by the Auditor General states that the Housing Executive knew or should have known about problems with its maintenance company, Red Sky. The auditor general stated that there were 'serious weaknesses' with the management of the maintenance company contracts, including charges of housing executive officials accepting 'excessive hospitality' and charges of overpayment.

### 5 September

Save the Children has reported that more than a quarter of parents living on low incomes are skipping meals in order to feed their children. Additionally the report found that almost a third of parents are short of money on a weekly basis, while 40% have missed a bill payment in the last year. The organisation is increasing the amount it spends on intervention programmes but has expressed concern for the well-being of these families with the high prices of oil during the winter months.

### 17 September

Rates of homelessness and joblessness for young adults are on the rise. Over 97% of 18-35 year olds who sought accommodation from Simon Community NI, an organisation which runs hostels for homeless individuals, were also jobless. Additionally, 22% of people approaching the NI Housing Executive for homes were between the ages of 16 and 25.

Both the Housing Executive and Simon Community have identified this as an increasing concern.

### 19 September

A retired RUC sergeant who killed an unarmed IRA man in 1992 has been granted anonymity at the Pearse Jordan inquest. The High Court ruled that naming him would place his life under greater threat from dissident republicans. The court also ruled in favour of anonymity and screening for three other officers expected to give evidence at the inquest.

### 26 September

Members of a teachers union have taken industrial action against schools in a dispute over pay, pensions, job losses, and workload. Employers have informed the teachers that they could have their salary reduced for taking part in the industrial action.

A report released by the OFMDFM found that approximately 69% of people living near peace walls in Northern Ireland believe that the walls are still necessary and should not be removed. These communities expressed concern about the police's ability to preserve peace and order if the walls were to be removed. Of the general population of Belfast, however, only 40% felt that the peace walls were still necessary.

### 27 September

An state inquiry into historic institutional abuse in church- and state-run homes and schools in Northern Ireland is set to begin. The first stage of the Stormont inquiry will welcome victims' participation and offer a chance for survivors to tell their stories. This inquiry is planned to be independent, public, judge-led and supported by an independent panel of people with expertise in the area of abuse.

*Compiled by Elizabeth Super  
from various newspapers*

## Just News

**Just News** welcomes readers' news, views and comments.

**Just News** is published by the Committee on the Administration of Justice Ltd.

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