

**REPORT OF THE INDEPENDENT REVIEWER**

**JUSTICE AND SECURITY (NORTHERN IRELAND) ACT 2007**

**FIFTEENTH REPORT**

**1 August 2021 – 31 July 2022**

Professor Marie Breen-Smyth

June 2023

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2007



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**FOREWORD**

In his letter of 1 February 2021 the Secretary of State for Northern Ireland, appointed me as the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 for the three-year period from 1 February 2020 - 31 January 2024 under Section 40.

My terms of reference were set out in that letter as follows: “the functions of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 are to:

- review the operation of sections 21 to 32 of the Act and those who use or are affected by those sections; to review the procedures adopted by the military in Northern Ireland for receiving, investigating and responding to complaints; and
- report annually to the Secretary of State.

In carrying out your duties, you must act in accordance with any request by the Secretary of State to include matters over and above those outlined in sections 21 to 32 of the Act”.

The reports prepared by my predecessor are available on the GOV.UK website: <https://www.gov.uk/government/publications/annual-reports-of-the-independent-reviewer-of-justice-and-security-northern-ireland-act-2007>.

I now have pleasure in submitting my second report, which is the 15th annual report, covering the period 1 August 2021 - 31 July 2022.

An executive summary of this report can be found at section two.

Marie Breen-Smyth

June 2023

## 1 INTRODUCTION

- 1.1 The powers contained in the Justice and Security (Northern Ireland) Act 2007 (JSA) are additional to those available to police and security services elsewhere in the UK and are designed to address the specific security situation in Northern Ireland. When the Act was passed in 2007, it was deemed that such powers were necessary for the preservation of peace or the maintenance of order. In this report, I consider whether this remains the case.
- 1.2 The role of the Independent Reviewer is set out in section 40 of the Justice and Security Act (JSA) 2007 and in some detail in the 14th report at paragraphs 1.2-1.4. The Independent Reviewer reviews the operation of sections 21 to 32 of the Act, which contains powers to stop and question, stop and search and to enter premises to search for munitions, to stop and search vehicles, to take possession of land and to close roads. The review includes the use of the provisions for Non-Jury Trials (NJT) and considers how they affect those subject to all of these powers. The procedures adopted by the military in Northern Ireland for receiving, investigating and responding to complaints are also scrutinised. The Independent Reviewer reports annually to the Secretary of State and the report is laid before parliament.
- 1.3 This report provides:
- my reviews of the operation of sections 21 to 32 of the Act and those who use or are affected by those sections. These sections provide the police with powers to stop and question, stop and search, to enter premises to search for munitions or wireless apparatus and to stop and search vehicles. Sections 21 to 32 of the Act are summarised in Part 1 of Annex C to this report;
  - a review of the authorisations of schedule 3 powers which are subject to specific routine regimes of authorisation by the Secretary of State;
  - a review of the use of JSA powers to take possession of land and to close roads from August 2021– July 2022;
  - a review of two aspects of Army operations: Explosive Ordnance Disposal activity (EOD) where the Army supports the PSNI in dealing with explosive material; and the operation of the Army procedures for handling complaints;
  - in addition, following the Secretary of State’s request on 6 October 2017, a review of Non-Jury Trials (NJT) from August 2021 -July 2022.

The provisions in the JSA 2007 relating to NJTs are set out in sections 1 to 9 and are at Annex F. The Public Prosecution Service's (PPS) internal guidance on how those provisions are to be applied, which form the terms of reference for this review of NJTs, are at paragraph 14.2 of the 10th report, and are also at Annex G of this report.

- 1.4 This review and previous reports are available on the GOV.UK website as downloadable reports at <https://www.gov.uk/government/publications/annual-reports-of-the-independent-reviewer-of-justice-and-security-northern-ireland-act-2007>.
- 1.5 Lord Anderson QC, the former Independent Reviewer of Terrorism Legislation (IRTL) for the UK, explained the value of the Reviewer insofar as [they are] independent; have access to secret and sensitive national security information; are able to engage with a cross section of the community; and produce a prompt report which informs public and political debate.
- 1.6 In carrying out my duties in relation to NJT determinations by the PPS and in relation to cases of stop and search under the JSA 2007, I must review secret and sensitive material involving security clearance at Developed Vetting (DV) level. Further information on the vetting levels and processes can be obtained at <https://www.gov.uk/government/publications/united-kingdom-security-vetting-clearance-levels/national-security-vetting-clearance-levels>.
- 1.7 The JSA can be seen as a legislative bridge between the emergency provisions laws of the Troubles years and the more limited peacetime powers available to the authorities in England and Wales. The broader legislative context is that of the introduction of permanent and broad powers in laws of the Terrorism Act 2000 and its sequelae. The extent of these powers and principles of democratic accountability pointed to the need for regular review and oversight of the powers. Hence, the IRTL, Jonathan Hall KC has oversight of terrorism legislation throughout the UK. His work provides a review of the broader powers across all of the UK, and the work of The Human Rights Advisor to the Northern Ireland Policing Board, John Wadham, places the JSA powers in the broader context of all the powers available to the PSNI.

- 1.8 The JSA 2007 will have operated for over 16 years when this report is laid in Parliament. The many changes that occurred since then are outlined in the 14th report at paragraphs 1.12 - 1.14.
- 1.9 The national security threat from terrorism to the whole of the UK has been set at 'Substantial' for the past number of years. The threat level in Northern Ireland was reassessed at 'Severe' in August 2021, largely based on threats posed by dissident republican armed groups. However, on 22 March 2022, the Secretary of State announced that the decision to change the threat level to 'Substantial' had been taken by MI5, independently of Ministers. This was the first change in threat level in 12 years. The Secretary of State commented: "However, it is not a time for complacency. There is still a minority who wish to cause harm in Northern Ireland. As ever, the public should remain vigilant and report any concerns they may have to the police."
- 1.10 It is the role of the Independent Reviewer not only to review the operation of the JSA as part of that system, but also to recommend change where it seems necessary or desirable. I wish to thank those with whom I have met to discuss the many recommendations I made in the 14th report and to commend them on their positive engagement and willingness to provide the highest standards of public service and accountability. I hope that I may continue to enjoy their goodwill and cooperation.
- 1.11 This report is divided into three Parts. Part 1 deals with the use of the powers in sections 21 to 32. This includes a section on military provisions. Part 2 examines the operation of the NJT system. Part 3 sets out my conclusions relating to the exercise of the powers in respect of NJTs.
- 1.12 I am grateful to the community-based organisations, charities, human rights organisations and public watchdogs who have met me either virtually or in person and given me the benefit of their views. These are listed at Annex B. I am also grateful to the political parties and public representatives who engaged in this process. This includes public servants in the Northern Ireland Office (NIO), Ministry of Defence (MoD), Police Service of Northern Ireland (PSNI), the Department of Justice (DOJ), the Northern Ireland Policing Board (NIPB), their Human Rights Advisor, John Wadham and their staff, the Police Ombudsman for Northern

Ireland (PONI), Jonathan Hall, KC, The Independent Reviewer of Terrorism Legislation (IRTL) in the UK and my predecessor David Seymour CB and Public Prosecution Service (PPS) who have cooperated and assisted me in my review.

- 1.13 All references in this report to sections are to sections of the JSA 2007 unless otherwise stated.
- 1.14 All references to “mainstream criminal justice legislation” are references to the Police and Criminal Evidence (Northern Ireland) Order 1989, the Misuse of Drugs Act 1971 and the Firearms (Northern Ireland) Order 2004.
- 1.15 As with previous reports, comments may be directed to me personally at [marie-breen-smyth@irjsa.org](mailto:marie-breen-smyth@irjsa.org) or to [thesecretary@nio.gov.uk](mailto:thesecretary@nio.gov.uk). Again, I would also like to invite the Northern Ireland Office, the Northern Ireland Policing Board and any other bodies who wish to reply formally to do so.

## EXECUTIVE SUMMARY

- 2.1 The methodology adopted for the report is set out in Section 3. The methodology adopted for this report was amended following a reduction in the level of administrative support available in this review period. I relied heavily on construction e-lists and inviting stakeholders and agencies to respond to the previous report by email. Where a stakeholder or agency requested, I met with them in person, in some cases multiple times. I have endeavoured to continue my commitment to direct engagement with communities, but budgetary constraints require me to limit the time spent on this review, and there were fewer of these meetings than in the previous review period. This review was therefore conducted by email, by remote meetings by Webex or Zoom, in-person reviews of files as well as face-to-face meetings and briefings.
- 2.2 As noted at 1.19 above, the threat in Northern Ireland was classified as ‘Severe’ from the beginning of this review period (1 August 2021) until 22 March 2022 when the decision to change the threat level to ‘Substantial’ was taken by MI5, the first such change in 12 years.
- 2.3 The view has been expressed in paragraph 3.9 of the 9th report, repeated at 3.8 in the 10th report, in the 14th report and again here that the reporting period for this review should be changed from its current cycle of August – July to the calendar year. I recommend that draft amendments be prepared as part of the review of legislation in order to achieve this outcome in 2023 when parts of the JSA are due for renewal and amendment.
- 2.4 The rationale for the focus of MI5 almost exclusively on DRs is not well understood by members of the public and certain loyalist paramilitary sub-groups in particular communities profoundly damage the security of those communities. I repeat the recommendation in the 14th report (paragraph 6.90) that the allocation of responsibility between the various security agencies, interagency task forces and sections of the PSNI for proceeding against particular organisations or categories of organisation using counter-terrorism law including the JSA be published. Once again, I recommend that the security and intelligence services offer some clarity to these communities and to the public on the rationale for the current division of operations.

- 2.5 I recommend that the government implement the recommendation of the Independent Reporting Commission and appoint a person to directly engage with those involved in paramilitary organisations with a view to designing and implementing a process of transition away from proscribed organisations.
- 2.6 There is no unique incident number recorded on a PSNI stop and search record (unlike other non-stop and search incidents recorded on Niche) that would enable the number of stop and search incidents to be counted and reported. I recommend that PSNI ensure that data collection methodology for JSA stop and search is made capable of collecting both the numbers of stops and the numbers of individuals stopped and that the collected data is analysed so that this differentiation is always clear.
- 2.7 In line with recommendations and analysis in previous reports and with jurisprudence, the JSA powers are only to be used for the purposes of searching for illegal munitions or wireless apparatus, as the law requires, and for no other purpose.
- 2.8 The outcome rates for the use of JSA stop and search powers is much lower than the England and Wales arrest rate and vary between police districts. Such low arrest rates raise concerns about the effectiveness of the powers and thus create difficulties in justifying the use of the JSA powers where such low outcomes are apparent. I recommend that a discussion of outcome rates is included in future applications for authorisation.
- 2.9 I have noted a difference in travellers' experience of policing in general and between settled travellers and migrating travellers. I recommend that the views and experiences of JSA stop and search powers by Irish travellers are sought by the PSNI and taken into account in operational reviews of the exercise of these powers.
- 2.10 Of the 55 children under 12 stopped and searched under all powers, 44 were male and 11 female and none were arrested. Given proposed increases in the Minimum Age of Criminal Responsibility (MACR) in Northern Ireland from 10 years old to 14, I recommend that the PSNI conduct a review of its policies and practices in relation to JSA stops and searches of children between the ages of 10 and 14.
- 2.11 I recommend the PSNI publish their policy specifically in relation to the use of JSA powers on children who are the target of the search.

- 2.12 I have serious concerns that children, by virtue of their ethnicity, family circumstances or gender, are drawn into the criminal justice system from a very young age. I recommend that, in finalising their children and young person strategy, the PSNI address these risks directly and ensure that the strategy includes mitigations of them. I draw this to the attention of the Northern Ireland Commissioner for Children and Young People (NICCY) and to the attention of the Northern Ireland Policing Board (NIPB).
- 2.13 For this report, I had recommended that I should review a structured sample of BWV footage of JSA stops and searches of children and young people, which was to be drawn, viewed and analysed in consultation with the working group and/or the YIAG. The sample was to include stops and searches in both CRN and PUL communities, of both genders, a range of ages and include areas where stops and searches are concentrated. The analysis was to include an examination of police behaviour and attitudes during stops and searches, their deployment of BVWs, information cards, verbal briefings on rights and any other matter, which could inform improved practice. Unfortunately, I have not viewed BWV of children and young people being stopped and searched. I recommend that, as a priority, this is arranged for the next review period. I recommend that the sample include stops conducted by the Armed Response Units (ARUs).
- 2.14 I recommend that the PSNI seek the advice of the JSA Stop and Search working group, which contains many of the relevant children and young people's organisations in order to establish the YIAG without further delay.
- 2.15 It is reassuring that the PSNI have, on one occasion, assessed that a less than geographically comprehensive authorisation of JSA powers was necessary and sought this accordingly. I recommend that the PSNI continue to consider carefully whether comprehensive authorisations are routinely required and seek authorisation only for areas where the intelligence clearly and unequivocally warrants it.
- 2.16 I recommend that the JSA Code of Practice be amended to clarify that merely carrying a mobile phone is insufficient grounds for the exercise of the JSA powers.



- 2.17 I recommend that the PSNI review the intelligence material provided in support of JSA authorisations to ensure that it focuses on the requirements of the legislation and that it is specific, recent and timely, appropriately focused and supports the use of the powers.
- 2.18 I recommend that, where the use of a JSA power in the first instance leads to the formation of reasonable suspicion, that the officer proceed under a power other than JSA on the basis of that suspicion.
- 2.19 I recommend that the PSNI ensure that the effect of the exercise of JSA powers on mitigating risks to security is clearly set out in future applications for JSA authorisation.
- 2.20 The PSNI may not infer anything from an absence of feedback from PCSPs on the exercise of JSA powers. Absence of PCSP or community feedback does not constitute evidence of any kind about the impact on communities of the exercise of JSA powers and compromises the completeness of the authorisation itself. Direct feedback on any positive or negative community impact of the JSA powers from the PCSPs performs a very important role in the authorisation process.
- 2.21 In the course of my work, I have again noted perceptions within communities that the PSNI do not respond quickly or effectively to complaints from local people about drugs in the community resulting in despair on the part of local people and damage to the reputation of the police.
- 2.22 I have also noted perceptions in both the Protestant Unionist Loyalist (PUL) and Catholic Republican Nationalist (CRN) communities that there are inconsistencies in policing the two communities, perceptions that have yet to be convincingly addressed to their (opposing) satisfactions.
- 2.23 Communities also report that the good work at community level carried out by Neighbourhood Police Officers is compromised by frequent relocation of officers, which impairs the development of trusting relationships between the PSNI and local communities.

2.24 In this review period, I met a number of Police Community Safety Partnerships (PCSPs) who perform a key role in the administration and monitoring of policing in Northern Ireland. I am concerned to ensure that we maximise the benefit from their important work. I recommend that:

- I am invited to a meeting of all PCSP managers where this issue can be discussed centrally so that all PCSPs are similarly alerted to the importance of their feedback on the use of JSA powers.
- PCSPs must regularly seek the views of local people in relation to JSA stop and search, record this feedback formally in their minutes these and communicate them to the Policing Board in the first instance;
- I recommend that such feedback be a standing agenda item at all PCSP meetings going forward; and
- that PCSP minutes are made available to the local District Commander as soon as possible for use in preparing the district input to the authorisation process.

2.25 I recommend that, in order to further build on the capacity for such their more challenging work, that PCSP managers - and indeed the PSNI - consider providing additional training to PCSP chairs and PCSP members and to senior PSNI officers on managing contention in public meetings and the skills and approaches involved in handling high levels of conflict in difficult meetings.

2.26 Derry City & Strabane officers reported that those they consulted locally about the exercise of JSA powers were pleased to be consulted. Not only is this a method of obtaining feedback on stop and search but it also has a beneficial effect on police-community relations. I recommend a similar method of obtaining feedback be adopted by all districts where they do not already engage directly on a regular basis with a range of local residents. The feedback obtained should feed into the JSA authorisation process.

2.27 District Commanders are accountable for the manner in which JSA powers are used in their area. In view of this:

- I recommend that the PSNI clarify the line of command for Armed Response Units (ARUs) whilst operating in Districts.
- I also recommend that the PSNI make available a randomly selected sample of BWV of officers in the ARU for review jointly by the Human Rights Advisor and by me in the next review period.

2.28 In the 14th report, I recommended that Dr John Topping at Queen’s University, and Mr John Wadham, Human Rights Advisor to the NIPB review the value of BWV footage in police training, particularly at district level, and where appropriate deploy it for this purpose. I reiterate that recommendation here.

2.29 I also recommended that the use of BWV for performance management through dip sampling by senior officers be piloted and monitored. I would be grateful for feedback on where this matter stands.

2.30 I repeat the recommendation from the 14th report that the PSNI conduct a systematic review of requests for access to BWV footage of the use of JSA powers by legal advisors, legal representatives, PONI and others. I suggested that the review should include the number and source of requests for use as evidence, the purpose for which access is requested, the outcome of the request, the degree of access and the length of time before access was granted, and where it was denied, the reason for denial. The views of those requesting access should be included.

2.31 In the 14th report, I remarked that those stopped and searched under JSA powers are entitled to be informed of the powers under which they are being stopped and should be given a reference number to a police station in order to obtain a record of their stop and search. Whilst the 13th report recorded that work was in progress to improve access to records I note that the same solutions are still under consideration. I recommended that the PSNI select one solution and implement it before 31 July 2022. There still has been no progress made on this matter. I now recommend that the PSNI provide a time-line for the implementation of this recommendation.

- 2.32 Since there was currently no online advice available on how to access JSA stop and search records, I recommended that the online advice at <https://www.psni.police.uk/about-us/our-initiatives/stop-and-search> be amended to include instructions on current methods of accessing JSA (and other) stop and search records. I am pleased to report that this has been done, based on current practice and can be updated when the PSNI implement their plans (see 6.10 above) articulated in the 2019-2020 13th report.
- 2.33 General good practice regarding seizure and retention of property under JSA powers is included in PACE NI Code B section 7 (see Annex J). However the PACE NI Code does not cover loss or damage to seized property, nor does it explicitly mention seizures conducted under the JSA. I recommend that, in tandem with other secondary legislation required above, that loss or damage to seized property be incorporated into the Code and the application to JSA seizures be made explicit.
- 2.34 Given that the continuation of paramilitarism in Northern Ireland gives rise to the need for JSA powers, I recommend that, in order to expedite an end to paramilitarism that the UK government provide a clear, visible and accessible pathway to a demobilised and law-abiding life for those who remain in paramilitary groups.
- 2.35 I cannot exaggerate the deep frustration felt by many about the protracted delays in introducing community background monitoring of JSA stop and search. I recommend that the PSNI capitalise on all the previous work undertaken by the working group referred to by my predecessor and the various deliberations that have taken place over the intervening years since 2008 in introducing community background monitoring. I urge them not to delay further or reinvent any wheels in taking this forward.
- 2.36 As part of the preparation for the consideration of renewal of the non-jury trial (NJT) provision in the CJA, which is due in July 2023, a working group convened by the NIO undertook a range of work and on which all the stakeholder agencies and a range of experts were represented.
- 2.37 The Public Prosecution Service (PPS) agreed to undertake a manual trawl of Non-Jury Trial (NJT) cases to determine how many certificates were granted when juror bias was a consideration. However, it was not possible to get data on juror bias in jury trials because of

section 8 of the Contempt of Court Act 1981. They agreed to a manual trawl, the results of which were not available at the end of this review period<sup>1</sup>. I recommend that, when these data are available, they are made available to staff in the NIO so they can produce a summary for the purposes of briefing the Secretary of State when they are making the decision about seeking renewal of the powers.

2.38 I recommend that the assessments by MI5, of the threat to juries that were commissioned as part of the Working Group review of NJTs Non Jury Trials, are conducted on a biannual basis and that the DPP has sight of the full assessments, should he decide to do so, in order to inform his judgments. This will assist in ensuring that decisions are based on the fullest possible information in relation to the nature and extent of the risk to jurors and to assist the DPP in differentiating between real risk, as opposed to a remote or fanciful risk (see paragraphs 9.30- 9.32).

2.39 I commend the work of the working group on NJTs in identifying indicators to identify when NJT provisions in the JSA might be retired. They concluded that a combination of indicators together with feedback from the public consultation would assist the Secretary of State in deciding whether to renew the NJT provisions.

2.40 Whilst noting Lord Kerr's judgement that where one or more Grounds 1 to 4 for a JNT (see Annex F) are satisfied, and where there is a risk to the administration of justice, the Director of Public Prosecution's discretion can only be exercised by granting a certificate. In the 14<sup>th</sup> report at paragraph 9.53, I recommended, and I recommend again here, that in considering matters of jury bias in relation to Condition 4, that the PPS take particular account of societal changes in Northern Ireland and satisfy themselves that those conditions are sufficiently different to those elsewhere in the UK.

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<sup>1</sup> The PPS point out that it should be noted that there will be cases where it is judged that there is a risk of jury intimidation and a risk of jury bias. Furthermore, the risk of jury bias is also considered alongside a risk of jury fear, either of which could lead to a perverse verdict. A risk of jury bias can arise as a result of the nature of the offence (in which case it is often linked to Condition 4), but it can also arise from a knowledge or belief on the part of a juror that a paramilitary organisation is involved (which may be linked to Conditions 1 and 2, but, sometimes, not Condition 4). It is therefore important to understand that, even where a risk of jury bias is identified, a certificate may issue on additional grounds.

- 2.41 I recommend that the PPS include a range of information on NJTs on their website including information about the legislation pertaining to non-jury trials and how it is used.
- 2.42 The introduction of additional non-criminal measures such as civil orders against criminal assets (under the Proceeds of Crime Act 2002), Serious Crime Prevention Orders (under the Serious Crime Act 2007 – which can be imposed without criminal conviction) and The Terrorism Prevention and Investigation Measures (TPIM) Act (TPIMs) that involve closed procedures were also discussed as mechanisms that could be used alongside the Criminal Justice Act should the JSA provisions be retired. Whilst these might offer mitigations against the inability to prosecute all cases, such measures may represent a removal of Article 6 rights to a fair trial, and as such would be seen as a retrograde step.
- 2.43 I recommend that the JSA provisions are renewed for a further two years, during which time a review of the operation of the CJA in those terms is conducted in England and Wales and the outcome actioned accordingly. By the end of two years, I recommend that a plan is drawn up to implement the transition of the Northern Ireland legal system to sole reliance on the CJA, or an amended form of the CJA, for any NJT provision.
- 2.44 In the interim, I commend the use of the indicators identified by the working group and set out in Table 9.1 above, as support for this plan for transition. These indicators quantify the improved security situation, albeit one that gives continuing cause for concern in some cases about the risks of jury trial.

## METHODOLOGY

- 3.1 As noted in the 14th report, I am a native and resident of Northern Ireland and have a long involvement with both communities, with the voluntary sector and various Government departments. My previous networks, and the new ones I am building, support the work of this review. The role is part-time, with a budget providing for 3-4 days' work per month. This report has required more than the allocated time.
- 3.2 Work for this review began in August 2022, following the completion of the previous year's review, which was delayed until May 2022 by, amongst other things, the delay in processing the necessary security clearance.
- 3.3 Material for this review was collected from a wide range of stakeholders in government departments, the justice system, the police and armed forces and the security and intelligence services, the political parties and the communities across Northern Ireland.
- 3.4 The methodology for this report had to be adjusted to take into account the reduction in the level of administrative support available in this review period. I therefore constructed e-lists of stakeholders and those who had contributed to previous reports. I emailed those on this list the hyperlink to last year's report, inviting responses, updates or any other comments. Where a stakeholder or agency requested a meeting, I met with them in person. Where they sent written comments, these have been incorporated into the report. Where they made no response and they were not involved in the use of the powers contained in the JSA, there was no further interaction with them.
- 3.5 I met formally and informally with a wide variety of people in Northern Ireland including community leaders, non-governmental organisations, the Policing Board, the Ombudsman, human rights organisations, and members of the public. A full list of all those consulted is at Annex B.
- 3.6 Information was collected by email correspondence, remote meetings, by Webex or Zoom, in-person reviews of files and face-to-face meetings, visits and briefings. In some cases, I had multiple meetings with the same individual or organisation.

- 3.7 The views of those affected by the powers must also form part of my review. My commitment to direct engagement with communities was similarly constrained by the limits on time and support, which was mitigated by my volunteering some additional time. The complete list of those I met with is contained at Annex B of this report.
- 3.8 I consulted a wide range of legislation, codes of practice, jurisprudential material, official reports, policy articles and research papers. The powers within the JSA relating to non-jury trials (NJT) were renewed on its two-year cycle last year and were debated in the House on July 7, 2021<sup>2</sup>. They are due for review again in this report and in public consultation. In Part 2 Section 9 of this report, I comment in detail on the work undertaken to review NJTs in this review period and the reports of the Working Group on NJTs.
- 3.9 Following the recommendations in the 13<sup>th</sup> and 14<sup>th</sup> report the Northern Ireland Office (NIO) are seeking a legislative vehicle in order to bring in powers to allow for changes to the JSA Code of Practice to allow an extension to the length of authorisation period. A bid has been submitted; however, as these changes to the Justice and Security Act 2007 (JSA) are technical in nature they are not sufficient for a Bill of their own. Once a suitable legislative vehicle is identified, this work will progress.
- 3.10 The senior Police Service of Northern Ireland (PSNI) officers at their Knock Road headquarters in Belfast met with me to provide briefings and their responses to my recommendations contained in the 14<sup>th</sup> report. I met with the Commander and officers at Strand Road Station in Derry/Londonderry and the Commander and officers at Tennent Street in Belfast, all of whose enthusiasm and openness to developing good practice was uplifting. I attended meetings of the Policing and Community Safety Partnerships (PCSP) in Derry Londonderry, North Belfast and Causeway Coast and Glens and I attended a meeting of the Performance Committee of the Northern Ireland Policing Board. I attended a briefing by MI5-The Security Service in Northern Ireland and by the 38 (Irish) NI Garrison in Aldergrove and I am grateful for their cooperation in compiling Section 8 of this report.

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<sup>2</sup> [https://hansard.parliament.uk/Commons/2021-07-07/debates/b590851d-77d9-4a3b-b32f-897e25a5d86b/DraftJusticeAndSecurity\(NorthernIreland\)Act2007\(ExtensionOfDurationOfNon-JuryTrialProvisions\)Order2021\)](https://hansard.parliament.uk/Commons/2021-07-07/debates/b590851d-77d9-4a3b-b32f-897e25a5d86b/DraftJusticeAndSecurity(NorthernIreland)Act2007(ExtensionOfDurationOfNon-JuryTrialProvisions)Order2021)



- 3.11 The staff in the Northern Ireland Statistics and Research Agency (NISRA) who deal with security statistics responded with patience and cooperation to my requests. The Independent Reviewer of Terrorism Legislation (IRTL) Jonathan Hall KC, and the Human Rights Advisor to the Northern Ireland Policing Board John Wadham gave me the benefit of their experience and expertise. Those who served on the Working Group on NJTs produced excellent and detailed reports, which were invaluable in writing Sections 9 and 10 of this report. I am grateful to those in the NIO who have assisted in room bookings, arranging security briefings and those involved in the preparation of this report for publication.
- 3.12 Various individuals approached me with specific complaints about being stopped and searched under the JSA. Each individual was advised of the role of the Police Ombudsman and I informed the PSNI of each case. As I pointed out in the 14th report, I am unable to engage with complaints about the conduct of the police. Rather, that is a matter for PONI and I refer such cases to them. Currently, I inform PONI and ask that they exercise their discretion to undertake their ‘own motion investigation’ under (section 55(6) of the Police (NI) Act 1998, or a ‘policy and practice investigation’ under section 60A of that Act. The PONI has suggested that it may be worth recommending a statutory power for the Independent Reviewer of the JSA to refer cases to PONI. This would lend weight to any such referral. However, in all cases where I have made such referrals without a statutory power, they have been dealt with in a timely manner, albeit not always leading to the outcome desired by the complainant.
- 3.13 As before, in instances where there were *repeated and frequent* use of the JSA powers on the same individual over a protracted period, I deemed that to fall within my remit.
- 3.14 The reporting period for this review is raised in paragraph 3.9 of the 9th report, repeated at 3.8 in the 10th report, and the view expressed that it should be changed at some point in the future from its current cycle of August – July to the calendar year. I repeated this recommendation in the 14<sup>th</sup> report. I have been advised that this will require legislative change. **I recommend that draft amendments be prepared as part of the review of legislation in order to achieve this outcome in 2023 when parts of the JSA are due for renewal and amendment.**

## **PART 1 – THE OPERATION OF THE POWERS IN SECTIONS 21 TO 32**

### **SECURITY AND PUBLIC ORDER**

- 4.1 This section of the report follows the format adopted by my predecessor, Robert Whalley CB in his 2008 report, who followed the Secretary of State’s guidance for his periodic review, which asked three questions:
- Has the progress towards normal security been maintained?
  - What is the assessment of the security threat against which these powers were judged necessary?
  - What has been recent experience on the ground, especially in the handling of the marching seasons?

### **SECURITY ASSESSMENT**

- 4.2 In my 14<sup>th</sup> report, (paragraph 4.5) I reflected on the longer-term comparison of the security situation in Northern Ireland and the great distance we have travelled from the terrible decades of the Troubles. Up until 2019, the Joint Terrorism Analysis Centre (JTAC) assessed the threat from international sources and MI5 assessed the level of threat to national security from Irish and other UK based groups in Northern Ireland and Great Britain. The system changed and from July 2019 with the threat assessment reflecting all threats on a national threat level, with MI5 assessing the threat level in Northern Ireland. Threat levels determine the level of protective security response that may be required and are assessed at one of the following levels: Low; Moderate; Substantial; Severe; and Critical (see “Threat Levels: The System to Assess the Threat from International Terrorism”, 2006)<sup>3</sup>.
- 4.3 At paragraph 6.81 of the 14th report, I outline the responsibility of MI5 for national security intelligence work in Northern Ireland since 2007, explaining that this brought national security arrangements in Northern Ireland in line with the rest of the UK and that MI5 sees the political and security situations in Northern Ireland as linked. The focus of MI5 is largely on Dissident Republican organisations who are seen as a threat to national security whereas loyalist paramilitaries are policed largely by the PSNI and other agencies involved in the Paramilitary Crime Task Force (PCTF). They are a Law Enforcement Task Force composed of

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<sup>3</sup> Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62530/threatlevels.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62530/threatlevels.pdf)

the Police Service of Northern Ireland (PSNI), The National Crime Agency (NCA) and Her Majesty's Revenue and Customs (HMRC) launched with the aim to jointly work to "frustrate, disrupt and dismantle paramilitary organised crime groups using robust law enforcement."

- 4.4 In the 14th report, I recommended (paragraph 6.90) that the PSNI publish their policies in relation to policing all paramilitary groups. The allocation of responsibility between the various security agencies, interagency task forces and sections of the PSNI, and their policy on proceeding against particular organisations or categories of organisations using counter-terrorism law including the JSA, as opposed to the use of the ordinary criminal law. I made this recommendation, since, during the course of my meetings in various communities, I have noted that the rationale for the focus of MI5 almost exclusively on DRs is not well understood by members of the public. The damaging effect of certain loyalist paramilitary sub-groups caused by their racketeering and drug dealing in particular communities profoundly damages the security of local communities and the ability of local people to enjoy their own homes without fear. This reality gives rise to a perception amongst many in those communities that their security is not a priority for the authorities. The National Security Strategy and Strategic Defence Review<sup>4</sup> - which informs the work of all the security services - states that the first National Security Objective is "to protect our people – at home, in our Overseas Territories and abroad, and to protect our territory, economic security, infrastructure and way of life." **Once again, I recommend that the security and intelligence services offer some clarity to these communities and to the public on the rationale for the current division of operations.**
- 4.5 By way of contextualising the threat level in Northern Ireland with that in the rest of the UK, between 2015 and 2021, Monaghan and Slocombe (2022)<sup>5</sup> identified 184 terrorist incidents in the UK where the offender or offending group is known, using the Dragonfly's Terrorism Tracker<sup>6</sup>. The breakdown of offender ideology is shown in Table 4.1 :

**Table 4.1: Distribution of offender ideology**

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<sup>4</sup> See National Security Strategy and Strategic Defence and Security Review 2015 First Annual Report 2016 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/575378/national\\_security\\_strategy\\_strategic\\_defence\\_security\\_review\\_annual\\_report\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575378/national_security_strategy_strategic_defence_security_review_annual_report_2016.pdf)

<sup>5</sup> Monaghan, R. and Slocombe, B. (2022) 'The applicability of terrorism risk assessment frameworks for terrorist targets in the UK', Society for Terrorism Research 14th International Annual Conference, Coventry University, 8-9 September.

<sup>6</sup> Available at <https://www.dragonflyintelligence.com/intelligence/terrorismtracker/>

Offender group	No. of cases	%
Northern Ireland-related terrorists <sup>[1]</sup>	162	88
Jihadists (of which Islamic State = 7)	11	6.0
Far Right	8	4.3
Eco-terrorists (Individualistas Tendiendo a lo Salvaje; ITS)	2	1.1
Far Left/Anarchists	1	0.5

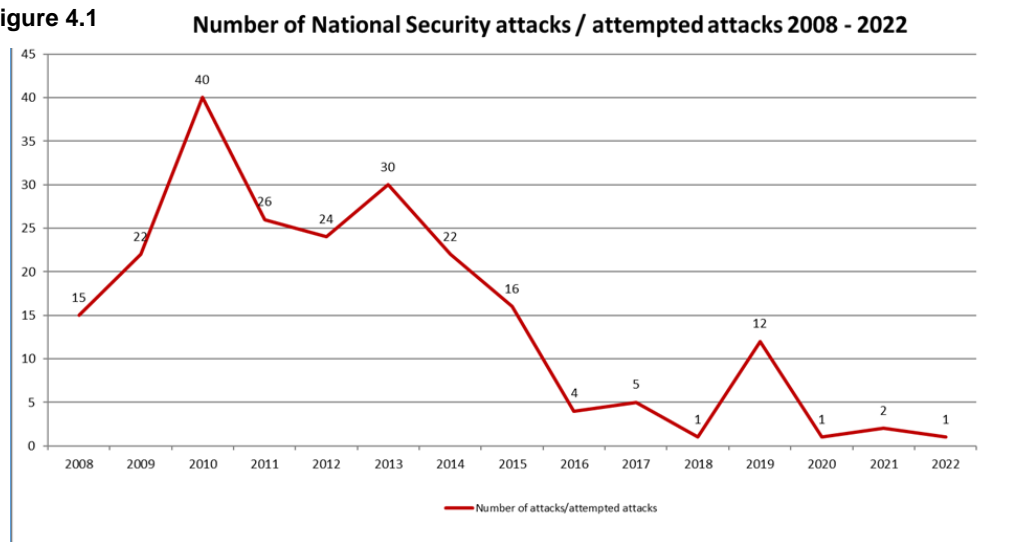
- 4.6 As outlined in paragraph 1.9, MI5 ranked the threat level in Northern Ireland as ‘SEVERE’ (an attack is highly likely) until 23 March 2022, when it was lowered to SUBSTANTIAL (an attack is likely). This is the first time since this system of threat level was introduced in Northern Ireland that it has been changed, and the lowering of the threat level, and the underlying improvements in security, are very welcome.
- 4.7 The reduction is due to the decline in the number of attacks and attempted attacks since 2009. There were no Dissident Republican (DR) attacks or attempted attacks during this reporting period, which ended on 31 July 2022. The national security and DR threat constitutes one part of the security picture, which must also include paramilitarism and serious and organised crime. DR groups, other republican groups and loyalist groups conduct paramilitary-style attacks (PSAs) and intimidation and this, too, contributes to the wider security assessment.
- 4.8 Despite this reduction, DR groups are assessed to be the primary driver of threat, a threat that emanates mainly from two groups: the New Irish Republican Army (new IRA); and the Continuity Irish Republican Army (CIRA). The security and intelligence services are almost certain that the new IRA intends to continue planning national security attacks. They assess that it is very likely that CIRA, too, intends to mount attacks against national security targets. Although the government restrictions and public response to the COVID-19 pandemic had a suppressive effect on the level of activity of these groups during 2020/2021, they have subsequently returned to their previous levels of operational activity. PSNI officers remain their primary target and there remains the possibility of an attack anywhere in Northern Ireland, which also poses a danger to members of the public.

- 4.9 There has been a significant decline in the number of attacks and attempted attacks since 2009 and there were no attacks or attempted attacks by Dissident Republicans (DRs) during this reporting period. In August 2022, the New IRA claimed to have fired a number of shots at police in Derry Londonderry, although there were no casualties. This incident, categorised as an attempted attack, was the first National Security attack or attempted attack since April 2021. The DR groups appear to have returned to their previous level of activity following the suppressive effect of the COVID-19 pandemic and the government's introduction of restrictions.
- 4.10 Both republican and loyalist paramilitary groups continue to be involved in serious and organised crime and continue to conduct paramilitary-style attacks (PSAs) and intimidation directed at the wider community.
- 4.11 The repercussions of EU Exit, the constitutional implications of the NI Protocol has given rise to a growing perception within sections of loyalism that loyalist identity and culture is threatened. Coupled with demographic changes and recent electoral outcomes this has led some to conclude that the union is in jeopardy. Although protests had abated somewhat in 2021, protest activity from within sections of the PUL community has persisted in the form of periodic rhetoric, graffiti and picketing, with an intermission during the negotiations between the UK government and the European Union aimed at resolving the issues about the NI Protocol. On 25 March 2022, a hoax device was planted at a Belfast event where Simon Coveney, the Irish Minister for Foreign Affairs of Ireland was speaking. The PSNI report that the device was transported in a vehicle hijacked at gunpoint and was most likely directed and organised by persons associated with the UVF. The PSNI expect that issues related to the NI Protocol and the constitutional position of Northern Ireland will continue to generate tension in the Protestant Unionist Loyalist (PUL) community in the near future.

#### **PROGRESS TOWARDS NORMAL SECURITY**

- 4.12 Figure 4.1 shows the numbers of actual and attempted attacks from 2008 until 2022 with a marked reduction in the numbers of attacks and attempted attacks over that period. The highest number of attacks were conducted in 2010 when the security risk was 'Severe' and has consistently fallen until 2022, when the threat level was reduced.

Figure 4.1



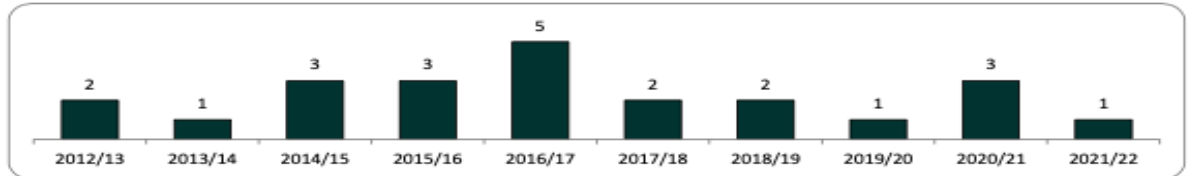
4.13 Figure 4.2 shows a breakdown of PSNI recorded security related incidents, which include both National Security attacks and other security related incidents by type from 2012/13 to the current review period. Again, the downward trend is apparent in all categories, with only a moderate decline in the numbers of arrested and charged (Figure 4.2).

4.14 From these comparisons, the steady longer-term improvement in the security situation is apparent. However, the threat level in Northern Ireland remains substantially higher than in the rest of the UK, in spite of this. The Office for National Statistics (ONS)<sup>7</sup> data shows that from April 2003 until 31 March 2021. There were 93 deaths, including 57 deaths in 2005 due to the London Bombing and three attacks in 2017 (Westminster Bridge and Palace, 6 deaths, Manchester Arena, 23 deaths and London Bridge, 11 deaths) excluding perpetrators, whereas the equivalent figure for Northern Ireland alone is 87<sup>8</sup> for the same period.

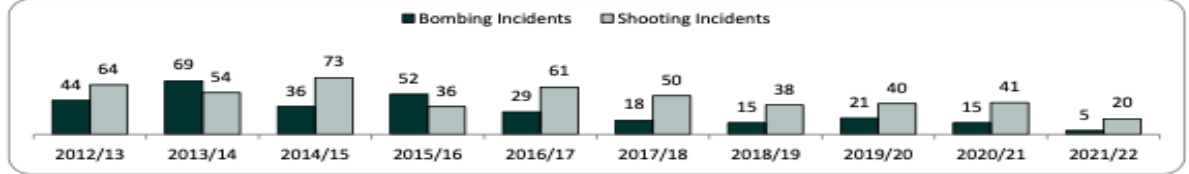
<sup>7</sup> <https://commonslibrary.parliament.uk/research-briefings/cbp-7613/>

<sup>8</sup> <https://cain.ulster.ac.uk/issues/violence/deaths2021draft.htm>

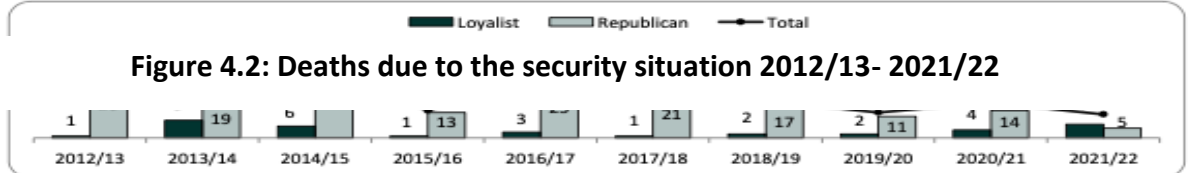
**Figure 2: Number of deaths due to the security situation 2012/13 – 2021/22**



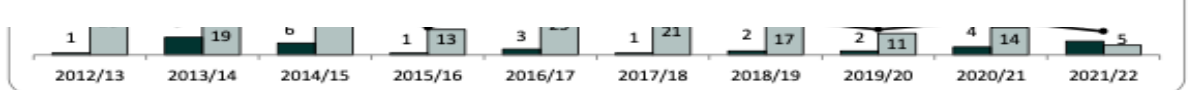
**Figure 3: Number of shooting and bombing incidents 2012/13 – 2021/22**



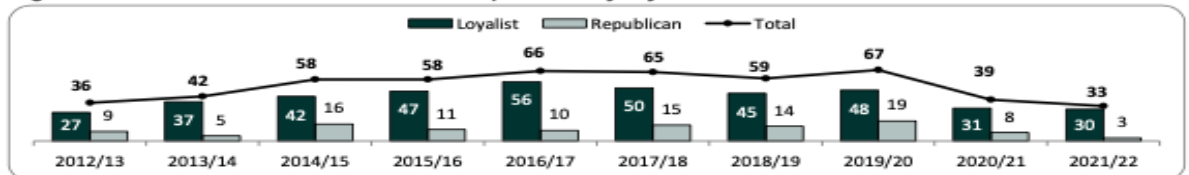
**Figure 4: Number of casualties as a result of paramilitary style shootings<sup>(1,2)</sup> 2012/13 – 2021/22**



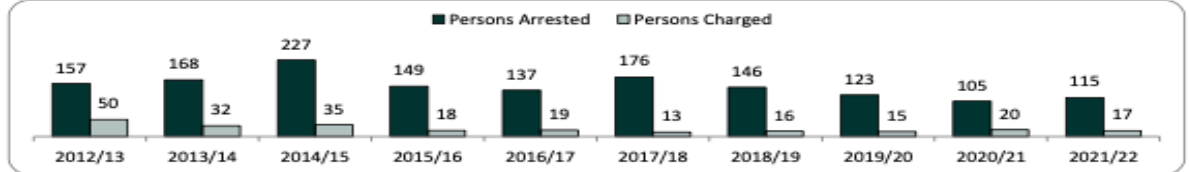
**Figure 4.2: Deaths due to the security situation 2012/13- 2021/22**



**Figure 5: Number of casualties as a result of paramilitary-style assaults<sup>(1,2)</sup> 2012/13 – 2021/22**



**Figure 6: Number of persons arrested under Section 41 of the Terrorism Act & subsequently charged with any offence 2012/13 – 2021/22**



(1) Paramilitary style assaults/shootings that result in death are counted as security related deaths and are not reflected in the paramilitary style assault/shooting figures. (2) Attribution is as perceived by PSNI based on the information available at the time of the incident and does not necessarily indicate the involvement of a paramilitary organisation.

Source: PSNI Statistics

Paramilitary style assaults/shootings that result in death are counted as security related deaths and are not reflected in the paramilitary style assault/ shooting figures  
 Attribution is as perceived by the PSNI based on information available at the time of the incident and does not necessarily indicate the involvement of a paramilitary organisation.

## POLICING THE THREAT

4.15 During 1 August 2021 to 31 July 2022:

- there was one security-related death, the same number as during the previous 12 months.
- there were fewer bombings, shootings and paramilitary style attacks than during the previous 12 months.
- there were 4 bombing incidents, compared to 13 in the previous 12 months and 26 shooting incidents, compared to 34.
- there were 32 casualties of paramilitary style assaults, compared to 38 in the previous 12 months. All 32 casualties were aged 18 years or older.

- there were 10 casualties of paramilitary style shootings compared to 18 during the previous 12 months. All 10 casualties were aged 18 years or older.
- there were 120 security-related arrests under Section 41 of the Terrorism Act 2000, the same number as during the previous 12 months.
- 17 persons were subsequently charged, compared to 22 during the previous 12 months.
- These figures include an attempted attack by the new IRA when shots were fired on 15 August at the PSNI in Derry Londonderry at an anti-internment commemoration bonfire

**Table 4.2: Security situation statistics in Northern Ireland by attribution**

	August 21 -July 22**			Total
	***Loyalist	Unknown		
Security Related Deaths	1	0	0	<b>1</b>
Shooting Incidents	14	12	0	<b>26</b>
Bombing Incidents	2	2	0	<b>4</b>
Casualties of paramilitary-style assaults	5	27	0	<b>32</b>
Casualties of paramilitary-style shootings	3	7	0	<b>10</b>
Firearms found	0	9	14	<b>23</b>
Explosives found (kg)	0.48	0	0.00	<b>0.48</b>
Rounds of ammunition found	0	1,238	610	<b>1,848</b>
Arrests under S41 TACT	88	32	0	<b>120</b>
Arrests under S41 TACT & subsequently charged	8	9	0	<b>17</b>

**Source: PSNI Statistics**

\*Further information, including definitions of the above types of incidents, can be found in the Security Situation Statistics User Guide at the following link: [www.psni.police.uk/SecuritySituationStatistics](http://www.psni.police.uk/SecuritySituationStatistics)

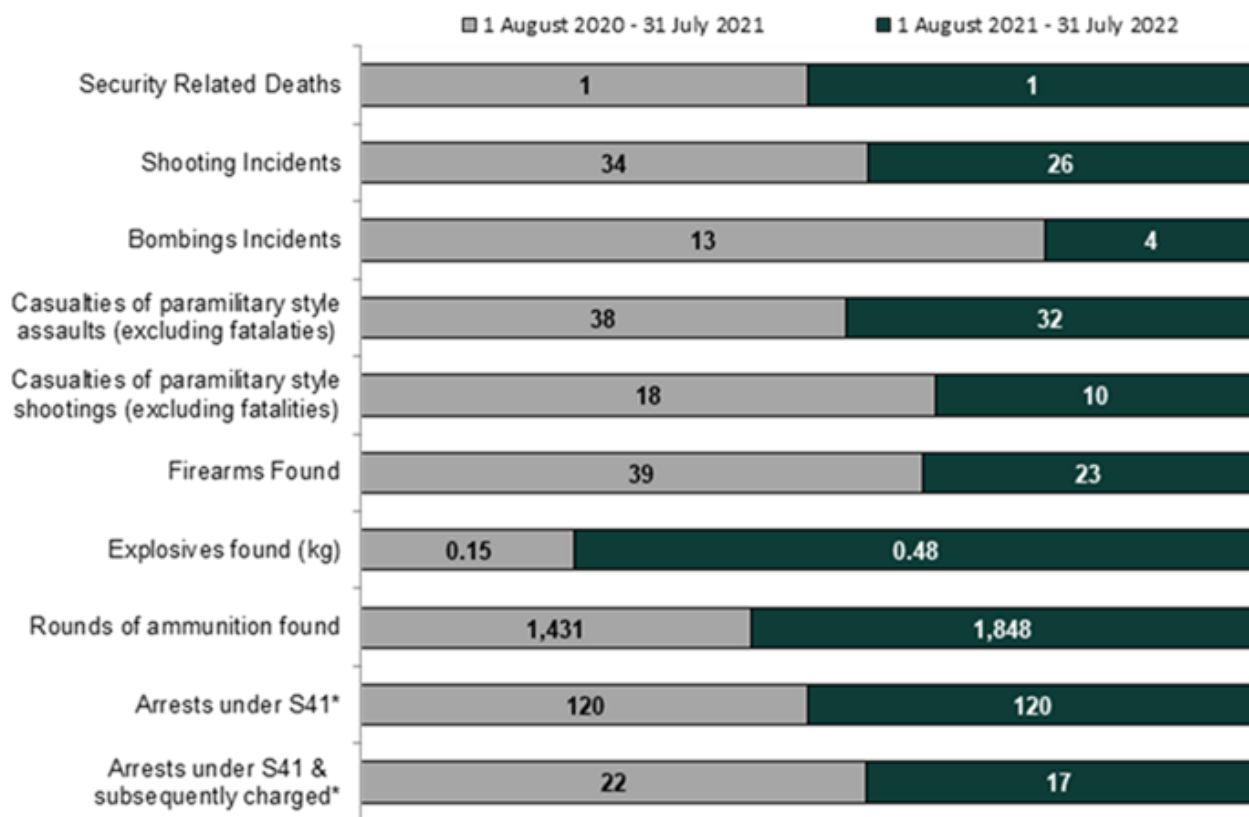
\*\*Figures are provisional and subject to change.

\*\*\*Attribution is as perceived by PSNI based on the information available at the time of the incident and does not necessarily indicate the involvement of a paramilitary organisation.

Figure 4.3 summarises the number of security related incidents during the past 12 months compared to the previous 12 months.



**Figure 4.3: Comparison of security incidents between 1 August 2020 – 31 July 2021 and 1 August 2021 – 31 July 2022.**



From Figure 4.3 it is apparent that whilst there has been one security-related death in both the previous and this review period, all other incidents have declined: shooting incidents declined from 34 to 26 in this review period; bombing incidents from 13 to 4, paramilitary style assaults from 38 to 32 paramilitary style shootings from 18 to 10. Conversely, although the numbers of firearms found have declined from 39 to 23, explosive finds have increased from 0.15 to 0.48 kgs, finds of rounds of ammunition increased from 1431 to 1848. Numbers of arrests remained the same (120) while S41 arrests that led to charges being made declined from 22 to 17.

#### **THE CURRENT THREAT LANDSCAPE**

4.16 Violent dissident republicans remain intent on attacking those who work to disrupt those threats. In spite of the successes achieved by the police and security partners and the very limited support for violent dissident republican (VDRs) activities, attacks and attempted attacks by VDRS remain likely.

4.17 The continued implementation of the NI Protocol and loyalist reaction to any impact that it has on the constitutional position of Northern Ireland is a cause of tension and anger in the Protestant Unionist Loyalist (PUL) community and is likely to remain so in the forthcoming period. Following a lull in 2021, the level of protest activity associated with the PUL community increased significantly during this reporting period but was suspended while HMG and the EU initiated negotiations in an attempt to resolve the NI Protocol.

#### **TACKLING PARAMILITARISM**

4.18 Risks to security and threats to local communities in Northern Ireland largely arise because of the continued existence of armed paramilitary organisations, sections of which are involved in murder, attempted murder, intimidation, violence, drug dealing, and people trafficking and sexual exploitation. It follows that the ending of paramilitarism would lead to improvements in the security situation thereby ending or reducing the need for additional legislation such as the JSA. This applies to the argument for Non-Jury Trials (reviewed in Part 2 of this report alongside ‘suspicionless’ stop and search and allied powers available to the PSNI in Sections 21-28 of the JSA (reviewed in Section 5 of this report).

4.19 Multiple and sustained government initiatives have aimed to end paramilitarism. These initiatives and details of the support provided by the UK and Irish governments are set out in detail in the 14<sup>th</sup> report to parliament at paragraphs 4.10 - 4.14. The work to end paramilitarism undertaken by the Northern Ireland Executive relies on both law enforcement and socio-economic and community intervention.

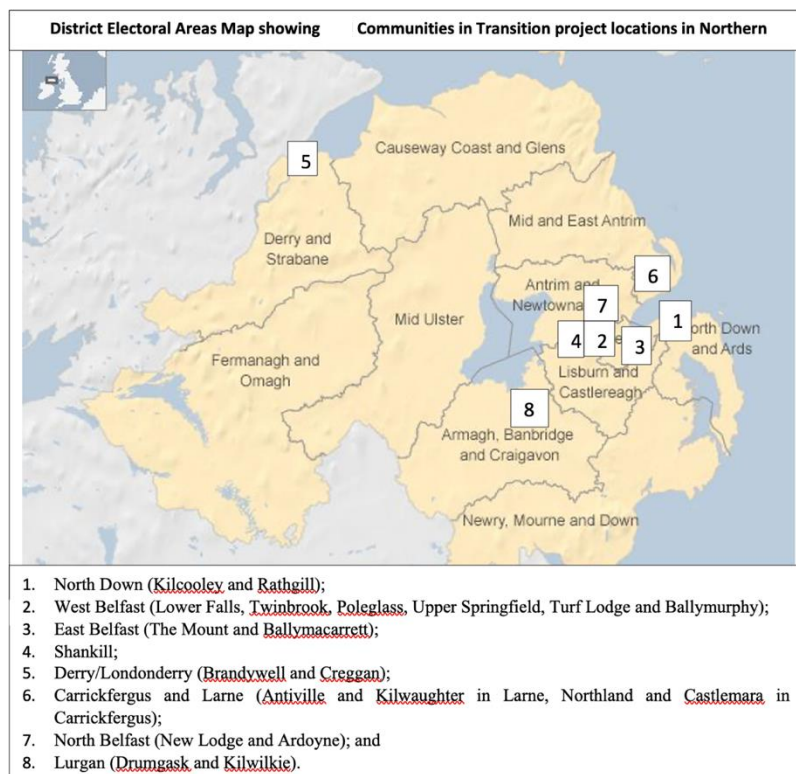
4.20 The cross-Executive Tackling Paramilitarism, Criminality and Organised Crime programme is based on the work of the Fresh Start panel involving four approaches: promoting lawfulness; support for transition; tackling criminality; and assessing systemic issues. The Programme’s overall aim is to achieve safer communities, resilient to paramilitarism, criminality and coercive control. The majority of actions in their Action Plan were completed in phase 1 of the programme, and the uncompleted actions were brought into phase 2. Through over 80 projects and interventions, the Programme aims to addressing complex, longstanding issues. Programme activity supports at least one of two key longer-term objectives: people and communities are safe from the harm caused by paramilitarism (Workstream one); and people and communities are more resilient to paramilitary influence and involvement in

paramilitarism, criminality and organised crime (Workstream two). The Communities in Transition (CiT) project has been awarded £10 million funding for the three-year financial period April 2021 – March 2024. This project sustains the efforts to build capacity and support in communities which are most impacted by paramilitary activity and coercive control. CiT schemes are led by The Executive Office and targeted at priority areas. Work to date has focused on seven key emerging themes: Community Safety and Policing; Addressing the needs of young people; Health and Wellbeing; Environment and Culture; Community Development Issues; Restorative Justice and Restorative Practice; and Personal Transition. These are

- North Down (Kilcooley and Rathgill);
- West Belfast (Lower Falls, Twinbrook, Poleglass, Upper Springfield, Turf Lodge and Ballymurphy);
- East Belfast (The Mount and Ballymacarrett);
- Shankill; Derry/Londonderry (Brandywell and Creggan);
- Carrickfergus and Larne (Antiville and Kilwaughter in Larne, Northland and Castlemara in Carrickfergus);
- North Belfast (New Lodge and Ardoyne); and
- Lurgan (Drumgask and Kilwilkie).

4.21 It is notable that there are no CiT projects in council areas **Mid-Ulster; Lisburn and Castlereagh; Fermanagh and Omagh; Newry, Mourne and Down;** or **Causeway Coast and Glens Council** areas, so almost half the population of Northern Ireland live in council areas where there are no CiT projects, since they are not deemed to be priority areas. However, CiT is one project among the much wider package of delivery under the TPP and the wider programme includes delivery in geographical areas that extend beyond those covered by CiT and the TPP may provide funding for other projects in areas outside those covered by CiTs. The DOJ differentiated response across Northern Ireland reflects a reality that for many in Northern Ireland, violent paramilitarism is something that usually happens elsewhere, whilst for others it is an everyday reality.

**Figure 4.4 Location of CiT projects in Northern Ireland**



4.22 Those working to disrupt or end paramilitarism must take account of wide variations in the forms that paramilitarism takes across the various districts and tailor policing and other intervention strategies to local conditions. What is appropriate in Belfast will not necessarily be appropriate in Ballymoney or Dungannon.

4.23 Other communities that have been blighted by paramilitarism but not identified as priority areas, including some of the areas I visited this year such as parts of North Antrim, have not benefited from the CiT scheme although the extension of this work into other areas may well be beneficial. In their fourth report in December 2021, the Independent Reporting Commission (IRC) also urged the Governments to establish a Group Transition process whereby organisations can transition out of paramilitarism<sup>9</sup>.

4.24 Particularly in relation to those areas where there are low levels of crime associated with paramilitarism, I note the Independent Reporting Commission's (IRC) recommendations that engagement with a view to opening a path to transition for paramilitary groups should

<sup>9</sup> See <https://www.ircommission.org/files/ircommission/2023-03/IRC%20Fifth%20Report%20-%20Web%20Accessible.pdf>

begin. The approach may be appropriate for some elements of these groups, often found in more rural locations and who are not involved in criminality. The results of the work undertaken by the Reference Group, the International Committee of the Red Cross and others can be seen across a number of areas outside those covered by CiTs. Many of those in the community who have been engaged with this work are now readying themselves for transition.

4.25 Any consideration of direct engagement with paramilitary groups has been stymied by the involvement of some branches of each of the paramilitary groups in violence, intimidation and criminality. If the paramilitary groups are dealt with as single units, then those wings of sub-groups of the organisation who are involved in violence, intimidation and other forms of crime are obstacles to those in other sub-groups within the same organisation, who have forsworn such illegal activities, from advancing towards transition. **Some form of sub-group direct engagement with a view to transition may well be worthy of serious consideration.** A more detailed analysis of this is contained in my additional paper to the Northern Ireland Affairs Committee's **Inquiry into the effect of paramilitary activity and organised crime on society in Northern Ireland**<sup>10</sup>.

4.26 Both the celebrations for the Northern Ireland 100<sup>th</sup> anniversary and a parade, which took place on 28 May 2022, and the Queen's Platinum Jubilee celebrations from the 2 to 5 June occurred without significant incident. In the lead-up to the July celebrations by the Orange Order, more than 250 bonfires were built in loyalist neighbourhoods across Northern Ireland, most built by stacking wooden pallets. Police consider around a dozen of these potentially problematic. This included a bonfire at Adam Street in the loyalist Tiger's Bay area of north Belfast. Nationalist residents on the other side of the peace-line in New Lodge estate claim that it is too close to the interface between the two communities. The atmosphere and concerns about safety around bonfires may have been subdued by the death of a bonfire builder on 9 July 2022 in the Antiville Estate, Larne. Another Larne bonfire in Craigyhill estate measuring 202.3ft high broke the world record for the tallest bonfire. On July 12, there were 573 loyal order parades, 33 of which follow routes that are deemed to be sensitive.

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<sup>10</sup> See <https://committees.parliament.uk/writtenevidence/117412/pdf/>

- 4.27 The Twelfth of July celebration period is the busiest and most resource-intensive time of the year, followed by the Eleventh Night. July 2022 saw 2,500 police officers on duty on the Twelfth, around a third of the strength of the PSNI. There were eleven crimes recorded following the burning of posters, flags and effigies of female politicians on a number of bonfires.
- 4.28 The most significant incidents in this review period arose in the context of protests and disorder linked to the Northern Ireland Protocol. These included the hijacking of a bus in Newtownards on 1 November 2021 by two masked men who subsequently burnt the bus. There was another bus hijacking in Newtownabbey on 7 November 2021 carried out by four masked men. During the month of November, there was continuing public disorder involving young people at interfaces in Stewartstown Road, Falls and Lanark Way and the Northern Ireland Electricity sub-station on the Springfield Road was petrol bombed and sustained significant damage. In February 2022, two further large-scale anti-Protocol events took place. On 10 February 2022 the Orange Order in County Down hosted a rally, and a second in Markethill, County Armagh was organised by Mid-South Armagh Grassroots Unionist Collective against the Northern Ireland Protocol. Twenty-six bands and an estimated 7,000-9,000 people attended. The Markethill rally passed off relatively peacefully despite some guest speakers being jeered by the crowd. Another large-scale event took place in Lurgan on 8 April 2022 attended by approximately 1000 people. On 30 April 2022, a smaller event attended by six bands was organised in Bangor by the United Unionists Against the Protocol. Many other smaller scale events also took place at a number of locations across Northern Ireland throughout the reporting period.
- 4.29 Throughout the reporting period there continued to be protests against the government restrictions associated with the pandemic including anti-vaccination demonstrations. These were both small and larger scale events held at various locations across Northern Ireland, notably:
- A “Freedom of Choice” protest at City Hall, Belfast on 31 December 2021 attended by 1500 people, and resulting in a road closure due to the size of the crowd.

- An Anti-vaccination cum anti-lockdown protest at City Hall, Belfast on 15 January 2022 attended by approximately 400 protestors. Police issued warnings as protestors proceeded along the road in an unlawful procession.

4.30 Other protest demonstrations during this were associated with a range of causes.

- **Pro-choice, Pro-life and anti-abortion protests** have taken place at various locations across Northern Ireland, including hospitals and clinics. Although the majority pass off peacefully there have been complaints from those in the clinics about the distressing images on display during some protests which face those attending the clinics;
- **Republican** protests associated with Dissident Republican politics occurred at a number of PSNI stations and at locations where PSNI recruitment drives were taking place;
- Around 120-150 protestors rallied by The 1916 Societies for Irish Unity protested in Newtownbutler on 24 October 2021, but the gathering passed off peacefully;
- A number of **Palestine Solidarity demonstrations took place in** Armagh, Dungannon and Derry Londonderry in January 2022. These were attended by small numbers of people, were peaceful and passed off without incident;
- A number of **Workforce Disputes** involved street protests at Larne Harbour and at the Guildhall, Derry Londonderry in March and April 2022 in support of 800 P&O workers who were sacked;
- A small number of **environmental protests** were held during the reporting period. In September 2021, **Communities Against the Injustice of Mining** held a protest outside PSNI HQ and a letter was passed to the Chief Constable highlighting concern about the Dalradian Goldmine in Omagh. Around 2000 people in Belfast City Centre attended a climate change march and rally to coincide with COP 26 on 6 November 2021. A second climate change protest was attended by a large crowd in Guildhall Square, Derry Londonderry on 6 November 2021 and it, too, passed off peacefully.
- Around 150 people in Writers' Square, Belfast on 27 November 2021, attended a Reclaim the Night rally protesting against violence against women and girls. A number of vigils were held in January 2022 in memory of Ashling Murphy who was murdered on 12 January 2022 in County Offaly, the largest of which was attended by approximately 400 people at City Hall, Belfast.

- Fiona Donohoe accompanied by a crowd of approximately 100 supporters gathered at PSNI HQ on 25 February 2022 and relayed her concerns to a senior PSNI officer about the investigation into her son's death. A second protest with around 40 protesters took place outside NI Policing Board on 03 March 2022. Fiona Donohoe spoke with the Chief Constable and an Assistant Chief Constable about the Public Interest Immunity process issued in relation to her son's death. Supporters at these protests held banners stating "No to PII".

4.31 During this reporting period, there was some disorder associated with a small number of football matches. This included:

- A fight that broke out at a licensed premises in January 2022 at Coleraine Showgrounds following Coleraine v Linfield match involving Linfield supporters. One male was assaulted with a bottle in a separate incident;
- In March 2022 smoke bombs were set off, fireworks were thrown and approximately 20 youths invaded the pitch at Windsor Park following a Cliftonville v Coleraine football match;
- In April 2022 at the Oval Stadium at a Glentoran v Cliftonville match nine flares were thrown on the pitch;
- Also in April 2022, on the same date at a Linfield v Coleraine match in the National Stadium an un-notified procession took place prior to the match.

4.32 Neither water cannons nor Attenuating Energy Projectiles (Impact Rounds) (AEPs) were deployed in any of these public order situations.



## SECTIONS 21-28: STOP AND SEARCH RELATED POWERS

- 5.1 In the 14th report, I outline the powers available to the both the PSNI and the police in England and Wales under the Police and Crime Evidence (Northern Ireland) Order 1989 (PACE NI) and the Misuse of Drugs Act 1971 (MDA) and associated Codes of Practice based on 'reasonable suspicion'. As I set out in paragraphs 5.1–5.2 of the 14th report, the PSNI have additional stop and search powers under the JSA. The closest equivalent powers in England and Wales were the powers under section 44/47A of the Terrorism Act 2000 (TACT) and section 60 of Criminal Justice and Public Order Act 1994, which dispensed with the 'reasonable suspicion' requirement.
- 5.2 However, after *Gillan and Quinton v. the United Kingdom* in 2010<sup>11</sup>, which found that the stop and search powers under section 44 of TACT, amounted to the violation of the right to a private life, the powers were amended by the Protection of Freedoms Act 2012 (PoFA). Changes were also made to the JSA, specifically the introduction of the authorisation process, in order to reflect the findings of the European Court.
- 5.3 In the 14th report, I set out the purpose of the Schedule 3 JSA powers and how they relate to other powers (paragraph 5.6) and the legislative context for those powers (paragraph 5.7).
- 5.4 In reading and interpreting the data on JSA stop and search, and indeed other stop and search data, I note what may be a recording issue. The PSNI complete a record of each person and each vehicle searched. However, if a person is in a vehicle and both are searched, and the object and grounds of the search are the same, only one record needs to be completed by an officer. If more than one person in a vehicle is searched, the officer must make separate records for each search of a person. This recording practice is outlined in Para 4.5 of Code A PACE Code of Practice. Therefore, for example, when a vehicle is stopped containing 4 passengers who were searched, 4 separate records would be submitted by the officer; this would be reported in the data figures as 4 persons searched. NISRA confirm that all of the statistics they have provided to me refer to the number of persons stopped and searched/questioned but which may **also** involve vehicles

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being searched during the same incident. The data excludes vehicle-only searches where no persons are searched during the incident. It would make for greater clarity if stop and search data could be recorded, published and analysed on two distinct counts. First, the number of people stopped and second the number of stops. These counts yield rather different results and it is not clear whether the interface on Origin, the electronic interface used by the PSNI to record such data, and other such methods in use, facilitate such differentiation and detail in data collection. When a vehicle is stopped containing four individuals, it should be possible to simultaneously record that incident as one stop and as a stop of four individuals. As it is, this differentiation is not always clear in the data currently provided on stop and search. **I recommend that PSNI ensure that data collection methodology for JSA stop and search is made capable of collecting both the numbers of stops and the numbers of individuals stopped and that the collected data is analysed so that this differentiation is always clear.**

## **TRENDS - NUMBERS AND RATES**

5.5 The overall downward trend in the use of stop and search powers has remained consistent in this review period. These are the lowest overall stop and search figures in ten years, marking a consistent decline since 2017. Ramsey ruled that “If the power is properly exercised therefore it will be used against known DRs and others otherwise involved in munitions<sup>12</sup>”. If the power is used in compliance with this ruling, its use will be infrequent and specific to locations where known DRs and others are located. Used alongside other powers to stop and search which require reasonable suspicion, JSA powers should be powers of last resort. Hence, the downward trend is appropriate as the full implications of the law and jurisprudence are applied. During the 12 months between 1 August 2021 and 31 July 2022:

- 20,313 persons were stopped and searched/questioned under all powers, 24% fewer than the previous 12 months;
- 73% of those stops were conducted under the Misuse of Drugs Act<sup>13</sup> (arrest rate 5%) and 12% of stops were conducted under PACE NI<sup>14</sup> (arrest rate 21%);

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<sup>12</sup> Ramsey (Stephen) Application No2 [2020] NICA 14 [30] citing para 7.9 of Eighth Report of the Independent Reviewer

<sup>13</sup> Alone or in combination with other powers

<sup>14</sup> Alone or in combination with other powers

- 13% of stops were conducted under the Justice and Security Act Section 24<sup>15</sup> (arrest rate 1%) and 2% under the Justice and Security Act Section 21<sup>16</sup>(arrest rate 1%);

the number of stop and searches decreased under each of the most frequently used powers, namely:

- PACE NI decreased by 27%,
- MDA by 22%,
- JSA Section 21 by 27%
- the JSA section 24 by 33%

compared to the previous 12 months.

5.6 The total number of stops under other less frequently used powers decreased by a small number compared to the previous 12 months. Counter terrorism powers accounted for 15% of all stops, compared to 17% during the period July 2021 to June 2022. Overall, 6% of stops resulted in an arrest. An additional 16% resulted in another form of outcome, e.g. Community Resolution Notice.

5.7 Figures in tabular form allow for a direct comparison, and the trends are visible in diagrammatic form in Figure 5.1.

**Table 5.1**

**Table 2: Number of times each power was used for a stop and search/question during July 2021 to June 2022 compared to the previous 12 months<sup>(1)</sup>**

Legislation	July 2020 - June 2021		July 2021 - June 2022	
	Number of persons stopped	Subsequent arrest rate <sup>(2)</sup>	Number of persons stopped	Subsequent arrest rate <sup>(2)</sup>
PACE	3,447	17%	2,520	21%
Misuse of Drugs Act	19,043	5%	14,742	5%
Firearms Order	31	29%	45	20%
TACT S43	34	0%	47	9%
TACT S43A	4	0%	11	0%
TACT 47A	0	.	0	.
JSA Section 21	552	<1%	372	1%
JSA Section 24	4,085	1%	2,577	1%
Other <sup>(3)</sup>	67	4%	56	4%

(1) As more than one legislative power can be used to stop and search/question a person, the sum of the powers used will be greater than the total number of persons stopped and searched/questioned.

(2) For those persons stopped under a combination of legislative powers (1% of stops) and subsequently arrested, the arrest will be counted under each power. Reason for arrest may not be linked to the initial reason of the stop and search. Arrest rates are counted to the nearest whole number.

(3) 'Other' legislative powers are listed in Section 10.2

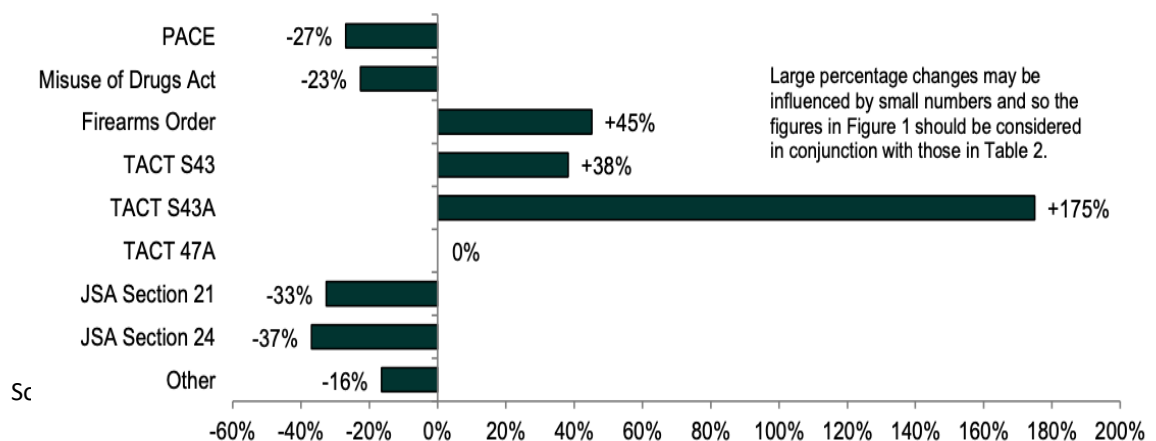
<sup>15</sup> Alone or in combination with other powers

<sup>16</sup> Alone or in combination with other powers

- The most commonly used stop and search power (73% of all stops) is the MDA, which has seen a reduction of 23% during the period July 2021 to June 2022 and 22% in this review period. The arrest rate for this power is 5%;
- The second most commonly used power (13% of all stops) is JSA section 24 and these stops fell by 37% in the calendar year, and 33% in the review period. Since this power accounts for 12.7% of all persons stopped, and with a low arrest rate of 1%, this is particularly welcome;
- The third most used power is under PACE NI (12%) and these decreased by 27% in both the review period and the calendar year. PACE NI stops has a much higher arrest rate of 21%;
- This is followed by JSA section 21 that accounts for 1.8% of the total stops and these are reduced by 33% during the period July 2021 to June 2022. This power has an arrest rate of 1.1% so this reduction is also very welcome.

**Figure 1**

**Figure 1: Percentage change in the number of stop and searches/questions by power during July 2021 to June 2022 compared to the previous 12 months**



5.8 Figure 5.1 represents the trends in the use of stop and search powers during the period July 2021 to June 2022, illustrating the decrease in the use of PACE NI, MDA and JSA powers and increases in the use of the Firearms Order, and TACT section 43 and 43a powers

5.9 The overall reduction of 24% from the last review period in stop and search is very welcome. As is shown in Table 5.1:

- The most commonly used stop and search power (73% of all stops) is the MDA, which has seen a reduction of 23% in the calendar year and 22% in this review period. The arrest rate for this power is 5%;
- The second most commonly used power (13% of all stops) is JSA section 24 and these stops fell by 37% in the calendar year, and 33% in the review period. Since this power accounts for 12.7% of all persons stopped, and with a low arrest rate of 1%, this is particularly welcome;
- The third most used power is under PACE NI (12%) and these decreased by 27% in both the review period and the calendar year. PACE NI stops has a much higher arrest rate of 21%;
- This is followed by JSA section 21 that accounts for 1.8% of the total stops and these are reduced by 33% in the calendar year. This power has an arrest rate of less than 1% so this reduction is also very welcome.

5.10 The large percentage increase during the period July 2021 to June 2022 in the use of counter terrorism powers masks the comparatively small numbers of these stops, 47 under TACT section 43, 11 under TACT section 43a and none under TACT section 47a, compared with 372 under JSA section 21 and 2577 under JSA section 24.

5.11 Table 5.2 shows the number of premises searched under JSA s24 by month and district during the current reporting period, August 2021 to July 2022. In Table 5.2, it is apparent that there are months in all districts when the JSA section 24 powers are not used; and three districts in which the powers were not used at all:

- Lisburn and Castlereagh City;
- Armagh City, Banbridge and Craigavon; and
- Antrim and Newtownabbey.

**Table 5.2 Number of premises searched under JSA S24 by month and district: 1 August 2021 - July 2022<sup>17</sup>**

	Aug-21	Sep-21	Oct-21	Nov-21	Dec-21	Jan-22	Feb-22	Mar-22	Apr-22	May-22	Jun-22	Jul-22	Total
Belfast City	0	1	0	4	3	0	0	3	3	5	3	0	22
<b>Lisburn &amp; Castlereagh City</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
Ards & North Down	0	0	0	2	0	0	0	0	0	0	0	0	2
Newry, Mourne & Down	0	0	3	0	0	0	1	0	0	0	0	0	4
<b>Armagh City, Banbridge &amp; Craigavon</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
Mid Ulster	0	0	0	0	0	0	0	0	0	1	0	0	1
Fermanagh & Omagh	0	0	0	0	0	0	0	1	0	1	0	0	2
Derry City & Strabane	1	3	2	0	2	0	4	7	7	3	5	1	35
Causeway Coast & Glens	4	0	0	3	0	0	4	2	2	1	1	0	17
Mid & East Antrim	0	0	0	0	0	0	0	0	0	0	4	0	4
<b>Antrim &amp; Newtownabbey</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>Northern Ireland</b>	<b>5</b>	<b>4</b>	<b>5</b>	<b>9</b>	<b>5</b>	<b>0</b>	<b>9</b>	<b>13</b>	<b>12</b>	<b>11</b>	<b>13</b>	<b>1</b>	<b>87</b>

There are three districts (Ards and North Down, Mid-Ulster and Mid and East Antrim) in which the section 24 powers were only used in one month; and two districts (Newry Mourne and Down and Fermanagh and Omagh) in which the powers are used in only two of the twelve months.

**Is the downward trend proportionate to the noted improving security situation?**

5.12 The Northern Ireland Human Rights Commission has written to me in the following terms:

“In your first report you noted a downward trend in the use of stop and search powers, it would be welcome if in your next report if you could explore whether the downward trend was proportionate to the noted improving security situation. You also noted increases in the number of stop

<sup>17</sup> Data is based on information recorded as at November 2022.

and search powers under the Misuse of Drugs Act and PACE NI, it would be informative if you could explore whether searches are being conducted under these powers that may have previously been conducted under the JSA.”

5.13 First, the use of JSA powers should be proportionate to the threat level, which if sufficiently reduced, would permit the retiring of JSA powers altogether. As set out in some detail in Section 4 above, the threat level in Northern Ireland was ranked as ‘SEVERE’ (an attack is highly likely) and was then lowered in March 2022 to SUBSTANTIAL (an attack is likely). The reduction in the overall use of JSA stop and search, on the face of it, would appear to reflect the improved security situation. Table 5.3 shows the ten-year trend in the use of the various powers of stop and search, and it is apparent that the use of all powers have declined in that period, with the smallest decline in the use of PACE NI, MDA and Firearms powers. Whereas these powers accounted for only 66% of all stops in 2012/13, they accounted for 83% in 2021/22, and counterterrorism powers (see footnote 5 of Table 5.4) accounted for 33% in 2012/13 and only 16% in 2021/22 (see Table 5.3).

**Table 3: Ten year trend in the use of stop and search/question powers**

	12/13	13/14	14/15	15/16	16/17	17/18	18/19	19/20	20/21	21/22
PACE / Misuse of Drugs / Firearms	20,910	24,428	22,189	25,151	21,876	22,628	21,062	19,842	22,530	19,136
TACT - Section 43/43A	186	173	192	344	265	118	74	38	35	57
- Section 47A <sup>(3)</sup>	0	70	0	0	0	0	0	0	0	0
JSA - Section 21	2,803	2,350	1,922	2,812	2,200	1,505	1,283	997	456	471
- Section 24	7,687	6,239	3,906	6,980	7,935	6,245	6,035	4,818	3,739	3,195
Other legislative powers	294	417	190	97	140	32	79	21	49	93
<b>Total uses of each legislative power <sup>(2,4)</sup></b>	<b>31,880</b>	<b>33,677</b>	<b>28,399</b>	<b>35,384</b>	<b>32,416</b>	<b>30,528</b>	<b>28,553</b>	<b>25,716</b>	<b>26,809</b>	<b>22,952</b>
<i>Total number of persons stopped and searched/questioned <sup>(2,4)</sup></i>	30,502	32,590	27,539	34,171	31,274	29,882	28,116	25,450	26,590	22,823

5.14 The security situation can be crudely gauged according to the increasing or declining number of attacks and incidents (see Figure 4.3). However, the number and recency of attacks and incidents is subject to sudden change due to the

existence of latent risks discussed in Section 4. Policing operations must therefore not only respond to attack but also act pre-emptively to manage risks. So, JSA powers are both responsive to the security situation and anticipatory of it, in the sense that policing powers ought to be used to at least maintain, if not drive down, the risk and frequency of attack. Of course, the question remains about whether measures such as JSA stop and search are effective in achieving such ends, a matter which will be discussed when we come to consider authorisations of JSA Section 21 -29 powers, below.

**Table 4: Percentage of stops carried out under non-counter terrorism powers and counter-terrorism powers**

PACE / Misuse of Drugs / Firearms	66%	73%	78%	71%	67%	74%	74%	77%	84%	83%
Counter Terrorism Powers <sup>(5)</sup>	33%	26%	21%	29%	32%	26%	26%	23%	16%	16%
Other legislative powers	1%	1%	0.7%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%
<b>All Powers <sup>(7)</sup></b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

(1) Figures in this section are based on financial year.

(2) The difference between **total uses of each legislative power** and **total number of persons stopped and searched/questioned** will be due to persons stopped under combinations of powers being counted under each legislation used (e.g. someone stopped under PACE and the Misuse of Drugs Act will have a count of one under each of these powers).

(3) TACT Section 47A has been in place since March 2011 although the power has only been authorised for use during one period in May 2013.

(4) Searches under the authority of a warrant and searches that have been carried out after an arrest have been excluded from the 2017/18 figures onwards (impact is an approximate 2.5% reduction in the total number of persons stopped).

(5) TACT S43, S43A and JSA S21, S24.

(6) Percentages may not sum to 100% due to rounding.

(7) Figures from 2004/05 can be found in the accompanying spreadsheet.

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5.15 Second, from the data set out in Tables 5.5a, 5.5b, and 5.6 it is clear that the frequency with which the powers are used varies widely across policing districts. Mapping such variation exactly on to the level of threat, it is apparent from more detailed inquiries that it is in districts where the threat from dissident republicans is most intense that the powers are most used. It is less clear, partly to do with the way the threat is defined and assessed, the extent to which the use of powers map onto threats from other sources such as loyalist groups for example. It seems reasonable to conclude that the degree to which the powers are used is determined at least in part by the level of threat in a district. The issue of how effective the powers are at detecting or deterring attack is discussed below.

5.16 The NIHRC also asked, “**Are searches being conducted under these powers that may have previously been conducted under the JSA?**” In Figure 5.1 above, it is apparent that whilst searches conducted under PACE NI, MDA, and JSA powers have decreased in number, the greatest decrease is in the use of JSA powers, but



there is also a 22% decrease in the use of the MDA. The use of TACT sections 43 (+ 13 stops) and 43a (+7 stops) have increased by a total of 20 stops. In the context of 2,577 stops under JSA section 24 and 372 under JSA section 21, this is small beer. Furthermore, officers using the powers should and, I hope do, understand that where there they have reasonable suspicion, other powers, such as PACE NI, TACT or MDA, must be deployed in all instances. **The JSA powers are only to be used for the purposes of searching for illegal munitions or wireless apparatus, as the law requires, and for no other purpose.**

## RATES PER POPULATION

5.17 Comparing the stop and search rate for England and Wales (for the period 1st April 2020 to 31st March 2021<sup>18</sup>, with the latest comparative data available it appears that the PSNI overall stop and search rate, not including the JSA powers was 12 per 1000 population<sup>19</sup>. This is the same as England and Wales, but dwarfed by a Metropolitan Police stop and search rate of 35 per 1000 population.

5.18 A variation across the districts in Northern Ireland is apparent in the data across Northern Ireland. Table 5.5a shows the numbers of JSA section 24 stops across PSNI districts for the past six years broken down by financial year. Table 5.5b shows these data for the past five years broken down by the review period (1 August - 31 July). In all but Belfast and Ards and North Down, there were fewer stops than in the previous 12 months.

District	Financial Year						Total
	16/17	17/18	18/19	19/20	20/21	21/22	
Belfast City	1,678	1,095	1,153	863	708	1,020	<b>6,517</b>
Lisburn & Castlereagh	427	388	463	326	189	102	<b>1,895</b>
Ards & North Down	160	130	210	160	90	67	<b>817</b>

<sup>18</sup> Source: Use of Stop and Search Powers by the Police in Northern Ireland, PSNI Statistics Branch and Police powers and procedures, England and Wales, year ending March 2021

<sup>19</sup> PSNI overall stop and search rate is 12 per 1,000 population for the period April 2020 to March 2021 if stops under JSA Section 21 and Section 24 are excluded.

Newry, Mourne & Down	807	456	353	340	173	132	<b>2,261</b>
Armagh City, Banbridge & Craigavon	939	971	806	566	530	188	<b>4,000</b>
Mid Ulster	179	269	315	279	217	189	<b>1,448</b>
Fermanagh & Omagh	179	214	214	279	101	89	<b>1,076</b>
Derry City & Strabane	1,859	1,454	1,521	941	717	678	<b>7,170</b>
Causeway Coast & Glens	554	380	433	289	289	172	<b>2,117</b>
Mid & East Antrim	803	670	432	581	432	389	<b>3,307</b>
Antrim & Newtownabbey	350	218	135	194	293	169	<b>1,359</b>
<b>Total</b>	<b>7,935</b>	<b>6,245</b>	<b>6,035</b>	<b>4,818</b>	<b>3,739</b>	<b>3,195</b>	<b>31,967</b>
<b>Source: PSNI Statistics</b>							

5.19 The most prolific users of JSA section 24 powers are Derry City and Strabane District, and this reflects the assessment of the national security threat. There are greater numbers of stops than Belfast, an area of 44.4 square miles serving a population of 341,877 with an additional transient population of approximately 120,000<sup>20</sup>. The stop rate per 1,000 people for JSA section 24 for Belfast is 2.5 per thousand if the transient population is included and 2.8 per thousand if it is not. The population of the Derry City and Strabane District Council (DCSDC) area is estimated at 150,680<sup>21</sup>. This gives a JSA section 24 stop and search rate of 4.5 per thousand people in the DCSDC area, 70-80% higher than in Belfast District. It is noteworthy that the DCSDC area has a younger population profile than that for Northern Ireland (NI) as a whole, with 33.5% aged 24 and younger whereas the figure is 31.9% for the whole of Northern Ireland. Table 5.5b shows the use of JSA section 24 powers over the last 5 review periods (i.e. August – July).

District	Reporting period 1 August 2021 – 31 July 2022					Total
	Aug17 -Jul18	Aug18- Jul19	Aug19- Jul20	Aug20- Jul21	Aug21- Jul22	
Belfast City	1,065	1,268	681	869	897	<b>4,780</b>
Lisburn & Castlereagh	377	456	262	192	82	<b>1,369</b>
Ards & North Down	188	177	142	90	125	<b>722</b>
Newry, Mourne & Down	412	381	299	188	73	<b>1,353</b>
Armagh City, Banbridge & Craigavon	1,031	669	676	334	166	<b>2,876</b>

<sup>20</sup> PSNI website <https://www.psnipolice.uk/about-us/local-policing/belfast-city>

<sup>21</sup> <https://www.derrystrabane.com/Subsites/Derry-and-Strabane-Statistics/Population>

Mid Ulster	278	270	263	239	136	<b>1,186</b>
Fermanagh & Omagh	233	227	211	123	57	<b>851</b>
Derry City & Strabane	1,449	1,254	872	778	659	<b>5,012</b>
Causeway Coast & Glens	406	424	291	282	104	<b>1,507</b>
Mid & East Antrim	563	415	630	474	198	<b>2,280</b>
Antrim & Newtownabbey	200	116	214	328	108	<b>966</b>
<b>Total</b>	<b>6,202</b>	<b>5,657</b>	<b>4,541</b>	<b>3,897</b>	<b>2,605</b>	<b>22,902</b>
<b>Source: PSNI Statistics</b>						

5.20 Table 5.5a and 5.5b show the number of stops per district, permitting us to see in which districts the JSA section 24 powers are used most frequently.

5.21 The overall stop and search rates for all powers are shown in Table 5.6 as a rate per 1000 of population. For Northern Ireland as a whole, the rate for this review period is 11 people per 1000 population, compared with the previous review period when the rate was 14 per 1000 population. It is notable that the highest stop and search rate per 1000 for all powers (18) is found in Belfast City, considerably higher than Derry City and Strabane (13) where the VDR threat is highest. However, this rate derives from the use of all powers, including those targeting illegal drugs and other forms of criminality.

<b>Table 5.6 PSNI District Stop and Search Rates (all powers): August 2021 to July 2022</b>		
PSNI District	Arrest Rate	Stop and Search rate per 1000 population
Belfast City	8%	18
Lisburn & Castlereagh	6%	8
Ards & North Down	6%	4
Newry & Mourne	5%	9
Armagh, Banbridge & Craigavon	5%	11
Mid Ulster	3%	9
Fermanagh & Omagh	4%	12
Derry City & Strabane	7%	13
Causeway Coast & Glens	5%	5
Mid & East Antrim	4%	14
Antrim & Newtownabbey	6%	6
<b>Northern Ireland</b>	<b>6%</b>	<b>11</b>
<i>Source: PSNI Statistics Branch 2022</i>		

## OUTCOMES

5.22 Table 5.6 also shows the arrest rate for each district for all powers of stop and search. These rates vary between 3% (Mid-Ulster), 8% in Belfast and 7% in Derry City and Strabane and provide some indication of the effectiveness of stop and search at intercepting offenders. This means that between 97% and 93% of stops and searches do not lead to an arrest.<sup>22</sup> Of course, there are other criminal justice outcomes than arrest as is seen in Table 5.7 and 5.8, which deal with JSA stops and searches. We see, however, that all stop and searches under all powers are a broad brush that often does not yield results in terms of detecting crime beyond inconveniencing members of the public and utilising police time. My concern is with the effect that this inconvenience (and worse) has on police-community relations. We will return to the issue of effectiveness when we consider the authorisation process for JSA stop and search.

5.23 Tables 5.7 and 5.8 show the outcomes for all JSA section 21 and section 24 stops for this review period. I calculate the overall outcome rate for s21 stops at 2.6% and for s24 at 3.3%.

<b>Table 5.7: Outcome of stop and search under JSA s21: 01 August 2021 – 31 July 2022</b>		
Outcome	Number	%
Arrest	4	1%
Community Resolution	2	1%
Penalty Notice for Disorder	0	0%
Report to PPS	4	1%
No Further Action Disposal	369	97%
<b>Total</b>	<b>379</b>	<b>100%</b>
(1) The outcome may not be linked to the initial reason of the stop and search. For example if an individual is stopped under JSA S24 and during that search an officer finds illegal drugs, the individual may get a community resolution for possession of drugs. On the stop and search record that outcome will be recorded against a search under JSA S24. (2) Percentages may not sum to 100% due to rounding.		

<sup>22</sup> For context, 6% of all stops across all policing districts during the reporting period resulted in an arrest. An additional 16% of all stops resulted in another form of outcome, i.e. Community Resolution, Penalty Notice for Disorder or report to the PPS.

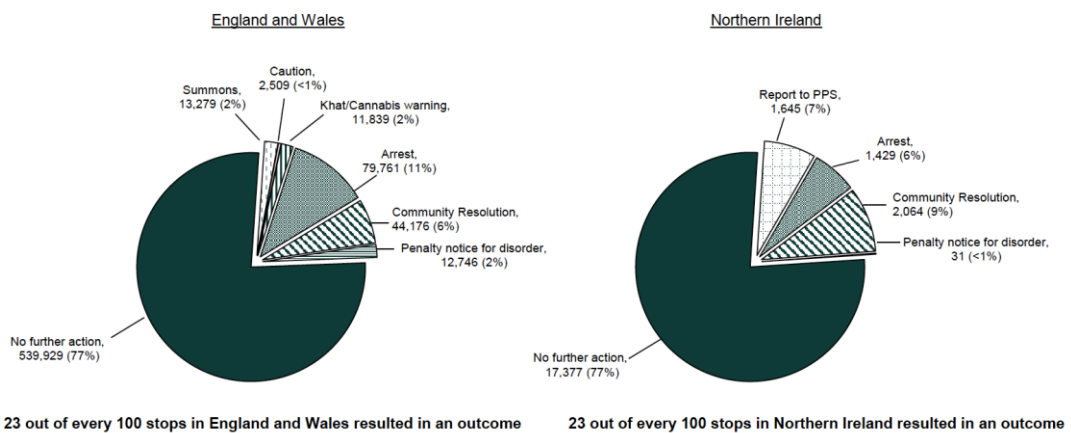
This places the overall outcome rate for both s21 and s24 at the lower end of the outcome rate for all powers as seen in Table 5.6. In both instances, the numbers of arrests and referrals to the PPS are similar.

Outcome	Number	%
Arrest	33	1%
Community Resolution	17	1%
Penalty Notice for Disorder	2	<1%
Report to PPS	34	1%
No Further Action Disposal	2,519	97%
<b>Total</b>	<b>2,605</b>	<b>100%</b>

(1) The outcome may not be linked to the initial reason of the stop and search.  
(2) Percentages may not sum to 100% due to rounding.

5.24 Figure 5.2 is included in the PSNI bulletin on the use of Stop and Search Powers in Northern Ireland and compares PSNI stop and search outcomes with those in England and Wales. The pie charts show the outcome for all stop and search powers with the exception of stops under the JSA powers in Northern Ireland in the interests of a direct comparison since these powers are not available to the police in England and Wales. In both England and Wales and Northern Ireland the overall outcome rate is 23%, or 23 in every 100 stops result in some kind of outcome. The outcomes are marked on each pie chart, showing an arrest rate of 11% in England and Wales and an arrest rate of 6% in Northern Ireland.

**Figure 5.2**



(1) The latest data available for England and Wales is 2020/21 (*Police powers and procedures, England and Wales, year ending March 2021*). For comparability, the 2020/21 NI figures are also shown.  
(2) In the interest of comparability, the NI figure excludes stops under JSA Section 21 and 24.  
(3) England and Wales figures include vehicle only searches (2% of all searches). Northern Ireland figures do not.  
(4) Percentages may not sum to 100% due to rounding.

5.25 Using the data in tables 5.7 and 5.8, I calculate an outcome rate of 2.6 per hundred for JSA s21 and 3.3 per hundred for JSA s24. These outcome rates of between 2.6% and 3.3% of the use of the JSA powers can be assessed by comparing them with an overall PSNI arrest rate of 6%, including JSA powers. This is much lower than the England and Wales arrest rate of 11%. When we examine rates in districts, they vary between 3% (mid Ulster) and 8% (Belfast). Such low arrest rates raise concerns about the effectiveness of the powers in terms of crime detection or prevention outcomes. It is difficult to justify the use of the JSA powers where such poor outcomes are apparent. **I recommend that a discussion of outcome rates is included in future applications for authorisation.**

### Race and ethnicity

5.26 Table 5.9 shows the breakdown of people stopped and searched/questioned under all legislative powers in NI by ethnicity during the review period. The arrest rates are as follows:

- White: 6.0%;
- Irish traveller: 15.3%;
- Other ethnic group: 7.4%;
- Black: 6.6%;
- Asian: 7.0%;
- Mixed: 7.1%; and
- Not specified: 0%.

**Table 5.9: Number of persons stopped and searched/questioned and subsequently arrested and the percentage of the population stopped under all legislative powers during August 2021 to July 2022, by ethnicity.**

	Persons stopped and searched/questioned	Persons subsequently arrested	Percentage of population stopped and searched/questioned <sup>(2,3)</sup>
White	19,096	1,154	1.0%
Irish Traveller <sup>(1)</sup>	379	58	14.5%
Other Ethnic Group	378	28	5.5%
Black	197	13	1.8%
Asian	171	12	0.6%
Mixed	85	6	0.6%
Not specified	7	0	-
<b>Total</b>	<b>20,313</b>	<b>1,271</b>	<b>1.1%</b>

(1) Ethnicity may be officer perceived. A degree of undercounting may exist for the Irish Traveller category as some Irish Travellers are likely to be categorised as White.

(2) Figures based on 2021 Census figures.

(3) Percentage figures rounded to one decimal place.

If the numbers stopped and searched in Table 5.9 are considered as a percentage of their total ethnic group using the 2021 census data, we find that whereas the overall percentage rate for all ethnicities is 1.1%, the rate for Whites is slightly lower at 1%. Taking the PSNI figure for stops of Irish travellers as a percentage of the total reported Irish traveller population gives a stop rate of 14.5%, over 14 times that for Whites. The equivalent rate for all Black people is also high at 1.8%, almost twice that for White people.

**Table 5.10 Number of persons stopped and searched/questioned and subsequently arrested and the percentage of the population stopped under JSA powers during August 2021 to July 2022, by ethnicity.**

	Persons stopped and searched/questioned	Persons subsequently arrested	Percentage of population stopped and searched/questioned <sup>(2,3)</sup>
White	2,838	34	0.2%
Irish Traveller <sup>(1)</sup>	21	0	0.8%
Other Ethnic Group	32	2	0.5%
Black	13	0	0.1%
Asian	22	1	0.1%
Mixed	6	0	<0.1%
Not specified	4	0	-
<b>Total</b>	<b>2,936</b>	<b>37</b>	<b>0.2%</b>

(1) Ethnicity may be officer perceived. A degree of undercounting may exist for the Irish Traveller category, as some Irish Travellers are likely to be categorised as White.

(2) Figures based on 2021 Census figures.

(3) Percentage figures rounded to one decimal place.

5.27 Table 5.10 shows the figures for the exercise of the equivalent JSA powers. These trends are **reflected in the data for JSA stops, with 0.2% of the White population being subject to JSA powers, compared with four times that share of the Irish Traveller population, and over twice that share of the ‘other ethnic group’ category. It is noteworthy that the share of Black and Asian people is lower than that for the White population.** Such large differentials in rates between ethnic groups are difficult to explain except by referring to policing practices. Both the Irish Traveller Community and the Black population in Northern Ireland are protected under the Race Relations (NI) Order 1977 as amended by the Race Relations Order 1991 (Amendment) Regulations (NI) 2012.

5.28 During this review period, I engaged with those working with traveller groups and directly with members of the travelling community in both the mid-Ulster and in

the Craigavon areas. They reported a difference in travellers’ experience of policing in general between settled travellers and migrating travellers. Travellers resident on serviced sites reported daily police patrols on their site, often at a rate of twice daily for a site of six berths. **I recommend that the PSNI consider whether this level of surveillance is appropriate and lawful under the legislation. I recommend that the views and experiences of JSA stop and search powers by Irish travellers are sought by the PSNI and taken into account in operational reviews of the exercise of these powers.**

5.29 In the 14<sup>th</sup> report to parliament, (see paragraphs 6.4 – 6.42) I raised a wide range of issues relating to the use of JSA powers on children and young people. During the period 1 August 2021 - 31 July 2022:

- of the 2,936 persons stopped under section 21 and/or section 24 of the JSA, 62 or 2.1% were children under the age of 18; (in the previous review period out of a total of 4,309 person stopped under sections 21 and/or sections 24, 120 or 2.8% were children under the age of 18);
- of those 62 under 18 year olds, 56 (90%) were male;
- of these 2,936 persons stopped under this same legislation, 774 (26%) were aged 18-25; (in the previous review period, 1,467 (34%) were aged 18-25);
- some 2,726 (93%) of those stopped under JSA s21 and/or s24 were male.

(Please note that the number of persons may be lower than the number of stops, since the same person can be stopped under more than one power.)

**Table 5.11 Number of persons stopped and searched/questioned during August 2021 to July 2022 under JSA S21 and JSA S24 by age <sup>(1)</sup>**

Table 5.11	Persons stopped and searched/questioned									Total
	12 and under	13 to 17	18 to 25	26 to 35	36 to 45	46 to 55	56 to 65	Over 65	Not specified	
JSA Section 21	0	14	90	91	66	65	44	9	0	<b>379</b>
JSA Section 24	0	51	689	494	656	458	189	64	4	<b>2,605</b>

(1) **PLEASE NOTE:** As more than one legislative power can be used to stop and search/question a person, the sum of the powers used may be greater than the total number of persons stopped and searched/questioned.<sup>23</sup>

<sup>23</sup> To accurately report the number of persons stopped and ensure a consistent approach this example explains why the figures in the narrative do not match those in the table.

- Person 1, a 17 year old, is stopped under JSA S21
- Person 2, a second 17 year old, is stopped under JSA S24



(2) Age may be officer perceived.

5.30 Table 5.12 shows the age of those stopped and searched by the power used from July 2021 to June 2022. JSA powers were not used during this period on children under the age of 12. Section 21 powers were used 12 times and section 24 powers were used 52 times on children aged 13-17. The age range on which the JSA – and indeed other – stop and search powers were used most frequently was in the 18-25 age range, with section 21 being used 92 times and section 24 used 667 times. As age increases after the age of 35, the use of stop and search becomes less frequent.

**Table 9: Number of persons stopped and searched/questioned during July 2021 to June 2022, by age and power <sup>(1)</sup>**

	Persons stopped and searched/questioned									Total
	12 and under	13 to 17	18 to 25	26 to 35	36 to 45	46 to 55	56 to 65	Over 65	Not specified	
PACE	40	564	733	649	333	128	54	18	1	2,520
Misuse of Drugs Act	14	1,567	6,941	4,038	1,567	487	115	12	1	14,742
Firearms Order	0	7	9	12	11	3	2	1	0	45
TACT S43	0	1	4	7	14	14	4	3	0	47
TACT S43A	0	0	0	3	1	7	0	0	0	11
TACT 47A	0	0	0	0	0	0	0	0	0	0
JSA Section 21	0	12	92	87	69	59	43	10	0	372
JSA Section 24	0	52	667	505	655	457	174	63	4	2,577
Other	1	11	13	7	12	8	2	2	0	56

- (1) As more than one legislative power can be used to stop and search/question a person, the sum of the powers used will be greater than the total number of persons stopped and searched/questioned.  
 (2) Age may be officer perceived.  
 (3) Figures are provided in the accompanying spreadsheet by single year of age for the 13 to 17 year group.

5.31 In the period July 2021 to June 2022, of the 55 children, under 12 stopped and searched 44 were male and 11 female and none were arrested. (The Minimum Age of Criminal Responsibility (MACR) is currently 10 years old, one of the lowest in Europe, and one of the lowest in the world, which means that anyone over the age of 10 can be arrested. A proposal to change this to 14 is currently under consideration by the Department of Justice<sup>24</sup>). Currently, children under 10 cannot

Person 3, a third 17 year old, is stopped under JSA S21 and JSA S24.

**Three** 17 year olds have been stopped under JSA section 21 and/or section 24. It would be incorrect in this example to state that **four** 13 to 17 year olds had been stopped under JSA section 21 and/or section 24.

<sup>24</sup> Of the 455 responses received 381 (84.7%) agreed that there should be some kind of increase in MACR, with various ages being proposed; 26 said they would accept an increase in MACR if exceptions were permitted for serious offences; 43 were definite that there should be no change to the current MACR of 10 years.

be arrested or charged with a crime, but children between 10 and 17 can be arrested and taken to court if they are accused of committing a crime.) **In the light of the DOJ proposal to raise the MACR in Northern Ireland from the current age of 10 years to 14 years, I recommend that the PSNI conduct a review of its policies and practices in relation to JSA stops and searches of children between the ages of 10 and 14.**

5.32 Of the 2,204 children aged between 13-17 stopped, searched and/or questioned, 1,808 were male and 392 were female and 50 males and 13 females were arrested. The largest age category is the 18-25 year old age group, of whom a total of 8,429 were stopped, 7,106 of whom were male, 1,315 were female and 330 males and 33 females were subsequently arrested. The consequent arrest rates are 0% for under 12s, 2.8% for the 13-17 age group and 4.3% for the 18-25 age group.

5.33 These low arrest rates raise the question of the purpose of stopping and searching for any age, but particularly the stopping and searching of children, in the absence of evidence of any other law enforcement benefit. In the policing of children I refer to Service Instruction SI10321<sup>25</sup> of 02/09/2021 paragraph 7 which states that “Any decision taken to stop and search a child must be in the best interests of that child, taking into consideration that exploitation of the child may be a factor in the case.” **I recommend that, in producing their policy statement on the use of stop and search recommended in the 14th report at paragraph 6.67, that the PSNI specify their policy specifically in relation to the use of JSA powers on children who are the targets of the stop and search.**

5.34 In terms of the PSNI’s NIA section 75 duties, it is apparent from the data that the powers are used overwhelmingly on boys rather than girls. This predominance of males is apparent throughout the criminal justice system, both in terms of those who administer justice and those upon whom the attention of the system are

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<sup>25</sup> Available at <https://www.psni.police.uk/sites/default/files/2022-09/Stop%20and%20Search%20%20September%202021.pdf>

visited. The implications of this are complex and the consequences for gender justice require constant vigilance.

5.35 In the absence of any form of community background monitoring being in place, it is not possible to know definitively the community background of those subject to JSA powers, but anecdotal evidence suggests that boys from a Catholic/Republican/Nationalist (CRN) background are likely to compose a majority of those subject to these powers. Thus, the PSNI are unable to deliver their Section 75 duties in this regard without implementing the monitoring of community background. Research<sup>26</sup> commissioned by the Department of Justice (DOJ) investigated more generally the high proportions of Catholic children interfacing with the justice system and confirmed this disproportionality. They also raised an additional concern about disproportionality in the numbers of ‘looked after’ children within the system. Available data on children in the care system does not include an analysis<sup>27</sup> of children who come to the attention of the justice system.

5.36 **I have serious concerns that children, by virtue of their ethnicity, family circumstances or gender, are drawn into the criminal justice system from a very young age. I recommend that, in finalising their children and young person strategy, the PSNI address these risks directly and ensure that the strategy includes mitigations of them. I draw this to the attention of the Northern Ireland Commissioner for Children and Young People (NICCY) and to the attention of the Northern Ireland Policing Board (NIPB).**

5.37 In the 14th report, from paragraph 6.7 onward noted the existence of the working group formed “to seek feedback and engagement about how to increase community awareness around stop and search concerning children and young people along with working collaboratively to improve the effectiveness of the use

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<sup>26</sup>Siobhán McAlister, Catherine McNamee, Mary-Louise Corr and Michelle Butler OVER-REPRESENTATION IN THE YOUTH JUSTICE SYSTEM IN NORTHERN IRELAND FULL REPORT 07.03.2022 Available at [https://www.justice-ni.gov.uk/sites/default/files/publications/justice/over-rep%20in%20yjs%20main%20report\\_4.pdf](https://www.justice-ni.gov.uk/sites/default/files/publications/justice/over-rep%20in%20yjs%20main%20report_4.pdf)

<sup>27</sup> See <https://www.health-ni.gov.uk/sites/default/files/publications/health/nicl-21-22.pdf>

of this power”. This was composed of PSNI officers and representatives from the Northern Ireland Commissioner for Children and Young Persons, Northern Ireland Youth Forum, Start 360, Include Youth, Youth Work Alliance, the Health and Social Care Board, the Children’s Law Centre, Voice of Young People in Care and Northern Ireland Youth Forum and chaired at Inspector level, which first met on November 2020.

5.38 In the 14th report, I discussed the online survey designed by the working group, which ran between 30 April and 2 July 2021 to canvas the views of young people between 11 – 18 on stop and search. The findings of this survey highlighted many negative aspects of young people’s experiences and increased existing concerns about the relationship between young people and the police. As a result of this survey the working group developed an action plan with the PSNI, including the recommendations:

- A. Update to the stop and search guidance point pages conveying the thoughts and feelings of young people regarding stop and search (to increase officer awareness around these issues; this is currently being progressed through the corporate communications department.
- B. Work is ongoing to create a video aimed at increasing officers’ awareness about young people’s feelings and experiences of stop and search.
- C. The creation of a stop and search information card in hard copy and electronic format, designed specifically for children and young people setting out their rights and proper police procedure. By July 2022, three groups of young people were directly engaged via various neighbourhood-policing teams in Lurgan and Belfast. The engagements were very productive, generated positive feedback and good ideas from the young people. Further engagements are planned. The PSNI Corporate Communications Department plan to deliver the card via social media and link to the useful and pre-existing [Y-stop.org](https://www.y-stop.org) app, which is already available.
- D. The PSNI plan to run focus groups with police officers to discuss the views expressed in the survey of young people. At the time of writing, the working group has developed a draft questionnaire for review.

- E. The working group have accepted my recommendation that, in addition to the current instructions to officers to record all stops and searches on Body Worn Video (BWV), that all officers be instructed to ensure that BWV cameras are activated prior to interactions with young people, so that the entire encounter is captured. Footage can be reviewed (along with any ensuing stop search activity) by a supervisor and used for performance review and training purposes. In furtherance of this, a pilot exercise is to assess how much impact there would be on front line supervisors to review the BWV footage of all stop searches involving people under the age of 18 (current guidance is that supervisors conduct a supervision check on 100% of these searches). A paper was drafted for the Police Powers Development Group (PPDG) setting out the required change to PSNI systems before implementation of this pilot. The change involves the list of searches displayed, so that searches of those under the age of 18 stand out and are more easily identified by supervisors looking at the list. This paper was agreed at PPDG on 12 April 2022 and a request for changes to be made to PSNI systems has been made to the PSNI Information and Communications Systems (ICS) department.
- F. A further recommendation was that a checklist/guidance document be drawn up for supervisors to refer to whilst dip sampling stop searches, which highlight these concerns as areas to focus on for learning or further investigation if serious wrongdoing is suspected. I am informed that a draft document has been created for PSNI supervisors and circulated for feedback to supervisors and PSNI district training. This consultation process is ongoing and the document will be put into use as soon as possible.
- G. The results of the survey were to be communicated to district training so that awareness training can be delivered to operational officers. It was recommended that the training should have a procedural element to include items such as informing young people why they are being stopped and searched and informing them what the PSNI are looking for. I am informed that the survey results have been shared with district training and discussions are currently focused on the possibility of developing a new district training course.

- 5.39 I am informed that the group last met on 17th Feb 2022. Since that time, the group has been updated by email on the progress on these recommendations, which the PSNI describe as ‘significant’. The PSNI informs me that they are proceeding with implementing the recommendations and will convene a meeting in April 2023 where the PSNI plan to share a comprehensive update with the stop and search working group members and plan next steps.
- 5.40 In my 14<sup>th</sup> report to parliament, in line with the recommendation in the 2021 report of His Majesty’s Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS) to *“Provide external scrutiny panel members with access to samples of body-worn video footage showing stop and search encounters and use of force incidents”*. I recommended that for this report **I should include a review of a structured sample of BWV footage of JSA stops and searches of children and young people which was to be drawn, viewed and analysed in consultation with the working group and/or the YIAG. The sample was to include stops and searches in both CRN and PUL communities, of both genders, a range of ages and include areas where stops and searches are concentrated. The analysis was to include an examination of police behaviour and attitudes during stops and searches, their deployment of BVWs, information cards, verbal briefings on rights and any other matter that could inform improved practice. Unfortunately, although I have viewed BWV in Derry City and Strabane District, I have not viewed BWV of children and young people being stopped and searched. I recommend that, as a priority, this be arranged for the next review period. I recommend that the sample include stops conducted by the Armed Response Units (ARUs).**
- 5.41 I commend the working group’s plan to share the action plan on JSA stops and searches of children with the Northern Ireland Policing Board and to ensure that the work flowing from it is in harmony with the imminent PSNI Children and Young Persons’ Strategy and proposed changes to the MACR and that it complies with Professional Standards Department (PSD) requirements. I look forward to seeing these changes reflected in the data on PSNI data on the use of JSA powers.

5.42 I have asked to see the Children and Young Person Strategy but I am informed that the PSNI cannot yet make it available. It is anticipated that it will be launched by June 2023.

### **OUTSTANDING UNDERTAKINGS**

5.43 In the 14th report, I recommended that the PSNI implement the plan to establish regional YIAGs (Young People's Independent Advisory Group) without delay and share minutes of these groups with partners and online. Unfortunately, the YIAG has yet to be established. I have discussed the difficulties in doing so with the PSNI and suggested a number of ways that these could be overcome. **I recommend that they seek the advice of the JSA Stop and Search working group, which contains many of the relevant organisations in order to establish the YIAG without further delay.**

5.44 At paragraph 6.38 of the 14th report, I referred to NICA Ní Mhurchú [2021] which points out the absence of guidance in the PSNI Code of Practice in relation to the stopping and searching of children and the value of the Scottish code of practice for stop and search in relation to stopping children. I recommended that the PSNI incorporate some or all of the Scottish code into their own Code. Any amendment to the JSA requires primary legislation and parliamentary time has been requested for this purpose in order to alter the JSA authorisation period recommended in the 14<sup>th</sup> report. Amendments to the Code requires secondary legislation, that once a suitable legislative vehicle is identified, the NIO will be able to progress this amendment. The NIO has an obligation to publicly consult on any changes to the JSA Code of Practice. In order to meet the requirement they plan to carry out a public consultation once legislation allowing this and for an extension in the authorisation period (mentioned at paragraph 5.48) receives Royal Assent. My recommendation and that of my predecessor will be subject to a consultation process, which, when completed, will allow the NIO to advance legislation to amend the Code accordingly.

5.45 I met with staff from the Children's Law Centre (CLC), who reported a wide range of concerns in relation to policing and children, some of which were outside my

remit, but were instructive in informing me of the general background to my review of JSA powers. Amongst the concerns they raised were the PSNI's strip-searching of children in custody, where they reported that only in 3 of 27 cases was anything found, and that in only one of these was a designated adult present. Furthermore, they pointed out that the data records of the PSNI do not record disability, which is a protected category. The Equality Commission has powers (under paragraph 10 and 11 of Schedule 9 of the Northern Ireland Act) to investigate complaints that public authorities have failed to comply with their equality schemes from people who are directly affected by such failure. The CLC have initiated such a complaint about this matter.

5.46 The CLC also reported their concerns about cancellations, delays and infrequency of meetings of existing advisory groups to the PSNI to which they are party. They also expressed concern about the failure of the PSNI to appoint an independent advisory group and their concern that processes for making appointments of independent advisors lack transparency and those appointed do not always represent stakeholder organisations.

5.47 This is of particular concern, since in the 14th report, at paragraph 6.15 I reported that many of the groups and individuals I met during the previous review period had reported that the relationship between the PSNI and young people was very poor indeed. Unfortunately, that appears to remain the case, and the difficulties reported by the CLC do not serve the cause of improvement. I am particularly concerned with the relationship with young males, those in the CRN community, "looked after" children and children and young people in the Irish Traveller community. JSA stop and search compounds these difficulties. In the 14<sup>th</sup> report, I commented that, in order to improve relationships and gain the trust of children and young people and the agencies that work with and advocate for young people, that it is crucially important that PSNI accord the highest priority to working closely with these organisations and to delivering on all its outstanding undertakings in relation to work with children and young people. **I recommend that the PSNI meet with the CLC, NICCY and other stakeholder organisations to**



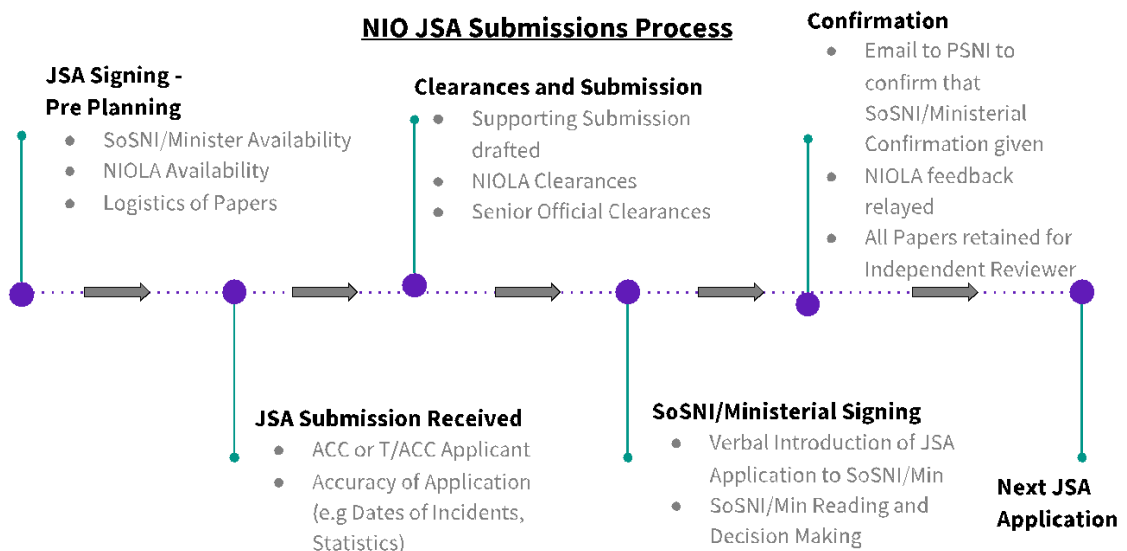
evaluate the status of current relationships and identify and implement steps to improve collaboration.

## AUTHORISATIONS

5.48 As set out at paragraph 5.8 onward of the 14<sup>th</sup> report, JSA powers of stop and search must currently be authorised every two weeks. Following my recommendation in the 14<sup>th</sup> report, the frequency of these authorisations will reduce to every four weeks. This change requires new legislation and once the NIO has identified a suitable legislative vehicle, such change will be instituted, in a manner similar to that described at paragraph 3.9 above.

5.49 The application for authorisation is completed in a pro forma shown at Annex E, and these documents and supporting material are compiled by the PSNI, first at District level, then passed to PSNI headquarters to be scrutinised by their senior staff and lawyers and signed by an Assistant Chief Constable. They are then passed to the NIO whose staff and lawyers likewise scrutinise it and provide a covering note for the Secretary of State whose signature is required for the authorisation of the powers. This process is set out in Figure 5.3 below.

**Figure 5.3**



5.50 The authorisation documents must contain all the requisite information on the previous use of the powers by districts, the supporting fresh intelligence material

as well as assessments of the impact of the powers on the community. In total, the documents must convince the Secretary of State that the powers are **necessary** and **effective** to address the threat level and that any **impact on the community due to the broad nature of the powers is justified** in terms of their effectiveness in mitigating that threat.

5.51 Between 1 August 2021 and 31 July 2022, there were 32 JSA authorisations. There were no lapses in JSA authorisations and there were no TACT S.47A authorisations during this period, with one interim JSA application made when the Threat level was altered.

5.52 All during this review period authorised all areas. I would urge the PSNI to continue to exercise vigilance in ensuring the necessity of authorisation in all areas, and eliminate areas where the powers are not used or are likely to be required.

5.53 In the 14<sup>th</sup> report, paragraphs 5.14-5.15 I examined in some detail whether the powers could be justifiably authorised on a blanket basis across Northern Ireland. This issue was discussed by the PSNI and they properly concluded that where the documentation did not support an authorisation in a particular district, they would omit that district from the application. The system has operated every two weeks since the outcome of *Gillan and Quinton v United Kingdom* (Application no 4158/05) (which concluded in 2010) required the institution of a review process. PSNI close scrutiny of authorisations would reassure that they consider the authorisation in a meaningful review, and are aware of the need to use such sweeping powers as sparingly as possible. **I recommend that the PSNI consider carefully whether comprehensive authorisations are routinely required and seek authorisation only for areas where the intelligence clearly and unequivocally warrants it.**

#### **SCRUTINY OF AUTHORISATIONS - 1 AUGUST 2021 - 31 JULY 2022**

5.54 I have dip-sampled a selection of the authorisations for the review period. I wish to thank the staff in the PSNI and NIO for their willingness to accommodate my

repeated visitations of this material in this review period. These were necessary in order to elucidate five issues to be addressed in the authorisations, which I set out below. These are:

- **the purpose of the search;**
- **the focus and coverage of the intelligence material;**
- **the ‘reasonable suspicion’ test;**
- **the effectiveness of the powers; and**
- **the proportionality of the use of the powers.**

5.55 Before considering these aspects, it is useful to go back to what the legislation says about the justification of an authorisation. JSA Schedule 3 4 (A)(1)<sup>28</sup> states: “A senior officer may give an authorisation under this paragraph in relation to a specified area or place if the officer—

- reasonably suspects (whether in relation to a particular case, a description of case or generally) that the safety of any person might be endangered by the use of munitions or wireless apparatus, and
- reasonably considers that—
  - (i) the authorisation is necessary to prevent such danger,
  - (ii) the specified area or place is no greater than is necessary to prevent such danger, and
  - (iii) the duration of the authorisation is no longer than is necessary to prevent such danger.”

5.56 The Code of Practice for the exercise of the JSA powers is also useful in this.<sup>29</sup> Para 8.22 of the Code of Practice states:

“The authorising police officer must also be satisfied that the powers are necessary to prevent such endangerment and that the use of these powers is required to help deal with the perceived threat. He or she should also

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<sup>28</sup> Available at <https://www.legislation.gov.uk/ukpga/2007/6/schedule/3>

<sup>29</sup> Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/199875/Final\\_version\\_of\\_the\\_Code\\_to\\_be\\_printed\\_for\\_laying\\_before\\_Parliament\\_13MAY2013.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/199875/Final_version_of_the_Code_to_be_printed_for_laying_before_Parliament_13MAY2013.PDF)

consider whether the paragraph 4A (1) power is the most appropriate to use in the circumstances. In determining whether the use of the powers is necessary, the senior police officer must take into account not just available information on the endangerment from munitions or wireless apparatus, but also:

- the proportionality of the use of without reasonable suspicion search powers.
- that searches (if authorised) may be exercised only for the purpose of discovering unlawfully held munitions or wireless apparatus;
- the suitability of other search powers including those that require reasonable suspicion; and - the safety of the public and the safety of officers.”

I will now consider the five issues in turn.

#### **THE PURPOSE OF THE SEARCH**

5.57 At paragraph 6.73 of the 14<sup>th</sup> report, I set out the previous deliberations about the

legal purposes of JSA s24 searches. Paragraph 8.61 of the Code of Practice states:

“8.61 Where a person or vehicle is being searched without reasonable suspicion by an officer (but with an authorisation from a senior officer under paragraph 4A (1)) there must be a basis for that person being subject to search. The basis could include but is not limited to:

- that something in the behaviour of a person or the way a vehicle is being driven has given cause for concern;
- the terms of a briefing provided;
- the answers made to questions about the person’s behaviour or presence that give cause for concern.”

5.58 The proper purpose of a search, and the limits thereof, are delineated further in the eighth report of the Independent Reviewer as follows:

“7.9 So the power should not be exercised wholly at random **but on the basis of intelligence or other factors that might indicate the presence of munitions or wireless apparatus**. The power should be targeted at the

threat based on informed considerations (which can include the officer's training, briefing and experience). If the power is properly exercised therefore it will be used against known DRs and others otherwise involved in munitions.

7.10 However –

(a) the power to stop and search without reasonable suspicion under section 24/Schedule 3 **does not give the police an unfettered discretion to stop a known DR at any time or place. There needs to be a basis for the use of the power and the purpose must always be to search for munitions or wireless apparatus – so where there is no basis a person cannot be stopped and searched simply because of his known DR profile;**

(b) **the purpose of the search can never be to put pressure on an individual, to remind him that the police are monitoring him, to disrupt his activities or to get intelligence** – the sole statutory purpose is to search for munitions etc. If as a result of a legitimate search these collateral benefits accrue then that does not render the use of the power unlawful”

5.59 In discussions with the PSNI at various levels, I note what I consider to be a misunderstanding on the part of some officers that JSA powers may be used for the purposes of intelligence gathering or for the purposes of disrupting the activities of those the police suspect are in the process of committing or conspiring to commit a crime. It is clear from the passages above that my predecessors, and now I, do not consider this a proper use of the powers. If the PSNI have reason to suspect that a crime is being committed or individuals are conspiring to do so, the powers are available under the ordinary law to intervene in whatever way they deem effective. I refer to the Code of Practice which states: “where reasons are expressly set out in the legislation for the use of a particular power, the PSNI must not rely on any other rationale for its use” (paragraph 5.12). **I recommend that the PSNI issue a clarification to all officers that the JSA powers may not be used purely or primarily for intelligence gathering, or for disruption**

**of illegal activity. Officers should be advised to use the ordinary criminal law or TACT in such circumstances.**

#### **FOCUS AND COVERAGE OF THE INTELLIGENCE MATERIAL**

5.60 In the 14<sup>th</sup> report, I cited Ramsey [2020] NICA 14 [30] who in turn cites the eighth report of the Independent Reviewer on ‘the proper exercise of the power:’

“the power should not be exercised wholly at random but on the basis of intelligence or other factors that might indicate **the presence of munitions or wireless apparatus**. The power should be targeted at the threat based on informed considerations (which can include the officer’s training, briefing and experience). **If the power is properly exercised therefore it will be used against known DRs and others otherwise involved in munitions.**<sup>30</sup>”–(my emphasis)

5.61 The intelligence or other material that is included in the authorisations must therefore indicate the (likely) presence of munitions or wireless apparatus. It is not sufficient to rehearse the affiliations of known suspects, or their past activities. The documentation must make the case that the DR or person suspected is likely to be **currently** in possession of, or en route to obtain or transport illegal munitions or wireless apparatus. I agree with the PSNI Human Rights Advisor who observed in his 2022 report that: “Some of the intelligence suggested that the PSNI needs to take urgent action, (rarely involving the need to use any stop and search power, let alone a JSA power) to search a specific address or person or act to protect a person and once that action had been taken the intelligence would not justify an authorisation” (p53).

5.62 In relation to ‘wireless apparatus’ the Wireless Telegraphy Act (2006) sets out the purposes and definition of ‘wireless telegraphy’ as:

- The emitting or receiving, over paths that are not provided by any material substance constructed or arranged for the purpose, of

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<sup>30</sup> Ramsey (Stephen) Application No2 [2020] NICA 14 [30] citing para 7.9 of Eighth Report of the Independent Reviewer

electromagnetic energy of a frequency not exceeding 3,000 gigahertz that:

- serves for conveying messages, sound or visual images (whether or not the messages, sound or images are actually received by anyone), **or for operating or controlling machinery or apparatus**, or
- is used in connection with determining position, bearing or distance, or for gaining information as to the presence, absence, position or motion of an object or of a class of objects

5.63 To authorise the JSA stop and search of a person on the grounds that they were carrying a mobile phone would be to apply the legislation in a profligate manner, since most people carry mobile phones. In narrowing the application of the powers, we are not assisted by the wording of the JSA in determining the meaning of this term or the intent of the legislation. One could argue that the original intent was to use the powers only to include detonating devices for explosives. **I recommend that the Code of Practice be amended to clarify that merely carrying a mobile phone is insufficient grounds for the exercise of the powers.**

5.64 The presence of ‘wireless apparatus’ alone is not sufficient grounds for the application of the JSA powers, unless there is a clear indication that the device is being used or is likely to be used to coordinate an attack or to detonate explosive devices. The intelligence material included in the authorisations must support this case. The provision of what might be termed ‘general purpose intelligence’ in the authorisation documents in support of an authorisation does not meet the requirements of the legislation. In his 2022 report the PSNI Human Rights Advisor remarked that: “it was rarely obvious to the reader of the intelligence that the JSA ‘non-reasonable suspicion power’ would assist with the particular threat set out in the intelligence, as set out in Para 8.22, Code of Practice” (p54).

5.65 **I recommend that the PSNI review the intelligence material provided in support of JSA authorisations to ensure that it focuses on the requirements of the legislation and that it is specific, recent and timely, appropriately focused and supports the use of the powers.**

## THE “REASONABLE SUSPICION” TEST AND THE AVAILABILITY OF OTHER POWERS

5.66 Paragraph 8.22 of the Code of Practice says that:

The authorising police officer must also ... consider whether the JSA powers are the most appropriate to use in the circumstances. In determining whether or not the use of the powers is necessary the senior police officer must take into account not just available information on the endangerment from munitions or wireless apparatus, but also: ... the suitability of other search powers including those that require reasonable suspicion...”

Paragraph 5.13 of the Code also states that: “Wherever possible, less intrusive strategies should be used. However, where there is no other alternative, the powers should be used in line with the principles set out above.”

5.67 I noted in the 14<sup>th</sup> report that at Box 6, the Authorisation Form asks: ‘Authorising Officers should explain how the use of Para 4A Schedule 3 powers is an appropriate response to the circumstances and why the powers under s43 and s43A of the Terrorism Act or other PACE NI powers are not deemed sufficient...’. Intelligence about munitions or wireless apparatus (see above) that is in the possession of a named individual or in a particular location meets the reasonable suspicion test, and enables the PSNI to use TACT or other legislation. In this instance, no authorisation of JSA powers is necessary. If the material is known to be held by a particular person or is in a particular location, it could be moved around by others. If the intelligence indicates that this is likely to happen then the PSNI must first use TACT or some other power in relation to the known person or location. Only subsequently should the PSNI use the JSA powers.

5.68 Powers under the JSA should only be used in circumstances where the PSNI holds intelligence material about munitions or wireless apparatus but **no intelligence about the person in possession or the location of that material**. Only in such instances would an authorisation be justified. In authorisations, the PSNI have indicated that:

“While intelligence is available on such activity it is rarely sufficiently specific to provide officers with a ‘reasonable suspicion’ for conducting a specific stop and



search. In cases where intelligence indicates a potential terrorist attack, the precise date, time and location of the activity may not be known.”

5.69 In order to meet the reasonable suspicion test it is sufficient to know either the person in possession of the material or the location of that material. To set the bar as high as knowing the precise details about planned attacks would preclude police officers elsewhere in the UK from stopping persons known to be in possession of munitions unless there was intelligence about an attack, since JSA powers are not available outside of Northern Ireland. Clearly, other police services do carry out such stops, using the ordinary law to apprehend such individuals. The PSNI should do likewise, without recourse to the JSA.

5.70 In his 2022 report, the PSNI Human Rights Advisor points out that JSA Section 21 (which does not require authorisation) could be used where PACE NI stop and search powers do not apply. The use of JSA s21 powers may result in responses from the persons questioned which trigger the reasonable suspicion power of PACE and allow a stop and search under that power. I agree with him that if a PACE NI stop and search power exists in the particular circumstances set out, the PSNI are under a duty to use PACE NI instead of the JSA (p55). **I recommend that, where the use of a JSA power in the first instance leads to the formation of reasonable suspicion, that the officer proceed under a power other than JSA on the basis of that suspicion.**

#### **THE EFFECTIVENESS OF THE POWERS**

5.71 A further test applied at the authorisation stage is to consider whether JSA powers are “necessary to prevent such danger”. The question that arises here is the effectiveness of the JSA powers, given what we have learned in paragraphs 5.22-5.25 above about the very low outcome rate for the use of these powers. Authorisations should specify (a) the purposes to which the powers are to be applied; bearing in mind the Code, the legislation and jurisprudence set out above in relation to its proper purpose; and (b) the authorisation must show that JSA powers are fit for the purpose to which they are applied. The Human Rights Adviser has pointed out that in the authorisations he examined, “there were no

examples where the JSA power had helped to deal with the threat described (or the threat described in a previous authorisation)” (2022, p54). Authorisations must specify the effect of the use of the powers and how those effects will mitigate the risks set out in other sections of the authorisation. **I recommend that the PSNI ensure that the effect of the powers on mitigating risk is clearly set out in future applications for JSA authorisation.**

5.72 In the 14<sup>th</sup> report, I reported that several of the individuals and groups I met throughout the review period considered JSA powers to be invasive, and particularly in relation to young people, alienating and counterproductive insofar as the exercise of the powers damages the possibility of good police-community relations. Hence the need to balance the policing gains from the use of the powers against the potentially damaging effect on relationships and the risk of alienation of particular communities or demographic groups. Paragraph 7.3 of the Code of Practice sets out the guidance on this:

“7.3 Whilst powers of entry help keep the public safe, their use may involve some interference with a person’s rights under Article 8 of the European Convention on Human Rights (the right to privacy) and/or Article 1 of Protocol No. 1 to the Convention (peaceful enjoyment of possessions).

Officers should not intrude unless it is necessary to preserve the peace or maintain order, and the nature and length of such intrusion should be proportionate to the aim sought to be achieved. Officers should also consider if any alternative, less intrusive ways of preserving the peace and maintaining order can be used...”

Paragraph 9 also states that: “It is imperative that the powers are exercised in a way which ensures the least possible interference with individual rights, where those rights may lawfully be interfered with. Furthermore, the terms of reference for my review of the powers as set out by the Secretary of State requires me to “review the operation of sections 21 to 32 of the Act and those who use or are affected by those sections”.

5.73 For these reasons, community engagement and community impact assessment in some form is essential so that the PSNI may assess whether the ‘minimum

interference' principle is being adhered to. The views of the community are essential in this regard. Box 11 of the Authorisation Form asks for:

“a detailed account of the steps that have been taken to engage those in communities that will be affected by the authorisation. Where it has not been possible to carry out community engagement prior to authorisation, the Authorising Officer should carry out a retrospective review of the use of the powers.”

The explanatory notes further advise:

“Authorising Officers should demonstrate that communities have been engaged as fully as possible throughout the authorisation process. When using the power, the PSNI may use existing community engagement arrangements. However, where stop and search powers affect sections of the community with whom channels of communication are difficult or non-existent, these should be identified and put in place. Independent Advisory Groups (IAGs) should be as fully engaged as possible at all stages of an authorisation.”

5.74 The issue of community engagement is challenging for the PSNI, yet it has possibly never been more crucial. I expressed concerns in my last report about the effectiveness of PSNI community engagement and quoted the February 2021 report of HM Inspector of Constabulary Wendy Williams CBE who wrote that: “we know that forces still do not fully understand the impact on individuals and communities of the use of police powers, despite stop and search data being available since the mid-1980s. We have been urging the police to improve their understanding in this area for years now.”<sup>31</sup>

5.75 In my last report (paragraphs 5.25-5.35) I considered in detail the methods cited by the PSNI for community engagement. I have concluded that community impact assessments as they are currently conducted by the PSNI, whether Full Community Impact Assessments (FCIAs) or Community Impact Assessments (CIAs) are not the appropriate method for making assessments in relation to the use of

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<sup>31</sup> Disproportionate use of police powers A spotlight on stop and search and the use of force

JSA powers. These assessments are made in connection with specific operations and not sufficiently focused on the issue, namely the invasiveness of JSA powers. I also note that there is no requirement for the PSNI to use this or any other suitable methodology in their assessments of the impact of JSA powers on the community, although they are required to carry out such assessments by some means or other.

5.76 The second method of community impact assessment cited in authorisation pro formas is feedback from Policing Community Safety Partnerships (PCSPs). Following the 14<sup>th</sup> report, the NIHRC wrote to me expressing their interest in the activities of the PCSPs relating to the JSA and in community engagement more generally. The PCSPs play a vital role in policing in Northern Ireland. They are statutory bodies established by the Justice Act (Northern Ireland) 2011 and jointly funded by the Northern Ireland Policing Board (NIPB) and the Department of Justice (DOJ). They are required to carry out a number of functions by the legislation, including to:

- **Consult & Engage** with their local community on issues of concern in relation to policing and community safety. Each PCSP has a Policing Committee responsible for providing community views to the relevant district commander and the Policing Board on policing matters.
- **Identify & Prioritise** issues and prepare plans for how these can be tackled at a community level;
- **Monitor** the performance of the police and work to gain the cooperation of the public with the police in preventing crime.

The NIPB and DOJ set a number of strategic objectives for PCSPs, namely:

- Strategic Priority 1 – To ensure effective delivery in response to local need, and improve the visibility and recognition of the work of the PCSP through effective consultation, communication and engagement;<sup>32</sup>
- Strategic Priority 2 – To improve community safety by prioritising and addressing local community safety issues, tackling crime and anti-social behaviour;<sup>33</sup>

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<sup>32</sup> Available at <https://www.pcsp.org/strategic-objectives-what-pcsp-are-expected-do#toc-0>

<sup>33</sup> Available at <https://www.pcsp.org/strategic-objectives-what-pcsp-are-expected-do#toc-1>

- Strategic Priority 3 – To support confidence in policing, including through collaborative problem solving with communities<sup>34</sup>.

5.77 In theory, PCSPs could offer the PSNI valuable information about the impact of JSA powers in the various areas across Northern Ireland. In practice, the issue of JSA Stop and Search is rarely discussed between PCSPs and the PSNI. In fact, I met with two PCSPs in this review period and neither were aware of the significance of their not raising local difficulties with stop and search formally at their meetings. Both PCSPs informed me that there were, indeed, difficulties that they used to bring up at meetings, but after a while they decided that there was no point in doing so. I explained to them that the PSNI are required to conduct an assessment of the exercise of the powers on the community and that on most, if not all, the authorisations I have reviewed they recorded, for example, that “The use of these powers including stop and search has not been raised by any community leader or person with influence in the district at any formal meeting or setting during this reporting period.” **The PSNI may not infer anything from an absence of feedback, it does not constitute evidence of any kind about the impact on communities of the exercise of JSA powers. The absence of evidence on community impact compromises the completeness of the authorisation itself. Direct feedback on any positive or negative community impact of the JSA powers from the PCSPs performs a very important role in the authorisation process, and should be timely, recent, relevant and specific.**

5.78 I recommend that:

- I am invited to a meeting of all PCSP managers where this issue can be discussed centrally so that all PCSPs are similarly alerted to the importance of their feedback on the use of JSA powers.
- PCSPs must regularly seek the views of local people in relation to JSA stop and search, record this feedback formally in their minutes these and communicate them to the Policing Board in the first instance;

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<sup>34</sup> Available at <https://www.pcsp.org/strategic-objectives-what-pcsp-are-expected-do#toc-2>

- I recommend that such feedback on the exercise of JSA powers be a standing agenda item at all PCSP meetings going forward; and
- that PCSP minutes are made available to the local District Commander as soon as possible for use in preparing the district input to the JSA authorisation process.

5.79 PCSPs also have the power to call public meetings where members of the public may attend and raise any matter of concern including, for example the community impact of JSA stop and search operations. Meetings where members of the public are permitted to express their concerns, including their anger, and where the PSNI are able to listen and take on board any legitimate concerns are a method of assessing the impact on the community of, *inter alia*, the use of JSA powers and have the additional beneficial effect of building of trust when they are well handled. I commend the officers who engage in such exchanges in a professional manner and make use of the feedback to inform their organisation about public perceptions and experiences. I have attended public meetings where public complaints and anger were well handled by the PSNI and the PCSP chair and others where, in my view, opportunities were lost.

5.80 At a public PCSP meeting in one district that I attended it was apparent that the ability of some officers within the PSNI to take seriously the concerns of the public was limited. A subsequent meeting in that same district was arranged which was conducted in a much more useful manner. I attended a public meeting of another PCSP in another district, which was held after a television programme reported serious allegations about the behaviour of police officers in that district. On this occasion, the meeting was crowded, but the 'elephant in the room' was not discussed for some considerable time. When the television programme and the allegations were raised, the PSNI responded that they could not discuss the matter because of ongoing investigations. Whilst this is technically correct, in my view it was a lost opportunity. The response did nothing to rebuild damaged confidence, or to reassure the public about the ability of the police to monitor their standards of service. I appreciate the extremely difficult task that faces both the PCSP and the PSNI when faced with outrage and condemnation. With skilled

chairing and a well-researched understanding of local reactions, a carefully prepared and sensitive presentation could have provided members of the public with information about the mechanisms within the PSNI for performance management and the way in which performance standards are monitored. The crisis provided an opportunity to offer reassurance that, when performance problems arise, there are methods of dealing with them and that lessons have been learned by the PSNI. Such situations are testing in the extreme, even for the most experienced and skilled personnel. In the current general climate where confidence in policing everywhere requires rebuilding, the PCSPs can play a vital role. **I recommend that, in order to further build on the capacity for such challenging work, that PCSP managers - and indeed the PSNI - consider providing additional training to PCSP chairs and PCSP members and to senior PSNI officers on, for example, managing contention in public meetings and the skills and approaches involved in handling high levels of conflict in difficult meetings.**

5.81 Whilst the PCSPs should provide important information on the community impact of JSA stop and search, other mechanisms are also available to the PSNI. At paragraph 6.66 of the 14<sup>th</sup> report, I recommended that that the PSNI identify a list of communities where JSA stop and search activity is particularly concentrated; conduct periodic assessment that include regular external inputs from local teachers, clergy, councillors, youth and community workers; devise a strategy for improving mutual understanding and opening effective channels of communication between police and communities where stop and search activity is concentrated; use the findings from these reviews and the views of the community to appropriately modify police operations, and improve communication with people in particularly affected communities.

5.82 On 7 October 2022, I held the first of a number of very useful meetings with the senior team in Derry City and Strabane (DC&S) District. At the first of these meetings, I was impressed that all officers had read the lengthy 14<sup>th</sup> report. They were keen to explore my recommendations with me. As a result of discussions that day and in subsequent meetings, the DC&S team now collects fresh information directly from the community on stop and search. They do this by

identifying a range of key individuals in the community, such as local shopkeepers, teachers, youth leaders and so on and by phoning these people in turn to obtain their on-the-ground assessment, which they then feed into the authorisation process. At a subsequent meeting, DC&S officers reported very positive feedback from those they rang in the community about the fact that they were being consulted about policing matters. Officers felt that not only was this a method of obtaining feedback on stop and search but it also had a beneficial by-product of improving police-community relations. **I recommend a similar method of obtaining feedback is adopted by all districts where they do not already engage directly on a regular basis with a range of local residents. The feedback obtained should feed into the JSA authorisation process.**

5.83 Flowing from these comments, a range of issues arises to do with the ability of the authorisation documentation to address the specific requirements of the legislation and the Code of Practice. I recommend that, in reviewing the pro forma in use for the purposes of preparing authorisations, the PSNI and the NIO consider the inclusion of more specific questions tightly focused on the legislation and the Code of Practice. I offer the following for such consideration.

**Table 5.14 Amendments to the authorisation form**

<b>In order to satisfy the requirements of the JSA, Sch.3 4(A)(1), please verify the following:</b>			
In the period for which the authorisation is sought:		<b>Yes</b>	<b>No</b>
1	Are there grounds to reasonably suspect (whether in relation to a particular case, a description of case or generally) that the safety of any person might be endangered by the use of munitions or wireless apparatus?		
2	Is it reasonable to consider that the authorisation is necessary to prevent such danger?		
3	Is the range of locations specified in this authorisation no greater than is necessary to prevent such danger?		
4	Is the duration of the authorisation is no longer than is necessary to prevent such danger?		

<b>In order to satisfy the requirements of Para 8.22, Code of Practice, please verify that:</b>			
In the period for which the authorisation is sought:		<b>Yes</b>	<b>No</b>
5	You have examined the available information on the endangerment from munitions or wireless apparatus		



6	You are satisfied that the powers are necessary to prevent such endangerment		
7	that the use of these powers is required to help deal with the perceived threat		
8	You are satisfied that the paragraph 4A(1) power is the most appropriate power to use in the circumstances.		
9	You are satisfied the use of 'without reasonable suspicion' search powers is proportional to the threat;		
10	You have considered the suitability of other search powers including those that require reasonable suspicion;		
11	You have taken into account the safety of the public and the safety of officers;		
12	That the authorisation of the stop and search power is "necessary to prevent such danger".		

**5.84 I recommend that the following questions be considered in operations where the powers are being applied.**

<b>Table 5.15: When briefing of officers using the powers, please verify that you and the officers using the power understand that following:</b>		
	<b>Yes</b>	<b>No</b>
Where there is intelligence about munitions or wireless apparatus that relates to a named individual or location, one of the other 'normal' stop and search powers should be used (since it is likely that the intelligence will be sufficient to cross the reasonable suspicion threshold.)		
Where there is intelligence that munitions or wireless apparatus are being held or moved but there is no intelligence about the location or the person suspected then the use of without suspicion powers would be justified.		
All officers using the powers are fully briefed and understand that searches (if authorised) may be exercised only for the purpose of discovering <b>unlawfully held munitions or wireless apparatus</b>		

## **Direct Scrutiny of use of JSA powers: body worn videos (BWVs)**

6.1 Current guidance to PSNI officers states that: “body worn video MUST be used when conducting ANY stop and search. Any stop and search not recorded on body worn video will require a reasoned explanation as to why this is the case.” The NIHRC have indicated an interest in my assessment in this report of the use of body worn cameras.

6.2 In the last report, I tracked the use of Body Worn Video on JSA stop and search operations from the 13th report where 61% of stops were recorded using of BWV in August 2019, increasing to 88% by July 2020 rising to 86% in the six-month period from August 2020 to January 2021, and 93% in the six-month period of February 2021 to July 2021. In the current review period 1 August 2021 – 31 July 2022 the usage of BWV on JSA stops was 94%<sup>35</sup>.

6.3 At 5.40 above, I make comments and recommendations about advancing the use of BWVs to record and review JSA stops of those under the age of 18. I am assured by the PSNI that work to implement this recommendation is under way. I look forward to reporting on a review of a sample of the footage drawn from the universe of JSA stops of children in my next report. In the interim, the PSNI has undertaken to provide access to a structured sample of stop search encounters (from which BWV footage can be drawn) involving JSA stops and searches of children and young people for review. I would welcome the involvement of the new Northern Ireland Commissioner for Children and Young People in this review when an appointment is made to this important role. I would also welcome the involvement of the NIHRC, the Children’s Law Centre (CLC) and any other relevant agencies.

- **I also reiterate my reminder of the HMICFRS recommendation that BWV footage should be made available to an external scrutiny panel and urge the PSNI to move forward on this as a matter of urgency.**

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<sup>35</sup> Excluding vehicle-only stops and stops conducted under only JSA S21 (stop and question).

6.4 On two occasions, I viewed BWV in Derry City and Strabane District, once of footage officers selected, and once of footage selected by me. On both occasions, the footage I viewed did not raise any major concerns about the conduct of officers or their use of the JSA powers. I viewed the footage with a team of officers and they raised points about the performance of one officer on one stop. Whilst, perhaps predictably, the encounter between officers and those searched could not be classified as friendly, officers were seen to advise those stopped of the powers being deployed and made their requests in a mannerly and professional manner. These stops were conducted in an area of Northern Ireland where tensions are highest for officers and the threat to them is perhaps greatest, Derry City and Strabane. I greatly appreciate the openness of officers and their willingness to discuss and analyse their practice and that of their colleagues. It is an important indicator of their commitment to achieving and maintaining a high level of both professionalism and accountability.

6.5 I note that the JSA powers are also used by Armed Response Units (ARU)s<sup>36</sup> who cover every district in Northern Ireland and are a central resource within the PSNI. They are officers deployed at the request of District Commanders, but are separately organised. The fact that they are not part of district teams, are armed, and are called to deal with some of the most challenging situations that face policing suggests that they may operate differently to district-based officers whose BWV I have reviewed. I note a lack of clarity in some quarters within the PSNI ranks about whether or not these officers under the command of the District Commander or some other line of accountability whilst operating in Districts. District Commanders are accountable for the manner in which JSA powers are used in their area. In view of this:

- **I recommend that the PSNI clarify the line of command for ARUs whilst operating in Districts.**
- **I also recommend that the PSNI make available a randomly selected sample of BWV of officers in the ARU for review jointly by the Human Rights Advisor and by me in the next review period.**

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<sup>36</sup> See <https://www.psnipolice.uk/about-us/our-departments/operational-support/armed-response-unit>

- 6.6 In the 14th report, I recommended that Dr John Topping at Queen’s University, Mr John Wadham, Human Rights Advisor to the NIPB and Dr Jonny Byrne of Ulster University, review the value of BWV footage in police training, particularly at district level, and where appropriate deploy it for this purpose. **I urge that this take place in the next review period.**
- 6.7 **I also recommended that the use of BWV for performance management through dip sampling by senior officers be piloted and monitored. I understand that this is in hand and I look forward to its implementation in the coming weeks.**
- 6.8 I made a further recommendation **that the PSNI conduct a systematic review of requests for access to BWV footage of the use of JSA powers by legal advisors, legal representatives, PONI and others in order to determine how readily available such footage is to those who can legally request access to it. I suggested that the review should focus on the number and source of requests for use as evidence, the purpose for which access is requested, the outcome of the request, the degree of access and the length of time before access was granted, and where it was denied, the reason for denial and include the views of those requesting access. I urge that this is progressed at the earliest opportunity.**
- 6.9 At paragraph 6.43 of the 14th report, I pointed out that those stopped and searched by the PSNI are entitled to be informed of the powers under which they are being stopped and should be given a reference number to a police station in order to obtain a record of their stop and search, in compliance with 6.12 of the JSA Code of Practice. I noted that the 13th report recorded that work in progress to improve access to records and options being considered included a printer in the police vehicle, or providing access to the record via a secure web portal. I noted that no progress had been made since the same solutions are still under consideration. I recommended that the PSNI select one and proceed to implement it without further delay, before 31 July 2022. There still has been no progress made on this matter. **I now recommend that the PSNI provide a time-line for the implementation of this recommendation.**

6.10 Since there was currently no online advice available on how to access JSA stop and search records, **I recommended that the online advice at <https://www.psnipolice.uk/about-us/our-initiatives/stop-and-search> be amended to include instructions on current methods of accessing JSA (and other) stop and search records. I am pleased to report that this has been done, based on current practice and can be updated when the PSNI implement their plans (see 6.8 above) articulated in the 2019-2020 13th report.**

#### **SEIZURE AND RETURN OF PROPERTY**

6.11 In the 14th report, from paragraph 6.50 I commented in detail on PSNI practices in relation to the seizure, retention and return of property that they may seize during the exercise of JSA powers. These include items such as mobile phones, computers, clothing and money. I noted that whilst such items may be necessarily seized as part of a police investigation, that due regard must be paid to the management of such items, which should be returned as soon as they are no longer required. I noted that the consequences of depriving people from access to their property may be unjustly punitive if no determination of criminality has been made and the item has been used only for legitimate purposes.

6.12 In the 14th report, I recommended that the JSA Code of Practice be amended to include provisions to cover the duty to provide a full receipt to the person from whom the property is seized, that this should contain the officer number the making the seizure, the date of the seizure, any case number or identifying codes; the timely return of property where no crime is found; the copying of data to facilitate the return of items essential to, for example school work; the deletion of data where no criminality is found; compensation for loss or damage; and due regard for the rights of innocent individuals. I am advised that general good practice regarding seizure and retention of property is included in PACE NI Code B section 7 (see Annex J), the PACE NI Code does not appear to cover loss or damage to seized property, nor does it explicitly mention seizures conducted under the JSA. However, paragraph 7(a) 7.1 indicates that the Code refers to “an officer who is searching any person or premises under any statutory power or

with the consent of the occupier” indicating that seizures under the JSA do indeed fall under the Code. **I recommend that, in tandem with other secondary legislation required above, that loss or damage to seized property be incorporated into the Code and the application to JSA seizures be made explicit.**

## **COMPLAINTS TO PONI**

6.13 The Office of Mrs Marie Anderson, Police Ombudsman for Northern Ireland reported on complaints in relation to the operation of JSA powers. These provide an indication of the numbers of people who are aware of the Ombudsman’s role and availability, the processes by which to make a complaint and the skills and confidence to do so. In the 14th report, I relayed the Ombudsman’s concern about the very low levels of complaints from children and young people, given the difficulties in relationships between police and young people. Thus, the numbers of complaints must be seen in the light of those factors. As stated above, the Ombudsman deals with complaints about police behaviour in the conduct of their duties.

6.14 According to PONI, between 1 August 2021 and 31 July 2022 they received 3041 complaints in total, of which 14 complaints related to JSA powers, representing 0.46% of all complaints. Complaints concerned searches in 6 different Policing districts: Belfast City, Newry Mourne & Down, Derry City & Strabane, Causeway Coast & Glens, Mid & East Antrim and Antrim & Newtownabbey. There were 4 searches carried out in Mid and East Antrim, 3 in Belfast city and no more than 2 in each of the remaining districts. I would draw these complaints to the attention of the PCSPs in the respective districts.

6.15 All 14 of these were complaints from members of the public. Unfortunately, it was not possible to get a full age breakdown of complaints though none of the complaints were made by a child or young person. Of a total of 167 complaints following a search under all laws, 14 complaints were about JSA searches, accounting for 8.4% of the total complaints about stop and search.

6.16 Within the 14 complaints from members of the public, there were 26 allegations. Of these 26 allegations, 13 related to the Search, 10 to oppressive behaviour, 2 to failure in duty and 1 to incivility. In terms of outcomes, all 14 have now been closed, 12 of these as unsubstantiated and 2 as a result of non-cooperation from the complainant.

## **POLICING AND THE COMMUNITIES**

6.17 In considering the continued usage of JSA powers, the desirability of additional powers to address the security situation in Northern Ireland must be balanced against the impact that the exercise of those powers have on the human rights of those in the communities most affected and their - perhaps consequent - confidence in and support for the PSNI. In the 14th report, I noted reports from community workers in some nationalist areas that confidence that the PSNI had initially enjoyed in certain nationalist areas was at a low ebb. Community workers in PUL areas make similar reports. Whilst persistent reports of police misconduct across the UK<sup>37</sup> play a role in this, the other factor is perceived (or actual) unfairness in policing between the two communities. Paradoxically, this perception is expressed by, or on behalf of, both PUL and CRN communities.

6.18 Accusations from PUL sources of ‘two tier’ policing followed the funeral of IRA ex-prisoner and Chair of Sinn Féin Bobby Storey, which took place during the last review period whilst the pandemic restrictions were in place. The funeral was attended by Michelle O'Neill, Gerry Adams and other senior Sinn Féin figures allegedly in breach of the coronavirus guidelines, but no prosecutions ensued, First Minister Arlene Foster called for Chief Constable Simon Byrne to resign; Mr Byrne declined to do so<sup>38</sup>. Following the publicised decision to close Crossmaglen police station, in July 2021 DUP leader Sir Jeffrey Donaldson said, “There can be no denying that the PSNI’s handling of the Bobby Storey funeral has had profound implications for public confidence. There is a growing belief that the rule of law is

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<sup>37</sup> See <https://www.gov.uk/government/statistics/police-misconduct-england-and-wales-year-ending-31-march-2021/police-misconduct-england-and-wales-year-ending-31-march-2021#key-findings>

<sup>38</sup> See <https://www.bbc.com/news/uk-northern-ireland-53275733>

not being applied equally or fairly. Within unionist and loyalist communities' concerns about two-tier policing are not only legitimate but also widespread. I made it clear to Simon Byrne that the PSNI must meaningfully re-engage those who have become disillusioned over recent months.<sup>39</sup>

6.19 The PSNI faced a challenge in overcoming the historic alienation by the CRN community from policing dating back to the era of the Troubles and the Royal Ulster Constabulary, when the religious composition of the RUC sat around 96% PUL. Following the formation of the PSNI and the Patton reforms the religious composition of the PSNI is roughly 32% CRN, with new recruits 75% PUL and 24% CRN<sup>40</sup>. Several other factors contribute to allegations of bias in policing emanating from CRN sources. Section 51(5) of the Police of Northern Ireland Act (2000) stipulates that PSNI officers must notify the Chief Constable of their membership of groups "if membership of the organisation in question might reasonably be regarded as affecting the officer's ability to discharge their duties effectively and impartially". A Freedom of Information (F-2021-02612<sup>41</sup>) request to the PSNI shows that the PSNI employs 378 officers who are members of such organisations. Of these, 168 are members of exclusively Protestant groups – the Orange Order, the Royal Black Preceptory, the Apprentice Boys of Derry and the Independent Orange Order with two officers who were member of CRN-associated groups, The Knights of Columbanus and the Ancient Order of Hibernians.

6.20 In terms of the use of powers, in December 2021 The Detail published a report based on PSNI statistics pointing out that almost double the number of Catholics as Protestants were arrested and charged over a five-year-period in Northern Ireland<sup>42</sup>. CAJ commented that the figures showed a "stark disparity on the basis of community background which cries out for explanation and remedy".

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<sup>39</sup> See <https://www.newsletter.co.uk/news/crime/two-tier-policing-concerns-raised-with-chief-constable-by-dup-3301263>

<sup>40</sup> See <https://www.bbc.com/news/uk-northern-ireland-59126178>

<sup>41</sup> See <https://www.psni.police.uk/sites/default/files/2022-10/02612%20Notifiable%20Organisations.pdf>

<sup>42</sup> See <https://www.thedetail.tv/articles/almost-twice-the-number-of-catholics-than-protestants-arrested-and-charged-by-psni>



6.21 CAJ expressed their long-standing concern that the PSNI does not monitor the community background of individuals subjected to stop and search powers (see paragraphs 6.27-6.41 below) and commented that the provisional results of the exercise designed to estimate the community background of those stopped under JSA powers “requires further explanation”. The Detail submitted a Freedom of Information (Fol) request asking why the PSNI do not record the community background of people subjected to stop and search, but the Fol was rejected on cost grounds. CAJ also expressed concern about disparities in the use of spit and bite guards, where they reported that use on Catholics was twice as frequent as on Protestants.

6.22 At paragraph 6.67 of the 14th report, I noted a recommendation by the Policing Board in 2019 that PSNI have a clear stand-alone policy on the use of TACT and JSA stop and search. In the 14th report, I noted that although a stand-alone policy was developed it was never finalised. In her review of authorisations of JSA powers Joanne Hannigan QC noted the absence of “a specific PSNI policy in respect of searches under TACT or JSA on the website.” Since she recommended that rectify this as a matter of urgency. In paragraphs 6.73 – 6.76 of the 14th report, I review the jurisprudence and previous recommendations on the use of JSA powers including the ruling in The NI Court of Appeal in *Ramsey* [2020], which cites David Seymour’s eighth report. The PSNI policy on the role of JSA powers remains unarticulated. **In view of the various comments in this and previous reports about the proper use of these powers, I recommend that the policy is expressed and published on the PSNI website without further delay.**

#### **REPEATED STOP AND SEARCH AND ALLEGATIONS OF HARASSMENT**

6.23 At paragraph 6.68 of the 14th report, I described complaints from individuals from PUL communities about being frequently and repeatedly subject to large numbers of JSA stops and searches over a period of years without any charges being brought. I am pleased to report that, following liaison with the PSNI, these matters have been resolved for the individuals concerned. Some of these individuals may have former associations with paramilitary groups, but currently

lead law-abiding lives. Whilst they continue to do so, this refocusing of PSNI attention on those who are breaking the law is both appropriate and welcome.

- 6.24 Nonetheless, legal anomalies exist in many communities for those with such paramilitary histories and associations. In the 14th report, I commented at length (from paragraph 4.11 on) on the policing of paramilitaries in Northern Ireland. Should paramilitarism end, the powers available to the PSNI under the JSA could be retired, the PSNI could operate under the same laws as the rest of the UK, so an end to paramilitarism lies at the centre of JSA usage and continuation. At paragraph 6.70 I recommended there, and I repeat here, **my recommendation that serious attention be given by the UK government to the provision of a clear, visible and accessible pathway to a law-abiding life for those who remain in paramilitary groups... in contemporary efforts to end paramilitarism.**

#### **COMMUNITY BACKGROUND MONITORING**

- 6.25 At 6.93 of the 14th report, I reviewed the long and troubled history of recommendations that the PSNI monitor the community background of JSA stop and search, which date back 2008. Eight successive Independent Reviewer reports have each repeated this recommendation and a working group was established in 2020 to take forward the introduction of such monitoring following the 2020 Ramsey judgement. My predecessor, David Seymour CB commented that, although the group had done a good deal of work, he questioned whether their work was necessary and that their programme of work could be construed as an attempt to “kick the can down the road”. In the 14th report, I reported no discernible progress in the subsequent year.

- 6.26 In preparing the 14th report, I had extensive engagements with a wide range of people in the PSNI and beyond on the issue of community background monitoring. I reported and analysed the series of obstacles that the PSNI considered stood in the path of implementation of community background monitoring of JSA powers. These were: lack of clarity about the meaning of ‘community background’; the method of monitoring to be used; data protection issues; and the legal basis for monitoring. I dealt with each of these in paragraphs 6.95 – 6.99. I also commented

in detail on the various methodologies under consideration for conducting community background monitoring of JSA stop and search subjects.

6.27 In January 2022, I also asked the Northern Ireland Statistics and Research Agency to conduct a secondary analysis by mapping data on JSA Stop and Search against data from the Small Area Census data for 2011. Northern Ireland is a society characterised by a high level of residential segregation between the two main PUL and CRN communities. The home postcode was recorded in 72% of 4,309 JSA stops and searches. These data were extracted prior to any mapping, to maintain the anonymity of those whose records were used. Census data was not mapped at any stage onto the records of individuals or any personal records of those who had been stopped and searched/questioned under JSA powers.

6.28 By using the home postcode of those subject to the JSA powers (it was available in 72% of 4,309 cases only) the stop could be identified with a Small Area and the religious composition of that Small Area could be used to estimate the breakdown of JSA data by community background. The Census variable used was 'Religion or Religion brought up in' (hereafter referred to as religion). At the Northern Ireland Level we were unable to assign the religion variables to 28% of records. This coverage varies between policing districts and ranges from 54% to 83% across districts.

6.29 There were serious limitations to this exercise due to inaccuracies or the absence of postcode data, which were provided by the individual who was stopped, or identified by linking to addresses on PSNI systems. For example, In Table 6.1 it is evident that only 72% of stops generate a postcode. Likewise, data from the 2011 census was used, and there may well have been demographic changes in the interim. The equivalent religious composition data from the 2021 Census is not due to be available until summer 2023. The detail of this methodology and the full account of this exercise, including a breakdown by policing district, is contained in the NISRA report on this exercise which available online at [https://www.psni.police.uk/sites/default/files/2022-09/religious-composition-jsa-aug20-jul21\\_0.pdf](https://www.psni.police.uk/sites/default/files/2022-09/religious-composition-jsa-aug20-jul21_0.pdf) and at Annex K.

6.30 The result of this exercise provides an estimate of the religious composition of those persons stopped and searched/questioned under JSA powers between August 2020 and July 2021 across Northern Ireland, with a very high rate (28%) of missing cases. The results are shown in Table 6.1 For a baseline, Column A shows the share of each category in the 2011 census. Column B shows the results of the exercise.

<b>Table 6.1 Estimated Religious Composition of those subject to JSA stop and search</b>					
<b>Community background</b>	<b>A: 2011 census of population</b>	<b>B: Postcode exercise result</b>	<b>C: All missing are Catholic</b>	<b>D: All missing are Protestant</b>	<b>D: All missing are Other/None</b>
<b>Catholic</b>	45%	45%	73%	45%	45%
<b>Protestant</b>	48%	24%	24%	52%	24%
<b>Other / None</b>	7%	4%	4%	4%	32%
<b>Missing</b>		28%	0%	0%	0%

6.31 The limitations of the results of exercise due to the large share of missing cases becomes apparent. The raw results of the exercise, shown in Column B, shows that the share of Catholics subject to JSA powers matches the share of Catholics in the population in 2011 (Column A), whereas the share of Protestants subject to the powers (24%) is considerably lower than the Column A share of Protestants in the population (48%). Column C shows the results if all the missing cases are presumed to be Catholic, a highly unlikely situation. Nonetheless, it provides an idea of the highest possible Catholic share of the population subject to the powers – 73%. This compares with the equivalent exercise where all missing cases are presumed to be Protestant, yielding a ‘worst /unlikely case scenario’ figure of 52% of Protestants subject to the powers. For completeness, Column D attributes all missing cases to the Other/None category, another unlikely scenario.

6.32 In summary, the exercise suggests that a robust analysis of the real data on the community background of those subject to JSA powers – for which there is no substitute – is likely to find a higher share of Catholics subject to the powers. I

comment on this in 6.102-6.104 of the 14th report. Such findings are not a surprise, nor will they be in any future exercise, since the PSNI 2015 pilot of community background monitoring also found ‘a significant preponderance of those stopped came from a perceived Catholic background’. Furthermore, a breakdown of arrests by community background showed that ‘almost twice the number of Catholics than Protestants are arrested and charged<sup>43</sup>’.

6.33 In the 14th report, I conclude that disproportionality, whilst a cause for constant monitoring and concern about compliance with the Code and Section 75 duties, is not necessarily caused by illegal discrimination. I cite *Ramsey’s* [57] comment that disproportionate shares of Catholics is “not necessarily surprising since the DRs constitute the principal threat and are most active in those communities.”

**However, once again, I must conclude that any meaningful discussion about PSNI compliance in relation to JSA stop and search is impossible until community background monitoring is implemented. I cannot exaggerate the deep frustration felt by many that this is not already the case.**

6.34 I have previously reported the assurances that I had received from the PSNI of their commitment to the implementation of community background monitoring of JSA stop and search powers. I commented at 6.100 of the 14th report that “such assurances would appear more credible to observers if there was a solid prospect of implementation in the coming year” and that some observers believed that the PSNI were simply resistant to implementing such monitoring.

6.35 I also read and took into account the legal advice obtained by the PSNI from independent Counsel. I considered the legal basis for community background monitoring of the JSA powers at paragraphs 6.97- 6.99. The legal arguments had previously been set out in paragraph 7.39 of the 13th report by predecessor. I referred to *Ramsey 2020*, where Lord Chief Justice Morgan accepts “that the monitoring and supervision requirements of the Code establish a duty on the part of the PSNI to devise a methodology of enabling such monitoring and

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<sup>43</sup> <https://www.thedetail.tv/articles/almost-twice-the-number-of-catholics-than-protestants-arrested-and-charged-by-psni>

supervision.”[56] I also pointed to the Code of Practice for the Exercise of Powers in the JSA, which sets out the PSNI’s duty to avoid discrimination, specifying at 5.7 that “Officers should take care to avoid any form of racial or religious profiling when selecting people to search under section 24/schedule 3 powers.” The Code also sets out the duty of the PSNI to monitor and supervise the use of stop and search powers:

“Senior officers with area or service-wide responsibilities must also monitor the general use of stop and search powers and should take action if they do not feel the powers are being used appropriately.”

6.36 In the 14th report, I commented that “[t]he pursuit of new legislation should not prevent the PSNI from implementing a form of community monitoring in the interim without any further delay.” Nonetheless, the PSNI’s reading of the advice of Independent Counsel led them to write, first to the DOJ and then to the NIO seeking additional legislation to empower them to conduct community background monitoring, which would provide, as they put it, “legal certainty to all parties involved.” At 6.99 of the 14th report, I conclude that “[t]he PSNI wish to obtain legal certainty and any amendments to existing codes or new legislation remains a matter for Government.”

6.37 The Right Honourable Brandon Lewis CBE MP was Secretary of State when this issue first arose and was minded to advance legislation in order to ensure that community background monitoring could move forward. However, the current Secretary of State the Right Honourable Chris Heaton Harri missings MP has concluded that legislation is unnecessary.

6.38 In early January 2022, I met with Assistant Chief Constable Christopher Todd to discuss the way forward, and on 17 January, wrote to me informing me that: “Agreement in principle was given at the Strategic Management Board to commence a program of work to identify the best and most defensible method of obtaining and collating community background data relating to persons subject to the use of Justice and Security Act powers to stop and search. This is subject to

further stakeholder engagement, confirmation of requisite methodologies and assurances regarding legal compliance.” He also informed me that the PSNI would now start working through the requisite methodologies, policy, IT requirements and so on, but that the agreement to advance this work was now in place.

6.38 When implementing community background monitoring, I would remind the PSNI that on 24 November 2020 the PSNI wrote to my predecessor David Seymour reporting that, in response to the Ramsey 2020 judgement they had established a working group:

“to consider various methodologies and explore practical ways of capturing community background information which also respect individuals’ privacy and data protection rights and builds on previous learning.”

That working group was to demonstrate “a commitment to both the Policing Board and to the courts that PSNI are taking the recommendation forward.” David Seymour reported that the group had done a good deal of work. **I therefore recommend that the PSNI capitalise on all the previous work undertaken by the working group referred to by my predecessor and the various deliberations that have taken place over the intervening years since 2008 when the proposal was first mooted. I urge them not to delay further or reinvent any wheels in taking this forward.**

## **ROAD CLOSURES AND LAND REQUISITIONS**

7.1 Under Sections 29 to 32 of the JSA the Secretary of State may requisition land (s29) and close roads (s30 and 32) for “the preservation of the peace or the maintenance of order” (s29). In line with Agency Agreements agreed between the DOJ and the Secretary of State (see paragraph 238 onward of the fourth report) the requisition power in section 29 and the road closure power in section 32, can be exercised by the DOJ in respect of devolved matters.

### **ROAD CLOSURES**

7.2 In the reporting period – 1st August 2021 to 31<sup>st</sup> July 2022 no new road closures were initiated.

### **LAND REQUISITIONS**

7.3 In that same period, S29 powers were utilised to requisition land on 3 occasions as detailed below:

- 25<sup>th</sup> June 2022 – land at the Invest NI site (Forthriver Business Park), Springfield Road, Belfast was requisitioned to facilitate an effective policing operation for the purposes of enforcing a Parades Commission for Northern Ireland (PCNI) determination in respect of the annual ‘Whiterock Parade’.
- 12<sup>th</sup> July 2022 - – land at the Invest NI site (Forthriver Business Park), Springfield Road, Belfast was requisitioned to facilitate an effective policing operation for the purposes of enforcing a Parades Commission for Northern Ireland (PCNI) determination in respect of a parade by LOL 974.
- 25<sup>th</sup> July 2022 – land at Brookfield Mill, Crumlin Road, Belfast was requisitioned to facilitate the erection of a CCTV camera in connection with the proposed removal of interface security barriers and their replacement with automated vehicular and pedestrian access gates on Flax Street.

7.4 The Economy Minister was notified of the two parade-related requisitions given Invest Northern Ireland’s (INI’s) ownership of the land in question.



- 7.5 Both the re-routed parades passed off peacefully during the 24hr requisition periods (midnight to midnight). There were no objections to the use of requisition orders in this review period.
- 7.6 Approval was given by the developer of one site by the operator at that site in respect of the CCTV camera requisition. Local community groups were made aware of the need for the camera and were advised of its capability.

## **8. THE ARMY**

8.1 In his first report covering the period 1 August 2007- 31 July 2008, my predecessor Robert Whalley CB, set out the role of the Army from 1 August 2007: the security background against which the powers were being sought and the specific reasoning for seeking them, namely the evolution towards a condition of peace:

*“... while the armed forces are not responsible for maintaining national security in the UK, they provide focused support in this area to the civil authorities...”*

8.2 The role of the Army in Northern Ireland remains unchanged from that time.

8.3 Here, I report on two aspects of Army operations:

- Explosive Ordnance Disposal (EOD activity) where the Army support the PSNI in dealing with explosive material; and
- the operation of the Army complaints procedure.

### **EOD ACTIVITY**

8.4 Table 8.1 summarises the EOD activity for the period from 1 August 2021 - 31 July 2022 with the figures for the previous review period shown in brackets for comparative purposes, thus: (1 August 2020 - 31 July 2021). Figure 8.1 shows the longitudinal trend in EOD tasks since 2008. In the current review period there were 149 EOD incidents compared with 199 EOD incidents in the previous period. These were as follows:

- on 12 occasions the Army were called out to deal with an IED – typically an active device such as a pipe bomb, compared with 23 in the previous year and 18 in 2019-20, the fewest in three years;
- on eight occasions the were called out to deal with an explosion, compared with nine in the last review period and 11 the period before, again, the lowest number in three years;

<b>Table 8.1: Explosive Ordnance Disposal (EOD) Activity in support of PSNI: 1 August 2021 - 31 July 2022 (1 August 2020 - 31 July 2021)</b>									
<b>DATE</b>	<b>IED</b>	<b>EXPLOSION</b>	<b>HOAX</b>	<b>FALSE</b>	<b>INCENDIARY</b>	<b>FINDS</b>	<b>TOTAL</b>	<b>FIND X-Ray</b>	<b>TOTALS incl X-RAY 21-22 (20-21) (19-20)*</b>
Aug 21	2 (4)	0 (1)	1 (9)	2 (5)	0 (0)	0 (2)	5 (21)	7 (8)	12 (29) (13)*
Sept 21	2 (1)	0 (1)	1 (3)	0 (0)	0 (0)	0 (0)	3 (5)	1 (8)	4 (13) (25)*
Oct 21	1 (3)	0 (0)	2 (1)	0 (3)	0 (0)	0 (0)	3 (7)	11 (5)	14 (12) (14)*
Nov 21	2 (3)	1 (1)	2 (6)	1 (2)	0 (0)	2 (2)	8 (14)	10 (6)	18 (20) (16)*
Dec 21	0 (1)	0 (1)	0 (4)	1 (1)	0 (0)	1 (3)	2 (10)	8 (12)	10 (22) (14)*
Jan 22	1 (1)	3 (1)	2 (3)	1 (1)	0 (0)	1 (3)	8 (9)	5 (7)	13 (16) (25)*
Feb 22	0 (1)	0 (0)	1 (2)	0 (1)	0 (0)	1 (2)	2 (6)	5 (7)	7 (13) (14)*
Mar 22	1 (2)	2 (2)	4 (2)	3 (3)	0 (0)	3 (8)	13 (17)	5 (7)	18 (24) (24)*
Apr 22	1 (1)	1 (0)	1 (4)	1 (0)	0 (0)	0 (1)	4 (6)	10 (7)	14 (13) (10)*
May 22	1 (4)	0 (1)	1 (5)	2 (1)	0 (0)	0 (0)	4 (11)	10 (11)	14 (22) (26)*
Jun 22	0 (2)	0 (1)	0 (1)	1 (1)	0 (0)	1 (1)	2 (6)	9 (2)	11 (8) (28)*
Jul 22	1 (0)	1 (0)	4 (1)	0 (0)	0 (0)	1 (1)	7 (2)	7 (5)	14 (7) (17)*
<b>TOTAL</b>	<b>12 (23) (18)*</b>	<b>8 (9) (8)*</b>	<b>19 (41) (25)*</b>	<b>12 (18) (32)*</b>	<b>0 (0) (0)*</b>	<b>10 (23) (28)*</b>	<b>61 (114) (184)*</b>	<b>88 (85) (73)*</b>	<b>149 (199) (226)*</b>

KEY: Figures for previous reporting periods are in brackets (n)

IED – A confirmed Improvised Explosive Device, e.g. a pipe bomb; Explosion – A confirmed explosion

Hoax – A suspicious object, which has been accredited to a codeword or similar warning, cleared, and declared not to be an IED

False – A suspicious object which is found by a member of the public, examined and declared to be nothing of concern

Incendiary – A device designed to create a fire rather than explosion

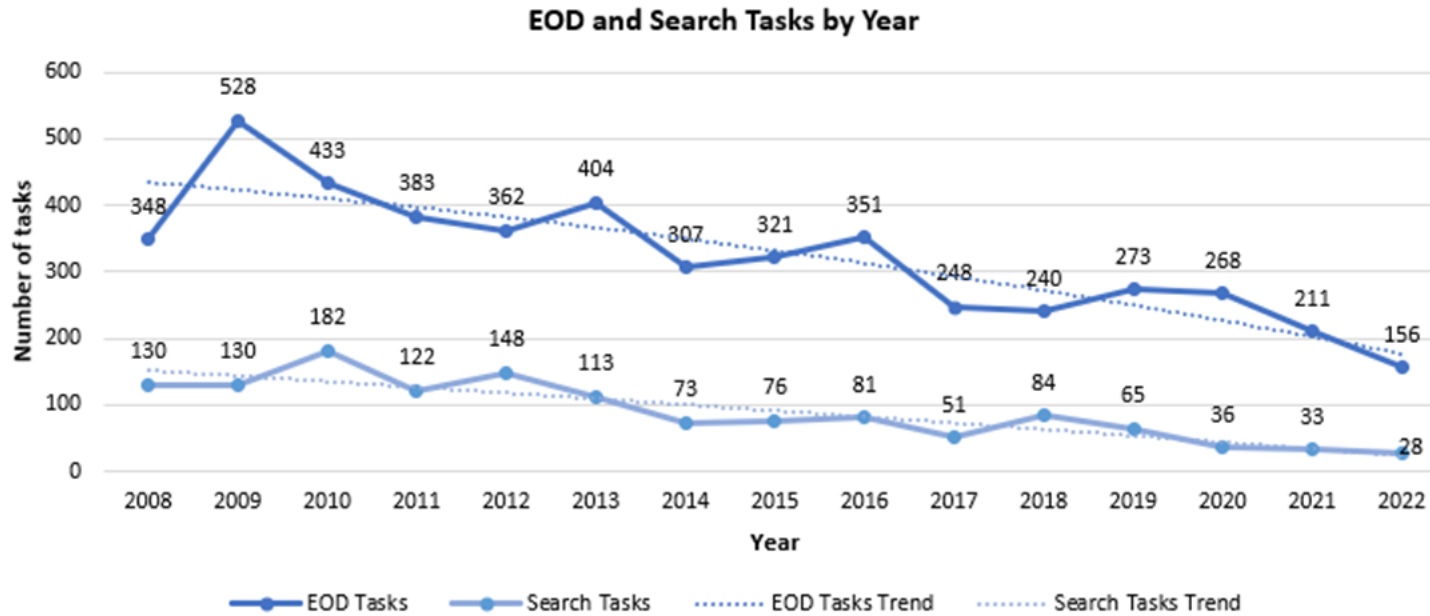
Finds – Objects recovered, usually during a search

Find X-Ray – An object x-rayed by EOD and declared safe before being entered into police evidence

Figures were provided for CMD or "Common Munitions Disposal" i.e. grenades or legacy munitions washed up on the shores and are not included here.

\*Figures for 2019-2020. **Source: MOD 2021.**

Figure 8.1 Explosive Ordnance Disposal activity trend 2008-2022



Source MOD

- The Army dealt with 19 hoaxes – where an object is deliberately made to look like an IED and sometimes accompanied by a telephone warning confirmed by the police, which could potentially be a prelude to a “come on” attack. This compares with 41 such hoaxes in the previous period, and 25 in 2019-20. Again this is the lowest number in three years;
- on 12 occasions the Army dealt with a false alarm for example, a member of the public genuinely reporting a suspect object giving rise to a legitimate concern but there was warning or attribution. This compares with 18 hoaxes in 2020-21 and 32 hoaxes in 2019-20, again a steady decline;
- on no occasion was the Army called out to deal with an incendiary device which is programmed to ignite and burn a building, nor were there any such devices in the previous two review periods;
- on 10 occasions the Army had to deal with the discovery of munitions, compared with 23 such occasions in 2020-21 and 28 in 2019-20, again, a steady decline;
- the only activity that increased in this review period was instances where the Army were called on to x-ray and declare safe or otherwise an apparatus or package. In this review period, the Army were called on 88 times compared with 85 in the previous review period and 73 times in 2019-20. This is a steady increase over the three-year period.

8.5 This total of 199 EOD incidents where the Army were called out is a reduction from the 226 occasions in the last reporting period. This reduction is accounted for by a change in the pattern of demands on the Army, as follows.

- a fall in the numbers of explosions (nine compared with 11 previously)
- the numbers of false alarms (18 compared with 32 in the previous period) and
- a reduction in the number of occasions when the Army had to deal with the discovery of munitions (23 compared with 101 occasions previously).

8.6 For two reporting periods in a row, on no occasion was the Army called out to deal with an incendiary device.

8.7 However, there was a small increase in:

- the occasions when the Army were called out to deal with an IED (23 compared with 18 previously)
- a marked increase in the number of hoaxes dealt with by the Army (41 compared with 25 previously).
- The biggest increase was in the number of times the Army dealt with x-rayed objects (85 compared with 73 previously), more than twice the number in the previous period.

### **PROCESSING AND HANDLING OF COMPLAINTS**

8.8 There were a total of six cases contained in the Military Complaints File for the period 1 August 2021 - 31 July 2022, compared with eight complaints during the previous reporting period. As in the previous review period, all six cases referred to overhead aircraft.

“In the 13th report, David Seymour noted, “the issue of low flying military aircraft is a sensitive issue in Northern Ireland and Sinn Fein have previously called for such activity to stop.” He further noted the need to respond appropriately to those concerns. In my scrutiny of the files kept on such complaints, I examined the thoroughness with which the complaints were examined and the courtesy with which complainants were treated.”

8.9 I examined all six files. Of these:

- one file contained not a complaint but a question from one individual about the type of aircraft (a Royal Air Force (RAF) Typhoon FGR4) and the purpose of the manoeuvre – a routine training flight;
- one file was an individual complaint about low flying aircraft repeatedly flying low over a nature reserve causing disturbance to nesting and fledging birds. The same complainant reported the disturbance also caused to a nearby riding stables. The response confirmed the presence of a military helicopter that was operating in the

area under permitted guidelines. An explanation and an apology for any annoyance was given by email. However, this did not satisfy the complainant who was not content and proposed to contact air traffic control at Aldergrove;

- in one file, there were three complaints relating to French Mirage jets flying low over Kilrea, Antrim and Bellaghy on training exercises. In all three cases, an explanatory letter, confirming the identity of the aircraft and the nature of the flight was sent to complainants by RAF High Wycombe;
- one file related to a complaint by a resident of Crossgar/Downpatrick area about low flying helicopters in July 2022. In this case, the aircraft complained about were a military aircraft and the complainant was referred to the Civil Aviation Authority (CAA);
- likewise, one complainant reported low flying planes at 2300 over Claudy, but again this was found not to be military aircraft and the individual was referred to CAA Aviation Regulation Enforcement;
- the final file contained a request to confirm the presence of military helicopters over Claudy. They were not, in fact, military craft. The complainant had already contacted the CAA but was also referred to the PSNI.

8.10 The documentation of all of these cases was thorough and complete. The average response time across all eight cases was over thirteen days, an increase from the four-day reply period in the previous review period. Those contacting the Army were treated with respect and courtesy. Their concerns were taken seriously and the responses were, for the most part, timely and appropriate.

8.11 I appreciate that it takes time to investigate the complaint and identify the aircraft complained about. **I recommend, however, that in all instances, an immediate response acknowledging the complaint or query, explaining that an investigation will be embarked upon and undertaking to respond when the investigation is complete, will provide timely responses to members of the public. In some instances regret was expressed for any inconvenience or disturbance caused, and this, too, might be adopted universally as good practice.**

## PART 2 – NON-JURY TRIALS (NJT)

### Background

9.1 Trial by jury is held as a central democratic right. The Lord Chief Justice in reference to a trial under the Criminal Justice Act provisions (*J, S, M v R* [2010] at the Court of Appeal) said:

*"The trial of a serious criminal offence without a jury ... remains and must remain the decision of last resort, only to be ordered when the Court is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled."*

9.2 In the 14<sup>th</sup> report, at paragraphs 9.1 – 9.4 I set out the provisions for Non-Jury Trials (NJT) in Northern Ireland under the JSA. Briefly, the decision to institute a NJT is taken by the Director of Public Prosecutions (DPP) in Northern Ireland under the provisions of section 1 of the Justice and Security (Northern Ireland) Act 2007 (JSA 2007). Where a Certificate is issued, it must be lodged with the Court in advance of arraignment, before the defendant enters a plea. The full guidance used in determining that a trial should be tried without a jury is included at Annex G. The system in Northern Ireland is distinct from the previous so-called Diplock Court for trying 'scheduled' offences connected with the Troubles that pertained under Northern Ireland (Emergency Provisions) Act 1973. Offences are no longer 'scheduled' in this way.

9.3 The current special statutory provisions for Non-Jury Trials (NJT) in Northern Ireland, intended to take account of the special circumstances facing jury trials in Northern Ireland, apply to a small number of cases only and are set out in Sections 1 to 9 of the JSA 2007 (see Annex F). The evidential standard required to institute a NJT under the Sections 44-46 Criminal Justice Act (CJA) 2003 Act and referred to in *J, S, M v R* [2010] EWCA Crim 1755 at the Court of Appeal, is considerably higher than the test under the JSA. The CJA is the only provision for NJTs in the rest of the UK. The difference between the CJA 2003 and JSA 2007 provisions are laid out in more detail in Table 9.8 of the 14<sup>th</sup> report to parliament.



## RENEWAL OF SECTIONS 1-9

9.4 The current provisions for non-jury trials are due to expire in July 2023. They may only be extended by two years until July 2025 subject to the approval of both Houses of Parliament. At each renewal, the Northern Ireland Office (NIO) launches a public consultation on whether to renew these legislative provisions. There are no limits on the number of times NJT provisions may be extended, although they were designed to be a temporary measure, and they have been extended by successive orders since 2007. In the last public consultation which closed on 15 February 2021<sup>44</sup> the majority of respondents supported the extension of NJT provisions under the JSA 2007, although many look forward to a time when NJTs in this format are no longer necessary.

9.5 Subsequent to the consultation, the Secretary of State for Northern Ireland extended the NJT provisions until 31 July 2023 and Parliament passed the Justice and Security (Northern Ireland) Act 2007 (Extension of Duration of Non-Jury Trial Provisions) Order 2021. A public consultation on this renewal is due to report early in 2023.

9.6 On the occasion of its last renewal, The then Minister for State for Northern Ireland, Mr Robin Walker told Parliament:

“Although we are confident that the decision to extend for two years is necessary at this time, the Government remain committed to ensuring that the Northern Ireland-specific provisions are brought to an end when the time is right.” Hansard: Wednesday July 7, 2021<sup>45</sup>.

9.7 In his 12th report (16.1a) the previous Independent Reviewer recommended the establishment of a working group to examine ways to reduce the number of NJTs under

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<sup>44</sup> This Consultation Response, published online at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/980235/NJT\\_Consultation\\_Response\\_Doc\\_.docx.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/980235/NJT_Consultation_Response_Doc_.docx.pdf) contains an analysis of the responses received.

<sup>45</sup> [https://hansard.parliament.uk/commons/2021-07-07/debates/b590851d-77d9-4a3b-b32f-897e25a5d86b/DraftJusticeAndSecurity\(NorthernIreland\)Act2007\(ExtensionOfDurationOfNon-JuryTrialProvisions\)Order2021](https://hansard.parliament.uk/commons/2021-07-07/debates/b590851d-77d9-4a3b-b32f-897e25a5d86b/DraftJusticeAndSecurity(NorthernIreland)Act2007(ExtensionOfDurationOfNon-JuryTrialProvisions)Order2021)

the 2007 Act, and the group was asked to identify indicators of when it would be safe and compatible with the interests of justice to allow the provisions to expire.

9.8 The working group was composed of representatives from:

The Bar of NI;  
the Department of Justice NI;  
The Law Society of Northern Ireland;  
the NI Executive Tackling Paramilitarism, Criminality and Organised Crime Programme NI;  
NI Courts and Tribunals Service;  
NI Human Rights Commission;  
Northern Ireland Office;  
Police Service of Northern Ireland;  
Public Prosecution Service;  
Victim Support NI;  
Together with:  
NI Policing Board Human Rights Advisor, John Wadham;  
Dr Johnny Byrne, University of Ulster;  
Dr Mark Coen, University College Dublin;  
Seamus Mulholland, Queen's University Belfast;  
Dr Kevin Brown, Queen's University Belfast;  
Professor Clive Walker, Professor Emeritus University of Leeds.

They held their inaugural meeting on 27 July 2021 and continued to meet monthly from July-December 2021, with further meetings planned until December 2022.

9.9 The working group was asked to:

- Identify practical measures and legal measures that could be taken to reduce the number of NJTs taking place.

In addition, I asked them to:

- Identify the indicators that members would look to in order to be satisfied that the NJT provisions were no longer necessary.

9.10 The group was briefed on the security situation, the work of the Northern Ireland Executive's Tackling Paramilitarism (TPP) programme, and the processes involved in

the issuing a NJT certificate under the JSA and the non-jury trial provisions under the Criminal Justice Act 2003 (CJA). I met with the working group in December 2021 and on two subsequent occasions and was impressed with their range of expertise and the earnestness with which they engaged with their tasks. The group met throughout 2022 and produced two briefing papers (see Annexes P and Q), one on each task.

9.11 The first paper, (see Annex L) identifies practical and legal measures that could be taken to reduce the number of non-jury trials taking place. It also briefly discusses the identification of amendments to the JSA NJT provisions as part of an interim move away from a Northern-Ireland specific regime towards measures more akin to those in the CJA. They did not consider any of these amendments in detail for a number of reasons, although I do so below. First, in the view of the working group, they retain an, albeit amended, regime in Northern Ireland that is distinct from that in the rest of the UK; second, the declared intention of government has been to allow JSA provisions to expire, rather than to breathe new life into them; and third, consequent on the second, seemingly there is little appetite for, and therefore possible difficulty in, obtaining parliamentary approval for such amendments to the JSA.

9.12 The working group did however, consider that temporary amendments to the CJA to take account of the persistence of paramilitarism in Northern Ireland might be a more politically feasible step towards aligning with England and Wales whilst managing the Northern Ireland-specific risks. I will return to this useful point below.

9.13 Having been aware of the arrangements currently in place in Northern Ireland to protect juries by sections 10-13<sup>46</sup> of the JSA, the group considered that it would be prudent for these provisions to remain in place even if the JSA provisions for NJTs were to be lapsed. They are:

- restriction on disclosure of juror information (making it an offence for those engaged in the criminal justice system to disclose juror information);

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<sup>46</sup> Sections 10-13 of the Justice and Security (Northern Ireland) Act 2007 can be found here: <https://www.legislation.gov.uk/ukpga/2007/6/crossheading/juries>

- balloting of jurors by number rather than by name
- routine criminal records checks to prevent disqualified persons from serving as jurors; and
- provision for a judge to privately hear any challenge from the defendant against a juror.

9.14 The group further noted the current precautions that are, or can be, deployed in Northern Ireland to protect the integrity of the trial. These include:

- jury keepers acting as a conduit between the jury and the judge so that any concerns (for example about jury tampering) can be escalated to the judge;
- providing entry/exit/access points to the court for jurors which are not used by members of the public/defendants; and
- consent forms are kept separately rather than as part of a list so that jurors do not see each other's signatures.

9.15 The working group reviewed a range of other measures, such as screening and sequestering juries, moving the trial to another location, police protection and the use of technology to facilitate juries operating remotely. They considered that none of these to assist the situation in Northern Ireland, for reasons set out in paragraphs 11-17 of Annex L. I discuss these options further below.

9.16 The working group suggested that it would be useful to consider cases where the DPP has refused a NJT certificate in order to determine whether those trials proceeded with a jury and if so, whether any additional measures were introduced as a result. The NIO and the PPS considered whether lessons can be learned from those cases. The PPS provided detail on the small number of cases - 7% between 2007 and 2020 - where an application for NJT had been refused. They reviewed cases from 2017 and the refusals fell into two categories:

- Conditions 1 - 4 not met - DPP considered evidence not sufficient. For example, ambiguous, limited or third-hand intelligence not deemed sufficient to meet conditions. Other examples include limited or historic

intelligence on membership of proscribed organisations but with more recent evidence that the accused had disassociated themselves.

- Any of conditions 1 - 4 were met, but DPP were not satisfied of sufficient risk to the administration of justice. For example, charges were unrelated to proscribed organisation elements such as financial fraud for personal gain. Provisions of the Criminal Justice Act 2003 (the 2003 Act) could be relied upon should there be any approach to the jury.

9.17 As part of the working group, the PPS agreed to undertake a manual trawl of the last full year's cases to determine how many certificates were granted when juror bias was a consideration. However, it was not possible to get data on juror bias in jury trials because of section 8 of the Contempt of Court Act 1981. They agreed to a manual trawl, the results of which were not available at the end of this review period<sup>47</sup>. I recommend that, when these data are available, they are made available to staff in the NIO so they can produce a summary for the purposes of briefing the Secretary of State when they are making the decision about seeking renewal of the powers.

9.18 An assessment of the threat to juries was commissioned and, at the time of writing, was partially completed by the secret intelligence service, MI5 and the PSNI in two parts. I have had sight of the first part of this assessment, pertaining to the threat to jurors from paramilitary groups. A summary official sensitive version of these threat assessments will be shared with the working group. Whilst the DPP may consider it preferable in the interests of transparency that he rely solely upon relevant assessments that are in the public domain, **I recommend that these assessments are conducted on a biannual basis and appropriate arrangements for the DPP to have**

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<sup>47</sup> The PPS point out that it should be noted that there will be cases where it is judged that there is a risk of jury intimidation and a risk of jury bias. Furthermore, the risk of jury bias is also considered alongside a risk of jury fear, either of which could lead to a perverse verdict. A risk of jury bias can arise as a result of the nature of the offence (in which case it is often linked to Condition 4), but it can also arise from a knowledge or belief on the part of a juror that a paramilitary organisation is involved (which may be linked to Conditions 1 and 2, but, sometimes, not Condition 4). It is therefore important to understand that, even where a risk of jury bias is identified, a certificate may issue on additional grounds.

**sight of the full assessments, should he wish to do so, so that he has full and focussed information on which to base his judgments.**

9.19 The report highlights that there may be lessons learned from cases where certificates had been applied for but refused (paragraph 18) and suggests checks that jury protection has been considered in the process of granting a certificate. They also consider but regard as a last resort the use of civil orders where prosecution is regrettably not possible due to the various risks involved (paragraph 22). Again, I will consider this proposal again later in this report.

9.20 Jury bias is another concern for criminal trials in Northern Ireland and at paragraphs 23-30 the group set out their deliberations on this matter. Some thought that due to the history and divisions in Northern Ireland there was a strong likelihood of bias in certain cases, whilst others thought that the public in Northern Ireland had moved on and bias could not be assumed.

9.21 The first working paper concludes that detailed examination of NJTs is an important first step in their reduction but that no one measure will reduce the numbers of NJTs in Northern Ireland. The context of continuing paramilitarism restricts the amount of change possible, and a move to the exclusive use of the CJA would involve risks that are a matter for the government.

9.22 The working group's most important conclusion is set out in paragraph 25, thus:

Finally, further consideration could be given to specific, temporary amendments for Northern Ireland being made to the 2003 Act as described in paragraph 8. These amendments could perhaps allow cases in Northern Ireland to be considered at a slightly lower standard of proof than in England and Wales. Whilst it would take some time (likely years) to make such a legislative change and noting that it would continue to distinguish Northern Ireland, it would be a marked step towards aligning with England and Wales whilst seeking to manage risks associated with the persistence of paramilitarism.

I will return to this recommendation, also mentioned in 9.12 above in the discussion and recommendations below.

9.23 The second working group report seeks to identify the indicators that could be used to identify a time when non-jury trial provisions were no longer necessary. The group were briefed on the TPP, on PSNI crime measures progress using a benefits realisation approach and reviewed evidence of intimidation collected by Victim Support NI. They then identified a range of indicators that might be used in order to determine whether the JSA non-jury trial provisions were still necessary.

9.24 Having been briefed by the group and read their paper, appended in Annex M, I would offer the following comments, captured in more detail in Table 9.1 below, on their deliberations on the range of indicators they reviewed.

- The lack of evidence of jury tampering is, as they note, due to the preventative nature of the current NJT provisions under the JSA, hence the need for proxy data to deduce the level of risk of this;
- Whilst the proxy data depicts the general picture of the (somewhat<sup>48</sup>) improving security situation in Northern Ireland, the estimate of potential threat of jury tampering, whilst informed by these data, remains an educated guess;
- I note the group’s caution on the accuracy and reliability of the data used, due to factors such as impact of the COVID-19 pandemic and the provisional nature of some of the data used. Data on intimidation deserves cautious treatment due to under-reporting.

<b>Table 9.1: Evaluation of the indicators identified by the working group with recommendations for their use.</b>					
	<b>INDICATOR</b>	<b>MEASURES?</b>	<b>COMMENT</b>	<b>5-YEAR TREND</b>	<b>RECOMMENDATION</b>
1	regular (six-monthly) intelligence-based assessment	threat against jurors in Northern Ireland	assessed threat-level (low, moderate, substantial, severe, critical)		Strong indicator, Threat Assessment has been commissioned

<sup>48</sup> I note the working group’s conclusion that the analysis of the metrics paints a complex picture where the trendlines are of low to moderate statistical significance and, indexed to 2007, the trends flatten. However, as they point out, the numbers in the shorter period may be too low to reach this conclusion.

<b>Table 9.1: Evaluation of the indicators identified by the working group with recommendations for their use.</b>					
	<b>INDICATOR</b>	<b>MEASURES?</b>	<b>COMMENT</b>	<b>5-YEAR TREND</b>	<b>RECOMMENDATION</b>
			openly available		and once available it will be shared at OFFICIAL SENSITIVE level. : USE
2	Deaths due to the security situation	fatalities	proxy for overall level of violence	Stable	USE
3	Paramilitary-style shootings and assaults	paramilitary violence	proxy for paramilitarism	Downward/ stable	USE
4	Security-related incidents	shootings, bombings incendiaries	proxy for overall security situation	Downward	USE
5	Number homeless due to intimidation via NIHE	Intimidation levels	Proxy for paramilitarism and fear	Stable	USE
6	Number of offences of intimidation or threats to harm witness per year	Court witness intimidation	Indicator of level of interference with court proceedings	Little variation but n=500+	USE
7	Numbers thinking paramilitary Groups have controlling influence in area (NILT)	Opinion of sample	'soft' indicator – opinion rather than evidence based, sample rather than census-based	Stable or downward trend	DO NOT USE
8	Numbers thinking paramilitary groups create fear and intimidation in area (NILT)	Opinion of sample	'soft' indicator – opinion rather than evidence based, sample rather than census-based	Stable or downward trend	DO NOT USE
9	Numbers convicted under terrorism legislation	Convictions	Note delay – can be several years - between offence and conviction	Stable/ or slight upward	USE WITH CAUTION*
10	Persons detained in Northern Ireland under Section 41 of	PSNI activity	Current law enforcement activity	Downward	USE



<b>Table 9.1: Evaluation of the indicators identified by the working group with recommendations for their use.</b>					
	<b>INDICATOR</b>	<b>MEASURES?</b>	<b>COMMENT</b>	<b>5-YEAR TREND</b>	<b>RECOMMENDATION</b>
	the Terrorism Act 2000				
11	Usage of various Stop and Search/Question Powers in NI	PSNI activity	Current law enforcement activity	Downward	USE WITH SOME CAUTION*
12	NJT cases as a percentage of all Crown Court cases	Prevalence of NJTs	Current PPS usage of powers	Downward	USE
13	Certificates issued and refused for NJTs by the Director of Public Prosecutions	Critical scrutiny of NJT applications	Current PPS usage of powers	Downward (issued) Stable (refused)	USE
14	Percentage of cases in which each condition met	Strength of case for NJT	Condition 1 is most frequently met		USE
15	Average percentage of cases in which each condition met	Frequency of reliance on specific condition	Condition 3 least frequently met		USE
16	PPS complaints of intimidation files	offences of intimidation, attempted intimidation conspiracy to intimidate witnesses, jurors and other persons -	can apply to all 'other persons' so agree that it too broad as an indicator	n/a	DO NOT USE
<p>NIHE – Northern Ireland Housing Executive; NILT – Northern Ireland Life and Times Survey<sup>49</sup>            *there may be a substantial delay between the time when the offence was committed and the date of conviction            **may also reflect factors such as staffing levels and other pressures within PSNI</p>					

## DISCUSSION AND RECOMMENDATIONS

<sup>49</sup> Available at <https://www.ark.ac.uk/ARK/nilt>

9.25 I commend the work of the working group to the Secretary of State and concur with their conclusion that no one indicator will suffice for this purpose. I also agree that a combination of the indicators listed in points A-D (see Annex M), together with feedback from the public consultation may assist the Secretary of State in taking into account the security and law enforcement context when deciding whether or not to renew the NJT provisions.

#### **RECOMMENDATIONS ON NJTS FROM THE 14<sup>TH</sup> REPORT**

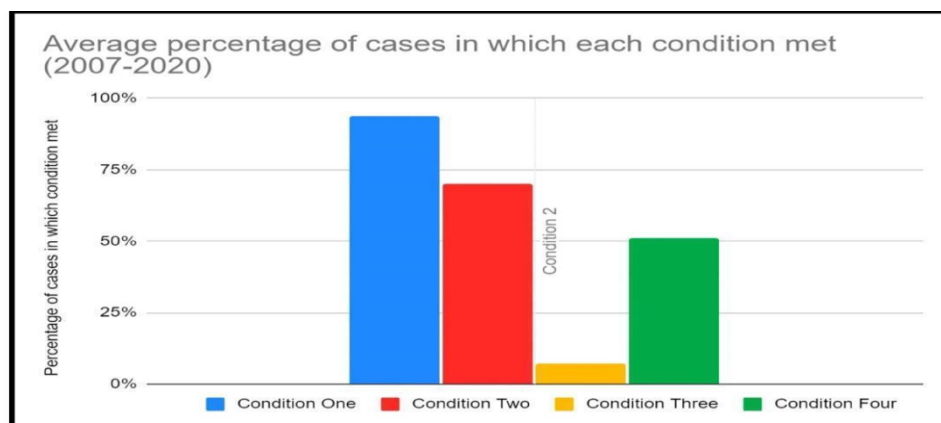
9.26 In the 14<sup>th</sup> report, I made several specific recommendations in relation to NJTs. First, at paragraph 9.48 I repeated a recommendation from previous reports that “to proceed with a low risk case using the CJA 2003. In cognisance of the concerns about using a real case, even if completed, I recommend a walk-through of the process in a hypothetical but realistic case to highlight such risks.”

9.27 Even though Section 1 of the 2007 Act is certainly a discretionary power<sup>50</sup>, the PPS consider that they may not withhold a certificate in a case where although the statutory criteria were met, albeit barely, and there was a low risk of jury tampering or bias since they are legally obliged to do so if the statutory conditions are met. The PPS remain of the view that there is little change, in this regard at least, in what is possible whilst the JSA is in force. In this, they are supported by Lord Kerr’s judgement, which holds that where one or more Grounds 1 to 4 is satisfied, and where there is a risk to the administration of justice jeopardising the fairness of the trial, the Director’s discretion can only be exercised by granting a certificate.

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<sup>50</sup> In comparison to the judge’s duty under the non-jury trial provisions for England and Wales in section 44 Criminal Justice Act 2003.

Figure 9.1



1. When displayed graphically over time in Chart 20, we can see that the usage of condition four varies the most over the years.
2. Chart 21 shows the average percentage of cases in which each condition was met from 2007-2020.

9.28 Second, in the 14<sup>th</sup> report at paragraph 9.53, I recommended, and **I recommend again here, that in considering matters of jury bias in future, that those making these assessments take particular account of more recent societal changes in Northern Ireland and satisfy themselves that the conditions are sufficiently different to those elsewhere.** In support of this, I cite the 2020 Northern Ireland Life and Times Survey (NILT), which found that 42% of respondents considered themselves neither unionist nor nationalist, including people who would have considered themselves unionist or nationalist five years ago. Condition 4 is relied on in cases where ‘the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.’ Figure 9.1 shows that condition four was met in 51% of cases in the period 2007 -2020, and is most relied on alongside Condition 1. Exceptionally, it was the sole condition relied on in the case of *Hutchings* [2019] UKSC 26, and its use has varied over the years and is currently in decline. This decline is to be welcomed. The PPS point out however, that the additional test of the risk to the administration of justice must also be met in these, and indeed in all, cases. They can rely on the reports of the Independent Reporting Commission to provide useful information in relation to the continuing influence of paramilitaries within communities in terms of understanding the risks associated with knowledge or belief that paramilitaries are involved in any particular case.

- 9.29 Third, at paragraph 9.32 of the 14<sup>th</sup> report, I recommended that in cases where Condition 1 is the sole condition met, that the nature of the offence is taken into account, *viz* whether or not the paramilitary organisation will benefit from or approve of the offence and whether, as a result, the paramilitary organisation is likely to seek to assist the accused by means of jury intimidation or tampering. In cases where the offence is unrelated to paramilitary membership and unlikely to benefit that organisation, and where the risks of jury tampering are very low, I recommended the DPP give serious consideration to going to jury trial. I welcome indications from the PPS that they are in the process of amending their Staff Instructions SI No 14 of 2019 to take account of this recommendation (see paragraph 9.31 below).
- 9.30 Fourth, at 9.35 of the 14<sup>th</sup> report, I noted the concerns expressed elsewhere that the basis for the decision to issue a certificate for a NJT remains undiscoverable under the JSA 2007 provisions for NJTs. I also noted the suggestion that this could be mitigated by some form of Closed Material Procedure where a Special Advocate reviews evidence and acts on behalf of the accused so far as possible. I recommended that, should the NJT system be renewed, that the benefits of a Closed Material Procedure (CMP) be evaluated.
- 9.31 The PPS considered the suggestion about a CMP and shared their evaluation with me. They noted that such a procedure does not enhance transparency if the material remains withheld, since neither the public nor the other party see the material. They allowed that a CMP and a special advocate makes sense in the context of proceedings before a Judge in which one party seeks to withhold material and a special advocate is appointed to test that party's arguments. The role of the advocate is to assist the Judge who is tasked with the decision. They agreed that, whilst such a procedure could be adopted in the event of a judicial review challenge, they did not consider it possible as part of the Director's decision-making process under the current statutory regime. They pointed to the Supreme Court's judgement on this matter, in paragraphs 63-5 of *Hutchings*<sup>51</sup>:

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<sup>51</sup> *Hutchings' Application for Judicial Review*, Re, 2019 WL 02373190 (2019)

63. ... the appellant complains that effective representations cannot be made in the absence of information about the material on which the Director made his decision and the reasons that he decided as he did. Quite apart from the statutory prohibition on a challenge ... there are two sound reasons that the appellant should not succeed in this argument. First, in many cases involving the issue of a certificate, information will have been received by the Director from the police or other members of the security services, which must, for obvious reasons, remain confidential. Secondly, the nature of the decision that the Director takes, as I have already explained, will usually be of an instinctual or impressionistic character, not susceptible of ready articulation.

64. But the truly important point to make here is that section 1 qualifies, if not indeed removes, the right to trial by a jury. Hence, the issue of a certificate does not itself remove the right (it is the statute which has done that). In reality the issue of a certificate under section 1 partakes of a case management decision aimed at ensuring the relevant end result of a fair trial. Viewed from this perspective, it is of obvious importance that elaborate, protracted challenges to the issue of a certificate under section 1 are wholly to be avoided, where possible. It is, no doubt, with this consideration in mind that section 7 circumscribed the opportunity for judicial review challenge. Such challenges have the potential to undermine the objective of the legislation to ensure that trials take place in accordance with the requirements of article 6 of ECHR (both as to fairness and to promptness).

65. That is not to say that there will never be an occasion where some information can be provided which would assist in the making of representations by a person affected by the issue of a certificate. I refrain from speculation as to how or when such an occasion might arise...<sup>52</sup>

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<sup>52</sup> Hutchings' Application for Judicial Review, Re, 2019 WL 02373190 (2019)

9.32 It is notable that the Supreme Court was not concerned that the defendant did not have access to the material upon which the Director made his decision. The reason for this lack of concern was that the process within the PPS in deciding on a NJT was “a case management decision aimed at ensuring the relevant end result of a fair trial”. I am satisfied that the PPS have evaluated how a CMP might address issues about discoverability and on the basis of their arguments, conclude that a CMP is unlikely to offer any improvement to the transparency of the process. The PPS also directed my attention to the recognition by the Supreme Court of the benefit in avoiding protracted challenges to the Director’s decision, since a CMP is likely to extend the time taken to issue, or not, a certificate.

9.33 In the 14<sup>th</sup> report, at 9.56 I thought the working group might consider a roadmap to the final destination of reducing the numbers of NJTs in Northern Ireland and ultimately of reverting to NJTs under the CJA 2003. Such a map might have a number of way stations en route (perhaps each requiring some legislative change). I suggested that, at each way station where legislative change is called for, this could be drafted and implemented by secondary legislation. I noted at 9.57 that this would require a good deal of time and work in order to incrementally move toward the CJA 2003 provisions. It would involve considering whether the UK legislation could be altered to permit Northern Ireland, and other places that face similar risks, to operate entirely under the mainstream UK legislation. In the 14<sup>th</sup> report, I go on to suggest a wide range of measures and issues that might be considered.

9.34 The PPS was represented on the working group which considered the options of how an incremental move away from the current statutory regime to reliance (solely) on the CJA 2003 might be affected. I fear that, whilst the PPS are not persuaded of the merits of any of these suggestions about incremental movement towards the CJA, they do accept some other recommendations. These changes include amendments that pertain to the interpretation of the four conditions in determining whether to issue a certificate.

9.35 In addition, at paragraph 9.31 of the 14<sup>th</sup> report I recommended that the nature of the ‘close association’ between the accused and any paramilitary group is specified. And

at paragraph 9.32 of the 14<sup>th</sup> report, I made a recommendation in relation to cases where the offence is unrelated to paramilitary membership and unlikely to benefit that organisation. I understand that the PPS are in the process of making changes to the PPS staff instruction under the JSA and that those amendments include instructions:

- To note the need to be alert to the difference between a criminal association and an association as defined by section 1(9) of the 2007 Act;
- To highlight the relevance of the nature of the offending and whether it potentially benefits a proscribed organisation;
- To emphasise that the purpose of a certificate is to address any risk to the fairness of the proceedings; and
- To ensure that the risk to the administration of justice must be a real risk, as opposed to a remote or fanciful risk.

9.36 On the last point, in the determination of the risk to a fair trial, I am grateful to Jonathan Hall KC, Independent Reviewer of Terrorism Legislation, who directed my attention to Lord Kerr's deliberations in *Hutchings* (UKSC 26, 2019, para 37) on the 'imperative on ensuring that the trial is fair'. In paragraph 27, Lord Kerr refers to a 'real (as opposed to the remote or fanciful) possibility of jury bias', not to *any* risk to the administration of justice. The kind of risk to which Lord Kerr refers at paragraphs 26-7 and again at paragraph 40, also described in *Jordan* as a "real risk", not a "remote or fanciful possibility", "a real (as opposed to the remote or fanciful) possibility of jury bias".

9.37 Jonathan Hall notes, however that the current PPS's Staff Instruction which provides guidance on non-jury trial certification, included as Annex G to the 14<sup>th</sup> report:

- does not distinguish between a real risk and a remote or fanciful risk.
- does not explain that the focus of considering the risk to the administration of justice is the risk to the fairness of the proceedings.

I echo his recommendation **that the PPS Staff Instruction be amended to properly reflect the approach of the Supreme Court's view, and welcome the PPS declared intention to do so.**

9.38 **I also recommend that the PPS include a range of information on NJTs on their website including information about the legislation pertaining to non-jury trials and how it is used.**

9.39 In the 14th report, at paragraph 9.44 I recommend that the working group, or a person or persons with a suitable security clearance on behalf of the Working Group, obtain a contemporary and focused security risk assessment of the specific level of risk to juries, taking into account the capacity, goals and focus of contemporary active paramilitary organisations whose members routinely face jury trials. The NIO has now commissioned this assessment, which was not available at the end of this review period. However, I am informed that it can be shared at the OFFICIAL SENSITIVE level. **I recommend that these assessments continue to be commissioned on a bi-annual basis and made available to the DPP in order that he may use it to inform his judgments about the risks to juries should he choose to do so.**

#### **THE WAY FORWARD FOR NON-JURY TRIALS**

9.40 Any possible extension of non-jury trial provisions in Northern Ireland is the subject of careful consideration by the Secretary of State for Northern Ireland and by parliament. Even if the Secretary of State, having reviewed the public consultation analysis and the outputs of the working group, believes that there is a case for the powers to be extended any renewal of the powers is subject to the approval of both Houses of Parliament. Until that approval is given there can be no certainty that the JSA NJT provisions will be extended.

9.41 A number of options were considered by the working group in relation to the future of NJT provision in Northern Ireland. These were:

- a. renew the JSA and continue its current usage;
- b. modified JSA regime;
- c. the discontinuance of the JSA provisions and adoption of the CJA provisions in their stead;
- d. a CJA regime modified in Northern Ireland, to take account of local conditions; and



e. a CJA regime potentially modified following a review that applies across the whole of the UK.

9.42 On a. **renew the JSA and continue its current usage**, there are no specified limits on the number of times NJT provisions may be extended and the JSA provisions for NJTs have been extended by successive orders since 2007. However, the NJT arrangements were designed to be a temporary measure aimed at taking account of the specific security situation in 2007, arrangements that were designed to be ended when the security situation permits. Furthermore, indeterminate renewal of the provisions is damaging to trust in the values embodied within the criminal justice system. Since 2007, the security situation has continued to improve as discussed earlier in this report, yet the threat level is higher than that in England and Wales and it is considered that there is a continuing, if diminished threat to jury trials in paramilitary cases. The public consultation that takes place each time the NJT provision is renewed will report its findings sometime before the expiry of the current provisions on 31 July 2023. Whilst we must await the outcome of that consultation, I am mindful of the intention of the government that these provisions should be temporary, hence my consideration, below, of the alternatives to simply renewing them.

9.43 In relation to b. above, **a modified JSA regime**, since the JSA regime itself was designed to be temporary legislation, I do not favour making modifications to it. This would be a retrograde step, in my view, when the direction of travel should be towards provisions on a par with those pertaining elsewhere in the UK. Furthermore, breathing new life into the JSA NJT provisions is not likely to attract wide support.

9.44 I hesitate to recommend c. - the **discontinuance of the JSA provisions and adoption of the CJA provisions in their stead**. Currently the identified way of addressing the problem of a risk to the administration of justice that is consistent with a fair trial is a non-jury trial. Where the evidential standard required by the CJA cannot be met, the current way of addressing this is a non-jury trial under the JSA. If NJTs under the JSA were to be abolished the PPS would simply apply the Test for Prosecution and present the case before a jury – unless there was the evidence to make an application under the CJA which is, in many cases, very unlikely. The risks of this path include perverse

outcomes that damage public confidence in the criminal justice system and the intimidation of jurors, whether detected or undetected. Removal of the provisions under the JSA would thus result in a situation where certain cases could be prosecuted where intelligence material or other information about risks to juries or to a fair trial is available but falls below the evidential standard required by the CJA. This could result in cases where serious offences including murder have been committed, exposing juries to the risks that cannot be evidenced to meet the CJA standard. This may add to the difficulties within the system to pursue some cases for various other reasons (see paragraph 9.45). For example, if the PPS cannot disclose material and that undermines the right to a fair trial the case cannot proceed. Of course, it is a matter for the government whether such a likely extension of these impediments to the prosecutor process in certain serious cases is a price worth paying for a form of normalisation, arguably in what remains somewhat exceptional circumstances. Without the JSA, there is no identified way of the court system addressing this problem other than to discontinue the case. The persistence of paramilitarism, albeit at a slightly reduced level, in Northern Ireland, means that these issues in prosecuting in some such cases are likely to arise.

9.45 Whilst ‘prosecution is—first, second and third—the government’s preference when dealing with suspected terrorists’<sup>53</sup>, currently prosecution is not pursued in all cases. Even when there is a viable evidential case, the application of the public interest test can prevent prosecution. Where prosecution is not possible, it has been suggested that, for cases that cannot go to trial, alternative non-criminal solutions could be considered. These include civil orders against criminal assets (under the Proceeds of Crime Act 2002), Serious Crime Prevention Orders (under the Serious Crime Act 2007 – which can be imposed without criminal conviction) and The Terrorism Prevention and Investigation Measures (TPIM) Act (TPIMs) which have not so far been used in Northern Ireland. Such measures could ensure that, should the JSA regime be retired and replaced by the CJA in Northern Ireland, when faced with an offender, the choice is not binary— either prosecute or do nothing. These non-judicial measures have been created as part of the reform of terrorism laws in 1973, 2000, and 2007.

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<sup>53</sup> Hansard (HC) vol 472, col 561 (21 February 2008), Tony McNulty.

9.46 Whilst the use of these measures would bring Northern Ireland into line with practice in England and Wales, the use of such measures does nothing to reassure those whose primary objection to NJT measures under the JSA are that they fail to deliver on the basic principles of the criminal justice system. The adoption of such measures instead of the current NJT system under the JSA represents a removal of Article 6 rights to a fair trial in cases where these measures are used instead. The Independent Reviewer of Terrorism Legislation, Jonathan Hall KC reports an additional drawback in terms of the rights of the accused in his review of TPIMs in his 2020 report<sup>54</sup>. He finds that “their greatest drawback is that morally culpable behaviour is addressed outside the criminal process and subject to closed procedures from which the TPIM subject is excluded” (paragraph 8.2). The introduction of additional non-criminal measures that involve closed procedures and lack due process at a time when the security situation is improving could be seen to be retrograde, but hardly address the issue of the rights of the accused. These non-criminal mitigations against the inability to prosecute all cases notwithstanding, on balance I cannot recommend that option c. **the discontinuance of the JSA provisions and adoption of the CJA provisions in their stead** is adopted.

9.47 **A fourth option is d. a CJA regime modified in Northern Ireland, to take account of local conditions**, where modifications are identified and made for Northern Ireland alone. Such modifications would be designed to ease the transition towards sole reliance on the CJA 2003, so that the JSA 2007 could be terminated. Professor Clive Walker suggests that modifications or additional measures might include:

- earlier intervention by the trial judge (such as on an application prior to arraignment);
- a lower evidential threshold for an order;
- a new right might be accorded to the defendant of election for a non-jury trial. This device is used in the US and elsewhere.<sup>55</sup>
- The introduction of a new statutory instrument subject to the affirmative procedure and limited to one year could provide a legal mechanism for the contingent revival of

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<sup>54</sup> Available at <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2022/04/Terrorism-Acts-in-2020.pdf>

<sup>55</sup> See Sean Doran and John Jackson, 'The Case for Jury Waiver' in Thom Brooks (ed.), *The Right to a Fair Trial* (Routledge, 2009).

NJTs under the JSA 2007, section 9 if the circumstances warrant. Currently, JSA section 9 only envisages expiry.

9.48 As I recommended in 14th report at paragraph 9.55, protections available to juries in the JSA 2007 be fully taken into account, be reviewed and reinforced where possible. This was also recommended by my predecessor David Seymour CB in the *10th Report* (Belfast, 2018), para.23.2(c). The retention of sections 10-13 of the JSA in the event of retiring of JSA sections 1-9 would offer continued protection to juries, such as restriction on disclosure of juror information (it is an offence for those engaged in the criminal justice system to disclose juror information); balloting of jurors by number rather than by name; routine criminal records checks to prevent disqualified persons from serving as jurors; and provision for a judge to privately hear the cause for any challenge from the defendant against a juror. Further precautions outlined at paragraph 9.14 that can be deployed include: jury keepers; the use of entry/exit/access points to court for jurors; and consent forms kept separately. In the 14th report, (paragraph 9.55) I recommended an evaluation of these measures to ascertain whether they are effective and whether they could be improved.

9.49 Professor Walker further advises that, in addition to the JSA measures, general protective measures for juries in criminal trials can include:

- transfer of venue under the Judicature (Northern Ireland) Act 1978, section 48;
- physical screening, usually from the public rather than the defendant; and
- sequestering of jurors.

Screening, sequestration and moving the trial are usually deemed unfeasible options in Northern Ireland, since they may have little impact because of the small geographical area and small population. Sequestration imposes considerable personal burdens on jury service and the use of perspex screens were reported to have impacted on lines of sight and thus on fair trial rights.<sup>56</sup> Professor Walker suggests that other measures could include those proposed by the Law Commission (of England and Wales) *Contempt Of*

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<sup>56</sup> NIO Working Group, Paper of 2 November 2021. See Annex MXXX

*Court (1): Juror Misconduct And Internet Publications* (LAW COM No 340, 2013), those implemented in the Criminal Justice and Courts Act 2015, sections 68-77, technologically 'remote' juries or special juries of seven (or some other number). Each of these measure present their own risks, of raising jury anxiety levels, of impairing due process<sup>57</sup>, and since they depart from normal legal practice they compromise the intent of the government to move towards normalisation.

9.50 A further issue facing the PPS is the Condition 4 risk of bias or what was referred to by the Courts as 'tribal loyalties' which they identified in cases such as *Jordan* and *Hutchings*. Much of the information currently relied upon in relation to Conditions 1 and 2 would not be suitable for deployment as evidence. As it stands, the CJA offers no mitigations for such cases.

9.51 The fifth option, e. is **a CJA regime potentially modified following a review that is conducted across the whole of the UK and the CJA amended as a whole**. This would involve a review of the operations of the CJA 2003 held jointly for Northern Ireland and England and Wales together offering a comprehensive UK-wide approach lacking under the JSA. Such a review may serve two functions. First, it may elucidate the methods of management of risk to juries that may be of service in Northern Ireland, and it may also shed light on difficulties in jury trials faced in cases of organised crime or gang-related cases. England and Wales has more experience of the operation of the CJA 2003, and such a review could examine *inter alia* a. the prevalence of jeopardy to jurors; and b. the operation of the non-jury and jury options in cases of, for example gang crime or organised crime where juries may be at risk of intimidation. A review could identify any pinch-points in the operation of the CAJ in England and Wales in relation to, for example, organised crime, which may be shared by the system in Northern Ireland.

9.52 The outcome of such a review may suggest the need for modifications to the CJA NJT provision in its totality which would make its operation in Northern Ireland more feasible whilst ensuring that NJT provision was consistent throughout the UK; such

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<sup>57</sup> As noted in *R v Mackle* [2007] NIQB 105; *R v J, S, M v R* [2010] EWCA Crim 1755.

modifications could ease the transition towards sole reliance on the CJA 2003, assuming that the JSA 2007 would then be terminated. Alternatively, the review may demonstrate the adequacy of CJA provision for jury trial even in cases of paramilitary or organised crime and gang-related prosecutions.

#### **EQUIVALENT PROVISIONS IN THE REPUBLIC OF IRELAND**

9.53 For completeness, I include here information on the equivalent provisions for NJTs in the Republic of Ireland. During the year, I met with the Mr Justice Michael Peart, former Judge of the Court of Appeal, along with Dr Alan Greene, Ms Anne-Marie Lawlor SC, Professor Donncha O’Connell, Ms Caitlín Ní Fhlaitheartaigh and Mr Ken O’Leary who together comprise the expert review group currently conducting the review of the Offences Against the State Acts (OASA) in the Republic of Ireland. Their terms of reference are to consider:

- The current threat posed by domestic/international terrorism and organised crime
- The duty to deliver a fair and effective criminal justice system to ensure the protection of communities and the security of the State
- Ireland’s obligations in relation to Constitutional and ECHR rights and international law.

Their report is due imminently.

9.54 Current NJT provisions in the Republic are to be found in the Offences Against the State Act 1939 (OASA), as amended. Art 38.3.1° of the 1937 Irish Constitution provides that:

Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.’

9.55 The Oireachtas (National Parliament) in due course enacted the OASA, Pt V of which deals with the establishment of special criminal courts which sit with three judges and no jury. Section 35(1) of the OASA states that where the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, it may make a proclamation ordering

that Pt V shall come into force. These proclamations have been made on two occasions, in 1939 and 1972. Since 1972, the Special Criminal Court (SCC) has sat on a continuous basis. Since 2016, there have been two SCCs in operation, the second established in 2015 to cope with the backlog of cases.

9.56 Sections 45 to 47 of the OASA set out the procedures by which an accused person may be returned for trial before the SCC. The OASA provides for a system of scheduled offences usually those linked to paramilitarism and more recently organised crime under the Criminal Justice Act 2007 (ICJA). (The practice of scheduling offences in Northern Ireland ceased in Northern Ireland following the reform of the criminal justice system after the Good Friday Belfast Agreement.)

9.57 There are two pathways to the SCC. First, all scheduled offences automatically go to the non-jury SCC, unless the Irish Director of Public Prosecutions (IDPP) directs otherwise. Second, the IDPP can send any case to the SCC if she is satisfied that 'the ordinary courts are inadequate to secure 'the effective administration of justice and the preservation of public peace and order.' This wide-ranging discretion is subject to very limited judicial review. Whereas the JSA requires one or more of four conditions to be met – there are no specific conditions under the OASA. The decision to certify a NJT is based on the opinion that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. That decision is based on privileged information that is not disclosed to the accused or to the Court. The IDPP's decision to send cases to the Special Criminal Court is reviewable on grounds of mala fides, improper motive or policy, and in exceptional circumstances where constitutional rights are at stake. However, the Irish Supreme Court (ISC) (*Murphy v Ireland* [2014] 1 IR 198, 233) ruled that the IDPP has a duty to give reasons, or justify her refusal to do so, where she certifies that the ordinary courts are inadequate. The ISC held that compliance with this obligation is mitigated by the need to ensure that other public interests are not compromised. The ISC suggested that stating that no reason can be given without impairing national security might fulfil this obligation in that instance. Therefore, in effect, the IDPP can refuse to give reasons and justify that refusal on grounds of national security.

- 9.58 The provisions in the Republic of Ireland are similar to those in Northern Ireland, insofar as the IDPP, like the DPP in Northern Ireland, is the key decision-maker. The discretion given to the IDPP to order a non-jury trial is somewhat broader than that in the JSA, since there is no independent review of NJT cases. There is, however, no legislation in Ireland equivalent to the CJA, which provides for a NJT based on evidence presented after arraignment.
- 9.59 Perhaps the most contentious issue in the current system in the Republic of Ireland is the admission of opinion evidence from a police chief superintendent, as highlighted by Alice Harrison<sup>58</sup> BL of Maynooth University. Dr Mark Coen of University College Dublin also observed that under the current provisions in Northern Ireland the decision on trial venue is made by the PPS who are a party to the proceedings. That is also the situation under the Republic's current non-jury trial legislation.
- 9.60 In conclusion, I return to the JSA and the renewal, or not, of the JSA powers. Without the benefit of knowing the outcome of the public consultation on the renewal of JSA powers, albeit having been informed by the work of the working group and by further consultations with expert colleagues, I wish to make the following recommendations.
- 9.61 **I recommend that the JSA provisions are renewed for a further two years, during which time a review of the operation of the CJA in those terms is conducted in England and Wales and the outcome actioned accordingly. By the end of two years, I recommend that a plan is drawn up to implement the transition of the Northern Ireland legal system to sole reliance on the CJA, or an amended form of the CJA, for any NJT provision.**
- 9.62 **In the interim, I commend the use of the indicators identified by the working group and set out in Table 9.1 above as support for this plan for transition. These indicators quantify the improved security situation, albeit one that gives continuing cause for concern in some cases about the risks of jury trial.**

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<sup>58</sup> Harrison A. (2021) "Disclosure and Privilege: The Dual Role of the Special Criminal Court in Relation to Belief Evidence" in Mark Coen, *The Offences Against the State Act 1939 at 80 A Model Counter-Terrorism Act?* Dublin: Hart.



## **REVIEW OF NJT CASES - TERMS OF REFERENCE**

9.63 At paragraph 9.14 of the 14<sup>th</sup> report, I set out the terms of reference for the Independent Reviewer's review of NJTs from 14.2 of the tenth report by my predecessor David Seymour CB. Briefly, the review is "...limited to a high level engagement with the key stakeholders in this process, to better understand the overall effectiveness of the procedures currently in place to issue a NJT certificate." The terms call for examination of "a small, retrospective sample of information which has led to a NJT certificate being issued" so that the necessity for the system may be assessed. Examination of cases where a NJT certificate is granted to see if of alternative juror protection measures are routinely considered as part of the determination; and oversight of other relevant indicators such as any noticeable trends in the type of defendants or offences, which routinely receive NJT certificates; the views of external parties such as academics or human rights organisations on the use of NJTs and; whether any improvements could be made to existing processes. (summary of 14.2 of tenth report)

## **PROCESS OF DETERMINATION**

9.64 The process of determining whether a NJT certificate is to be granted is set out in detail in Arthurs [2010] NIQB 75 and at paragraphs 19.1-19.5 of the tenth report. A case file is compiled by the PSNI containing a summary of the case according to the investigating officer, details of the circumstances of the accused, the offence and/or the motivation for the offence and a view on whether any of the four conditions for NJT are met in this case. This file is sent to the Public Prosecution Service (PPS) and the Prosecutor will then write to senior police asking whether any of the conditions in section 1 of JSA may be met. A Prosecutor seeks the views of senior police on this question based on the facts and circumstances of the case. Once a reply is received and any relevant intelligence material reviewed, an application for a NJT certificate is compiled by the Prosecutor and submitted to the Assistant Director, who may add a covering note in marginal or unusual cases. The Deputy DPP then passes all of this information to the Director of Public Prosecutions (DPP) who makes the final determination on the issuance or not of a certificate in advance of arraignment. The

full guidance, including the four conditions to be met in order to determine whether a NJT certificate should be issued, is included at Annex G.

## CONDITIONS

9.65 Under the JSA 2007, each case must meet one or more of four conditions in order for a NJT to be established (see Annex G for more detail):

- **Condition 1** – the defendant is, or is an associate of, a person who is a member of a proscribed organisation, or has at any time been a member of an organisation that was, at that time, a proscribed organisation.
- **Condition 2** – the offence or any of the offences was committed on behalf of the proscribed organisation, or a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.
- **Condition 3** – an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and the attempt was made on behalf of a proscribed organisation or a proscribed organisation was otherwise involved with, or assisted in, the attempt.
- **Condition 4** – the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one group of persons towards another person or group of persons.

9.66 When one or more of four conditions is met, the Director must apply the second test, namely he must be satisfied that there is a risk to the administration of justice. Only on meeting these two tests can a Certificate to be issued. This two-stage test is set out in Table 9.8. of the 14th report. Table 9.2 shows a breakdown of the first test, whether one or more of the conditions are met, for cases where a certificate was issued in this review period.

<b>Table 9.2 Conditions met in NJT cases 2007-2022</b>					
<b>Year</b>	<b>Number of Cases in which Condition Met</b>				<b>Certificates Issued</b>
	<b>Condition 1</b>	<b>Condition 2</b>	<b>Condition 3</b>	<b>Condition 4</b>	
<b>2007</b>	12	6	3	4	<b>12</b>
<b>2008</b>	24	16	3	4	<b>25</b>
<b>2009</b>	11	7	0	2	<b>11</b>
<b>2010</b>	13	9	2	3	<b>14</b>
<b>2011</b>	27	23	4	8	<b>28</b>
<b>2012</b>	21	16	1	10	<b>25</b>
<b>2013</b>	22	16	3	21	<b>23</b>
<b>2014</b>	18	12	0	16	<b>18</b>
<b>2015</b>	14	13	0	7	<b>15</b>
<b>2016</b>	10	11	0	7	<b>11</b>
<b>2017</b>	9	6	0	8	<b>9</b>
<b>2018</b>	16	12	0	14	<b>17</b>
<b>2019</b>	10	9	0	8	<b>13</b>
<b>2020</b>	10	7	2	4	<b>11</b>
<b>2021</b>	15	10	1	12	<b>16</b>
<b>**2022</b>	11	10	0	3	<b>12</b>
<b>Total</b>	243	183	19	131	<b>(total grounds)</b>
<b>%age</b>	42%	32%	3%	23%	<b>% of all conditions used</b>

**Source:** Northern Ireland Director of Public Prosecution's Office  
**\*\*** to 31 July 2022

- There has been an increase from 16 in the last review period to 21 in this period in the number of certificates issued;
- Several of the cases met more than one condition;
- Condition 3 (where an attempt has been made on behalf of a proscribed organisation to prejudice the investigation or prosecution) was not met in any case, even though, as I pointed out in the 14th report, Condition 3 arguably represents the most direct and compelling case for a NJT;
- Condition 4, the offence/s committed were connected to religious or political hostility, was used in only 3 cases;

- As in the last review period, Condition 1, that the defendant is believed to have paramilitary links continues to be the most frequently met condition.
- Again, this year, Condition 2 is the second most frequently relied on condition, where there is a paramilitary link. Following my recommendation in the 14th report at paragraph 9.31, the PPS have agreed to clarify how this condition is applied by specifying further the nature of the paramilitary link and will do so in their staff instruction imminently.
- Condition 4 relies on the presence of political or religious hostility and is most often deployed alongside Condition 1, although it was, for example, the sole condition relied on in *Hutchings* [2019] UKSC 26. In the 14th report at paragraphs 9.53 and 9.57, I recommended that account be taken of societal changes in levels of such hostility.

## NJT TRENDS OVER TIME

9.67 Table 9.3 shows the numbers of NJT certificates issued by year since the passing of the JSA. There has been an increase in the number of certificates issued in this review period and an increase in the number refused.

YEAR	CERTIFICATES ISSUED	CERTIFICATES REFUSED
2007	12*	2
2008	25	2
2009	11	0
2010	14	0
2011	28	0
2012	25	3
2013	23	3
2014	14	1
2015	15	0
2016	19	1
2017	22	1
2018	17	1
2019	13	1
2020	11	2
2021	16	1
**2022	21	3

**Source:** Northern Ireland Director of Public Prosecution's Office  
 \*Provisions under the 2007 Act were brought into effect on 1 August 2007  
 \*\* Figures are provisional, to 31 July 2022.

Since 2007 and the passing of the JSA (see Table 9.3 of the 14th report) the numbers of NJT certificates are significantly lower compared with the period immediately prior to its passing, although the number in this review period is almost double the number in 2010.

9.68 At 9.21 of the 14th report I recommended NICS make available data for a retrospective longitudinal comparison of the outcomes of jury trials and NJTs for inclusion in this report. Unfortunately, these data were not easily acquired and so are not available. In the 14th report, I compare disposals for jury trials and NJTs (paragraph 9.22) and set out the enhanced right of appeal available for those convicted in a NJT (paragraph 9.21).

### ANALYSIS OF CASES

9.69 I examined applications for NJT certificates in the period 1 August 2021 to 31 July 2022. For each case I examined, I looked for evidence that each case was carefully and robustly considered in terms of how they met the conditions, I reviewed the intelligence material underpinning each case and I examined whether the use of alternative juror protection measures are being routinely considered. I also considered whether there was sufficient evidence in the file to suggest that there was jeopardy to a fair trial.

9.70 The cases are listed in Table 9.4 together with the DPP's decision and the date of that decision.

<b>CASE*</b>	<b>Quarter and year</b>	<b>OUTCOME</b>	<b>CONDITIONS MET</b>
A	03/2021	certificate granted	1, 2 & 4
B	03/2021	certificate granted	1
C	03/2021	certificate granted	1 & 4
D	03/2021	certificate granted	1, 2 & 4
E	03/2021	certificate granted	1 & 2
F	03/2021	certificate granted	1,2,3 & 4
G	04/2021	certificate granted	1,2 & 4
H	04/2021	certificate granted	1
I	04/2021	certificate granted	1,2 & 4

<b>Table 9.4: SUMMARY OF ANONYMISED NJT CASES August 1 2021- July 31 2022</b>			
<b>CASE*</b>	<b>Quarter and year</b>	<b>OUTCOME</b>	<b>CONDITIONS MET</b>
J	01/2022	certificate granted	1 & 2
K	01/2022	certificate granted	1 & 2
L	01/2022	certificate granted	4
M		certificate refused	
N		certificate refused	
O	01/2022	certificate granted	1 & 2
P	01/2022	certificate granted	1
Q	01/2022	certificate granted	1, 2 & 4
R	01/2022	certificate refused	
S	01/2022	certificate granted	1 & 2
T	02/2022	certificate granted	1 & 2
U	01/2022	certificate granted	1 & 2
V	02/2022	certificate granted	1 & 2
W	02/2022	certificate granted	1 & 2
X	02/2022	certificate granted	1, 2 & 4
*In some cases there are multiple defendants			

9.71 I examined in detail a sample (n=13) of cases to extract information about charges, affiliations and determinations in relation to certification for NJT. I examined in detail:

- all the papers in 13 of the 23 cases;
- all three cases where only one of the four conditions were met;
- two of the three cases where certificates were refused; and
- five cases where two of the conditions were met.

9.72 These cases involved a range of alleged offences:

- Possession of weapons
- Robbery
- Conspiracy
- Benefit fraud
- Murder
- Riot, possession and throwing of petrol bombs.

In all of the cases, there were paramilitary links of some kind, but in cases of alleged benefit fraud in persons with a paramilitary link, certificates were refused.

## **ROBUSTNESS OF THE PROCESS OF DETERMINATION**

- 9.73 From my scrutiny of the files, both last review period and again this period there is substantial documentation in each case. The PSNI provides analysis and intelligence and where necessary the PPS seek further information from them in order to satisfy the relevant conditions and tests. The PPS seek hardening of the intelligence material where the material provided merits further scrutiny and they seek further legal opinion in cases that appear marginal. In general, the intelligence and other information supports the assessment of whether one or more – or none of the conditions is met.
- 9.74 In my previous report, I noted that some of the intelligence material was of unspecified age and was rather general in nature. In this review period, I found that in general the material in the PPS file and the backup intelligence material fully supported the decision of the DPP according to the requirements of the JSA. As noted in the above discussion of the renewal of these powers, the PPS holds that they are bound by the law as it stands, so any departure from the current procedures will require legislative change.
- 9.75 Paragraphs 9 to 10 of the internal PPS guidance on NJTs deals with cases where the defendant is an “associate” of a member of the proscribed organisation and requires that that member and the organisation be identified and a strict interpretation is placed on the definition of “associate”. I saw evidence that the PPS considered carefully in instances where condition 1 or 2 were met, whether these associations were sufficient to constitute jeopardy to a fair trial and where they were judged not to, perhaps because of the nature of the offence, a certificate was refused. This is most reassuring in the light of the impetus to minimise the overall number of NJTs and my recommendation at paragraph 9.32 of the 14th report ... “that the nature of the offence is taken into account, *viz* whether or not the paramilitary organisation will benefit from or approve of the offence and whether, as a result, that organisation is likely to defend the accused by means of jury intimidation, tampering or bias. Where the offence is unrelated to paramilitary membership and unlikely to benefit that

organisation, and where the risks of jury tampering are very low, I recommend the DPP seriously considers going to jury trial.”

9.76 Again, in all cases I examined, the PPS directing officer’s submissions were substantial and addressed all the conditions in section 1 with a rationale for their agreement or disagreement with the PSNI assessment. There were additional notes in the files of marginal or unusual cases and I saw evidence of careful deliberation and internal challenges in the processes undertaken by the PPS staff. Again, although in all cases, the DPP considered juror protection measures, these were universally ruled as not feasible for the same general reasons - the size of Northern Ireland and the tight-knit nature of the community and so on, as discussed earlier in this section, since these factors are a constant in all cases. As noted in the 14th report at 9.33, only a substantial reduction or eradication of paramilitary threat is likely to change the feasibility of protective measures for juries.

#### **PSNI RESPONSE TIMES**

9.77 The Community Safety Department of the PSNI advised that in the previous review period, the average response time by the PSNI to requests for further information by the PPS in relation to NJT cases was 78.8 days or 11 weeks. This was almost double the response time in the two previous review periods. In this review period I have been unable to ascertain the response time. In the 14th report, **I recommended that the PSNI establish the current response time and examine the reasons for any increased delay in response times and take steps where possible to recover the slippage.**

9.78 Once again, in all the applications made in this review period, I am satisfied that each case was subject to the degree of scrutiny, deliberation and care appropriate to the seriousness of the denial of the right to jury trial.

9.79 In relation to the cases I reviewed I am concerned about the long delay in bringing some cases to trial. One case I reviewed dates back to 2017. For both victims of crime and those accused of it, justice delayed is justice denied during the period of delay. The Criminal Justice Inspection Northern Ireland (CJINI) June 2010 inspection of



“Avoidable Delay”<sup>59</sup> examined the interface between the PSNI and the PPS and the Chief Inspector concluded at that time:

“despite the major efforts to address the problem of avoidable delay since the previous inspection report in 2006, these initiatives have made a relatively limited impact. The length of time it takes the justice system to process individuals through to disposal by a court is too long. ... My overall conclusion is that a step change is required in the performance of justice organisations if they are to meet the challenge of reducing avoidable delay. A starting point is the need for justice organisations to work more closely together in the delivery of a joined-up approach to criminal justice. In particular, there needs to be a stronger working relationship between the Public Prosecution Service for Northern Ireland (PPS) and the Police Service of Northern Ireland (PSNI).” (CJINI, 2010)

9.80 CJINI have commented on delay in case progression in a number of recent inspections and its impact on victims, witnesses and on defendants – this was particularly acute in cases of sexual and domestic violence. CJI has completed fieldwork on File Quality and Disclosure, which looked at trial recovery from the pandemic and reviewed 100 PSNI files and 100 PPS case files. Another inspection on Remand and Bail was examining the continued increase in the rate of unsentenced prisoners, which came close to 40% of all prisoners in 2022. Both inspection reports will be published in 2023. CJINI continues to be concerned about delays which have been exacerbated (particularly in the Crown Court) by pandemic backlogs.

9.81 In the previous review period, I expressed my concern that the basis for the decision to issue a certificate for a NJT remains undiscoverable under the JSA and suggested that some form of Closed Material Procedure (CMP) might mitigate this. On further consideration, as discussed at 9.27 – 9.29 above, such a procedure does nothing to make the grounds more transparent to the accused.

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<sup>59</sup> Avoidable Delay: Incorporating an inspection of the interface between the Police Service of Northern Ireland and the Public Prosecution Service for Northern Ireland  
<https://www.cjini.org/getattachment/c0243f51-1e73-47e8-a6fa-344d5f0063c5/Avoidable-Delay.aspx>

## **RISK TO JURORS**

9.82 In the 14th report, I discussed the risks to jurors from paragraph 9.42 and the imperative of jury protection and the avoidance of exposure of jurors to threat or danger. I note that, as part of the working group process, a risk assessment of the risks to jurors was commissioned and completed by the security services. **I recommend that the results of this risk assessment be shared with the DPP and that similar assessments are conducted on a regular basis and the results shared with those charged with responsibility for deciding on the issuance of NJTs certificates.** In order to ensure that their decisions are based on the fullest possible information in relation to the nature and extent of the risk to jurors and to assist them in differentiating between real risk, as opposed to a remote or fanciful risk (see paragraphs 9.30- 9.32 above).

## **VIEW OF EXTERNAL PARTIES**

9.83 Throughout the year, in meetings with human rights organisations and other interested parties, concern continues to be expressed about the use of NJTs under the JSA in Northern Ireland. There are few who wish the present system under the JSA to continue a moment longer than it is necessary. I note with interest the outcome of the public consultation prior to the expiry of the powers and the consideration of their renewal.

## **PART 3 – CONCLUSIONS**

### **Conclusions relating to exercise of powers and NJTs**

10.1 The right to a fair trial is a fundamental principle in law and should only be dispensed with in the direst of circumstances. Whilst such circumstances pertained for a protracted period in Northern Ireland, steady improvements in the security situation warrant a reconsideration of such provisions here. In Part 2 of this report, I have recommended a ‘sunset’ arrangement for non-jury trial provision under the JSA, contingent on a consideration of whether the powers under the CJA are sufficient to meet the needs of the criminal justice system in Northern Ireland. The reasoning for this is set out in that section. Any such change will give rise to fear and caution on the part of many who participate in the criminal justice system. The proposal to allow time to make adjustments facilitates change and allows time for any reservations or difficulties to be identified and addressed and fears to be allayed.

10.2 Powers to stop and search under the JSA are intrusive and any stop and search power can alienate those sections of the community at whom they are targeted. Such alienation contributes to a lowering of confidence in the police. As in the 14th report, I reiterate the conclusions of the 13th report by once again noting these same four factors which lower confidence in policing in Northern Ireland, and which continue to persist. I have commented in detail on each of them in this and my previous report. They are:

- Perceptions within communities that the PSNI repeatedly fail to deal quickly and effectively with drugs and anti-social behaviour;
- community workers have also expressed concerns about the perceived lack of law enforcement response to their reports of drug dealing in the community and a consequent despair on their part about how drug dealing can be addressed
- frequent relocation of officers and the impact on neighbourhood policing and the development of trusting relationships between the PSNI and local communities; and
- perceived inconsistencies in policing the two communities in general and in public order policing in particular and a failure to convincingly address these perceptions.

10.3 In the view of some who review police powers, JSA stop and search powers are no longer required, since other ‘reasonable suspicion’ powers are, in their view, sufficient. When the security threat in Northern Ireland is further reduced to a level comparable to that in the rest of the UK, and when violent paramilitarism is ended, JSA powers should be immediately retired. Government initiatives aimed at opening up pathways to paramilitary transition can play a key role in achieving this. Political stability, which has yet to be achieved in the form of a devolved administration, is also a key component. Whilst progress on all of these factors has been made, there is still some little distance to go before I can recommend the retirement of the JSA stop and search powers. Like many in Northern Ireland, I look forward to that time.

10.4 As in previous report, in relation to safeguards on the use of the JSA powers, I conclude by citing Treacy LJ’s conclusions in the Court of Appeal in **Ramsey**:

“Thus, the implementation of outstanding recommendations from previous reports alongside any additional recommendations contained in this report form part of safeguard mechanisms in the eyes of the Court.”

10.5 My recommendations are listed in the executive summary at Section 2 of this report.

## **ANNEX A - ACRONYMS**

AAD	Action Against Drugs
AEP	Attenuating Energy Projectiles
BWV	Body Worn Video
CAJ	Committee for the Administration of Justice
CIA	Community Impact Assessment
CIRA	Continuity IRA
CiT	Communities in Transition
CJINI	Criminal Justice Inspection Northern Ireland
CLC	Children’s Law Centre
CMP	Closed Material Procedure
CRN	Catholic National Republican
CRN	Community Resolution Notice
DOJ	Department of Justice
DPIA	Data Protection Impact Assessment
DPP	Director of Public Prosecutions
DR	Dissident Republican
DUP	Democratic Unionist Party
DV	Developed Vetting
EA	Education Authority
ECHR	European Convention of Human Rights
EOD	Explosive Ordnance Disposal
EU	European Union
EWCA	England and Wales Court of Appeal
FETO	Fair Employment and Treatment (Northern Ireland) Order
FCIA	Full Community Impact Assessment
FOI	Freedom of Information
GDPR	General Data Protection Regulation
HMICFRS	Her Majesty’s Inspectorate of Constabulary and Fire and Rescue Services
HMP	Her Majesty’s Prison
IAG	Independent Advisory Group ICO Information Commissioner’s Office
IDPP	Director of Public Prosecutions in the Republic of Ireland

IED Improved Explosive Device  
IOPC Independent Office for Police Conduct  
IRA Irish Republican Army  
IRTL Independent Reviewer of Terrorism Legislation  
JSA Justice and Security (Northern Ireland) Act 2007  
KC King's Counsel  
LCC Loyalist Community Council  
MACR Minimum Age of Criminal Responsibility  
MDA Misuse of Drugs Act 1971  
MOD Ministry of Defence  
NCA National Crime Agency  
NIA Northern Ireland Act  
NICA NI Court of Appeal  
NICCY NI Commissioner for Children and Young People  
NICS NI Court Service  
NIHRC Northern Ireland Human Rights Commission  
NIO Northern Ireland Office  
NIPB Northern Ireland Policing Board  
NIQB NI Queen's Bench  
nIRA New Irish Republican Army  
NIRT Northern Ireland Related Terrorism  
NJT Non-Jury Trial  
NISRA NI Statistics and Research Agency  
OASA Offences Against the State Act, Republic of Ireland  
ONH Óglaigh na hÉireann  
PACE NI Police and Criminal Evidence (Northern Ireland) Order 1989  
PCTF Paramilitary Crime Task Force  
POFA Protection of Freedoms Act 2012  
PONI Police Ombudsman for Northern Ireland  
PPS Public Prosecution Service  
PPDG Police Powers Development Group  
PSA Paramilitary Style Attack  
PSNI Police Service of Northern Ireland

PPS Public Prosecution Service  
PUL Protestant Unionist Loyalist  
SCC Special Criminal Court, Republic of Ireland  
TACT Terrorism Act 2000  
TPP Tackling Paramilitarism, Criminality and Organised Crime Programme  
TSG Tactical Support Group  
UKSC United Kingdom Supreme Court  
VDRs Violent dissident republicans  
YIAG Young People's Independent Advisory Group  
VBIED Vehicle Borne Improvised Explosive Device

## **ANNEX B - ORGANISATIONS AND INDIVIDUALS CONSULTED**

### **The following organisations and individuals were met**

#### **Government**

Madeleine Alessandri, Permanent Secretary, Northern Ireland Office

James Crawford, Political and Security Director, Northern Ireland Office

Officials from the Political Affairs and Security and Protection Group

Adele Brown, Director of the Northern Ireland Executive's Cross-Departmental Tackling Paramilitarism, Criminality and Organised Crime Programme

Grant Donaldson, Australian Independent Reviewer

Irish OASA Review Group

#### **Policing/Security**

Simon Byrne, Chief Constable, Police Service of Northern Ireland and members of the senior management team

Officers from C3 Intelligence Branch, Operational Support Department and Statistics Branch, PSNI

Officers from Strand Road PSNI Station, Derry/Londonderry

Officers from Tennent Street PSNI Station, Belfast

Staff of 38 (Irish) Brigade and NI Garrison

Director V, MI5

John Wadham, Human Rights Advisor, Northern Ireland Policing Board

Adrian McNamee, Director of Performance, Northern Ireland Policing Board

Performance Committee, Northern Ireland Policing Board

Police Ombudsman's Office

Police Community Safety Partnership, Derry City and Strabane

Police Community Safety Partnership, North Belfast

Police Community Safety Partnership, Causeway Coast and Glens

#### **Legal**

Stephen Herron, Director of Public Prosecutions, The Public Prosecution Service for Northern Ireland



Michael Agnew, Deputy Director, The Public Prosecution Service for Northern Ireland  
Tom Murphy, Private Secretary to the Director of Public Prosecutions for Northern  
Attorney General, Brenda King DCB

### **Independents**

David Seymour, Independent Reviewer (NI) JSA from 2014- 2020  
Jonathan Hall QC, Independent Reviewer of Terrorism Legislation

### **Political**

Gerry Kelly, Sinn Féin  
Sinn Féin parliamentary group, Stormont.  
Mike Nesbitt, Ulster Unionist Party  
Naomi Long, Alliance Party  
Colin Halliday, South Belfast Ulster Political Research Group  
Jackie McDonald, South Belfast Ulster Political Research Group

### **Statutory Bodies**

Independent Reporting Commission

### **Youth Sector**

Children's Law Centre

### **Community and Voluntary Sector**

Brian Gormally, Director, Committee on the Administration of Justice Northern Ireland  
Daniel Holder, Committee on the Administration of Justice Northern Ireland  
Jim Roddy, City Centre Manager, City Centre Initiative, Derry/Londonderry  
Darren Richardson, Sperrin Cultural Awareness Association  
Traveller Project, Craigavon Travellers Support Committee  
Natasha McDonagh, Connections Service Key Worker, Start 360, Ballymena  
Leanne Abernethy, Restorative Practitioner, AIMS Project, Ballymoney  
Kenny Blair, AIMS Project, Ballymoney  
Conal McFeely, Development Executive, Rath Mór Centre, Creggan  
Paul O'Connor, Director, Pat Finucane Centre

Sean Feenan, The Reference Group

### **Academics**

Professor Clive Walker, University of Leeds

Dr John Topping, The Queen's University of Belfast

Professor Rachel Monaghan, Coventry University

Dr Jessie Blackbourn, Durham University

Professor Donncha O'Connell, University of Galway

Alice Harrison BL M.Phil LLB, Maynooth University

Dr Mark Coen, University College Dublin

### **Group Meetings**

Non-Jury Trials Working Group, Northern Ireland Office

## ANNEX C – SUMMARY OF POLICE POWERS

### **Summary of Police Powers in the Justice and Security (Northern Ireland) Act 2007 (2007 Act) and Terrorism Act 2000 (TACT 2000)**

#### Part 1

This summary sets out the powers in the Justice and Security (Northern Ireland) Act 2007 (2007 Act) which are used by the PSNI and which are covered in the Code of Practice. For a full description of the powers reference should be made to the relevant section of the 2007 Act. More details on how the powers should be exercised are set out at the relevant sections of the Code.

Section	Power	Overview	Records
21	21(1) A constable may stop a person for so long as is necessary to question him to ascertain his identity and movements.	<p>This power allows a police officer to stop and question a member of the public to establish their identity and movements.</p> <p>People stopped and questioned may be asked for their name, date of birth, and address. They may also be asked for identification. They may be asked to give details of their recent movements.</p> <p>A person commits an offence and may be prosecuted if they fail to stop when required to do so, if they refuse to answer a question addressed to them under this section or if they fail to answer to the best of his ability a question put to him.</p>	<p>A record of each stop and question must be made.</p> <p>The record will include details of the person's name, when they were stopped and questioned, and the officer number of the police officer who conducted the stop and question.</p> <p>Officers should inform those who have been stopped and questioned how they can obtain a copy of the record if required.</p>
23	23(1) A constable may enter any premises if he considers it necessary in the course of operations for the preservation of peace and the maintenance of order.	<p>This power allows a police officer to enter premises to keep the peace or maintain order.</p> <p>If the premises is a building (a structure with four walls and a roof), the police officer generally requires prior authorisation, either oral (from a Superintendent or above) or</p>	<p>A record of each entry into a building must be made. Records are not required for any premises other than buildings.</p> <p>Records must be provided as soon as reasonably practicable to the owner or occupier of the building.</p>

		<p>written (from an Inspector or above).</p> <p>However in circumstances where it is not reasonably practicable to obtain an authorisation (for example, where there is an urgent need to enter a building to preserve peace or maintain order) officers can enter a building without prior authorisation.</p>	<p>Otherwise the officer should inform the owner or occupier how to obtain a copy of the record.</p> <p>The record will include the address of the building (if known), its location, the date and time of entry, the purpose of entry, the police number of each officer entering and the rank of the authorising officer (if any).</p>
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Section	Power	Overview	Records
24/Schedule 3	<p>Paragraph 2: An officer may enter and search any premises for the purpose of ascertaining whether there are any munitions unlawfully on the premises, or whether there is any wireless apparatus on the premises.</p>	<p>This power allows officers to enter and search any premises for munitions or wireless apparatus.</p> <p>For an officer to enter a dwelling, two conditions must be met: (i) he must reasonably suspect that munitions or wireless apparatus are in the dwelling (ii) he must have authorisation from an officer at least the rank of Inspector.</p> <p>Officers may be accompanied by other persons during the course of a search.</p> <p>During the course of a search, officers may make requirements of anyone the premises or anyone who enters the premises to remain on the premises For example, movement within the premises may be restricted, or entry in the premises not permitted. A person commits an offence and may be prosecuted if they fail</p>	<p>A written record for each search of premises must be made, unless it is not reasonably practicable to do so. A copy of this record will be given to the person who appears to the officer to be the occupier of the premises.</p> <p>The record will include the address of the premises searched, the date and time of the search, any damage caused during the course of the search and anything seized during the search. The record will also include the name of any person on the premises who appears to the officer to be the occupier of the premises. The record will provide the officer's police number.</p>

		<p>to submit to a requirement or wilfully obstruct or se to frustrate a search of premises.</p> <p>A requirement may last up to four hours, unless extended for a further four hours if an officer at least the rank of Superintendent considers it necessary.</p>	
24/Schedule 3	<p>Paragraph 4: A constable may search a person (whether or not that person is in a public place) whom the constable reasonably suspects to have munitions unlawfully with him or to have wireless apparatus with him.</p>	<p>This power allows officers to search people who they reasonably suspect to have munitions or wireless apparatus. Searches can take place whether or not someone is in a public place.</p> <p>If searches take place in public, officers can only require someone to remove their headgear, footwear, outer coat, jacket or gloves. The person may be detained for as long as is reasonably required for the search to be carried out. The search may be at or near the place where the person is stopped. Searches may also be conducted of people travelling in vehicles.</p>	<p>A written record of each stop and search must be made.</p> <p>The officer should inform the person how to obtain a copy of the record.</p> <p>The record will include details of the person's name, when they were stopped and searched, and the officer number of the police officer who conducted the stop and search.</p>

Section	Power	Overview	Records
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<p>24/Schedule 3</p>	<p>Paragraph 4A(1): A senior officer may give an authorisation under this paragraph in relation to a specified area or place.</p>	<p>This power allows a senior officer to authorise officers to stop and search people for munitions or wireless apparatus in specified locations.</p> <p>A senior officer can only make an authorisation if he reasonably suspects that the safety of any person may be endangered by the use of munitions or wireless apparatus. He must also reasonably consider that the authorisation is necessary to prevent such danger, and that the specified location and duration of the authorisation is no greater than necessary.</p> <p>The authorisation lasts for 48 hours, unless the Secretary of State confirms it for a period of up to 14 days from when the authorisation was first made. The Secretary of State may also restrict the area and duration of the authorisation or cancel it altogether.</p> <p>Whilst an authorisation is in place, officers may stop and search people for munitions and wireless apparatus whether or not they reasonably suspect that the person has munitions or wireless apparatus.</p> <p>Searches may take place in public. Officers may ask the person being searched to remove their headgear, footwear, outer coat, jacket or gloves. The person may be detained for as long as is reasonably required for the search to be carried out. The search may be at or near the place where the person is stopped. Searches may also be conducted of people travelling in vehicles.</p>	<p>A written record of each stop and search must be made.</p> <p>The officer should inform the person how to obtain a copy of the record.</p> <p>The record will include details of the person's name, when they were stopped and searched, and the officer number of the police officer who conducted the stop and search.</p>
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This summary sets out the powers in the Terrorism Act 2000 (TACT 2000) which are used by the PSNI and which are covered in the Code of Practice. For a full description of the powers reference should be made to the relevant section of TACT 2000. More details on how the powers should be exercised are set out at the relevant sections of the Code.

Section	Power	Overview	Records
43	A constable may stop and search a person whom he reasonably suspects to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist.	<p>A “terrorist” is defined in section 40 as a person who has committed one of a number of specified terrorist offences or a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. And the definition of “terrorism” is found in section 1 of TACT 2000.</p> <p>A constable may seize and retain anything which he discovers in the course of a search of a person under subsection (1) or (2) and which he reasonably suspects may constitute evidence that the person is a terrorist.</p>	<p>A written record of each stop and search must be made, preferably at the time.</p> <p>The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search.</p> <p>The record is to set out all the information listed at paragraph 10.4 of the Code, including the person’s name, the date, time and place of the search, the purpose, grounds and outcome of the search and the officer’s warrant or other identification number and the police station to which the officer is attached.</p>
43 (2)	A constable may search a person arrested under section 41 of TACT 2000 to discover whether he has in their possession anything which may constitute evidence that he is a terrorist.	<p>A constable may seize and retain anything which he discovers in the course of a search of a person under subsection (1) or (2) and which he reasonably suspects may constitute evidence that the person is a terrorist.</p>	<p>A written record of each stop and search must be made, preferably at the time.</p> <p>The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record</p>

			<p>within 12 months of the search.</p> <p>The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the date, time and place of the search, the purpose, grounds and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.</p>
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Section	Power	Overview	Records
43(4B)(a)	<p>When stopping a vehicle to exercise the power to stop a person under section 43(1), a constable may search the vehicle and anything in or on it to discover whether there is anything which may constitute evidence that the person concerned is a terrorist.</p>	<p>In exercising the power to stop a person a constable reasonably suspects to be a terrorist, he may stop a vehicle in order to do so (section 116(2) of TACT 2000). The power in section 43(4B)(a) allows the constable to search that vehicle in addition to the suspected person. The constable may seize and retain anything which he discovers in the course of such a search, and anything which a constable reasonably suspects may constitute evidence that the person is a terrorist.</p> <p>Nothing in subsection (4B) confers a power to search any person but the power to search in that subsection is in addition to the power in subsection (1) to search a person whom the constable reasonably suspects to be a terrorist.</p> <p>In other words this power does not allow a constable to search any person who</p>	<p>A written record of each stop and search must be made, preferably at the time.</p> <p>The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search.</p> <p>The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the date, time and place of the search, the purpose, grounds and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.</p>



	<p>is in the vehicle other than the person(s) whom the constable reasonably suspects to be a terrorist.</p> <p>Where the search takes place in public, there is no power for a constable to require the person to remove any clothing other than their headgear, outer coat, jacket and gloves. The person or vehicle may be detained only for as long as is reasonably required for the search to be carried out. The search should be at or near the place where the person is stopped. A constable may, if necessary, use reasonable force to exercise these powers.</p>	
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Section	Power	Overview	Records
43A	<p>A constable may, if he reasonably suspects that a vehicle is being used for the purposes of terrorism, stop and search (a) vehicle, (b) the driver of the vehicle, (c) a passenger in the vehicle, (d) anything in or on the vehicle or carried by the driver or a passenger to discover whether there is anything which may constitute evidence that the vehicle is being used for the purposes of terrorism.</p>	<p>The definition of "terrorism" is found in section 1 of TACT 2000.</p> <p>A constable may seize and retain anything which he discovers in the course of a search under this section, and reasonably suspects may constitute evidence that the vehicle is being used for the purposes of terrorism.</p> <p>A constable may, if necessary, use reasonable force to exercise this power.</p>	<p>A written record of each stop and search must be made, preferably at the time.</p> <p>The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search. After searching an unattended vehicle, an officer should leave a notice on it recoding the fact it has been searched and how a copy of the record may be obtained.</p>

			The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the registration number of the vehicle, the date, time and place of the search, the purpose, grounds and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.
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Section	Power	Overview	Records
47A	A constable may stop and search a person or a vehicle in a specified area or place for evidence that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism, or evidence that the vehicle is being used for the purposes of terrorism. The specified area or place must be specified in an authorisation made by a senior police officer and where necessary confirmed by the Secretary of State in accordance with section 47A of, and Schedule 6B, to the Terrorism Act 2000.	<p>A senior officer (an assistant chief constable or above) may give an authorisation under section 47A(1) in relation to a specified area or place if that officer (a) reasonably suspects that an act of terrorism will take place; and (b) reasonably considers that the authorisation is necessary to prevent such an act and that the specified area or place and the duration of the authorisation are no greater than necessary to prevent such an act.</p> <p>The authorisation may be given for a maximum period of 14 days, but it will cease to have effect after 48 hours unless the Secretary of State confirms it within that period. The Secretary of State may also restrict the area or duration of the authorisation or cancel it altogether.</p>	<p>A written record of each stop and search must be made, preferably at the time.</p> <p>The officer should provide the written record to the person searched or, if this is wholly impracticable, provide the person with a unique reference number stating how the full record of the search can be accessed. The person may request a copy of the record within 12 months of the search.</p> <p>The record is to set out all the information listed at paragraph 10.4 of the Code, including the person's name, the date, time and place of the search, the fact that an authorisation is in place, the purpose and outcome of the search and the officer's warrant or other identification number and the police station to which the officer is attached.</p>

	<p>Whilst and where an authorisation is in place, a constable in uniform may stop and search persons or vehicles for the purpose of discovering whether there is evidence that the vehicle is being used for the purposes of terrorism or that the person is or has been involved in terrorism - whether or not the officer reasonably suspects that there is such evidence.</p> <p>A search may be of a vehicle, the driver, a passenger, anything in or on the vehicle or carried by the driver or passenger, a pedestrian or anything carried by the pedestrian.</p> <p>Where the search takes place in public, there is no power for a constable to require the person to remove any clothing other than their headgear, footwear, outer coat, jacket and gloves. The person or vehicle may be detained only for as long as is reasonably required for the search to be carried out. The search should be at or near the place where the person is stopped. A constable may, if necessary, use reasonable force to exercise these powers.</p>	
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## ANNEX D – SERVICE INSTRUCTION

Corporate Policy

**SERVICE INSTRUCTION**

<b>SI Identification Number</b>	SI0321
<b>Policy Ownership</b>	Operational Support Department
<b>Issue Date</b>	02/09/2021
<b>Review Date</b>	5 years from issue date
<b>Last Updated</b>	
<b>Governing Service Policy</b>	Police Search
<b>Cancellation of</b>	
<b>Classification</b>	<b>OFFICIAL [PUBLIC]</b>

### SI0321

## Stop and Search

This Service Instruction outlines Police Service of Northern Ireland specific stop and search guidance, in support of that provided in Authorised Professional Practice stop and the relevant codes of practice.

Keeping People Safe



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## 1. Introduction

The Police Service of Northern Ireland (PSNI) has adopted [Authorised Professional Practice \(APP\) stop and search](#), which provides the systematic procedures and appropriate detection techniques. The PSNI stop and search policy is governed by '[Service Policy 1316 Police Search](#)'

Personnel involved in stop and search should, where applicable:

- Substitute England and Wales specific legislation (contained in APP) with the relevant Northern Ireland (NI) version; and
- Take cognisance of the following PSNI specific guidance.
- Take note that ports officer's examinations and searches under Schedule 7 to the Terrorism Act 2000 are not governed by this instruction (Please refer to [Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000](#) for guidance in relation to Schedule 7 to the Terrorism Act 2000).

## 2. Aims

The aim of this instruction is to ensure that officers keep people safe whilst complying with the law, by exercising their powers to stop and search members of the public fairly, responsibly, without unlawful discrimination and with respect and dignity, whilst showing - We Care, We Listen, We Act.

## 3. Fair and Effective Stop and Search

Stop and search is a police power which, when used fairly and effectively can play an important role in the prevention and detection of crime. Officers should note that the primary purpose of stop and search powers is to enable us to allay or confirm suspicions about individuals without exercising powers of arrest. Using stop and search powers fairly makes them more effective.

**Whilst carrying out stop and search, police officers will act in accordance with the:**

- [Police and Criminal Evidence \(Northern Ireland\) Order 1989](#)

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- [Justice and Security \(Northern Ireland\) Act 2007](#) and [Codes of Practise](#)
- [Terrorism Act 2000](#) and [Codes of Practice](#);
- [Misuse of Drugs Act 1971](#); and
- [PSNI Code of Ethics](#).

The College of Policing has developed a definition of [fair and effective](#) stop and search in collaboration with police practitioners, force senior officers and the National Police Chiefs' Council (NPCC) lead for stop and search.

- A stop and search is most likely to be fair and effective when:**
- The search is justified, lawful and stands up to public scrutiny;
  - The officer has genuine and objectively reasonable suspicion that s/he will find a prohibited article or item for use in crime;

- The person understands why they have been searched and feels they have been treated with respect; and
- The search was necessary and was the most proportionate method the police officer could use to establish whether the person has such an item.

- Four core elements underpin this definition:**
- The decision to stop and search a person must be fair;
  - The search must be legal in basis and in application;
  - Interaction with the public during the encounter must be professional; and
  - Police use of stop and search powers must be transparent and accountable.

## 4. Powers of Search

### Powers requiring Reasonable Grounds for Suspicion

Most stop and search powers e.g. Misuse of Drugs Act/PACE 3-5 require an officer to have reasonable grounds for suspicion.

This is defined in [PACE Code A](#) which should be consulted for further information.

Officers must understand this definition and know how to apply it in practice, as this will decide whether a stop and search is lawful.

A summary of the main stop and search powers can be found at [Annex A](#) of the PACE Code of Practice.

All officers conducting stop and search must work through the process of PD GOWISE. The information must be provided to the subject before a stop and search takes place, and must be recorded on Body Worn Video:

- Power used;
- Detained for purpose of search;
- Grounds;
- Object of the search;
- Warrant card if not in uniform;
- Identification;
- Station attached to; and
- Entitlement to a copy of the record.

### **Powers which do not require reasonable grounds for suspicion**

There are occasions when officers carry out stop and search using legislation which does not require reasonable grounds for suspicion. These are likely to be counter terrorism powers under the Justice and Security (Northern Ireland) Act 2007 and the Terrorism Act 2000. Links to the relevant Codes of Practice are available above.

Whilst reasonable grounds are not required when carrying out certain searches under the Justice and Security (NI) Act 2007, appropriate authorisations from senior police must be in place.

In addition to this authorisation there must also be a lawful basis to carry out the search. This basis must be recorded by the searching officer or officer completing the form PACE 1/TA. The Origin application allows for the selection of briefing, incident, subject's behaviour and subject's location as the basis of the search. In addition to selecting the basis from the drop down list, officers must also record a short narrative regarding the basis selected. This should be a short rationale as to why that person has been stopped. Officers should be aware that to not fully



record this basis, could lead to a breach of the search subject/s right to privacy under Article 8 ECHR.

In cases where the search is of a child who accompanies the principal subject of the search (i.e. is not the target of the search but happens to be present in the vehicle or at the scene), the officer must record the reason why they decided that it was necessary and proportionate to conduct the search of the child, in addition to the search of the adult subject(s).

## 5. Recording

### Body Worn Video

All stop and search encounters must be recorded on body worn video when such a device is worn by the searching officer.

Any reason for not recording will be captured on the PACE1/TA and in the officers Police issue notebook.

The use of body worn video cameras help to reassure the public that their interactions with the PSNI are recorded. The technology offers greater transparency for those in front of the camera as well as those behind it. Body worn video allows us to gather evidence and demonstrate our professionalism during stop and search.

### PACE 1/TA

On all occasions where a stop and search of a person or vehicle is carried out, a form PACE 1/TA will be completed electronically via the Origin application, which is available on the officers' mobile data device.

The officer completing the form must record the date along with the stop and search reference number on the search information card. This must be offered to the person searched and will be used as follows:

- Where any person or persons' vehicle is stopped and searched.  
(NB: If the person is in the vehicle and both are searched, and if the object and the grounds for the search are the same, then only one record is required).
- Where unattended vehicles are searched (a record should be left on the windscreen for example).

Where a technical issue prevents an officer from recording a stop and search onto a mobile data device, then the details must be recorded in the officers police issue notebook for transfer when the technical issue has been resolved. In such circumstances the person searched must still be issued with a search information

card with sufficient information to enable details of the stop and search to be retrieved if required at a later date.

The outcome of a stop and search must always be recorded on the PACE1/TA.

## 6. Supervision and Monitoring

The monitoring of the use of stop and search powers by individual officers will ensure they are being applied appropriately, lawfully and fairly. Supervisors are required to conduct dip sampling of all stop and search carried out by officers under their supervision. Particular attention to the grounds of the search will assess whether the search was fair and effective. Supervisors should take timely and appropriate action to deal with any improper use of powers, such as performance or misconduct procedures.

When monitoring the use of stop and search, supervisors should be mindful of the proportionality in respect of community background and ethnic minority groupings, to ensure that powers are used fairly and appropriately at all times.

In relation to use of stop and search powers under the Justice and Security

(Northern Ireland) Act 2007 and the Terrorism Act 2000, in areas where use of said powers is high, supervisors should ensure that particular attention is given to the lawfulness and appropriateness of any search activity. When carrying out dip sampling in relation to searches using powers under the Justice and Security Act, supervisors should ensure that the basis of the search is recorded.

The outcome of all dip sampling of search records must be recorded electronically for audit purposes.

## 7. Children and Young People

Officers have the power to stop and search persons of any age. Those under the age of 18 should be considered vulnerable due to age and their safety and welfare should be paramount during any encounter.

Where officers consider it necessary to conduct a stop and search on a child or young person, the grounds for the search must be clearly communicated in simple and easy to understand language, the use of technical or legal language should be avoided unless required by law.

Any decision taken to stop and search a child must be in the best interests of that child, taking into consideration that exploitation of the child may be a factor in the case.

In the circumstances whereby an individual refuses to provide their date of birth to a searching officer, and it appears to the officer that the individual may be under 18, the officer should treat the individual as an under 18 and treat as vulnerable due to their age, and prioritise that individuals safety and welfare during the stop and search.

Officers should be aware that not all children of the same age will have the same level of understanding and should allow time for the child or young person to ask questions before a search begins, whilst the search is ongoing and upon conclusion of the search. Every effort should be made to ensure that the rights of the child are upheld during any stop and search encounter. Officers must take care not to discriminate unlawfully against any children or young people on the grounds of religious belief or political opinion, racial group, age, sexual orientation, gender or disability.

Information cards should be provided to the child/children subject to the search. This will facilitate any request for a copy of the PACE 1/TA search record. It may be appropriate to read or explain the content of the information card to the child, particularly if it is known that the child or young person has a learning or literacy difficulty. If it appears obvious to the searching officer, but not disclosed by the child or young person, that they have a learning or literacy difficulty, then the officer should treat that child or young person as if they have a learning or literacy difficulty. Consideration can be taken by the searching officer to contact an appropriate adult if required.

Further information on considerations when dealing with children can be found at [UNICEF](#).

## 8. Gender of searching officer

Searches and other procedures may only be carried out by, or in the presence of, persons of the same sex as the person subject to the search or procedure.

A police officer who has been granted a Gender Recognition Certificate will be able to stop and search an individual of the

same gender without any reference being made to the fact that their gender identity differs from the sex they were assigned at birth.

## 9. Transgender

Sensitivity must be shown when conducting searches of transgender individuals to minimise any embarrassment, avoid discrimination and promote equality. If any doubts exist as to the gender of the individual subject to the search, they should be asked which gender they wish to be treated and for any other information the searching officer deems relevant to carry out the search professionally and appropriately for those circumstances.

Guidance on the searching of transgender individuals can be found in [Code of Practice C – Annex L](#).

## 10. Accountability

Stop and search is scrutinised internally by District and Departmental supervision checks, assurance reviews and quarterly governance meetings chaired at ACC level.

Externally, stop and search is scrutinised by the Northern Ireland Policing Board,

Independent Reviewer of the Justice and Security (NI) Act 2007 and Independent Reviewer of the Terrorism Act 2000. The Police Ombudsman for Northern Ireland may investigate complaints made by members of public in relation to stop and search.

## 11. Human Rights

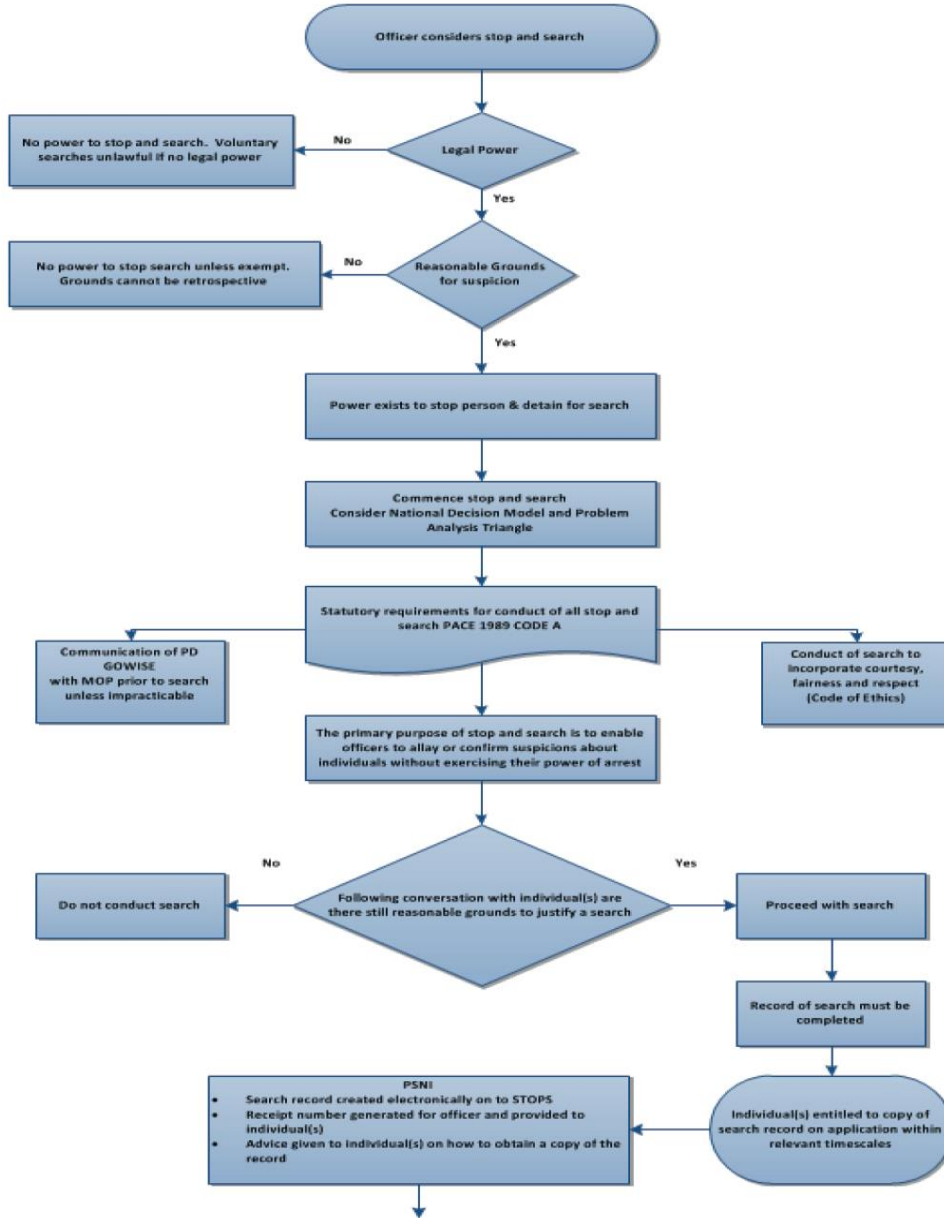
Officers should be mindful that the following articles of the [Human Rights Act 1998](#) could be engaged during stop and search:

- Article 3 – Prohibition of torture and inhumane treatment.
- Article 5 – Right to liberty
- Article 8 – Right to respect for private life
- Article 14 – Prohibition on discrimination

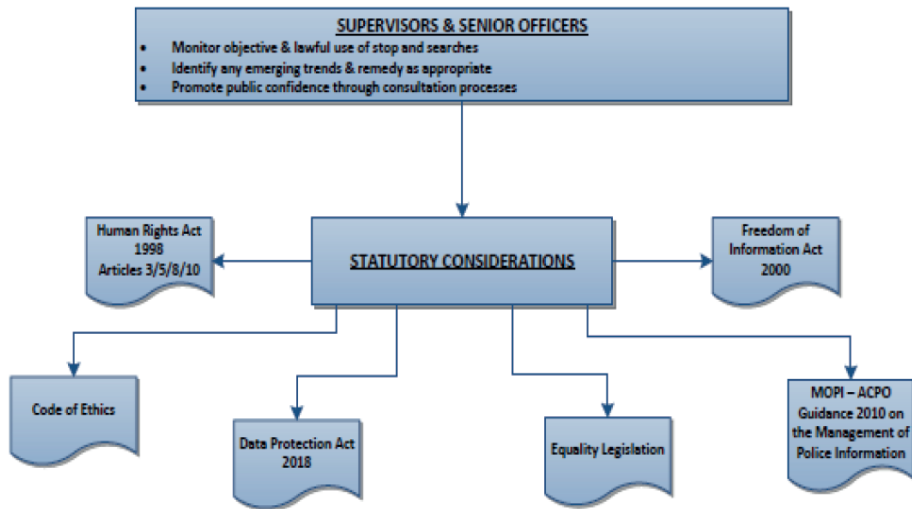
Police Officers must ensure that use of any stop and search power is proportionate, justified and in accordance with the relevant Code of Practice. Officers must be mindful that their conduct during stop and search can impact on the persons perception of the Police Service.

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**Appendix A Flowchart Process**



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**ANNEX E - DISTRICT/AREA EVIDENCE TO SUPPORT JSA AUTHORISATION**

Reference Number:  
SAJSA3/2022

**District/Area Evidence to Support Authorisation to Stop and Search – Para 4A, Schedule 3 under the Justice and Security Act (Northern Ireland) 2007**

**Applicants should retain a completed copy of this form for their own records**

- 1) **Name of Applicant: Area Commander– (Insert name, rank, position)**

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- 2) **Length of Request:**

Please note that the duration of a request should be “**no longer than is necessary**”.

Requests must not be for a full 14 day period unless this is necessary. (Please see Explanatory Notes for more details).

Start date:	Number of days: 14
End date:	End time (if not 23.59):

- 3) **Location where powers to apply (please specify):**

Entire Area <input checked="" type="checkbox"/>
Specific Area/District <input type="checkbox"/>
Map Attached <input type="checkbox"/>

- 4) **Reason for exercising Para 4A, Schedule 3 powers:**

Requesting Officers should only request the power when they **reasonably suspect** that the safety of any person might be endangered by the use of munitions or wireless apparatus, and he / she reasonably considers the request for authorisation **necessary** to prevent such danger (Please see Explanatory Notes for more detail).

Para 4A, Schedule 3 is required:

- To prevent endangerment to persons by the use of munitions or wireless apparatus
- To prevent and detect further terrorist/criminal incidents
- To protect the lives of the wider community
- To protect the life of Police personnel

- 5) **Requesting Officer:**

Requesting Officers must be Area Coordinator or Designated Deputy.

Signature

Print Name/Rank

Date Signed

Reference Number:  
SAJSA3/2022

## **Request for Authorisation to Stop and Search – Para 4A, Schedule 3 under the Justice and Security Act (Northern Ireland) 2007**

- 1) **Requesting Officer Rationale** (Please see Explanatory Notes for more details)

This is lengthy and detailed and includes intelligence material.

- 2) **Requesting Officer Contact and Telephone Number:**

- 3) **Assessment of the threat:**

Requesting Officers should provide a detailed account of the intelligence and incidents which has given rise to reasonable suspicion that the safety of any person might be endangered by the use of munitions or wireless apparatus. This should include classified material where it exists (Please see Explanatory Notes for more details).

- 4) **Previous use of Powers:**

Area Coordinators should demonstrate that they are satisfied that previous use of the powers has been both necessary and proportionate (Include statistics if this helps to support the rationale).

**SPECIFIC INTELLIGENCE DISSEMINATED**

**RELEVANT INCIDENTS**



All Districts have been asked to examine their use of the powers and to articulate if they feel they need to retain these powers, all have confirmed that they do.

The rationale for this application is based on the prevailing threat, the current intelligence picture and recent activity, incidents and attacks in South Area. I believe that the authorisation of these powers is both necessary and proportionate to counter the prevailing threat across xxx Area and :-

To prevent endangerment to persons by the use of munitions or wireless apparatus  
To prevent and detect further terrorist/criminal incidents  
To protect the lives of the wider community  
To protect the life of Police personnel

I continue to monitor our use of these powers across the Area to ensure that they are used proportionately and I have given careful consideration to this application for a further extension.

**5) Community engagement and accountability:**

Area Coordinators should provide a detailed account on the steps that have been taken to engage those communities that will be affected by the authorisation. Where it has not been possible to carry out community engagement prior to authorisation, the Area Coordinator should carry out a retrospective review of the use of the powers (Please see Explanatory Notes for details).

**Explanatory Notes to requesting Authorisation to Stop and Search under Para 4A, Schedule 3 of the Justice & Security Act (Northern Ireland) 2007**

**JSA 3**

<b><u>Point 2</u></b>	<b><u>Length of request</u></b>  Start time is the time and date required by the Requesting Officer. The <b>maximum</b> period for a request is <b>14 days</b> , and requests should <b>not</b> be made for the maximum period unless it is necessary to do so, based on the intelligence about the particular threat. Requests should be for no longer than necessary. Justification should be provided for the length of a request, setting out why the intelligence supports amount of time requested. If a request is one which is similar to another immediately preceding it, information should be provided as to why a new request is justified and why the period of the initial request was not sufficient. Where different areas or places are specified within one request, different time periods may be specified in relation to each of these
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	<p>areas or places – indeed the time period necessary for each will need to be considered and justified.</p> <p>PSNI may authorise the use of section Para 4A, Schedule 3 powers for less than forty-eight hours, however, <b>continuous use of 48 hour-long authorisations, whereby the powers could remain in force on a “rolling” basis is not justifiable and would constitute an abuse of the provisions.</b></p>
<b><u>Point 4</u></b>	<p><b><u>Reason for exercising Para 4A, Schedule 3 powers</u></b></p> <p>The test for requesting JSA powers is that the person requesting it: must reasonably suspect that the safety of any person might be endangered by the use of munitions or wireless apparatus and reasonably considers the request necessary to prevent such an act and that the area(s) or place(s) specified in the request are no greater than is necessary and the duration of the request is no longer than is necessary to prevent such an act.</p>

#### JSA 4

<b><u>Point 1</u></b>	<p>If a request is one which covers a similar geographical area to one which immediately preceded it, information should be provided as to how the intelligence has changed since the previous authorisation was made, or if it has not changed, that it has been reassessed in the process of making the new request, and that it remains relevant, and why.</p> <p><b>Whilst it is possible to issue a successive authorisation for the same geographic areas, this will only be lawful if it is done on the basis of a fresh assessment of the intelligence, and if the authorising officer is satisfied that the authorisation is justified.</b></p>
<b><u>Point 3</u></b>	<p><b><u>Assessment of the threat</u></b></p> <p>The Requesting Officer should provide a detailed account of the intelligence and incidents which have given rise to reasonable suspicion that the safety of any person might be endangered by the use of munitions or wireless apparatus. This should include classified material where it exists. Threat Assessments from Irish Republican Terrorism are provided by MI5 via C3. Assessments of the threat to various aspects of the UK infrastructure, such as aviation, transport, military establishments are available and if necessary should be sought. If reference is made to MI5 assessments, Requesting Officers should ensure that these references are to current material.</p> <p>A high state of alert may seem enough in itself to justify a request for powers; however it is important to set out in the detail the relation between the threat assessment and the decision to request.</p> <p>Intelligence specific to particular dates may still be included, even if the relevant date has passed, if it is still believed to be current.</p>
<b><u>Point 5</u></b>	<p><b><u>Community Engagement</u></b></p> <p>The Requesting Officer should demonstrate that communities have been engaged as fully as possible throughout the authorisation process. When using the power, PSNI may use existing community engagement arrangements. However, where stop and search powers affect sections of the community with whom channels of communication are difficult or non-existent, these should be identified and put in place.</p>

*Trials on indictment without a jury*

**1 Issue of certificate**

- (1) This section applies in relation to a person charged with one or more indictable offences (“the defendant”).
- (2) The Director of Public Prosecutions for Northern Ireland may issue a certificate that any trial on indictment of the defendant (and of any person committed for trial with the defendant) is to be conducted without a jury if—
  - (a) he suspects that any of the following conditions is met, and
  - (b) he is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.
- (3) Condition 1 is that the defendant is, or is an associate (see subsection (9)) of, a person who—
  - (a) is a member of a proscribed organisation (see subsection (10)), or
  - (b) has at any time been a member of an organisation that was, at that time, a proscribed organisation.
- (4) Condition 2 is that—
  - (a) the offence or any of the offences was committed on behalf of a proscribed organisation, or

- (b) a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.
- (5) Condition 3 is that an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and –
    - (a) the attempt was made on behalf of a proscribed organisation, or
    - (b) a proscribed organisation was otherwise involved with, or assisted in, the attempt.
  - (6) Condition 4 is that the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.
  - (7) In subsection (6) “religious or political hostility” means hostility based to any extent on –
    - (a) religious belief or political opinion,
    - (b) supposed religious belief or political opinion, or
    - (c) the absence or supposed absence of any, or any particular, religious belief or political opinion.
  - (8) In subsection (6) the references to persons and groups of persons need not include a reference to the defendant or to any victim of the offence or offences.
  - (9) For the purposes of this section a person (A) is the associate of another person (B) if –
    - (a) A is the spouse or a former spouse of B,
    - (b) A is the civil partner or a former civil partner of B,
    - (c) A and B (whether of different sexes or the same sex) live as partners, or have lived as partners, in an enduring family relationship,
    - (d) A is a friend of B, or
    - (e) A is a relative of B.
  - (10) For the purposes of this section an organisation is a proscribed organisation, in relation to any time, if at that time –
    - (a) it is (or was) proscribed (within the meaning given by section 11(4) of the Terrorism Act 2000 (c. 11)), and
    - (b) its activities are (or were) connected with the affairs of Northern Ireland.

## **2 Certificates: supplementary**

- (1) If a certificate under section 1 is issued in relation to any trial on indictment of a person charged with one or more indictable offences (“the defendant”), it must be lodged with the court before the arraignment of –
  - (a) the defendant, or
  - (b) any person committed for trial on indictment with the defendant.
- (2) A certificate lodged under subsection (1) may be modified or withdrawn by giving notice to the court at any time before the arraignment of –
  - (a) the defendant, or
  - (b) any person committed for trial on indictment with the defendant.
- (3) In this section “the court” means –



- (a) in relation to a time before the committal for trial on indictment of the defendant, the magistrates' court before which any proceedings for the offence or any of the offences mentioned in subsection (1) are being, or have been, conducted;
- (b) otherwise, the Crown Court.

### 3 Preliminary inquiry

- (1) This section applies where a certificate under section 1 has been issued in relation to any trial on indictment of a person charged with one or more indictable offences.
- (2) In proceedings before a magistrates' court for the offence or any of the offences, if the prosecution requests the court to conduct a preliminary inquiry into the offence the court must grant the request.
- (3) In subsection (2) "preliminary inquiry" means a preliminary inquiry under the Magistrates' Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I. 26)).
- (4) Subsection (2) –
  - (a) applies notwithstanding anything in Article 31 of that Order,
  - (b) does not apply in respect of an offence where the court considers that in the interests of justice a preliminary investigation should be conducted into the offence under that Order, and
  - (c) does not apply in respect of an extra-territorial offence (as defined in section 1(3) of the Criminal Jurisdiction Act 1975 (c. 59)).

### 4 Court for trial

- (1) A trial on indictment in relation to which a certificate under section 1 has been issued is to be held only at the Crown Court sitting in Belfast, unless the Lord Chief Justice of Northern Ireland directs that –
  - (a) the trial,
  - (b) a part of the trial, or
  - (c) a class of trials within which the trial falls,
 is to be held at the Crown Court sitting elsewhere.
- (2) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under subsection (1) –
  - (a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002 (c. 26);
  - (b) a Lord Justice of Appeal (as defined in section 88 of that Act).
- (3) If a person is committed for trial on indictment and a certificate under section 1 has been issued in relation to the trial, the person must be committed –
  - (a) to the Crown Court sitting in Belfast, or
  - (b) where a direction has been given under subsection (1) which concerns the trial, to the Crown Court sitting at the place specified in the direction;
 and section 48 of the Judicature (Northern Ireland) Act 1978 (c. 23) (committal for trial on indictment) has effect accordingly.
- (4) Where –

- (a) a person is committed for trial on indictment otherwise than to the Crown Court sitting at the relevant venue, and
- (b) a certificate under section 1 is subsequently issued in relation to the trial,

the person is to be treated as having been committed for trial to the Crown Court sitting at the relevant venue.

- (5) In subsection (4) “the relevant venue”, in relation to a trial, means –
  - (a) if the trial falls within a class specified in a direction under subsection (1)(c) (or would fall within such a class had a certificate under section 1 been issued in relation to the trial), the place specified in the direction;
  - (b) otherwise, Belfast.
- (6) Where –
  - (a) a person is committed for trial to the Crown Court sitting in Belfast in accordance with subsection (3) or by virtue of subsection (4), and
  - (b) a direction is subsequently given under subsection (1), before the commencement of the trial, altering the place of trial,the person is to be treated as having been committed for trial to the Crown Court sitting at the place specified in the direction.

## **5 Mode of trial on indictment**

- (1) The effect of a certificate issued under section 1 is that the trial on indictment of –
  - (a) the person to whom the certificate relates, and
  - (b) any person committed for trial with that person,is to be conducted without a jury.
- (2) Where a trial is conducted without a jury under this section, the court is to have all the powers, authorities and jurisdiction which the court would have had if the trial had been conducted with a jury (including power to determine any question and to make any finding which would be required to be determined or made by a jury).
- (3) Except where the context otherwise requires, any reference in an enactment (including a provision of Northern Ireland legislation) to a jury, the verdict of a jury or the finding of a jury is to be read, in relation to a trial conducted without a jury under this section, as a reference to the court, the verdict of the court or the finding of the court.
- (4) No inference may be drawn by the court from the fact that the certificate has been issued in relation to the trial.
- (5) Without prejudice to subsection (2), where the court conducting a trial under this section –
  - (a) is not satisfied that a defendant is guilty of an offence for which he is being tried (“the offence charged”), but
  - (b) is satisfied that he is guilty of another offence of which a jury could have found him guilty on a trial for the offence charged,the court may convict him of the other offence.
- (6) Where a trial is conducted without a jury under this section and the court convicts a defendant (whether or not by virtue of subsection (5)), the court

must give a judgment which states the reasons for the conviction at, or as soon as reasonably practicable after, the time of the conviction.

- (7) A person convicted of an offence on a trial under this section may, notwithstanding anything in sections 1 and 10(1) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47), appeal to the Court of Appeal under Part 1 of that Act—
  - (a) against his conviction, on any ground, without the leave of the Court of Appeal or a certificate of the judge of the court of trial;
  - (b) against sentence passed on conviction, without that leave, unless the sentence is fixed by law.
- (8) Where a person is convicted of an offence on a trial under this section, the time for giving notice of appeal under section 16(1) of that Act is to run from the date of judgment (if later than the date from which it would run under that subsection).
- (9) Article 16(4) of the Criminal Justice (Northern Ireland) Order 2004 (S.I. 2004/1500 (N.I. 9)) (leave of judge or Court of Appeal required for prosecution appeal under Part IV of that Order) does not apply in relation to a trial conducted under this section.

## **6 Rules of court**

- (1) Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of sections 1 to 5.
- (2) Without limiting subsection (1), rules of court may in particular make provision for time limits which are to apply in connection with any provision of sections 1 to 5.
- (3) Nothing in this section is to be taken as affecting the generality of any enactment (including a provision of Northern Ireland legislation) conferring powers to make rules of court.

## **7 Limitation on challenge of issue of certificate**

- (1) No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision or purported decision of the Director of Public Prosecutions for Northern Ireland in relation to the issue of a certificate under section 1, except on the grounds of—
  - (a) dishonesty,
  - (b) bad faith, or
  - (c) other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law).
- (2) Subsection (1) is subject to section 7(1) of the Human Rights Act 1998 (c. 42) (claim that public authority has infringed Convention right).

## **8 Supplementary**

- (1) Nothing in sections 1 to 6 affects—
  - (a) the requirement under Article 49 of the Mental Health (Northern Ireland) Order 1986 (S.I. 1986/595 (N.I. 4)) that a question of fitness to be tried be determined by a jury, or



- (b) the requirement under Article 49A of that Order that any question, finding or verdict mentioned in that Article be determined, made or returned by a jury.
- (2) Schedule 1 (minor and consequential amendments relating to trials on indictment without a jury) shall have effect.
  - (3) The provisions of sections 1 to 7 and this section (and Schedule 1) apply in relation to offences committed before, as well as after, the coming into force of those provisions, but subject to any provision made by virtue of –
    - (a) section 4 of the Terrorism (Northern Ireland) Act 2006 (c. 4) (transitional provision in connection with expiry etc of Part 7 of the Terrorism Act 2000 (c. 11)), or
    - (b) section 53(7) of this Act.
  - (4) An order under section 4 of the Terrorism (Northern Ireland) Act 2006 may make provision disregarding any of the amendments made by Schedule 1 to this Act for any purpose specified in the order.

## **9 Duration of non-jury trial provisions**

- (1) Sections 1 to 8 (and Schedule 1) (“the non-jury trial provisions”) shall expire at the end of the period of two years beginning with the day on which section 1 comes into force (“the effective period”).
- (2) But the Secretary of State may by order extend, or (on one or more occasions) further extend, the effective period.
- (3) An order under subsection (2) –
  - (a) must be made before the time when the effective period would end but for the making of the order, and
  - (b) shall have the effect of extending, or further extending, that period for the period of two years beginning with that time.
- (4) The expiry of the non-jury trial provisions shall not affect their application to a trial on indictment in relation to which –
  - (a) a certificate under section 1 has been issued, and
  - (b) the indictment has been presented,
 before their expiry.
- (5) The expiry of section 4 shall not affect the committal of a person for trial in accordance with subsection (3) of that section, or by virtue of subsection (4) or (6) of that section, to the Crown Court sitting in Belfast or elsewhere in a case where the indictment has not been presented before its expiry.
- (6) The Secretary of State may by order make any amendments of enactments (including provisions of Northern Ireland legislation) that appear to him to be necessary or expedient in consequence of the expiry of the non-jury trial provisions.
- (7) An order under this section –
  - (a) shall be made by statutory instrument, and
  - (b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.



## **Section 44-46 of the CJA 2003**

- 44 Application by prosecution for trial to be conducted without a jury where danger of jury tampering**
- (1) This section applies where one or more defendants are to be tried on indictment for one or more offences.
  - (2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.
  - (3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.
  - (4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.
  - (5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial

as to make it necessary in the interests of justice for the trial to be conducted without a jury.

- (6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place—
  - (a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,
  - (b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,
  - (c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial.

#### **45 Procedure for applications under sections 43 and 44**

- (1) This section applies—
  - (a) to an application under section 43, and
  - (b) to an application under section 44.
- (2) An application to which this section applies must be determined at a preparatory hearing (within the meaning of the 1987 Act or Part 3 of the 1996 Act).
- (3) The parties to a preparatory hearing at which an application to which this section applies is to be determined must be given an opportunity to make representations with respect to the application.
- (4) In section 7(1) of the 1987 Act (which sets out the purposes of preparatory hearings) for paragraphs (a) to (c) there is substituted—
  - “(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,
  - (b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,
  - (c) determining an application to which section 45 of the Criminal Justice Act 2003 applies.”
- (5) In section 9(11) of that Act (appeal to Court of Appeal) after “above,” there is inserted “from the refusal by a judge of an application to which section 45 of the Criminal Justice Act 2003 applies or from an order of a judge under section 43 or 44 of that Act which is made on the determination of such an application.”
- (6) In section 29 of the 1996 Act (power to order preparatory hearing) after subsection (1) there is inserted—

“(1A) A judge of the Crown Court may also order that a preparatory hearing shall be held if an application to which section 45 of the Criminal Justice Act 2003 applies (application for trial without jury) is made.”
- (7) In subsection (2) of that section (which sets out the purposes of preparatory hearings) for paragraphs (a) to (c) there is substituted—
  - “(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,
  - (b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,

- (c) determining an application to which section 45 of the Criminal Justice Act 2003 applies,”.
- (8) In subsections (3) and (4) of that section for “subsection (1)” there is substituted “this section”.
- (9) In section 35(1) of that Act (appeal to Court of Appeal) after “31(3),” there is inserted “from the refusal by a judge of an application to which section 45 of the Criminal Justice Act 2003 applies or from an order of a judge under section 43 or 44 of that Act which is made on the determination of such an application,”.
- (10) In this section –
  - “the 1987 Act” means the Criminal Justice Act 1987 (c. 38),
  - “the 1996 Act” means the Criminal Procedure and Investigations Act 1996 (c. 25).

#### **46 Discharge of jury because of jury tampering**

- (1) This section applies where –
  - (a) a judge is minded during a trial on indictment to discharge the jury, and
  - (b) he is so minded because jury tampering appears to have taken place.
- (2) Before taking any steps to discharge the jury, the judge must –
  - (a) inform the parties that he is minded to discharge the jury,
  - (b) inform the parties of the grounds on which he is so minded, and
  - (c) allow the parties an opportunity to make representations.
- (3) Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied –
  - (a) that jury tampering has taken place, and
  - (b) that to continue the trial without a jury would be fair to the defendant or defendants;but this is subject to subsection (4).
- (4) If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial.
- (5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled.
- (6) Subsection (5) is without prejudice to any other power that the judge may have on terminating the trial.
- (7) Subject to subsection (5), nothing in this section affects the application of section 43 or 44 in relation to any new trial which takes place following the termination of the trial.

## **ANNEX G – PPS GUIDANCE ON NJTs**

### **Introduction**

1. The decision that a trial should be conducted without a jury is taken by the Director under the provisions of section 1 of the Justice and Security (Northern Ireland) Act 2007. The 2007 Act replaced the former arrangements whereby certain offences were “scheduled” and trials on indictment proceeded without a jury unless the Attorney-General “de-scheduled” them (on the basis that the offences were not connected to the emergency situation within Northern Ireland). Section 1 requires an examination of circumstances potentially pertaining to the accused, the offence and / or the motivation for the offence. Whereas in the past the presumption was that a trial would be a non-jury trial unless the Attorney General certified otherwise, the presumption now is that a trial will be by jury unless the Director takes the positive step of issuing a certificate for a trial to proceed without a jury.

2. Section 1 of the 2007 Act provides for the Director to issue a certificate that any trial on indictment is to be conducted without a jury if he suspects that one or more of four statutory conditions are met and he is satisfied that, in view of this, there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

3. The decision to issue a certificate can be challenged by way of judicial review. By virtue of section 7 of the 2007 Act the scope of any such challenge is limited to grounds of dishonesty, bad faith, or other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law). See also the case of *Arthurs* [2010] NIQB 75.

4. The decision to issue a certificate is an extremely important one and prosecutors must ensure that applications to the Director contain all relevant details and are accurate. This document is intended to provide some practical guidance in this regard. Whilst there are a number of themes and issues that tend to recur in these applications they often give rise to their own specific issues and it is important that the information and evidence relevant to each particular application is carefully considered and analysed and that recommendations are based upon the merits of the individual case. I set out below what experience indicates are some of the main considerations that most frequently arise.

### **Condition 1 - the defendant is, or is an associate of, a person who is a member of a proscribed organisation, or has at any time been a member of an organisation that was, at that time, a proscribed organisation.**

5. It is important that the information from police makes it clear which sub-condition of Condition 1 is relied upon. On occasion it is not apparent whether police consider that the intelligence indicates that a defendant is a member of a proscribed organisation, or merely an associate. If reliance is placed upon the defendant’s association with a member, or members, of a proscribed organisation then that other person should, if possible, be identified. It may be important, for example, to know whether a defendant is an associate of a senior member of a proscribed organisation as this may make it more likely that the proscribed organisation would seek to influence the outcome of the trial than if the defendant is only an associate of a low-ranking member. Police and prosecutors should also be cognisant of the definition of “associate” provided for by section 1(9) of the 2007 Act:

For the purposes of this section a person (A) is the associate of another person (B) if

–

- (a) A is the spouse or a former spouse of B
- (b) A is the civil partner or a former civil partner of B
- (c) A and B (whether of different sexes or the same sex) live as partners, or have lived as partners, in an enduring family relationship,
- (d) A is a friend of B, or
- (e) A is a relative of B.

6. Whilst the term “associate” might normally be considered to include a broad range of persons including, for example, acquaintances, the definition in section 1(9) requires that the two individuals are in fact “friends” or have one of the other specific relationships referred to therein.

7. If possible, the information provided by police should also identify the particular proscribed organisation involved, rather than simply refer, for example, to “dissident republicans”.

8. It is important also that the application is clear as to whether a defendant is a current or past member of a proscribed organisation. In the case of historical membership it will be important to ascertain, to the extent possible, when such membership ceased. Cases of historical membership can give rise to difficult issues in respect of whether a proscribed organisation is likely to seek to interfere with the administration of justice in respect of a past member. There have been cases in which condition 1 (ii) has been met but no risk to the administration of justice has been assessed as arising therefrom. This may be the case, for example, where the suspect is a former member of PIRA but has not subsequently associated himself with any organisation that is actively conducting a terrorist campaign. If these cases relate to overtly terrorist offences, it is often the position that Condition 4 is met; and that, whilst no risk to the administration of justice arises from a possibility of jury intimidation, it does arise from the possibility of a fearful or partial jury (see below).

**Condition 2 - the offence or any of the offences was committed on behalf of the proscribed organisation, or a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.**

9. There will be cases where there is specific intelligence that the offences were carried out on behalf of a proscribed organisation and this can obviously be relied upon. There will be cases in which such specific intelligence does not exist. However, in light of the information available in relation to Condition 1 and the nature of the offences being prosecuted, it may still be possible to be satisfied that Condition 2 is met. For example, if there is intelligence that D is a member of the “new IRA” and he is caught in possession of explosives, there is likely to be a proper basis for the Director to be satisfied that the offence of possession of explosives was committed by, or on behalf, of the new IRA. However, care must be exercised in this regard and an automatic assumption should not be made.

**Condition 3 - an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and the attempt was made on behalf of a proscribed organisation or a proscribed organisation was otherwise involved with, or assisted in, the attempt.**



10. It is rare that there is information that provides a basis for relying upon Condition 3. The cases in which it should be relied upon are usually readily apparent. The most obvious form of an attempt to prejudice the investigation or prosecution would be the intimidation of a witness. In one previous case Condition 3 was satisfied by the involvement of a proscribed organisation in assisting the defendant to escape from lawful custody after he had been previously charged (in the 1970s) with the same offences.

**Condition 4 - the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one group of persons towards another person or group of persons.**

11. The scope of Condition 4 has been considered by the Divisional Court in the case of *Hutchings* [2017] NIQB 121 in which it was held that:

a. In principle there is a need to narrowly and strictly construe Section 1 of the 2007 Act in light of the strong presumption in favour of jury trial.

b. Nevertheless, it is important to remain faithful to the wording of the statute and its context notwithstanding the need to narrowly construe Section 1 of the Act and the statutory conditions are expressed in clear and unambiguous terms.

c. Condition 4 has to be read in its full context, set as it is in close juxtaposition to subsections (7) and (8).

d. In relation to the wording of Condition 4 itself the Court noted that:

i. It is couched in wide terms;

ii. It is not confined to the circumstances of Conditions 1, 2 and 3. The wording moves beyond the confines of the accused person being within a paramilitary organisation. It clearly envisages looking at the circumstances leading up to the offence being considered;

iii. The significance of the wording that the offence “was committed to any extent (whether directly or indirectly)” cannot be underestimated. This clearly widens the bracket of connective circumstances that can be embraced between the offence itself and the religious or political hostility;

iv. Political hostility can apply to “supposed” political opinion, again widening the reach of the section: para 38.

e. The phrase “political hostility” is in use daily in Northern Ireland and is easily understood. The most obvious examples of the situation arising out of Condition 4 may be incidents with a sectarian background but the wording of the statute is manifestly wide enough to embrace the scenario of the British Army engaging with suspected members of the IRA.

f. The wording of Condition 4 is such that Parliament clearly intended to include a broad reach of circumstances whilst at the same time recognizing that any legislation removing jury trial needs to be tightly construed.

12. Advice was previously sought from Senior Counsel in relation to the scope of Condition 4 in the context of dissident republicans being prosecuted for possession of firearms or explosives. In relation to the dissident republican organisations (ONH, RIRA and CIRA) referred to in a number of examples considered by Senior Counsel,

he noted that “they all have, as one of their aims, the removal of the British presence in Northern Ireland. All have used, and continue to use, violent methods to further that aim and such methods have involved attacks on the security forces, i.e. members of the British army and members of the PSNI. The use of such violent attacks has regularly and routinely involved the possession of firearms and explosive substances by members/associates of such organisations.” In Senior Counsel’s view, “such actions directed against members of the security forces, and the associated possession of prohibited items, are connected to political hostility.”

13. It is often possible for the Director to be satisfied that Condition 4 is met in light of the nature of the offences, the evidence in the case and the information provided 96 by police in relation to conditions 1 and 2. In terrorist cases it is usually more appropriate to rely upon the connection to political, rather than religious, hostility.

### **Risks to the Administration of Justice**

14. There are three main risks to the administration of justice that regularly arise as a result of one or more of the Conditions being met. They are:

- a. The risk of a proscribed organisation intimidating the jury;
- b. The risk of a fearful jury returning a perverse verdict;
- c. The risk of a partial/hostile jury returning a perverse verdict.

15. Risk (a) will have to be considered in circumstances where any of Conditions (i) – (iii) are met. In advising PPS in relation to this risk police should provide an assessment of the threat currently posed by the relevant proscribed organisation. Formerly this was done by reference to the reports of the Independent Monitoring Commission. For some time these have been recognised as outdated and police will provide their own assessment. It is often helpful if police refer to recent incidents for which the particular proscribed organisation is believed to be responsible.

16. Risk (b) tends to be related to Condition 4 and the evidence in the case. The jury will not, of course, be made aware of the intelligence that forms the basis of the assessment in relation to Conditions 1 and 2. However, in many cases it will be apparent to the jury from the facts of the case and the evidence to be adduced that a proscribed organisation was involved. This is likely to generate fear for their personal safety and/or the safety of their families that may impact upon their verdict.

17. Risk (c) also tends to be related to Condition 4 and the facts of the case. It will often be the case that it will become apparent to the jury that the offences were committed by or on behalf of a republican or loyalist paramilitary organisation. There is a risk that certain members of the jury would be so influenced by hostility towards the defendant and/or his associates such that their ability to faithfully return a verdict based upon the evidence would be compromised. There may also be a risk that a juror would be biased in favour of the defendant and/or his associates.

18. The risk of jury bias can also arise in cases involving military shootings of suspected terrorists. In the Hutchings case referred to above, the Court found no reason to dispute the Director’s conclusion that, where the context is of a soldier shooting an innocent bystander against the background of an IRA attack a short time before, this circumstance carries in its wake the risk of a partisan juror or jurors in at least parts of this province with all the attendant dangers of impairment of the administration of justice if that trial were to be conducted with a jury.

19. It should always be remembered that there needs to be a link between the Condition(s) that is satisfied and the risk to the administration of justice before the Director can issue a certificate.

### **Jury Measures**

20. The Justice and Security (Northern Ireland) Act 2007 does not specifically refer to the potential for jury measures as a means of mitigating the risk posed to the administration of justice that arises from the circumstances in which the statutory conditions are met. However, it has been the practice of police and the Director to assess whether any such risk can be adequately mitigated by either (a) transferring the trial, or (b) screening or (c) sequestering the jury. It is helpful to consider how each of the jury measures might assist in relation to the various risks identified above.

#### *Risk of jury intimidation*

21. The transfer of the trial may be helpful if the proscribed organisation only has a very limited geographical reach. However, it is often the case that one is dealing with proscribed organisations with an ability to operate throughout the province and the ability to transfer the trial may be of little assistance in mitigating this risk.

22. Police and prosecutors should also be aware that an application to transfer the trial can be made in the Magistrates' Court at the committal hearing, although the matters which can be considered by the Court at that stage are specified by s.48(1) of the Judicature (Northern Ireland) Act 1978 as: (a) the convenience of the defence, the prosecution and the witnesses; (b) the expediting of the trial; and (c) any directions given by the Lord Chief Justice. Pursuant to s.48(2) of the 1978 Act the Crown Court has broader powers to give direction in relation to the place of trial and may have regard to considerations other than those contained in s.48(1): *R v Morgan & Morgan Fuels and Lubes Limited* [1998] NIJB 52. There is a strong presumption that a trial before a jury should be heard in the division in which the offence was committed, unless there is a statutory or other reason why this should not be the case: *R v Grew & Ors* [2008] NICC 6 at para 47 and *R v Lewis & Ors* [2008] NICC 16 at para 18. The onus will be on the prosecution to adduce evidence in support of an application to transfer. Furthermore, the courts may be reluctant to accept that any risk of intimidation can be materially alleviated by transferring the trial: *R v Grew & Ors* [2008] NICC 6 at para 50 referring to *R v Mackle & Ors* [2007] NIQB 105. Police and prosecutors therefore need to carefully consider the nature of any material that can be placed before a court in support of a potential application to transfer and the likelihood of a successful application in light of same.

23. Screening the jury prevents them from being seen by the public but does not prevent them from being seen by the defendant who could make a record of their appearance and pass that to his associates. Police have highlighted the further risk that jurors may be recognised by others called for jury service but not sworn on to the particular jury and there is a risk that these others could either deliberately or inadvertently pass on details of the jurors which would enable them to be targeted.

24. Sequestering the jury is a very draconian measure and police have often pointed out the potential for this to impact upon the jurors' lives and thereby impair their judgment, either in favour of or, more likely, against the defendant. In addition, police



have advised that the parochial nature of Northern Ireland would create a unique difficulty in the provision of anonymity and security of a jury.

### *Risk of a perverse verdict*

25. In general terms it is difficult to see how any risk of a perverse verdict arising from a fearful or hostile jury could be mitigated by any of the available jury measures. Transferring the trial would not address any issues of partiality unless, perhaps, the partiality arises from feelings confined to a local community. This possibility was noted by Stephens J in the context of inquests in *Jordan* [2014] NIQB 11 when he pointed out that the community divisions in our society are such that the exact nature of the danger of a perverse verdict is influenced by the geographic location of an inquest.

26. A transfer of the trial may also be unlikely to address any issue of fear, as the jury would most likely not consider themselves (or their families) to be safe from a proscribed organisation even if the offence happened in another part of the province. Screening may provide some re-assurance but this is imperfect for the reasons referred to above (they can be seen by the defendant and others called for jury service but not sworn). There is also a risk that the highly unusual measure of screening the jury would in fact exacerbate any disposition to be fearful or partial because it would be such an unusual measure and suggest that the defendant and / or his associates are dangerous people who would seek to intimidate the juror or his / her family. The same can be said, perhaps with even greater force, in relation to the sequestration of the jury.

27. In relation to this latter point prosecutors should note two judgments delivered in the context of the power to order non-jury trial under section 44 of the Criminal Justice Act 2003. The first is *R v Mackle and others* [2007] NICA 37. When considering whether to order a non-jury trial in a case of jury tampering a court is enjoined to consider what steps might reasonably be taken to prevent jury tampering before deciding whether the likelihood of it occurring is so great that the order should be made. The Court of Appeal held that a consideration of what was reasonable extends to an examination of the impact any proposed step would have upon the jury's fair and dispassionate disposal of the case. The Court held that the steps proposed in that case (round the clock protection of the jury or their being sequestered throughout its duration) would lead to an incurable compromise of the jury's objectivity which could not be dispelled by an admonition from the trial judge.

28. The decision in *Mackle & Ors* was subsequently approved by the English Court of Appeal in *R v Twomey & Ors* [2009] EWCA Crim 1035 where the court agreed that if a misguided perception is created in the minds of the jury by the provision of high level protection, then such a step would not be reasonable. It was also relevant to consider the likely impact of measures on the ordinary lives of the jurors, performing their public responsibilities, and whether, in some cases at any rate, even the most intensive protective measures for individual jurors would be sufficient to prevent the improper exercise of pressure on them through members of their families who would not fall within the ambit of the protective measures.

29. The particular facts and circumstances of the *Mackle* and *Twomey* cases should be noted. In both cases the Court was considering very extensive and expensive measures designed to protect the jury. However, the general point about the potential for measures to undermine the objectivity of the jury is an important one that should

be weighed in any assessment of their potential to mitigate the risk to the administration of justice in any particular case.

*Part 7 of the Criminal Justice Act 2003*

30. When considering the risk of intimidation of jurors and whether a certificate for non-jury trial should issue, police and prosecutors should also note the powers contained within Part 7 of the Criminal Justice Act 2003 (referred to above) which allow the Judge, in certain circumstances where there has been jury tampering, to discharge the jury and direct that the trial be heard by a judge alone, or continue without a jury to hear the trial. However, this potential “safety net” does not relieve the Director from his responsibility to apply the statutory test set out in the 2007 Act based upon the information that available to him at the time of his decision

## **ANNEX H – EXPLANATORY MEMORANDUM TO JSA CODE OF PRACTICE**

ANNEX H EXPLANATORY MEMORANDUM TO JSA CODE OF PRACTICE

### **EXPLANATORY MEMORANDUM TO**

#### **THE JUSTICE AND SECURITY (NORTHERN IRELAND) ACT 2007 (CODE OF PRACTICE) ORDER 2013**

**2013 No. 1128**

1. This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

#### **2. Purpose of the instrument**

2.1 The purpose of this Order is to make provision for a Code of Practice made in accordance with section 34(1)(a) and (2) of the Justice and Security Act 2007 (the 2007 Act) for the exercise of the powers contained within sections 21 to 28 and 30 of that Act.

#### **3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 This is the first exercise of the power to issue codes of practice under section 34 of the Justice and Security (Northern Ireland) Act 2007. It is being carried out under the urgent procedure outlined in section 36(2) because the Secretary of State believes that, in response to the decision of the Court of Appeal in the judicial review decisions in the case of Canning, Fox and McNulty, it is necessary to have a code of practice in place as a matter of urgency. The code of practice applies to the exercise by the Police Service of Northern Ireland of powers under section 21, section 23, section 24/Schedule 3 and section 26 of the 2007 Act and to the exercise of certain powers under the 2007 Act by the armed forces.

#### **4. Legislative Context**

4.1 The 2007 Act provides a range of powers to the PSNI, including stop and question, search for munitions and wireless apparatus and entry of premises. It also gives the police the power to seize items found during searches of people, premises and vehicles. As amended, it reflects the changes to the powers of stop and search for munitions and wireless apparatus in the 2007 Act which were brought into effect by the Protection of Freedoms Act 2012. Schedule 6 to the 2012 Act amended Schedule 3 to the 2007 Act, introducing an authorisation procedure for the exercise by the police of stop and search powers in relation to munitions and wireless transmitters. These powers do not require reasonable suspicion in relation to each individual who is searched, although they do require the authorising officer to have a reasonable suspicion that the safety of any person might be endangered by the use of munitions or wireless apparatus. Schedule 6 also introduced, by way of amendments to Schedule 3 to the 2007 Act, a power to stop and search, whether in public or private, if a constable reasonably suspects that an individual has munitions unlawfully with him or her or wireless apparatus with him or her. Whilst a number of the powers in the 2007 Act are primarily for use by the PSNI, the armed forces also have powers under the 2007 Act which they can use in support of the police.

## **5. Territorial Extent and Application**

5.1 This instrument applies to Northern Ireland.

## **6. European Convention on Human Rights**

The Minister of State (Mike Penning) has made the following statement regarding Human Rights:

“In my view The Justice and Security (Northern Ireland) Act 2007 (Code of Practice) Order 2013 is compatible with the Convention rights.”

## **7. Policy background**

### *What is being done and why*

7.1 The Code of Practice has been developed to provide guidance to the PSNI on the use of these powers, particularly to ensure that the powers are used with regard to proportionality and necessity principles. The Court of Appeal in Northern Ireland on 9 May 2013 ruled in the case of Canning, Fox and McNulty that a Code of Practice was required for the stop and question, and stop and search powers in the 2007 Act to ensure that necessary safeguards were in place. While the judgment relates to the use of the powers under the 2007 Act before amendment by the 2012 Act, it is judged necessary to introduce the Code of Practice without delay. The Northern Ireland Office is therefore making this Order under the urgency procedures in section 36(2) of the 2007 Act so that the Code can come into force without having first been approved in draft. It is anticipated that a resolution approving this Order will be debated within the next 40 days, computed as required in accordance with section 7(1) of the Statutory Instruments Act 1946.

## **8. Consultation outcome**

8.1 A public consultation on the draft Code was carried out for a period of 12 weeks from 13 December 2012 until 6 March 2013. A number of responses were received and considered and some modifications were made which are reflected in the Code of Practice in accordance with section 34(3) of the 2007 Act.

## **9. Guidance**

9.1 The Code of Practice sets out the basic principles for the use of powers by police officers under sections 21, 23, 24 / Schedule 3 and 26 of the Justice and Security Act 2007. Annex C deals with the exercise of powers at sections 21-28 and 30 of the Act by the armed forces.

9.2 The Code governs the way in which the powers are authorised and used. It includes guidance on:

- I. The scope of the powers
- II. The requirements for making an authorisation for the powers
- III. Briefing and tasking of officers

- IV. Avoiding discrimination
- V. Conduct of officers exercising the powers
- VI. Recording and monitoring the use of the powers

## **10. Impact**

- 10.1 The Order has no impact on business, charities or voluntary bodies.
- 10.2 The Order has a limited impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

- 11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

- 12.1 The Code of Practice provides guidance for the monitoring and supervision of the use of the powers.

## **13. Contact**

Francesca Higgins at the Northern Ireland Office Tel: 028 9052 7954 or 020 7210 0209, or email: [Francesca.higgins@nio.x.gsi.gov.uk](mailto:Francesca.higgins@nio.x.gsi.gov.uk) can answer any queries regarding the instrument.

## **ANNEX J**

### **POLICE AND CRIMINAL EVIDENCE ACT 1984 (PACE)**

#### **EXCERPT OF CODE B**

#### **REVISED**

### **Code of practice for searches of premises by police officers and the seizure of property found by police officers on persons or premises**

#### **7 Seizure and retention of property**

##### **(a) Seizure**

7.1 Subject to paragraph 7.2, an officer who is searching any person or premises under any statutory power or with the consent of the occupier may seize anything:

(a) covered by a warrant;

(b) the officer has reasonable grounds for believing is evidence of an offence or has been obtained in consequence of the commission of an offence but only if seizure is necessary to prevent the items being concealed, lost, disposed of, altered, damaged, destroyed or tampered with;

(c) covered by the powers in the Criminal Justice and Police Act 2001, Part 2 allowing an officer to seize property from persons or premises and retain it for sifting or examination elsewhere.

See Note 7B

7.2 No item may be seized which an officer has reasonable grounds for believing to be subject to legal privilege, as defined in PACE, section 10, other than under the Criminal Justice and Police Act 2001, Part 2.

7.3 Officers must be aware of the provisions in the Criminal Justice and Police Act 2001, section 59, allowing for applications to a judicial authority for the return of property seized and the subsequent duty to secure in section 60. (See paragraph 7.12(iii).)

7.4 An officer may decide it is not appropriate to seize property because of an explanation from the person holding it but may nevertheless have reasonable grounds for believing it was obtained in consequence of an offence by some person. In these circumstances, the officer should identify the property to the holder, inform the holder of their suspicions and explain the holder may be liable to civil or criminal proceedings if they dispose of, alter or destroy the property.

7.5 An officer may arrange to photograph, image or copy, any document or other article they have the power to seize in accordance with paragraph 7.1. This is subject to specific restrictions on the examination, imaging or copying of certain property seized under the Criminal Justice and Police Act 2001, Part 2. An officer must have regard to their statutory

obligation to retain an original document or other article only when a photograph or copy is not sufficient.

7.6 If an officer considers information stored in any electronic form and accessible from the premises could be used in evidence, they may require the information to be produced in a form:

- which can be taken away and in which it is visible and legible, or
- from which it can readily be produced in a visible and legible form.

**(b) Criminal Justice and Police Act 2001: Specific procedures for seize and sift powers**

7.7 The Criminal Justice and Police Act 2001, Part 2 gives officers limited powers to seize property from premises or persons so they can sift or examine it elsewhere. Officers must be careful they only exercise these powers when it is essential and they do not remove any more material than necessary. The removal of large volumes of material, much of which may not ultimately be retainable, may have serious implications for the owners, particularly when they are involved in business or activities such as journalism or the provision of medical services. Officers must carefully consider if removing copies or images of relevant material or data would be a satisfactory alternative to removing originals. When originals are taken, officers must be prepared to facilitate the provision of copies or images for the owners when reasonably practicable. (See Note 7C.)

7.8 Property seized under the Criminal Justice and Police Act 2001, sections 50 or 51 must be kept securely and separately from any material seized under other powers. An examination under section 53 to determine which elements may be retained must be carried out at the earliest practicable time, having due regard to the desirability of allowing the person from whom the property was seized, or a person with an interest in the property, an opportunity of being present or represented at the examination.

7.8 A All reasonable steps should be taken to accommodate an interested person's request to be present, provided the request is reasonable and subject to the need to prevent harm to, interference with, or unreasonable delay to the investigatory process. If an examination proceeds in the absence of an interested person who asked to attend or their representative, the officer who exercised the relevant seizure power must give that person a written notice of why the examination was carried out in those circumstances. If it is necessary for security reasons or to maintain confidentiality officers may exclude interested persons from decryption or other processes which facilitate the examination but do not form part of it. (See Note 7D.)

7.9 It is the responsibility of the officer in charge of the investigation to make sure property is returned in accordance with sections 53 to 55. Material which there is no power to retain must be:

- separated from the rest of the seized property, and
- returned as soon as reasonably practicable after examination of all the seized property.

7.9 A Delay is only warranted if very clear and compelling reasons exist, for example:

- the unavailability of the person to whom the material is to be returned, or
- the need to agree a convenient time to return a large volume of material

7.9 B Legally privileged, excluded or special procedure material which cannot be retained must be returned:

- as soon as reasonably practicable, and
- without waiting for the whole examination.

7.9 C As set out in section 58, material must be returned to the person from whom it was seized, except when it is clear some other person has a better right to it. (See Note 7E.)

7.10 When an officer involved in the investigation has reasonable grounds to believe a person with a relevant interest in property seized under section 50 or 51 intends to make an application under section 59 for the return of any legally privileged, special procedure or excluded material, the officer in charge of the investigation should be informed as soon as practicable and the material seized should be kept secure in accordance with section 61. (See Note 7C.)

7.11 The officer in charge of the investigation is responsible for making sure property is properly secured. Securing involves making sure the property is not examined, copied, imaged or put to any other use except at the request, or with the consent, of the applicant or in accordance with the directions of the appropriate judicial authority. Any request, consent or directions must be recorded in writing and signed by both the initiator and the officer in charge of the investigation. (See Notes 7F and 7G.)

7.12 When an officer exercises a power of seizure conferred by sections 50 or 51 they shall provide the occupier of the premises or the person from whom the property is being seized with a written notice:

- (i) specifying what has been seized under the powers conferred by that section;
- (ii) specifying the grounds for those powers;
- (iii) setting out the effect of sections 59 to 61 covering the grounds for a person with a relevant interest in seized property to apply to a judicial authority for its return and the duty of officers to secure property in certain circumstances when an application is made, and
- (iv) specifying the name and address of the person to whom:
  - notice of an application to the appropriate judicial authority in respect of any of the seized property must be given;
  - an application may be made to allow attendance at the initial examination of the property.

7.13 If the occupier is not present but there is someone in charge of the premises, the notice shall be given to them. If no suitable person is available, so the notice will easily be found it should either be:

- left in a prominent place on the premises, or
- attached to the exterior of the premises.



### **(c) Retention**

7.14 Subject to paragraph 7.15, anything seized in accordance with the above provisions may be retained only for as long as is necessary. It may be retained, among other purposes:

- (i) for use as evidence at a trial for an offence;
- (ii) to facilitate the use in any investigation or proceedings of anything to which it is inextricably linked (see Note 7H);
- (iii) for forensic examination or other investigation in connection with an offence;
- (iv) in order to establish its lawful owner when there are reasonable grounds for believing it has been stolen or obtained by the commission of an offence.

7.15 Property shall not be retained under paragraph 7.14(i), (ii) or (iii) if a copy or image would be sufficient.

### **(d) Rights of owners etc**

7.16 If property is retained, the person who had custody or control of it immediately before seizure must, on request, be provided with a list or description of the property within a reasonable time.

7.17 That person or their representative must be allowed supervised access to the property to examine it or have it photographed or copied, or must be provided with a photograph or copy, in either case within a reasonable time of any request and at their own expense, unless the officer in charge of an investigation has reasonable grounds for believing this would:

- (i) prejudice the investigation of any offence or criminal proceedings; or
- (ii) lead to the commission of an offence by providing access to unlawful material such as pornography;

A record of the grounds shall be made when access is denied.

### **Notes for guidance**

7A Any person claiming property seized by the police may apply to a magistrates' court under the Police (Property) Act 1897 for its possession and should, if appropriate, be advised of this procedure.

7B The powers of seizure conferred by PACE, sections 18(2) and 19(3) extend to the seizure of the whole premises when it is physically possible to seize and retain the premises in their totality and practical considerations make seizure desirable. For example, police may remove premises such as tents, vehicles or caravans to a police station for the purpose of preserving evidence.

7C Officers should consider reaching agreement with owners and/or other interested parties on the procedures for examining a specific set of property, rather than awaiting the judicial authority's determination. Agreement can sometimes give a quicker and more satisfactory route for all concerned and minimise costs and legal complexities.

7D What constitutes a relevant interest in specific material may depend on the nature of that material and the circumstances in which it is seized. Anyone with a reasonable claim to ownership of the material and anyone entrusted with its safe keeping by the owner should be considered.

7E Requirements to secure and return property apply equally to all copies, images or other material created because of seizure of the original property.

7F The mechanics of securing property vary according to the circumstances; “bagging up”, i.e. placing material in sealed bags or containers and strict subsequent control of access is the appropriate procedure in many cases.

7G When material is seized under the powers of seizure conferred by PACE, the duty to retain it under the Code of Practice issued under the Criminal Procedure and Investigations Act 1996 is subject to the provisions on retention of seized material in PACE, section 22.

7H Paragraph 7.14 (ii) applies if inextricably linked material is seized under the Criminal Justice and Police Act 2001, sections 50 or 51. Inextricably linked material is material it is not reasonably practicable to separate from other linked material without prejudicing the use of that other material in any investigation or proceedings. For example, it may not be possible to separate items of data held on computer disk without damaging their evidential integrity. Inextricably linked material must not be examined, imaged, copied or used for any purpose other than for proving the source and/or integrity of the linked material.



**Police Service**  
of Northern Ireland



Modelling 2011 Census Small Area Religious Composition  
onto Justice and Security Act Stop & Search postcode data  
from August 2020 to July 2021

PSNI Statistics Branch 18 March 2022

## Introduction

PSNI do not currently collect or process community background data in relation to the monitoring of stop and searches carried out under specific powers in Northern Ireland. PSNI is under a legal obligation to collect community background data to assist with monitoring the use of these powers and has been subject to a number of oversight recommendations advising them to put in place a methodology to do so.

This modelling exercise has been carried out at the request of the Independent Reviewer of the Justice and Security Act in Northern Ireland as an interim measure while PSNI identify the most appropriate methodology (or combination of methodologies) to collect, obtain and process 'community background' data for Stop and Searches.

## Methodology

This data modelling involved mapping PSNI Stop and Search data against results from the 2011 Census for the administrative geographies known as Census Small Areas<sup>1</sup>.

The Justice and Security Act (JSA) Stop and Search data<sup>2</sup> used for this analysis consisted of two variables 1) home postcode and 2) policing district, extracted from records of JSA Section 24 and JSA Section 21 Stops which occurred in the 12 month period 1 August 2020 to 31 July 2021. There were 4,309<sup>3</sup> such stops in that time period, however only 72% of these records contained a valid Northern Ireland postcode.

The Census variable used was 'Religion or Religion brought up in' (hereafter referred to as religion).

Each postcode (where available) was assigned three individual values of between 0 and 1 for 'Catholic', 'Protestant' and 'Other/None' respectively, based on the Census results for the Small Area associated with that postcode. These scores provide estimates for the probability of an individual living in that postcode area having a particular religion. For example a postcode which falls into an area with a composition of 45% Catholic, 50% Protestant and 5% other would be assigned values of 0.45, 0.50 and 0.05 respectively.

These estimates are then aggregated to give overall estimates for the religion of all persons stopped within Northern Ireland for each policing district.

Because the postcode data is extracted prior to any data matching taking place the final statistical dataset is anonymous. At no stage are any estimates applied to, or held against, any personal data of individuals who had been stopped and searched/questioned under JSA powers.

## Weaknesses of the analysis

**Census Data** – The census data used in this analysis was taken from the 2011 census. Over time the demographics of an area can change and we have no way of knowing the extent of some of these

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<sup>1</sup> Small Areas were introduced in Northern Ireland after the 2011 Census and were generally created by amalgamating 2001 Census Output Areas.

<sup>2</sup> <https://www.legislation.gov.uk/ukpga/2007/6/contents>.

<sup>3</sup> These are not 4,309 unique individuals as some persons may have been stopped on more than one occasion

changes until the 2021 Census results are released. The equivalent religious composition data from the 2021 Census is not due to be available until summer 2023.

Postcode coverage – Of the 4,309 Stops records, only 3,120 (72%) contain a valid Northern Ireland postcode which means that at the Northern Ireland Level we were unable to assign the religion variables to 28% of records. This coverage varies between policing district and ranges from 54% to 83% across districts (see table 1 for coverage rates by District)

Postcode Accuracy – Home postcodes are recorded by either linking to addresses on PSNI systems or through provision of a postcode by an individual who has been stopped. For those postcodes in the extracted data which were deemed to be valid Northern Ireland postcodes, no further quality assurance was carried out.

**Table 1: Postcode coverage by District**

District stopped in	Postcode coverage
Belfast City	77%
Lisburn & Castlereagh	73%
Ards & North Down	61%
Newry, Mourne & Down	61%
Armagh City, Banbridge & Craigavon	77%
Mid Ulster	71%
Fermanagh & Omagh	54%
Derry City & Strabane	83%
Causeway Coast & Glens	69%
Mid & East Antrim	71%
Antrim & Newtownabbey	54%
<b>Northern Ireland</b>	<b>72%</b>

### Results at Northern Ireland Level

The estimated religious composition of those persons stopped and searched/questioned under JSA powers between August 2020 and July 2021 across Northern Ireland was as follows<sup>4</sup>:

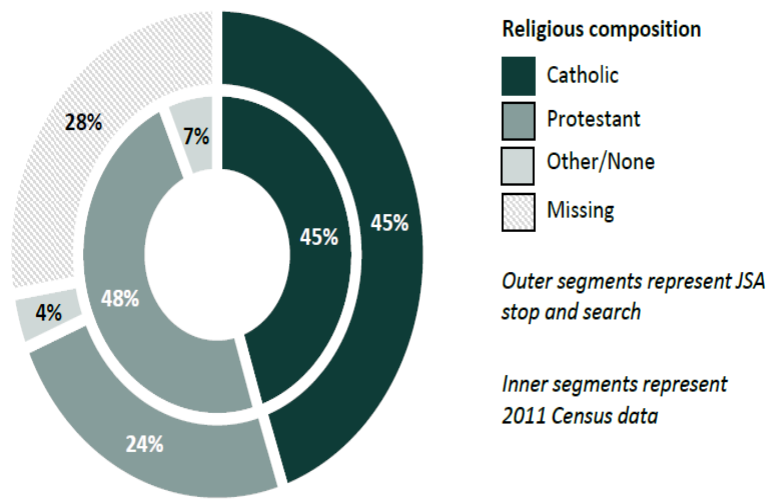
- 45% Catholic
- 24% Protestant
- 4% Other/None
- 28% Missing<sup>5</sup>

The religious composition of the Northern Ireland population taken from the 2011 Census was 45% Catholic, 48% Protestant and 7% Other/No religion. Figure 1 displays this comparison graphically.

<sup>4</sup> Percentage figures may not sum to 100 due to rounding

<sup>5</sup> Represents those missing and invalid postcodes

Figure 1: Comparing the estimated religious composition of persons stopped and searched/questioned under JSA with that of the Northern Ireland population



## Results by District

**Table 2: Comparing the estimated religious composition of persons stopped and searched/questioned under JSA with that of the population, broken down by the District in which the stop took place.**

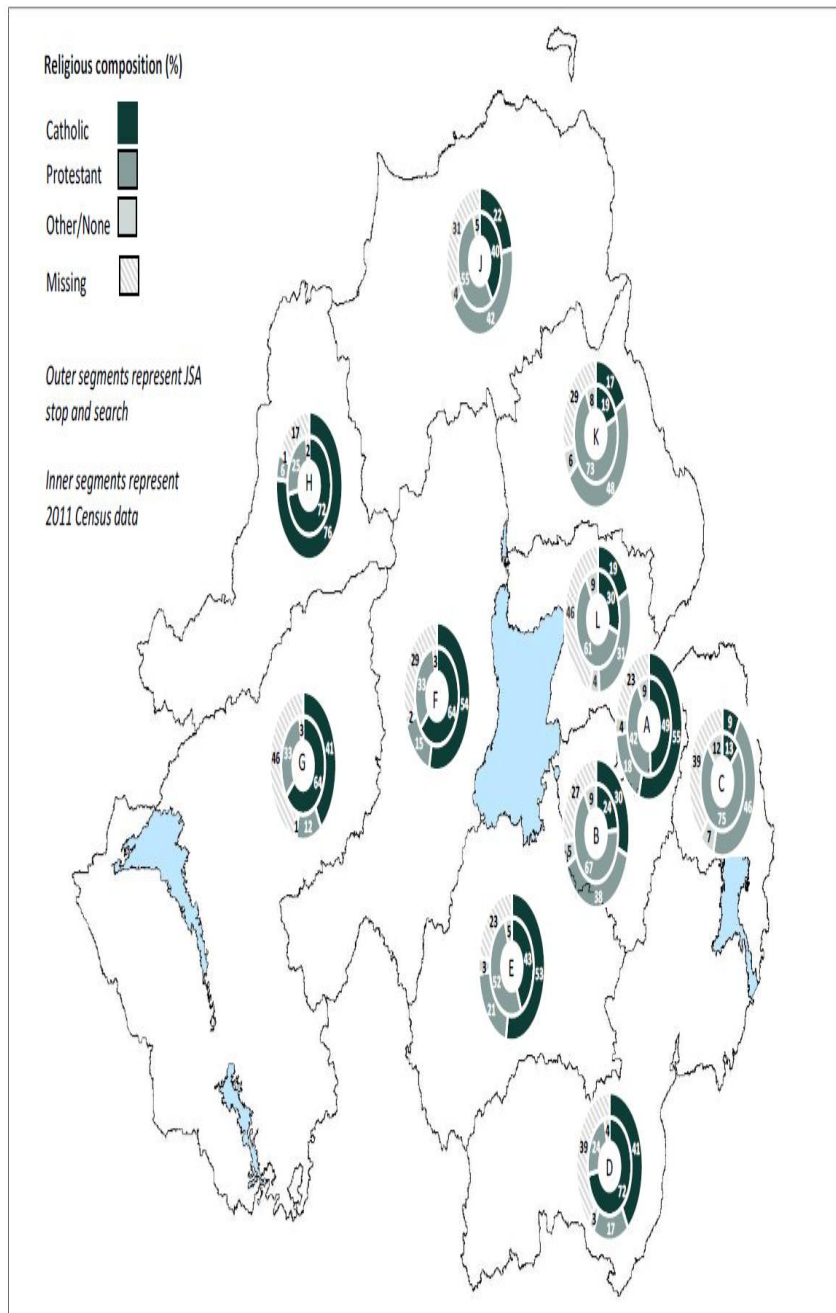
District stopped in	Estimated religious composition of those stopped/searched <sup>1</sup>				Religious composition of the population of that District <sup>2</sup>		
	Catholic	Protestant	Other/None	Missing	Catholic	Protestant	Other/None
Belfast City (A)	55%	18%	4%	23%	49%	42%	9%
Lisburn & Castlereagh (B)	30%	38%	5%	27%	24%	67%	9%
Ards & North Down (C)	9%	46%	7%	39%	13%	75%	12%
Newry, Mourne & Down (D)	41%	17%	3%	39%	72%	24%	4%
Armagh, Banbridge & Craigavon (E)	53%	21%	3%	23%	43%	52%	5%
Mid Ulster (F)	54%	15%	2%	29%	64%	33%	3%
Fermanagh & Omagh (G)	41%	12%	1%	46%	64%	33%	3%
Derry City & Strabane (H)	76%	6%	1%	17%	72%	25%	2%
Causeway Coast & Glens (J)	22%	42%	4%	31%	40%	55%	5%
Mid & East Antrim (K)	17%	48%	6%	29%	19%	73%	8%
Antrim & Newtownabbey (L)	19%	31%	4%	46%	30%	61%	9%
<b>Northern Ireland</b>	<b>45%</b>	<b>24%</b>	<b>4%</b>	<b>28%</b>	<b>45%</b>	<b>48%</b>	<b>7%</b>

<sup>1</sup> JSA Section 24 & 21 Stops between August 2020 and July 2021

<sup>2</sup> 2011 Census results

Figure 2 displays these comparisons graphically.

Figure 2: Comparing the estimated religious composition of persons stopped and searched/questioned under JSA with that of the population, broken down by the District in which the stop took place<sup>1</sup>



<sup>1</sup> Refer to Table 2 for District Names





Northern  
Ireland  
Office

## Non-Jury Trials Working Group

Report to the Independent Reviewer of the Justice  
and Security (Northern Ireland) Act 2007

December 2021

# Identification of practical measures that could be taken to reduce the number of non-jury trials taking place under the Justice and Security (NI) Act 2007

## BACKGROUND

### *Context*

1. The Justice and Security (Northern Ireland) Act 2007 (the 2007 Act) provides for a non-jury trial (NJT) mechanism in relation to a trial on indictment in exceptional cases where there is a risk from paramilitary or community-based pressure on a jury. The decision to proceed with an NJT is made by the Director of Public Prosecutions (DPP), following a request from the Police Service of Northern Ireland (PSNI), or the Public Prosecution Service (PPS).
2. NJT provisions expire after a period of two years, but may be extended for a further period of two years by secondary legislation, approved in both Houses of Parliament. There is no limit to the number of times that the NJT provisions may be extended in this way. The provisions were last extended in July 2021 and will expire on 31 July 2023.
3. The Government remains fully committed to bringing these temporary provisions to an end, when it is safe to do so and compatible with the interests of justice. In order to work towards this, the Northern Ireland Office has established a working group as recommended by the previous Independent Reviewer of the Justice and Security Act (IRJSA), David Seymour, in the Twelfth<sup>1</sup> and Thirteenth<sup>2</sup> Reports.

### *Meetings*

4. The working group has met four times since the introductory meeting on 27 July 2021.
5. The Terms of Reference (Annex A) were agreed at the first meeting. These outline two key aims for the working group:
  1. Identify practical measures and legal measures that could be taken to reduce the number of non-jury trials taking place.
  2. Identify the indicators that members would look to in order to be satisfied that the non-jury trial provisions were no longer necessary.
6. Aim one above has been the focus of the working group discussions to date and this report, from the perspective of the Northern Ireland Office (NIO) summarises the group's findings.
7. In order to establish a baseline understanding amongst members, the group has been briefed on:

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<sup>1</sup> The Twelfth Report of the IRJSA can be accessed here:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/957086/12th\\_Report\\_1819.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957086/12th_Report_1819.pdf)

<sup>2</sup> The Thirteenth Report of the IRJSA can be accessed here:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/979145/Thirteenth\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/979145/Thirteenth_Report.pdf)

- a. Northern Ireland security situation (PSNI);
- b. harms which the NI Executive's Tackling Paramilitarism Programme is seeking to address (NI Executive Programme for Tackling Paramilitarism, Criminality & Organised Crime);
- c. process of issuing a non-jury trial certificate under the 2007 Act (Public Prosecution Service); and
- d. non-jury trial process under the Criminal Justice Act 2003 (Crown Prosecution Service).

## DETAIL

8. In addition to practical measures, requirement one under the Terms of Reference also mentions the identification of legal measures. The working group has discussed the overall intention to move away from a requirement for Northern Ireland-specific provisions for NJTs. Suggestions for amendments which could be made to the 2007 Act have been noted. However, none have yet been considered in detail given that this would continue to keep a Northern Ireland-specific regime in place. Political appetite and Parliamentary approval for amendments that maintain such a distinction are unlikely given that the Government's repeatedly stated aim is to allow the provisions to expire when the time is right. An option, which has been mentioned in the working group and may be more politically palatable, would be to explore whether specific, temporary amendments for Northern Ireland could be made to the Criminal Justice Act 2003 (the 2003 Act). Whilst continuing to distinguish Northern Ireland, it would be a marked step towards aligning with England and Wales whilst seeking to manage risks associated with the persistence of paramilitarism.

### *Existing jury arrangements/measures*

9. During working group discussions, members have been made aware of the jury arrangements and measures that already exist. In addition to provisions for NJTs, sections 10-13 of the 2007 Act<sup>3</sup> contain measures aimed at protecting juries in Northern Ireland. It has been noted that it would be prudent for these provisions to remain in place even if the 2007 Act provisions for NJTs were to be elapsed. They include:
  1. Restriction on disclosure of juror information (it is an offence for those engaged in the criminal justice system to disclose juror information);
  2. Balloting of jurors by number rather than by name;
  3. Routine criminal records checks may be carried out to prevent disqualified persons from serving as jurors; and
  4. Provision for a judge to privately hear the cause for any challenge from the defendant against a juror.
10. The working group has also been made aware of precautions that are, or can be, deployed in Northern Ireland in relation to jurors to protect the integrity of the trial. These include:

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<sup>3</sup> Sections 10-13 of the Justice and Security (Northern Ireland) Act 2007 can be found here: <https://www.legislation.gov.uk/ukpga/2007/6/crossheading/juries>

1. Jury keepers who act as the conduit between the jury and the judge; any concerns (for example about jury tampering) can be escalated to the judge in this way;
2. Ensuring there are entry/exit/access points for jurors which are not used by members of the public/defendants; and
3. Consent forms are kept separately rather than as part of a list so that jurors do not see each other's signatures.

***Practical measures already considered by the DPP prior to the issuing of a NJT certificate***

11. In the Tenth Report<sup>4</sup>, the previous IRJSA recommended that it should be noted on the NJT certificate that prior consideration had been given to jury protection measures. This recommendation was accepted by the Public Prosecution Service (PPS). Before issuing a NJT certificate, consideration is given to:
  1. screening/sequestering the jury; and
  2. moving the trial to another location.
12. Whilst screening/sequestering and moving the trial are considered, they are rarely deemed to be feasible options in Northern Ireland. Changing the trial to another location would usually have little impact on the risks in question, given the small geographical area, the tight-knit nature of the community in Northern Ireland and the broad reach of paramilitary influence. Sequestering a jury of 12 people for the duration of a trial would have a significant impact on their own freedoms during that time and would incur significant cost. In relation to screening, during the COVID-19 pandemic, perspex screens were placed in front of juries. Even this relatively minor change raised concerns about the impact on a fair trial due to jurors' lines of sight being affected.
13. A key issue with the above options is that the likelihood that deploying them would cause jurors to question why the measure(s) had been deemed necessary. Consequently, the risk of a fearful, and therefore potentially biased, jury would arise. Given how prominent the presence of paramilitary groups is likely to be in the mindset of the general public in Northern Ireland, jurors would be quick to make those connections.
14. Similar concerns in relation to possible protective measures leading to an incurable compromise of the jury's objectivity are noted in case law on the use of the NJT provisions under the 2003 Act in England and included in the Crown Prosecution Service (CPS) guidance. For example in *J, S, M v R* [2010] EWCA Crim 1755, it is argued that "*protective measures would be unreasonable because they would subvert the jury's ability objectively and dispassionately to dispose of the case*".

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<sup>4</sup> The Tenth Report of the IRJSA can be accessed here:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/957084/10th\\_Report\\_1617.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957084/10th_Report_1617.PDF)

15. The CPS guidance also states that relevant consideration of protective measures can include their cost and feasibility, as well as the likely impact on the jurors' lives and consideration of whether even the most extensive measures would be sufficient to prevent the improper exercise of pressure were it to be attempted.

***Other possible jury protection measures***

16. A question was raised in the working group as to whether police protection could be put in place for jurors involved in trials where there could be a risk of threat or intimidation. However, there is a view that, as is the case with witness protection, jurors in such cases (and possibly their families) would need protection for the duration of the trial as well as afterwards. Significant cost implications would arise, as would the concerns noted in paragraphs 13-14 in relation to impact on the lives of jurors and possible compromise of their objectivity.
17. The working group has queried whether, particularly as a result of any changes brought about by the COVID-19 pandemic, consideration could be given to jurors carrying out their functions remotely. In addition to the comments in paragraphs 13-14 in relation to concerns about impact on a fair trial, we also note that a significant investment in technology would be required. If remote juries were introduced solely to deal with cases which would currently be deemed NJTs under the 2007 Act, the risk of compromise of juror objectivity still arises as does the question of fairness to defendants in these cases. Therefore, a move towards the use of remote juries for such cases should be in line with any broader plans for introducing remote juries in Northern Ireland. Advice from the Northern Ireland Department of Justice (DoJ) is that the option of remote juries is not currently under consideration.

***Other suggestions/matters which could contribute to reducing the number of NJTs under the 2007 Act***

18. The working group has agreed that it would be useful to consider cases where the DPP has refused a NJT certificate in order to determine whether those trials proceeded with a jury and if so, whether any additional measures were introduced as a result. The NIO and the PPS are considering whether lessons can be learned from those cases and will report back to the working group.
19. Similar to the inclusion on the NJT certificate of a note to confirm that jury protection measures have been examined (paragraph 11), a further suggestion is to include a note to confirm that use of the NJT provisions under the 2003 Act had been considered. Formal consideration of this at an early stage could help to determine whether any cases for which use of the 2007 Act is being considered, could be dealt with under the 2003 Act. In practice this would mean an early determination on whether any of the information being presented to the DPP to justify a NJT would meet the evidential threshold required by the 2003 Act. However, an application under the 2003 Act requires admissible evidence and the standard of proof is to the criminal standard. It would be rare for this standard of proof to be available at the pre-arraignment stage but any certificate for a NJT under the 2007 Act must be issued pre-arraignment.



20. While considering the 2003 Act as an alternative to be used pre-arraignment may not reduce the number of NJT certificates, thinking of the 2003 Act as a safety net may. In some cases, the DPP may choose not to grant a certificate under the 2007 Act because he can be confident that if necessary, the 2003 Act can be used to grant an NJT.
21. In accordance with the statutory criteria, certificates for a NJT may be granted by the DPP for legacy cases as well as present-day prosecutions. The UK Government published a Command Paper in July 2021 setting out a proposed way forward for addressing the legacy of Northern Ireland's past. Whilst next steps continue to be considered, we note that the Command Paper proposed a Statute of Limitations to remove the prospect of criminal prosecutions. This would not be a prohibition on investigations but any reduction in the number of legacy cases being taken through the criminal justice system would also likely see a small but further reduction in the number of NJTs under the 2007 Act.
22. During discussions of the working group, it has been suggested that the use of civil orders (e.g. Terrorism Prevention and Investigation Measures, Serious Crime Prevention Orders, Unexplained Wealth Orders) as alternatives to prosecution could be considered. The point has been made that certain cases are not able to be prosecuted, for example due to the sensitive nature of the intelligence used in the investigation. It was suggested that if the 2007 Act provisions were no longer available, then the number of cases that could not be prosecuted might increase. Members of the working group unanimously agreed that prosecution is always the preference but where that is not possible these civil orders provide a range of other measures to be considered and this should be of some reassurance to those making the decision when the time comes, to move away from Northern Ireland-specific provisions for NJTs. Whilst an important point for policy advisors, this has been determined to be outside the Terms of Reference of the working group.

### ***Juror Bias***

23. In addition to the risk of juror intimidation, there is also the potential for juror bias in certain cases as a result of a defendant's suspected association with a proscribed organisation or if the offence being tried is in connection with religious or political hostility. The NJT provisions in the 2007 Act can therefore be in the interests of the defendant; protecting against the risk of impairment to the administration of justice arising from a hostile jury.
24. When considering practical measures that could be taken to reduce the number of non-jury trials taking place under the 2007 Act, the working group examined the risk of juror bias.
25. The group discussed the fact that there is a lack of evidence to prove that jury bias is likely to be a significant problem. This is because of section 8 of the Contempt of

Court Act 1981<sup>5</sup> which makes it an offence to 'obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings'.

26. Before a NJT certificate can be granted, the DPP must suspect that one (or more) of the four statutory conditions is met and be satisfied that there is a risk that the administration of justice might be impaired if a jury trial were to be held. It was suggested that in order to gather data on juror bias, condition four<sup>6</sup> could be considered as a proxy for bias wherein certificates granted based on condition 4 could be counted as cases where bias was part of the reason a certificate was granted. However, this would be inaccurate given that condition four relates to the nature of the offence rather than the nature of the jury and an automatic linkage between religious or political hostility and jury bias should not automatically be made.
27. As the method described in paragraph 26 above would not yield accurate results, the PPS have agreed to undertake a manual trawl of the last full year's cases to determine how many certificates were granted when juror bias was a consideration.
28. We note that processes are in place to ensure jury selection is as fair as possible. For example, the Juries (Northern Ireland) Order 1996<sup>7</sup> outlines how a jury is selected; it lists persons disqualified, ineligible and exempt from jury service; and it explains how a juror may be challenged if the prosecution or defence believe they should not serve on the panel.
29. The working group heard about the pre-briefing that judges give to a jury before each trial wherein they stress the importance of making decisions based solely upon the available evidence. Each juror is required to swear or affirm that they will "faithfully try the defendant and give a true verdict according to the evidence". Anecdotally, members of the group asserted that jurors take this instruction very seriously.
30. Differing views were expressed within the group on the issue of juror bias. Some members were of the opinion that the history and societal divide in Northern Ireland is deeply ingrained in members of the public, therefore a strong assumption of likely bias can be made in certain cases. Others stated that the public in Northern Ireland had largely moved on and that this assumption may not be a safe one to continue to make. When the group examines the indicators that would be used to determine when Northern Ireland-specific provisions for NJTs may no longer be necessary, it will likely assist in furthering understanding of the continued likelihood of juror bias in the cases in question.

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<sup>5</sup> Section 8 of the Contempt of Court Act 1981 can be accessed here:

<https://www.legislation.gov.uk/ukpga/1981/49/section/8>

<sup>6</sup> The offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.

<sup>7</sup> The Juries (Northern Ireland) Order 1996 can be accessed here:

<https://www.legislation.gov.uk/nisi/1996/1141/contents>

## CONCLUSION

31. The establishment of the working group is the first time that this issue has been regularly discussed by those engaged with it since the 2007 Act provisions were introduced. This represents progress in itself and we expect that it will result in a rich selection of informed responses following the next public consultation on the matter. This will be of great assistance to Ministerial decision-making.
32. The group discussions have revealed the real challenge in further reducing the already small number of NJTs under the 2007 Act. This is particularly the case given that there is unlikely to be appetite for amending those provisions rather than moving to rely solely on the 2003 Act for NJTs in Northern Ireland. However, we remain mindful of Northern Ireland's unique circumstances and note that the difference in the threshold for a NJT under the 2007 Act and the 2003 Act has been described as a 'gulf.' Moving to rely solely on the 2003 Act in Northern Ireland is therefore a question of when the associated risk would be deemed to be acceptable. As it has been pointed out, a similar risk was taken in 2007 to move to the current NJTs system. The decision to take such a step is outside of the remit of the working group; rather it is for Ministers. Again, the information exchange within the group will be vitally important in advising on this, particularly as the discussion turns to the examination of relevant indicators.
33. In relation to reducing the number of NJTs under the 2007 Act, changes in the number of terrorist, paramilitary and legacy cases being tried would have an impact. In terms of practical measures that could be introduced, it is clear that no one change is likely to have a significant impact. Any move towards the introduction of remote juries in Northern Ireland may also contribute, however we understand that such a move is unlikely in the short-medium term.
34. It is clear that those engaged in certifying NJTs will continue to ensure challenge is inherent within that process and that options for proceeding with a jury continue to be considered in every case. We understand that there is an awareness amongst practitioners of the option of relying on the 2003 Act. It may be that there is a means of formally recording consideration of its use, particularly as a 'safety net' as set out in paragraph 20, prior to the issuing of a certificate under the 2007 Act.
35. Finally, further consideration could be given to specific, temporary amendments for Northern Ireland being made to the 2003 Act as described in paragraph 8. These amendments could perhaps allow cases in Northern Ireland to be considered at a slightly lower standard of proof than in England and Wales. Whilst it would take some time (likely years) to make such a legislative change and noting that it would continue to distinguish Northern Ireland, it would be a marked step towards aligning with England and Wales whilst seeking to manage risks associated with the persistence of paramilitarism.



## ANNEX A



### Working Group on the Non-jury trial provisions in the Justice and Security (Northern Ireland) Act 2007

#### Terms of Reference

#### Membership

The Bar of NI  
Dr Johnny Byrne, University of Ulster  
Dr Mark Coen, University College Dublin  
Department of Justice NI  
The Law Society of Northern Ireland  
Seamus Mulholland & Dr Kevin Brown, Queen's University Belfast  
NI Courts & Tribunals Service  
NI Executive Programme for Tackling Paramilitarism, Criminality & Organised Crime  
NI Human Rights Commission  
NI Policing Board Human Rights Advisor  
Northern Ireland Office  
Police Service of Northern Ireland  
Public Prosecution Service  
Professor Clive Walker, Professor Emeritus University of Leeds  
Victim Support NI

#### Requirement

1. Identify practical measures and legal measures that could be taken to reduce the number of non-jury trials taking place.
2. Identify the indicators that members would look to in order to be satisfied that the non-jury trial provisions were no longer necessary.

#### Timeframe

1. Working group introductory meeting 27 July 2021
2. Monthly working group meetings July - November 2021 with further meetings in 2022
3. Produce a briefing paper on requirement one for submission to Independent Reviewer of the Justice & Security (NI) Act 2007 by end of 2021

#### Product

The aim of the working group is to produce briefing documents outlining:

1. Operation and efficacy of current non-jury trial system and suggested practical measures to reduce the number of non-jury trials taking place and associated cost-benefit analysis
2. Qualitative and quantitative criteria which would indicate that the non-jury trial provisions may no longer be required.

#### **Resource Requirement**

Dedicated point of contact from each of the organisations listed in the membership section above to attend working group meetings and to provide input into NIO coordination point.

#### **Secretariat Function**

The Northern Ireland Office will secretariat the meetings.

The following tables provide statistics on non-jury trials in Northern Ireland, under the Justice and Security (Northern Ireland) Act 2007. Please note that the figures for 2020 are still provisional.

**Table 1: Certificates issued and refused for NJT by the DPP (2007-2020)**

Year	Certificates Issued	Certificates Refused
2007	12*	2
2008	25	2
2009	11	0
2010	14	0
2011	28	0
2012	25	3
2013	23	3
2014	14	1
2015	15	0
2016	19	1
2017	22	1
2018	17	1
2019	13	1
2020	11	2

Source: Northern Ireland Director of Public Prosecution's Office

\*Provisions under the 2007 Act were brought into effect on 1 August 2007

**Table 2: NJT cases as a percentage of all Crown Court cases (2013-2020)**

Year	Non-Jury Trial Cases	Other	Total	% Non-Jury Trial Cases
2013	36	1917	1953	1.80%
2014	28	1660	1688	1.70%
2015	17	1063	1080	1.60%
2016	12	1628	1640	0.70%
2017	9	1400	1409	0.60%
2018	18	1163	1181	1.50%

2019	14	1281	1295	1.08%
2020*	9	956	965	0.90%
<b>TOTAL</b>	<b>143</b>	<b>11068</b>	<b>11211</b>	<b>1.28%</b>

Source: NI Courts & Tribunals Service

\*Provisional figures

**Table 3: Acquittal rates for Crown Court defendants where a plea of not guilty is entered in NJTs, compared with those in jury trials (2013-2020)**

Year	Non-Jury Trials	Jury Trials
2013	13.54%	24.87%
2014	27.45%	25.21%
2015	47.62%	20.80%
2016	11.10%	23.71%
2017	44.00%	25.00%
2018	19.20%	24.50%
2019	38.10%	20.60%
2020*	0%	13.80%

Source: NI Courts & Tribunals Service

\*Provisional figures

**Table 4: Number (with percentages) of cases where conditions of the DPP statutory test have been met (2007-2020)\***

Year	Number of Cases in which Condition Met				Certificates Issued
	Condition 1	Condition 2	Condition 3	Condition 4	
<b>2007</b>	12 (100%)	6 (50%)	3 (25%)	4 (33%)	<b>12</b>
<b>2008</b>	24 (96%)	16 (64%)	3 (12%)	4 (16%)	<b>25</b>
<b>2009</b>	11 (100%)	7 (64%)	0 (0%)	2 (18%)	<b>11</b>
<b>2010</b>	13 (93%)	9 (64%)	2 (14%)	3 (21%)	<b>14</b>
<b>2011</b>	27 (96%)	23 (82%)	4 (14%)	8 (29%)	<b>28</b>
<b>2012</b>	21 (84%)	16 (64%)	1 (4%)	10 (40%)	<b>25</b>
<b>2013</b>	22 (96%)	16 (70%)	3 (13%)	21 (91%)	<b>23</b>
<b>2014</b>	18 (100%)	12 (67%)	0 (0%)	16 (89%)	<b>18</b>
<b>2015</b>	14 (93%)	13 (87%)	0 (0%)	7 (47%)	<b>15</b>

<b>2016</b>	10 (91%)	11 (100%)	0 (0%)	7 (64%)	<b>11</b>
<b>2017</b>	9 (100%)	6 (67%)	0 (0%)	8 (89%)	<b>9</b>
<b>2018</b>	16 (94%)	12 (71%)	0 (0%)	14 (82%)	<b>17</b>
<b>2019</b>	10 (77%)	9 (69%)	0 (0%)	8 (62%)	<b>13</b>
<b>2020</b>	10 (91%)	7 (64%)	2 (18%)	4 (36%)	<b>11</b>

Source: Northern Ireland Director of Public Prosecution's Office

\*Provisions under the 2007 Act were brought into effect on 1 August 2007



Northern  
Ireland  
Office

## Non-Jury Trials Working Group

Report to the Independent Reviewer of the Justice  
and Security (Northern Ireland) Act 2007

November 2022

**Report on NJT Working Group Requirement Two: *identify the indicators that members would look to in order to be satisfied that the non-jury trial provisions were no longer necessary***

**BACKGROUND**

**Purpose**

1. This paper was written to provide the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 (IRJSA) with an overview of the discussions that shaped the working group recommendation being made for Requirement Two of the Terms of Reference (ToRs). The working group would appreciate the IRJSA's views on this recommendation.
2. Recommendation: **all the metrics/indicators listed in points A-D below should be used in combination to build a contextual picture that the Secretary of State can use to help inform their decision on whether the NJT provisions in the 2007 Act should be extended.**

**Context**

3. The Justice and Security (Northern Ireland) Act 2007 (the 2007 Act) provides for a non-jury trial (NJT) mechanism in relation to a trial on indictment in exceptional cases where there is a risk from paramilitary or community-based pressure on a jury. The decision to proceed with an NJT is made by the Director of Public Prosecutions (DPP), following a request from the Police Service of Northern Ireland (PSNI), or the Public Prosecution Service (PPS).
4. NJT provisions expire after a period of two years, but may be extended for a further period of two years by secondary legislation, approved in both Houses of Parliament. There is no limit to the number of times that the NJT provisions may be extended in this way. The provisions were last extended in July 2021 and will expire on 31 July 2023.
5. The Government remains fully committed to allowing these temporary provisions to expire, when it is safe to do so and compatible with the interests of justice. In order to work towards this, the Northern Ireland Office has established a working group as recommended by the previous IRJSA, David Seymour, in the Twelfth<sup>1</sup> and Thirteenth<sup>2</sup> Reports.
6. The NIO created the group and provides a secretariat function for all meetings. When inviting membership to the group, the NIO used the IRJSA's recommendation ("*such a group could include representatives from the PPS, PSNI, the Court Service, the Bar, the Law Society and independent organisations with an interest in these matters*") as a template. To ensure a diversity of ideas, we wanted to ensure experts from as broad a range of organisations and backgrounds were included in the group. The full group membership is listed in Annex A.
7. It is important to note that the expiration of these provisions will not leave Northern Ireland without any option for non-jury trials. The Criminal Justice Act 2003, which

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<sup>1</sup> The Twelfth Report of the IRJSA can be accessed here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/957086/12th\\_Report\\_1819.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957086/12th_Report_1819.pdf)

<sup>2</sup> The Thirteenth Report of the IRJSA can be accessed here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/979145/Thirteenth\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/979145/Thirteenth_Report.pdf)

applies across England & Wales and Northern Ireland, provides (in very limited circumstances) for trials to be heard without a jury. However, the threshold for the use of these provisions is set much higher than the current system in Northern Ireland. The expiration of these 2007 Act provisions would be a further step towards security normalisation in Northern Ireland.

8. The decision on whether to extend the non-jury trial provisions under the 2007 Act for a further period is multi-dimensional and sits with the Secretary of State for Northern Ireland. The group agreed that, although not measurable and therefore not suitable as an indicator, **the values** inherent in the justice system should be borne in mind when considering the future of non-jury trials. These include
  - the value of raising the quality in the delivery of justice processes which the jury is considered to impart in the adversarial common law system;
  - jury participation, which is affirmative of equality, community legitimacy and the enhancement of civic education;
  - normalisation and the continued move from special security measures as part of the stronger attainment of a peaceful settlement.
9. The UK Government continues to be committed to bringing an end to these provisions when it is safe to do so and compatible with the interests of justice.

### **Meetings**

10. The ToRs at Annex A were agreed at the first meeting of the working group. They set out two key Requirements for the working group:
  - Identify practical measures and legal measures that could be taken to reduce the number of non-jury trials taking place.
  - Identify the indicators that members would look to in order to be satisfied that the non-jury trial provisions were no longer necessary.
11. On 16 December 2021 the working group met the IRJSA to discuss their findings around Requirement One.
12. Requirement Two has been the focus of the working group discussions since then and this report summarises the group's findings.
13. In order to establish a baseline understanding of potential indicators amongst members, the group has been briefed on:
  - a. How the Programme for Tackling Paramilitarism, Criminality & Organised
  - b. Crime measures progress (benefits realisation).
  - c. The different types of evidence of intimidation seen by Victim Support NI.

### **DETAIL**

#### **Summary**

14. The working group has discussed the indicators that members would look to in order to be satisfied that the non-jury trial provisions were no longer necessary.
15. The group has come to the conclusion that no indicator will be perfect. However, **a combination of imperfect indicators, alongside responses from public consultation** could inform the Secretary of State's decision-making process when the time to renew the NJT provisions comes around.

### **POTENTIAL INDICATORS**



#### **A. Assessed threat against jurors in Northern Ireland**

- The NIO will commission MI5 for a regular (six-monthly) intelligence-based assessment of the threat against jurors in Northern Ireland. This threat assessment will be based upon sensitive material but the assessed threat-level (low, moderate, substantial, severe, critical) will be openly available. We have requested the first threat assessment and expect to receive it soon.
- The working group raised concerns about the fact that the underlying intelligence will not be visible to everyone. However, the Secretary of State could request a briefing on the intelligence that shapes the threat-level in order to better inform his decision-making regarding the renewal of the NJT provisions.

#### **B. Level of Paramilitary/Terrorist Activity**

- The following metrics can be used to demonstrate the level of paramilitary/terrorist activity in Northern Ireland and how it has changed over time.
  - Deaths due to the security situation
  - Paramilitary-style shootings and assaults
  - Security-related incidents
- Charts and analysis are set out in Annex B. The full data sets are available in Annex C.

#### **C. Level of Intimidation**

- The following metrics can be used to demonstrate the level of intimidation exerted by terror/paramilitary groups in Northern Ireland and how it has changed over time.
  - Number of people accepted by the NI Housing Executive as homeless due to intimidation
  - Number of intimidation or threat to harm witness offences recorded per year
  - Number of intimidation offences recorded per year
  - Response to NI Life and Times Survey: Paramilitary Groups have a controlling influence in this area
  - Response to NI Life and Times Survey: Paramilitary groups create fear and intimidation in this area
- Charts and analysis are set out in Annex B. The full data sets are available in Annex C.

#### **D. Level of Use of Terrorism Legislation**

- The following metrics can be used to demonstrate the usage of terrorism legislation in Northern Ireland and how it has changed over time.
  - Number of persons convicted of an offence under terrorism legislation
  - Persons detained in Northern Ireland under Section 41 of the Terrorism Act 2000
  - Usage of Various Stop and Search/Question Powers in NI
- Charts and analysis are set out in Annex B. The full data sets are available in Annex C.

#### **E. Level of Use of NJTs**

- The following metrics can be used to demonstrate the usage of the NJT provisions in the 2007 Act.
  - NJT cases as a percentage of all Crown Court cases

- Certificates issued and refused for NJTs by the Director of Public Prosecutions
- Percentage of cases in which each condition met
- Average percentage of cases in which each condition met
- Charts and analysis are set out in Annex B. The full data sets are available in Annex C.

## ISSUES IDENTIFIED

### *Proxy Data*

16. The preventative nature of the current NJT provisions under the 2007 Act means that we do not hold data on jury tampering because the provisions ensure it does not generally happen. As a result, any potential indicators must rely on proxy data. This data will help us build a general picture of the security situation in Northern Ireland and the potential threat of jury tampering.
17. The working group accepted that proxy data must be used but with the caveat that we must be cognisant that this data is not directly related to the threat to jurors.

### *Data Accuracy & Reliability*

18. The data from 2020-2022 onwards must be treated with caution as the impact of the COVID-19 pandemic is likely to skew the figures. In addition we note that some of the data is compiled for operational reasons. While this does not negate the use of the data it does mean that it must be appropriately caveated and weighed. In particular the group noted that the number of people accepted by the NI Housing Executive as homeless due to intimidation risks potentially under and over estimating the scale of intimidation.
19. The Victim Support NI presentation highlighted informal and anecdotal evidence of various types of witness and victim intimidation that occurs. The presentation concluded by stressing that there are many cases in which victims will not come forward to report a crime or to report intimidation due to fear of the consequences. Data must be caveated to ensure that low reporting rates for intimidation do not skew interpretation of statistics.

### *Rejected Indicators*

20. The working group discussed each of the indicators presented in points A-D. However, the below was also discussed but was deemed unsuitable:
  - **Files received by PPS with a complaint of intimidation** - this metric covers offences of intimidation, attempted intimidation and conspiracy to intimidate witnesses, jurors and other persons - because it can apply to all 'other persons' the group found it was too broad to be of value as an indicator.

## CONCLUSION

21. Analysis of the metrics outlined above paints a complex picture (see Annex B for full analysis). Many of the trendlines are of low to moderate statistical significance. When some trendlines are split and indexed to 2007, we can see trends flattening - does this indicate a slowing of progress or are the numbers now too low to expect any additional significant decrease?
22. As discussed earlier in this paper, we are using proxy data and we have conceded that the nature of intimidation means some of our data will not be 100% accurate.

23. We have been focused on identifying indicators but we must also decide how the indicators should be used in the decision making process.
24. The working group discussed two options for how the indicators should be used:
  - a. Agree set levels that each metric should reach before they indicate that we should be satisfied that the non-jury trial provisions are no longer necessary; or
  - b. Take a more holistic approach wherein the indicators are considered together to build a contextual picture of the environment in which the Secretary of State is making their decision.
25. As a result of the nature of the data and the difficulties in identifying anomalous years up front, using the metrics to build a holistic contextual picture may be more beneficial than setting targets for each metric to reach before we are satisfied that the NJT provisions under the 2007 Act can be allowed to expire.
26. Therefore our recommendation is that all the metrics/indicators listed above should be used in combination to build a contextual picture that the Secretary of State can use to help inform their decision on whether the NJT provisions in the 2007 Act should be extended.

#### **Next Steps**

27. In practice, this recommendation means that views will continue to be collected from the public and interested stakeholders via public consultation when the provisions are approaching expiry. The Secretary of State will be provided with the consultation responses as per usual but at the same time he will also receive a summary of all the indicators listed in this paper to help inform his decision.
28. After the Independent Reviewer has read this paper, she will be invited to discuss this recommendation with the group.



Northern  
Ireland  
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**Working Group on the Non-jury trial provisions in the  
Justice and Security (Northern Ireland) Act 2007**

**Terms of Reference**

**Membership**

The Bar of NI  
Dr Johnny Byrne, University of Ulster  
Dr Mark Coen, University College Dublin  
Department of Justice NI  
The Law Society of Northern Ireland  
Seamus Mulholland & Dr Kevin Brown, Queen's University Belfast  
NI Courts & Tribunals Service  
NI Executive Programme for Tackling Paramilitarism, Criminality & Organised Crime  
NI Human Rights Commission  
NI Policing Board Human Rights Advisor  
Northern Ireland Office  
Police Service of Northern Ireland  
Public Prosecution Service  
Professor Clive Walker, Professor Emeritus University of Leeds  
Victim Support NI

**Requirement**

1. Identify practical measures and legal measures that could be taken to reduce the number of non-jury trials taking place.
2. Identify the indicators that members would look to in order to be satisfied that the non-jury trial provisions were no longer necessary.

**Timeframe**

1. Working group introductory meeting 27 July 2021
2. Monthly working group meetings July - November 2021 with further meetings in 2022
3. Produce a briefing paper on requirement one for submission to Independent Reviewer of the Justice & Security (NI) Act 2007 by end of 2021

## **Product**

The aim of the working group is to produce briefing documents outlining:

1. Operation and efficacy of current non-jury trial system and suggested practical measures to reduce the number of non-jury trials taking place and associated cost-benefit analysis
2. Qualitative and quantitative criteria which would indicate that the non-jury trial provisions may no longer be required.

## **Resource Requirement**

Dedicated point of contact from each of the organisations listed in the membership section above to attend working group meetings and to provide input into NIO coordination point.

## **Secretariat Function**

The Northern Ireland Office will secretariat the meetings.

## ANNEX A - CHARTS AND ANALYSIS

### Level of Paramilitary/Terrorist Activity

Chart 1

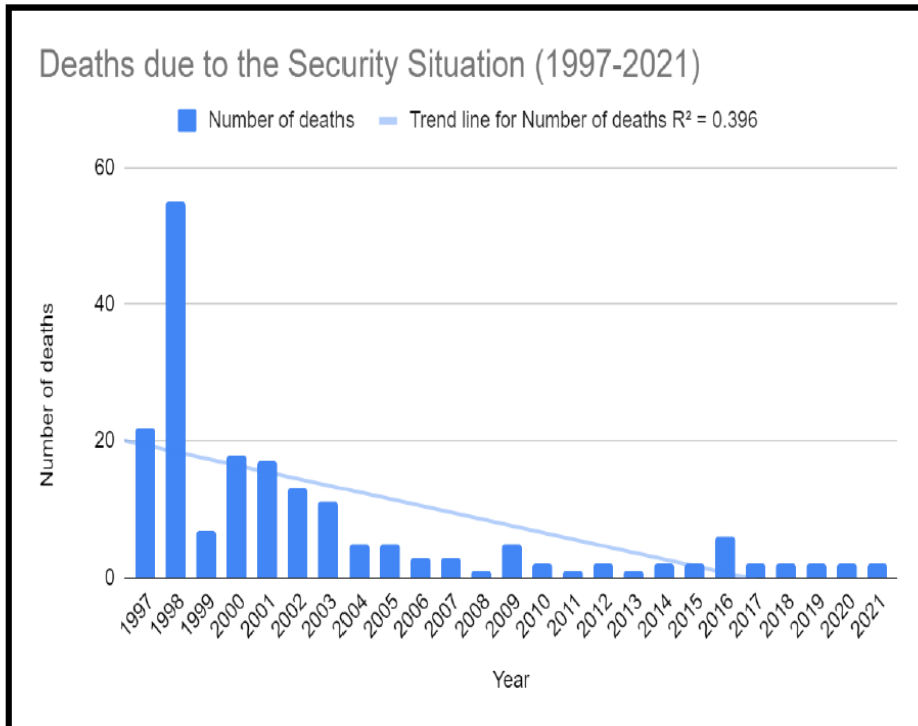
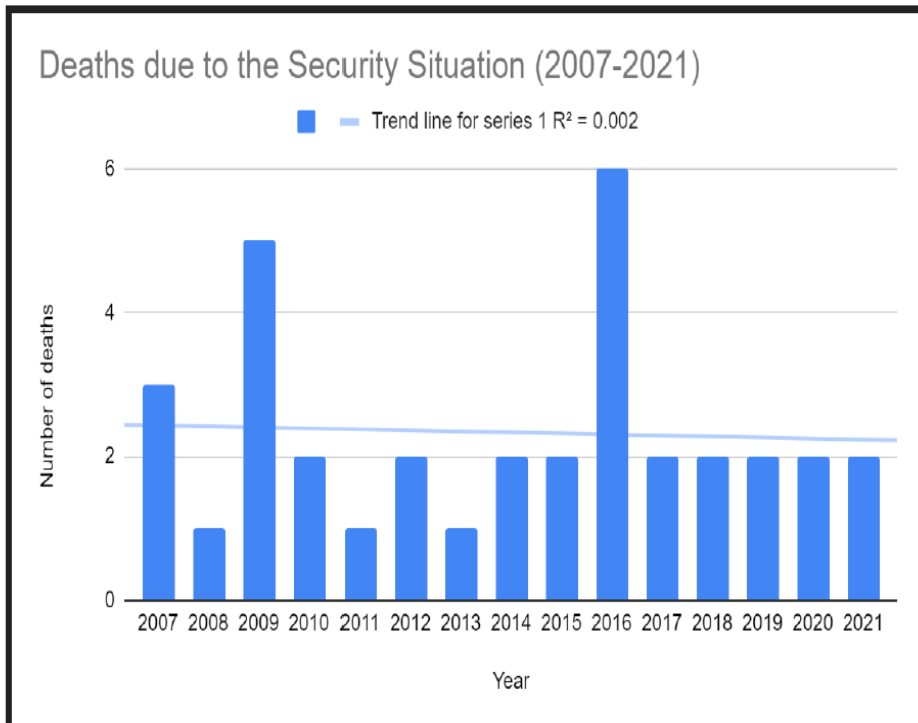


Chart 2



- Chart 1 shows a moderate downward trend since 1997. However, if we look at the change in the number of deaths since 2007 (chart 2), there is a flat trendline as the

numbers have plateaued over the last few years.

- The number of deaths has been so low since the mid-2000 that caution is necessary when interpreting the data.

Chart 3

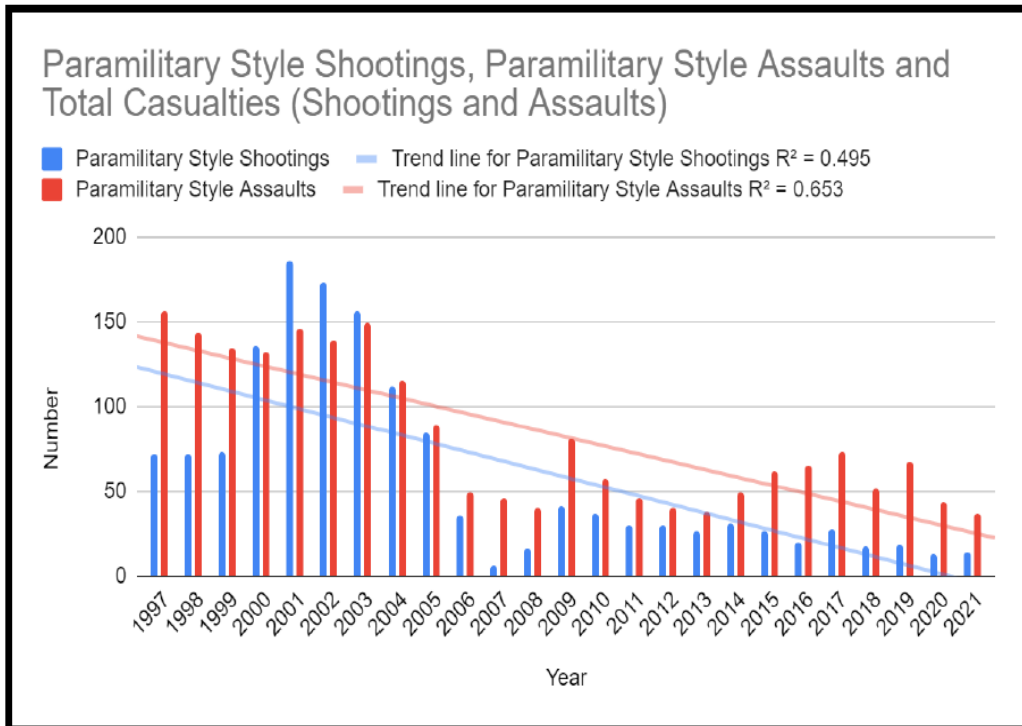


Chart 4

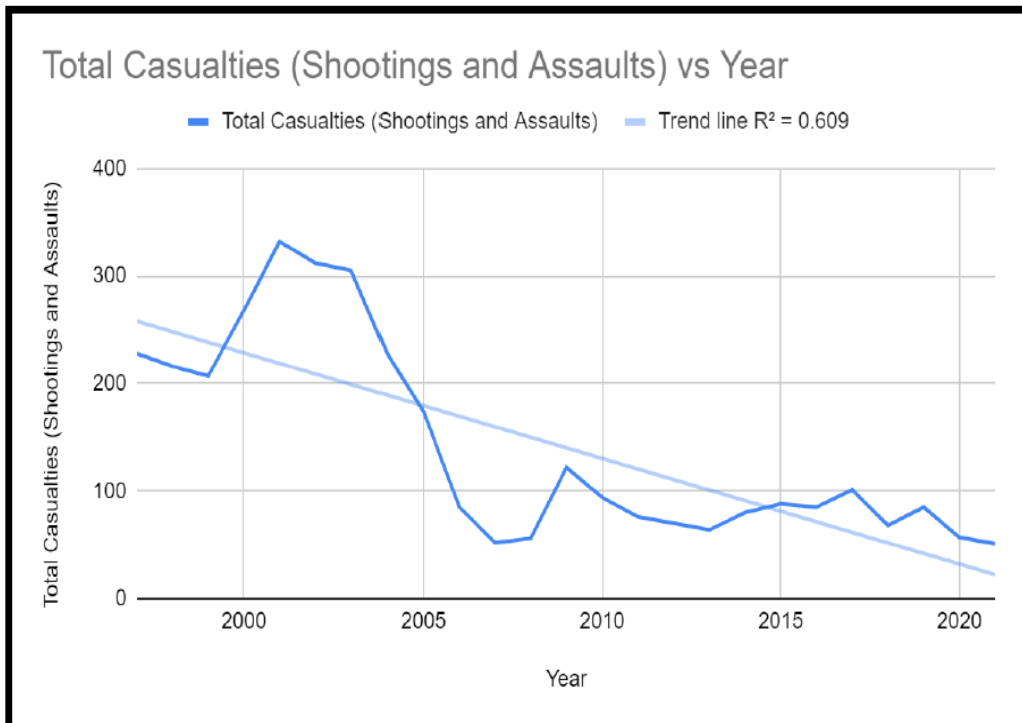
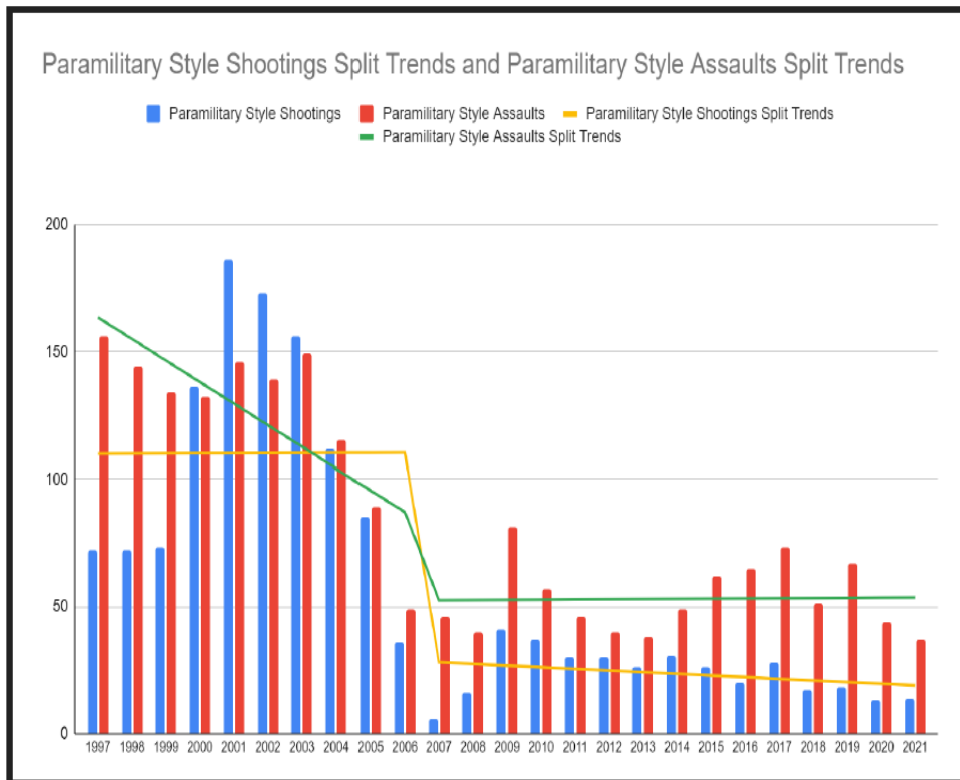




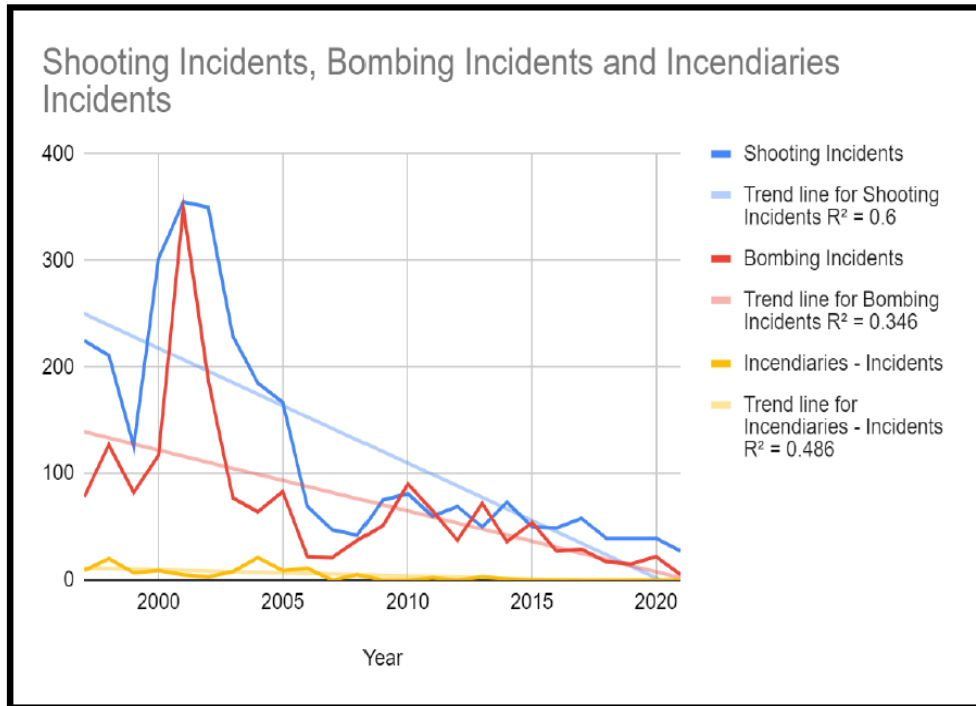
Chart 5



- Charts 3 & 4 show the number of paramilitary-style assaults and shootings that have taken place from 1997-2021. There is a moderate correlation between the annual percentage change in both shootings and assaults, this shows that on average, shootings and assaults see the same direction of change in the data (e.g. if shootings increase one year, assaults are also likely to increase that year).
- When looking at the data back to 1997, a clear downwards trend is reflected in the graph for both shootings and assaults (chart 3)
- However, chart 5 demonstrates split trends indexed to 2007. Paramilitary style assaults show a sharp downward trajectory between 1997-2006 and then a flat trend with marginal increase between 2007-2021. Paramilitary style shootings show a flat trend between 1997-2006 and then a very low/marginal downwards trend between 2007-2021.
- There has been little change in the number of paramilitary-style shootings and assaults since the NJT provisions were introduced in 2007.



Chart 6



- Chart 6 shows that both the number of bombings and the number of shootings display a downward trend from 1997 to present.
- However, since 2007, shooting incidents have been above 2007 levels for 60% of the years, and for bombing incidents 73.3% of the years.
- There is a medium to high correlation between shooting and bombing incidents, in that the more shooting incidents the more bombing incidents and vice-versa.

Chart 7

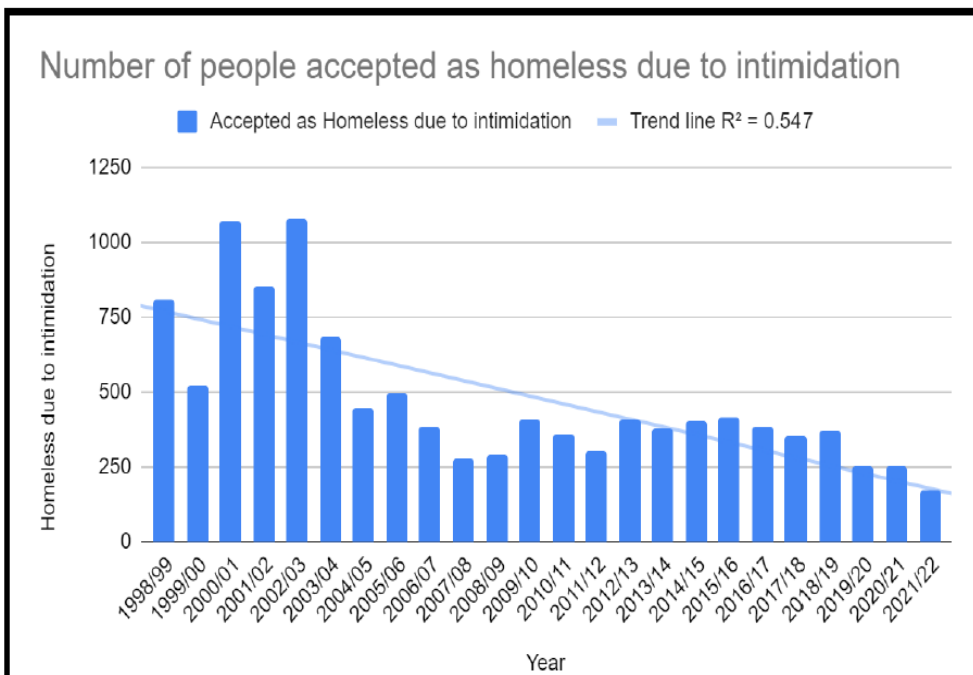
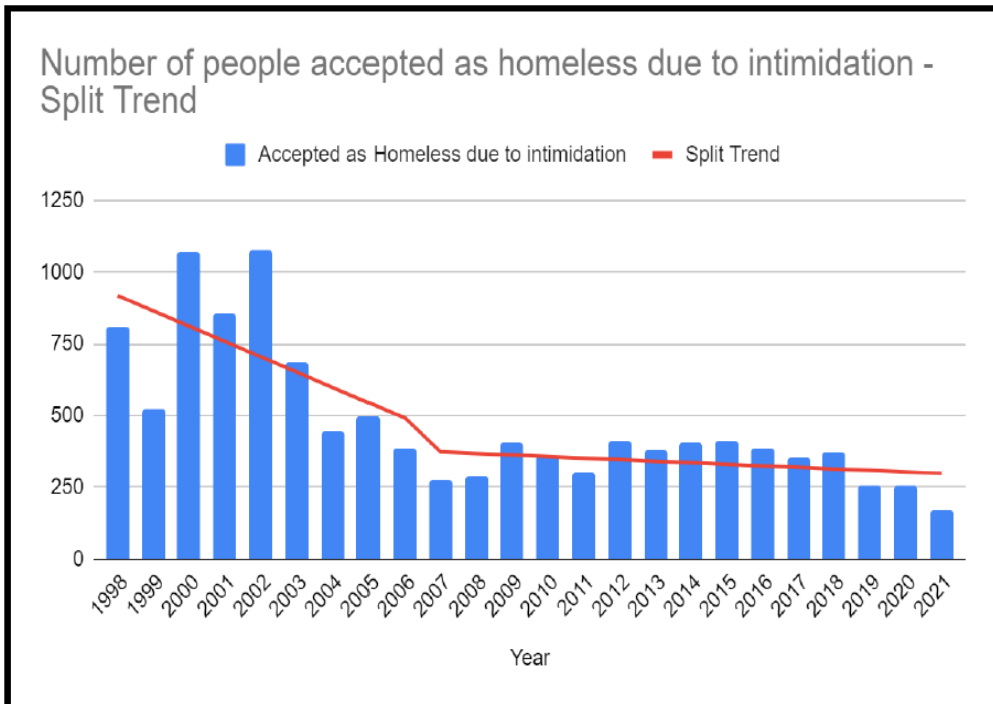


Chart 8

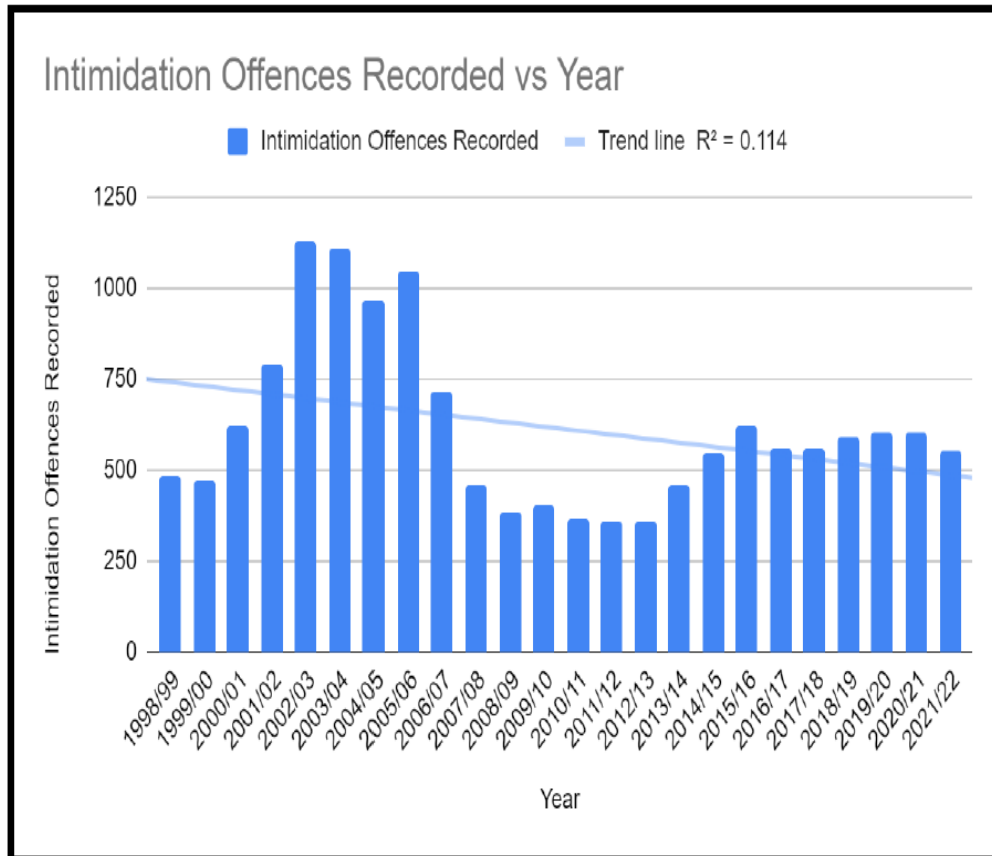


- Chart 7 shows a moderate/strong downwards trend in the number of people accepted as homeless due to intimidation between 1998-2021.
- However, chart 8 splits the trend line indexed to 2007. This shows a clear downwards trend from 1998-2006 but then an almost flat trend from 2007 onwards.

Chart 9



Chart 10



- Chart 9 shows the number of offences recorded that involved intimidation of, or threat to, harm a **witness**. There has been little variation in the number of offences recorded from 2007 to date.
- Chart 10 shows a slight downward trend in the total number of intimidation offences recorded by the PSNI each year. However, the dip in 2007-2013 likely skews the figures. A Pearson's correlation coefficient of 0.38 demonstrates a very low trend.

Chart 12

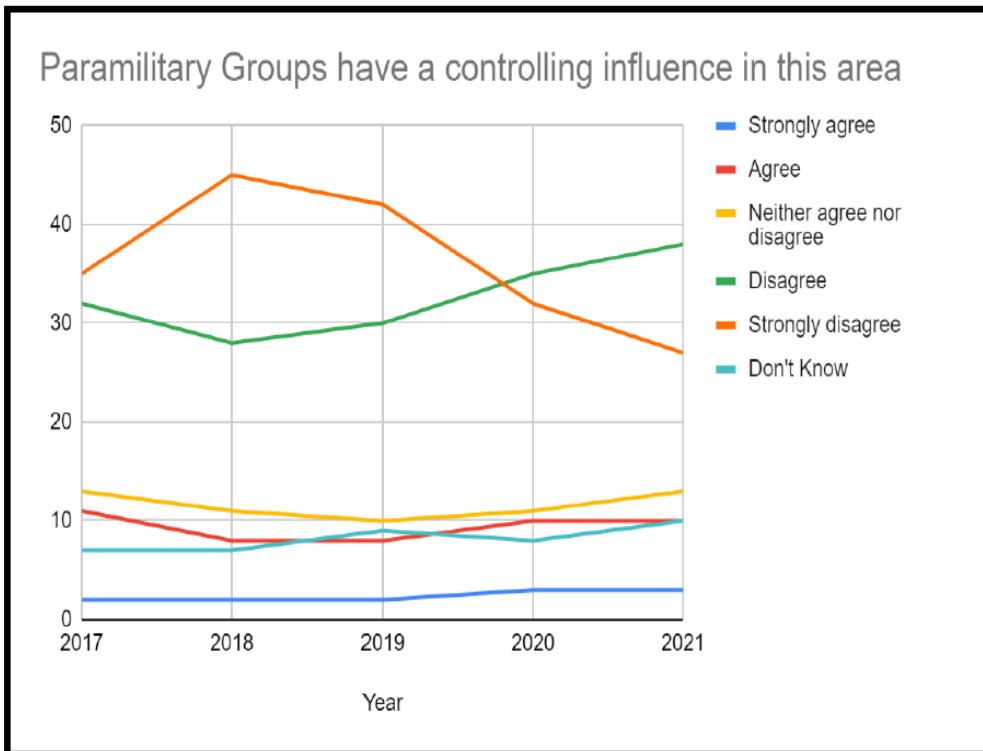
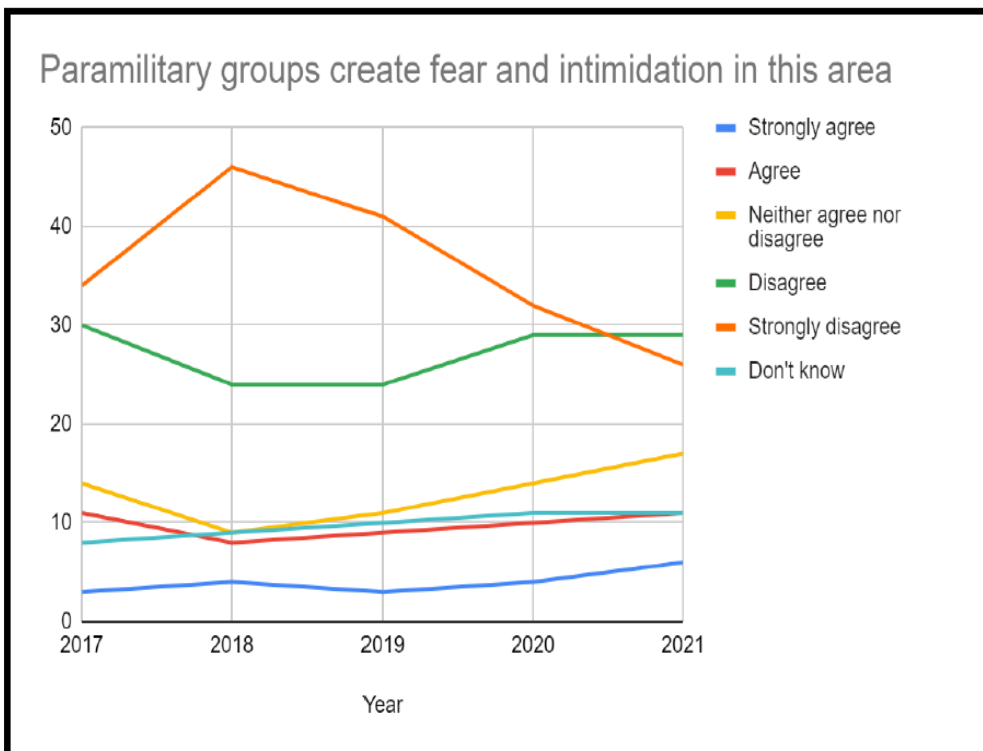
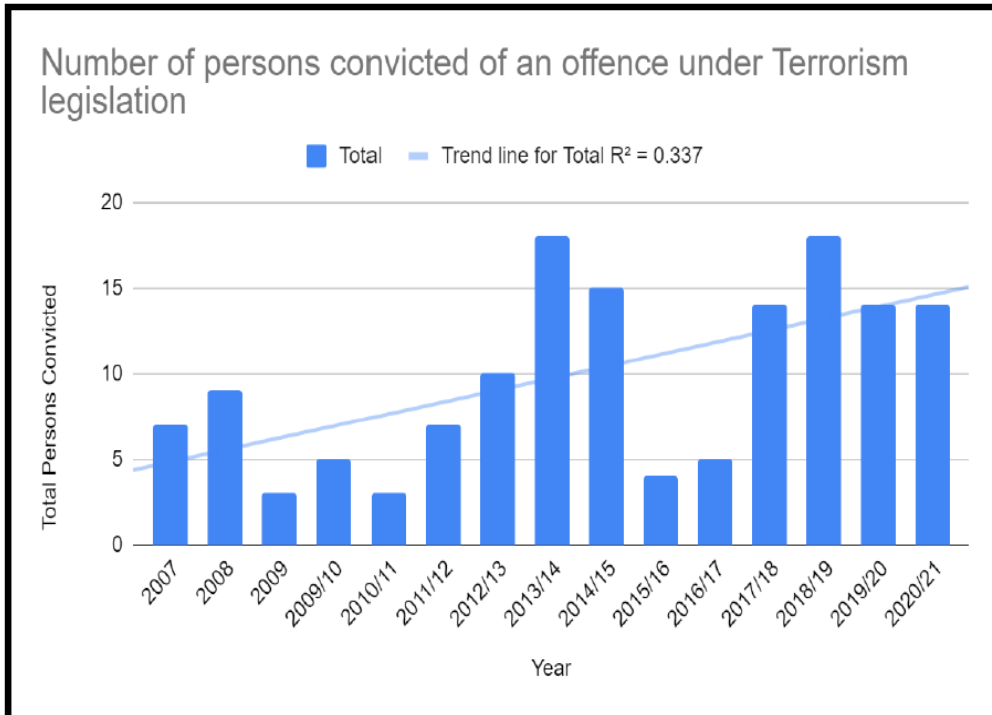


Chart 13



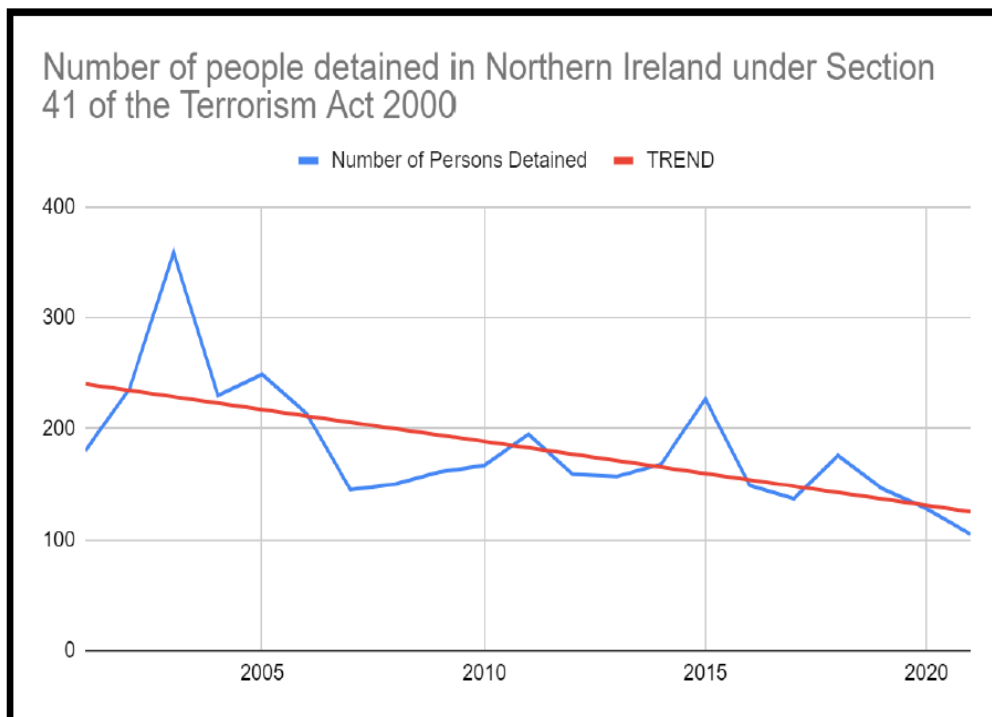
- Charts 12 and 13 are unlikely to be useful as tools to aid decision-making but they provide contextual information.
- The majority of people questioned disagree that paramilitary groups have a controlling influence and/or create fear and intimidation in their areas.

Chart 14



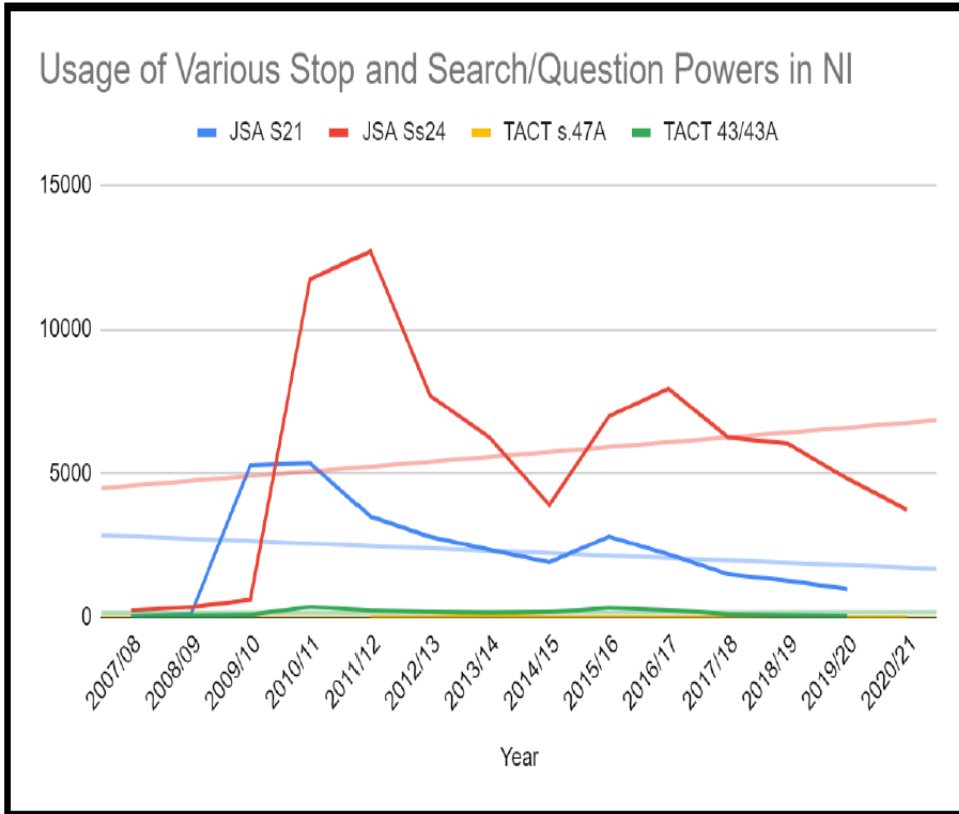
- Chart 14 shows the number of people convicted of an offence under terrorism legislation has a moderate upwards trend.
- For this metric, terrorism offences are those contained within the Terrorism Act 2000, Terrorism Act 2006 and Counter Terrorism Act 2008.

Chart 15



- Section 41 of the Terrorism Act 2000 provides that a constable may arrest without a warrant a person whom he or she reasonably suspects to be a terrorist.
- Chart 16 demonstrates a moderate downwards trend in the number of people detained in Northern Ireland under S41 of TACT.

Chart 16



- Chart 15 shows that the usage of the various stop and search powers in Northern Ireland has not changed significantly since 2007. There is a slight upwards trend in the use of the 'without suspicion' s24 power.

Chart 17

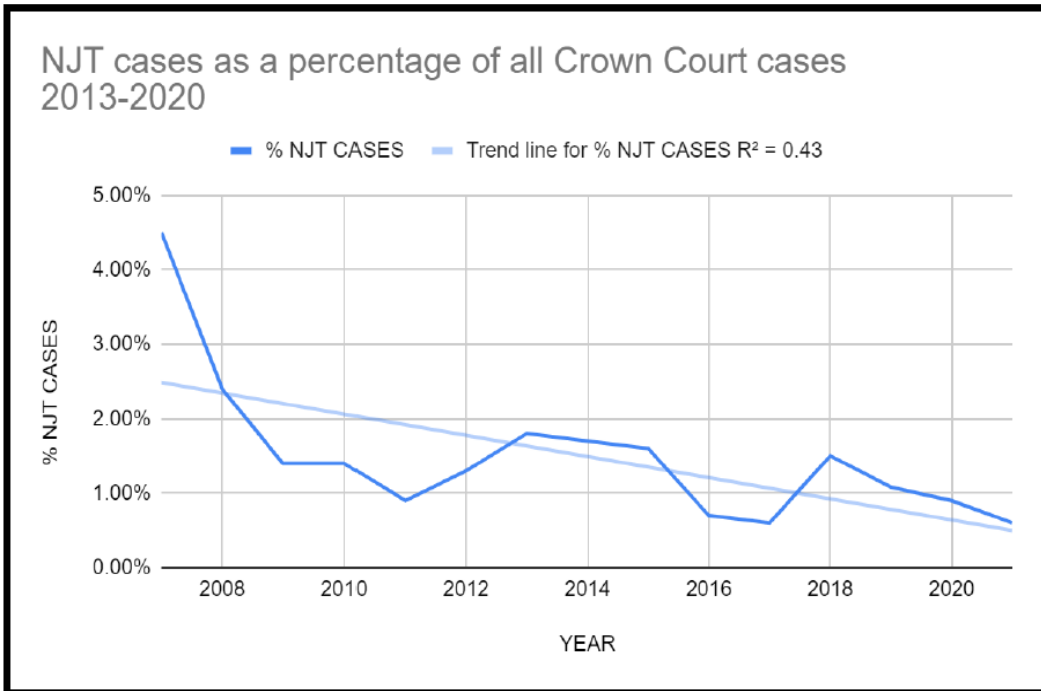
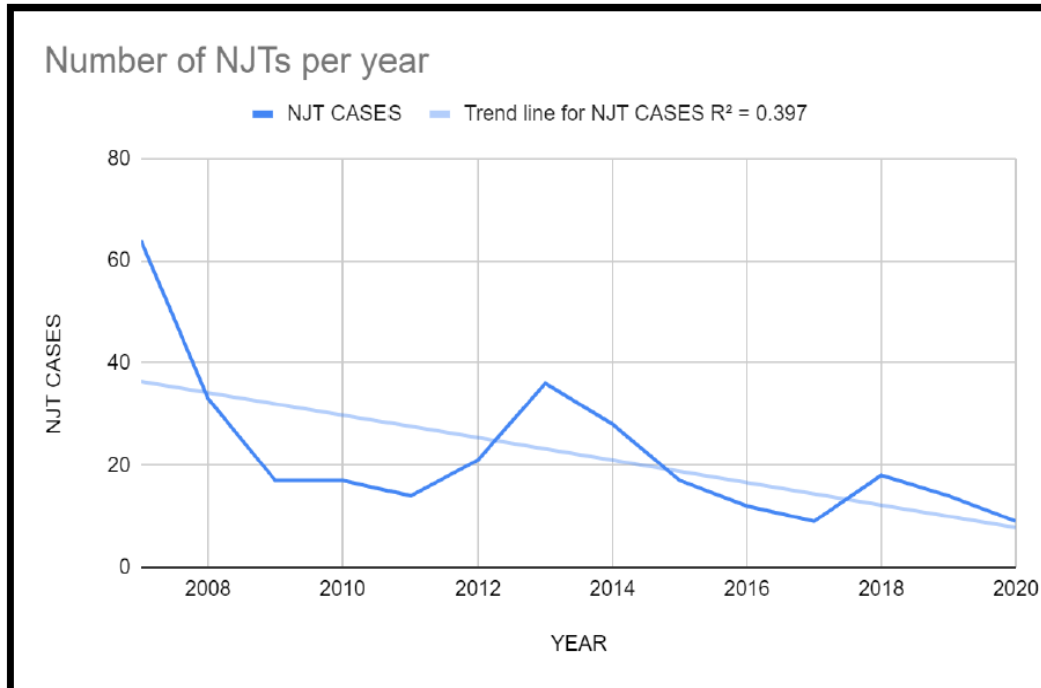


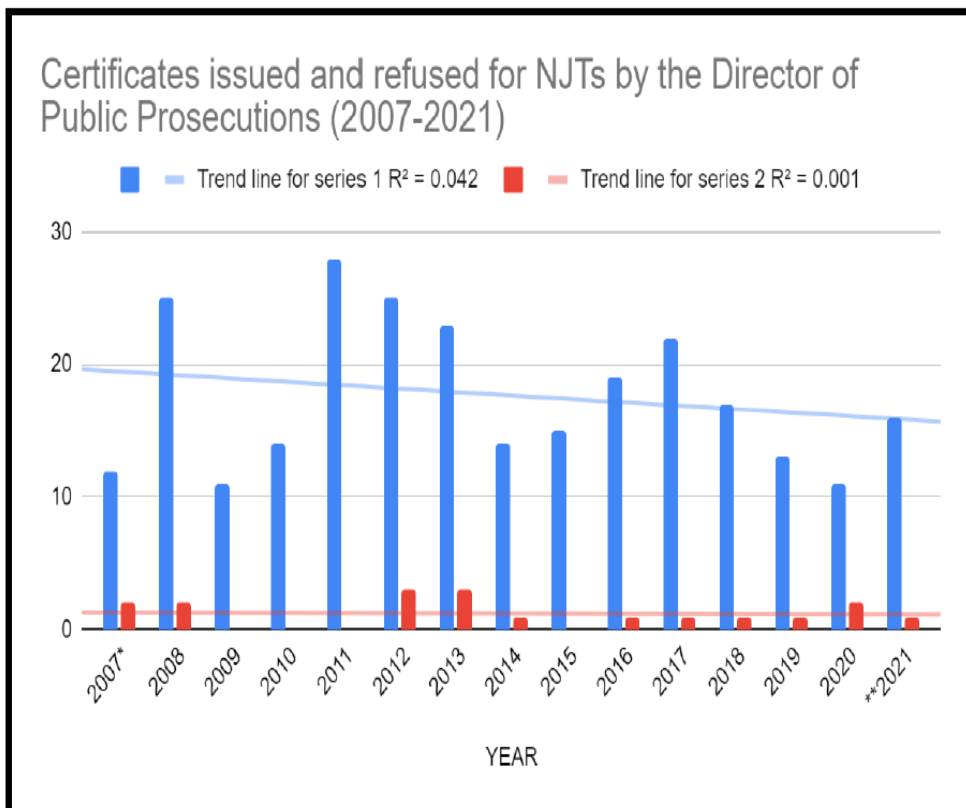
Chart 18



- Chart 17 displays a downward trend in the number of NJT cases as a percentage of all Crown Court cases. A Pearson's correlation coefficient of 0.65 indicates that this is a moderate trend.
- Chart 18 shows the number of NJT cases per year. When isolated, we can see that the overall numbers of NJT cases are on a greater decline (Pearson's correlation

coefficient of 0.66) than the number of NJTs as a percentage of all Crown Court cases.

Chart 19:



- Chart 19 shows that there has been a marginal downward trend in the number of NJT certificates issued over time. However, the  $R^2$  value of 0.042 and a Pearson's Coefficient of 0.2 both indicate that this downward trend is not statistically significant.



Chart 20

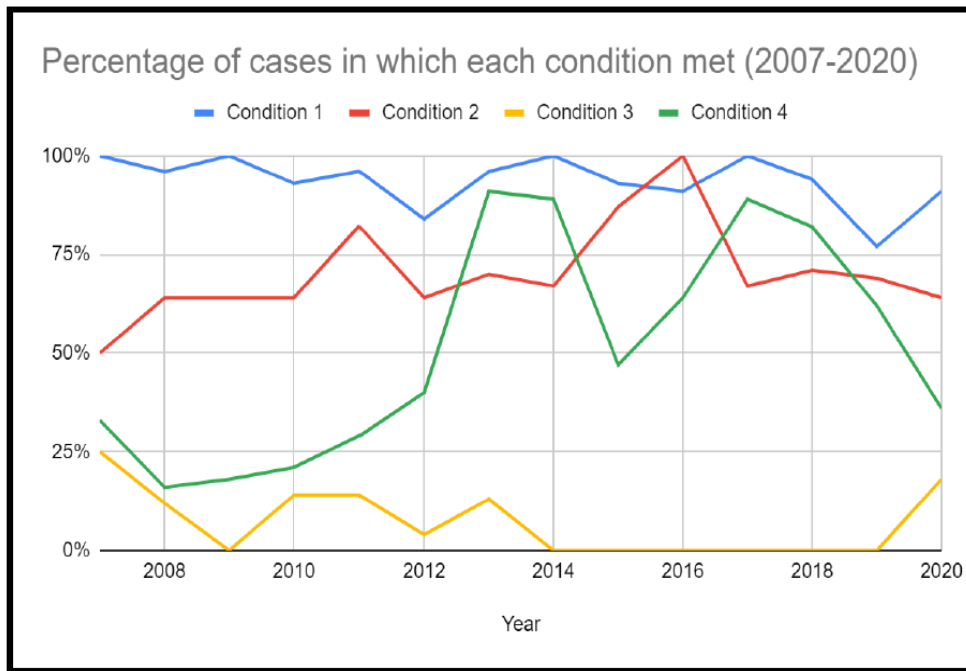
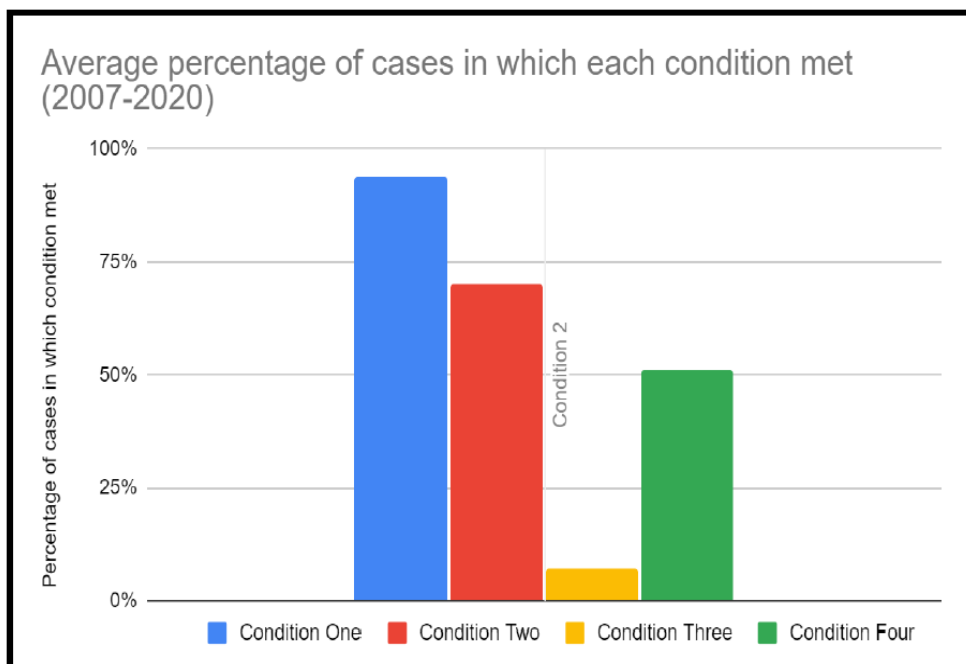


Chart 21



1. When displayed graphically over time in Chart 20, we can see that the usage of condition four varies the most over the years.
2. Chart 21 shows the average percentage of cases in which each condition was met from 2007-2020.

- a. Condition one was met most often (94% of cases)
- b. Condition two was next most frequently met (70% of cases)
- c. Condition four was met in 51% of cases
- d. Condition three was used least frequently (only 7% of cases)

## ANNEX C: INDICATOR STATISTICS TABLES

Table 1

Deaths due to the Security Situation (1997-2021)	
Year	Number of deaths
1997	22
1998	55
1999	7
2000	18
2001	17
2002	13
2003	11
2004	5
2005	5
2006	3
2007	3
2008	1
2009	5
2010	2
2011	1
2012	2
2013	1
2014	2
2015	2
2016	6
2017	2
2018	2
2019	2
2020	2
2021	2

[Source: PSNI Security Statistics Bulletin](#)

**Table 3**

<b>Security Related Incidents</b>			
<b>Year</b>	<b>Shooting Incidents</b>	<b>Bombing Incidents</b>	<b>Incendiaries - Incidents</b>
1997	225	78	9
1998	211	127	20
1999	125	82	7
2000	302	117	9
2001	355	349	5
2002	350	188	3
2003	229	77	8
2004	185	64	21
2005	167	83	9
2006	69	22	11
2007	47	21	0
2008	42	37	5
2009	75	51	0
2010	81	90	0
2011	60	65	2
2012	69	37	0
2013	50	72	3
2014	73	36	1
2015	50	54	0
2016	49	27	0
2017	58	29	0
2018	39	17	0
2019	39	15	0
2020	39	22	0
2021	27	5	0

[Source: PSNI Security Statistics Bulletin](#)

**Table 4**

<b>Files Received by PPS with a complaint of Intimidation 01 April 2016 - 31 March 2021</b>	
<b>Financial Year</b>	<b>Number of Cases</b>
16/17	117
17/18	86
18/19	79
19/20	78
20/21	55
<b>Total</b>	<b>415</b>
Source: PPS	

**Table 5**

<b>People accepted as homeless due to intimidation</b>	
<b>Year</b>	<b>Accepted as Homeless due to intimidation</b>
1998/99	807
1999/00	524
2000/01	1071
2001/02	853
2002/03	1077
2003/04	685
2004/05	447
2005/06	494
2006/07	385
2007/08	278
2008/09	288
2009/10	406
2010/11	361
2011/12	303
2012/13	411

2013/14	380
2014/15	405
2015/16	414
2016/17	387
2017/18	355
2018/19	374
2019/20	255
2020/21	256
2021/22	171
Source NIHE	

**Table 6**

Paramilitary Groups have a controlling influence in this area						
Year	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Don't Know
2017	2	11	13	32	35	7
2018	2	8	11	28	45	7
2019	2	8	10	30	42	9
2020	3	10	11	35	32	8
2021	3	10	13	38	27	10
Source: <a href="#">NI Life and Times Survey</a>						

**Table 7**

Paramilitary groups create fear and intimidation in this area						
Year	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Don't know
2017	3	11	14	30	34	8
2018	4	8	9	24	46	9
2019	3	9	11	24	41	10
2020	4	10	14	29	32	11
2021	6	11	17	29	26	11
Source: <a href="#">NI Life and Times Survey</a>						

**Table 8**

<b>Recorded Intimidation or threat to harm witness offences (1 April 2011 – 31 March 2022)</b>	
<b>Year</b>	<b>Intimidation or threat to harm witness etc</b>
2007/8	105
2008/9	160
2009/10	176
2010/11	156
2011/12	164
2012/13	149
2013/14	167
2014/15	171
2015/16	187
2016/17	197
2017/18	150
2018/19	152
2019/20	154
2020/21	129
2021/22	163
Source: PSNI	

**Table 9**

<b>Police Recorded Crime: Intimidation</b>	
<b>Year</b>	<b>Intimidation Offences Recorded</b>
1998/99	481
1999/00	469
2000/01	622
2001/02	787
2002/03	1,128

2003/04	1,109
2004/05	962
2005/06	1,043
2006/07	714
2007/08	461
2008/09	383
2009/10	404
2010/11	368
2011/12	362
2012/13	358
2013/14	456
2014/15	548
2015/16	619
2016/17	556
2017/18	557
2018/19	590
2019/20	604
2020/21	605
2021/22	554
Source: <a href="#">Police Recorded Crime In NI</a>	

**Table 10**

<b>Number of persons convicted of an offence under Terrorism legislation</b>			
<b>Year</b>	<b>Crown Court</b>	<b>Magistrates' Court</b>	<b>Total</b>
2007	6	1	7
2008	8	1	9
2009	2	1	3
2009/10	4	1	5
2010/11	2	1	3
2011/12	3	4	7
2012/13	7	3	10
2013/14	17	1	18
2014/15	11	4	15



2015/16	4	0	4
2016/17	5	0	5
2017/18	5	9	14
2018/19	6	12	18
2019/20	2	12	14
2020/21	10	4	14
Source: Northern Ireland Courts and Tribunals Service.			

**Table 11**

<b>Usage of Various Stop and Search/Question Powers in NI</b>				
<b>Year</b>	<b>JSA S21</b>	<b>JSA Ss24</b>	<b>TACT s.47A</b>	<b>TACT 43/43A</b>
2007/08	28	251	-	13
2008/09	112	372	-	56
2009/10	5285	621	-	97
2010/11	5,355	11,721	-	375
2011/12	3,511	12,699	0	254
2012/13	2,803	7,687	0	186
2013/14	2,350	6,239	70	173
2014/15	1,922	3,906	0	192
2015/16	2,812	6,980	0	344
2016/17	2,200	7,935	0	265
2017/18	1,505	6,245	0	118
2018/19	1,283	6,035	0	74
2019/20	997	4,818	0	38
2020/21		3,739	0	

**Table 12**

<b>Persons detained in Northern Ireland under Section 41 of the Terrorism Act 2000</b>	
<b>Year</b>	<b>Number of Persons Detained</b>
2001	180
2002	236
2003	359

2004	230
2005	249
2006	214
2007	145
2008	150
2009	161
2009/10	167
2010/11	195
2011/12	159
2012/13	157
2013/14	168
2014/15	227
2015/16	149
2016/17	137
2017/18	176
2018/19	146
2019/20	128
2020/21	105
Source: NI Terrorism Bulletin	

**Table 13: NJT cases as a percentage of all Crown Court cases 2013-2020**

YEAR	NJT CASES	OTHER	TOTAL	% NJT CASES
2007	64	1367	1431	4.50%
2008	33	1338	1371	2.40%
2009	17	1219	1236	1.40%
2010	17	1233	1250	1.40%
2011	14	1472	1486	0.90%
2012	21	1656	1677	1.30%
2013	36	1917	1953	1.80%
2014	28	1660	1688	1.70%
2015	17	1063	1080	1.60%
2016	12	1628	1640	0.70%
2017	9	1400	1409	0.60%
2018	18	1163	1181	1.50%

2019	14	1281	1295	1.08%
2020	9	956	965	0.90%
2021	8	1350	1358	0.60%
<b>TOTAL</b>	<b>317</b>	<b>20703</b>	<b>21020</b>	<b>Average: 1.49%</b>

Source: NI Courts & Tribunals Service

**Table 14: Certificates issued and refused for NJTs by the Director of Public Prosecutions (2007-2021)**

Year	Certificates Issued	Certificates Refused
2007*	12	2
2008	25	2
2009	11	0
2010	14	0
2011	28	0
2012	25	3
2013	23	3
2014	14	1
2015	15	0
2016	19	1
2017	22	1
2018	17	1
2019	13	1
2020	11	2
**2021	16	1

Source: Northern Ireland Director of Public Prosecution's Office

\*Provisions under the 2007 Act were brought into effect on 1 August 2007

**Table 15: Number of Cases in which each condition was met per year**

Year	Number of Cases in which Condition Met				Certificate s Issued
	Condition 1	Condition 2	Condition 3	Condition 4	
<b>2007</b>	100%	50%	25%	33%	<b>12</b>
<b>2008</b>	96%	64%	12%	16%	<b>25</b>
<b>2009</b>	100%	64%	0%	18%	<b>11</b>

<b>2010</b>	93%	64%	14%	21%	<b>14</b>
<b>2011</b>	96%	82%	14%	29%	<b>28</b>
<b>2012</b>	84%	64%	4%	40%	<b>25</b>
<b>2013</b>	96%	70%	13%	91%	<b>23</b>
<b>2014</b>	100%	67%	0%	89%	<b>18</b>
<b>2015</b>	93%	87%	0%	47%	<b>15</b>
<b>2016</b>	91%	100%	0%	64%	<b>11</b>
<b>2017</b>	100%	67%	0%	89%	<b>9</b>
<b>2018</b>	94%	71%	0%	82%	<b>17</b>
<b>2019</b>	77%	69%	0%	62%	<b>13</b>
<b>2020</b>	91%	64%	18%	36%	<b>11</b>
<b>Average</b>	<b>94%</b>	<b>70%</b>	<b>7%</b>	<b>51%</b>	
Source: Northern Ireland Director of Public Prosecution's Office					

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