

# REPORT ON THE THEMATIC REVIEW OF THE POLICING RESPONSE TO COVID-19



<b>CONTENTS</b>	<b>PAGE</b>
<b>Chair's Foreword</b>	<b>2</b>
<b>Executive Summary</b>	<b>4</b>
<b>Recommendations</b>	<b>9</b>
<b>Introduction</b>	<b>14</b>
<b>Chapter 1: The Health Protection Regulations and PSNI's Implementation</b>	<b>20</b>
<b>Chapter 2: Management of Custody</b>	<b>58</b>
<b>Chapter 3: Spit and Bite Guards</b>	<b>67</b>
<b>Chapter 4: Addressing Vulnerability</b>	<b>87</b>
<b>Annex 1: Terms of Reference</b>	<b>105</b>
<b>Annex 2: Methodology</b>	<b>106</b>
<b>Annex 3: Human Rights Considerations</b>	<b>108</b>
<b>Annex 4: Custody Statistics</b>	<b>118</b>

## CHAIR'S FOREWORD



The period of the COVID-19 pandemic has been a unique and challenging time for every one of us. It has also been a unique and challenging time for our Police Service. During the lockdown period, whilst everyone was instructed to stay at home and keep safe, PSNI officers could not stay at home. They had to have hundreds of interactions with members of the public every day in order to keep us all safe. The Board appreciates the commitment and service of all PSNI officers during this difficult and ongoing period.

This period was not without its policing challenges. The COVID-19 emergency resulted in police forces throughout the UK and Ireland being given very significant new powers. The Board, therefore, requested its Human Rights Advisor to examine and assess the PSNI's response during the period from 23 March until the end of June 2020.

The report is designed to capture the key challenges that faced the PSNI in complying with human rights in its response to the COVID-19 pandemic. The Human Rights Advisor was asked to consider the operational use of these new powers and if this has been in accordance with the law and compliant with human rights, specifically in relation to the temporary introduction of spit and bit guards, the suspension of the Independent Custody Visiting Scheme and the health and safety issues for both the PSNI and the public.

In addition, the Human Rights Advisor was also asked to consider any impact that policing during this period has had on community confidence and whether there are any recommendations or lessons to learn for continuing to police the ongoing pandemic.

A major issue that emerged during this period is the policing of protests and significant gatherings. These issues are addressed within this report from a Human Rights perspective. However, I am aware that in parallel with this report, the Office of the Police Ombudsman of Northern Ireland (OPONI) is carrying out a specific investigation in relation to the use of the Health Regulations by the PSNI during a series of gatherings. Board officials have been liaising with the Ombudsman's office to ensure that duplication between these reports is avoided.

I welcome the findings of the report and the recommendations made by the Human Rights Advisor. I will ensure that the Board and its Committee continue to scrutinise the work of the PSNI during this period so that the recommendations and lessons identified in this report are implemented to improve policing as we continue to cope with the significant challenges of the pandemic period.

A handwritten signature in black ink, appearing to read "Doug Garrett".

**Doug Garrett**  
Policing Board Chair



## EXECUTIVE SUMMARY

The Board, at its meeting in May 2020, requested that the Human Rights Advisor conduct a thematic review of the PSNI's response to COVID-19. The overarching aim of the review is to assess the impact of the policing response on public confidence. The review will consider the extent of the application the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 along with the temporary introduction of spit and bite guards, the Independent Custody Visiting Scheme and the health and safety issues for both PSNI and the public and the protection of victims of crimes, in particular domestic violence, which has seen a sharp increase. The terms of reference for the review are included at **Annex 1** of the draft report.

The Coronavirus pandemic has been a very significant crisis for Northern Ireland and the PSNI and along with other police services around the world, the PSNI have had a crucially important role. It is not obvious that the police service should have been tasked with trying to save us from the worst effects of the virus by reducing transmission or devoting themselves to stopping us going about our usual activities to save lives. It was the law, particularly the criminal law, that was used to try to prevent the spread of the virus and the police, as a result, were expected to regulate our activities and force us to stay at home. Many law-abiding citizens trying to go about their lawful activities – trying to work, to visit relatives and loved ones or buying groceries – had to think about whether in doing so, they were breaking the law and committing criminal offences. Some will have had unexpected and unwelcome interactions with police officers and, a few, will have committed offences.

Even without these extra and very considerable tasks the police service needed to do what everyone else was told not to do. They could not stay at home, they had to have hundreds of interactions, some involving close contact, and most of them unwanted, with members of the public. This was an obvious risk to them and, as with most other public servants, at least at the beginning, they had problems with accessing Personal Protection Equipment (PPE).

In addition to all of this, they had to deal with emergency rules which they often did not see in draft or in advance, which were often flawed or which had significant gaps and which changed very frequently. And, of course, all this in a new environment and without any previous experience.

Thankfully the lockdown rules led to a significant reduction in overall crime and many potential victims did not have to suffer. However, the rules also put many people in extra danger from abusers in their own home and were now not able to contact those who might be able to help them. The police had to take initiative themselves to try to protect them. This involved visiting those that the police knew were at risk and arresting those with warrants or were suspected of these kinds of crimes.

Not only did police officers need to be on the streets arresting people, getting closer to others than was healthy or safe, they needed to escort suspects to custody and then to look after them so that the risk of them becoming infected was low – and of course to ensure that they did not infect anyone else. One of the tools they were given were Spit and Bite Guards (SBGs), controversial equipment whose effectiveness in protecting them was unclear and could only be used by imposing additional restraint on the suspect and creating significant human rights issues – and possibly violation of the prohibition against ill-treatment.

Overall the PSNI were careful in their use of the Regulations, particularly by following the four Es of; Engage, Explain, Encourage and Enforcement. They went out of their way to avoid enforcement, took the initiative to protect those at risk of abuse in their homes, took care of those detained and only used SBGs against those who were trying to spit at them or to bite them. However, it is not clear that they were helped to understand the overlap between the Regulations and the Human Rights Act by the Executive or Assembly Members and may have not done enough to protect the right to protest safely.

The evidence presented within this report would indicate that, across this first period of the pandemic emergency, from 23 March to 30 June 2020, the PSNI's performance is assessed as generally positive. In particular, those consulted pointed to the PSNI's

response to vulnerable people, the overall leadership role it assumed, its innovative collaborative working with other statutory partners and its management of its custody suites as being a particularly positive experience. When criticisms were voiced they were focused on the policing of gatherings and protests, the introduction of Spit and Bite Guards, PSNI's interpretation of certain Regulations and the impact these issues had on confidence in policing. These issues were complex, with decisions having to be taken expediently in a time of an unprecedented health emergency. All these issues are explored in more detail below.

### **Confidence in the PSNI**

As might be expected the actions of the PSNI during the pandemic have had differential effects on confidence. On the one hand, people who support the police can find many good reasons to applaud the important work that they have done. Their general sensitivity in the use of the new enforcement powers and the fact they have taken the initiative to support those at risk at home was supported by the Non-Governmental Organisations (NGOs) dedicated to this work. There cannot really be any doubt that their actions in reducing face to face contacts, reduced transmission and will have saved many lives.

On the other hand some will point to the significant erosion of civil liberties. For example, it has been alleged that the lack of consistency in policing of gatherings: the crowded beaches left alone, the no enforcement in relation to some public political events, but unnecessary enforcement of perceived threats to the status quo and the Black Lives Matter (BLM) protests, people fined or convicted for trying to go about their normal lives and the fact that the pandemic was used as an excuse to introduce Spit and Bite Guards.

In practice, the PSNI and the criminal law were the tool used by the government to enforce compliance on those reluctant or unable to comply with the lockdown. Albeit that the enforcement provisions are at the lower end of the criminal scale. This was a health emergency not a criminal justice crisis, so maybe the more important question is whether there are better ways of doing this if there is a second wave of the

Coronavirus or a different virus threatening our lives in the future. However, the police are the obvious choice; they are used to dealing with public order, difficult individuals and have officers on the ground all around the country. It is not surprising though, that giving the police the job inevitably means they bring a policing and criminal justice approach to the problem.

If the choice is to use the police to protect our health then there is a very powerful argument for the health experts, at the Department of Health, to take responsibility and to assist the PSNI by suggesting overall objectives and giving guidance on the level of transmission risks. If the basis of the law was to reduce person to person contact, household to household contact and location to location contacts then that should have been made clear in the Regulations and the PSNI should have been supplied with daily 'threat levels' that could be shared with officers and in turn shared in interactions with members of the public. These threat level assessments would have also helped the PSNI and officers to gauge how far up the four Es enforcement escalation process they should go to achieve the objective of keeping us safe.<sup>1</sup> Interestingly, the PSNI has taken a more hands off approach to the Regulations about face masks and in the two weeks of those new Regulations no fines were issued. The PSNI stated that the primary responsibility for enforcement would lie with shops.<sup>2</sup>

The expression 'policing by consent' probably does not accurately represent how policing is carried out in practice anywhere, but what is true is that protecting the public cannot happen without community engagement and some level of support for the police. Giving the police powers to tell people how to live their own lives is fraught with danger, however important the objective is. Support and confidence in the police is very difficult to build and very easy to erode.

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<sup>1</sup> It is understood that senior officers proposed this very approach but it was not accepted by the Department of Health.

<sup>2</sup> BBC website, 18 August 2020.



## **Confidence in PSNI from sectors and organisations**

It is important to consider how police interpretation and enforcement of the Regulations can affect public confidence in the PSNI and how this may differ across different communities. It is also important to consider if the policing of specific issues throughout lockdown has affected confidence, such as the policing of Black Lives Matter protests and significant gatherings such as funerals and beaches. Following the policing of such events, it was apparent that public confidence had been impacted upon because of the perception that the policing of events differed.

The use of the four Es of 'Engage, Explain, Encourage and Enforcement' as set out by the College of Policing and the Chief Constable seemed to work well as it was promoted effectively by the PSNI and was well known by the public.

The lack of clarity around the meaning of the Regulations and subsequent amendments and guidelines is likely to have had a significant impact on how well the public consider PSNI to have policed during lockdown. In the early days of the pandemic the PSNI were criticised over their handling of new powers to enforce the lockdown, with some arguing they are going beyond what the legislation allows. This led to senior officers calling for greater clarity from the Department of Health on the Regulations, while recognising the very difficult circumstances within which the Regulations were drafted. PSNI recognised the impact its actions had on public confidence.

The majority of external stakeholders have reported a positive experience of policing during COVID-19. A number of PCSPs were very complementary about the policing response to COVID-19 and noted the effort by local police to signpost vulnerable individuals to appropriate agencies during COVID-19 for a range of services, e.g. food banks, housing, etc. However, some local communities noted disappointment with the changes to the deployment of neighbourhood teams during COVID-19 and the negative impact that this has had on confidence. It will remain important for PSNI and PCSPs to listen to local communities and to communicate these plans for policing effectively.

## RECOMMENDATIONS

### **The Executive and Assembly**

#### *Making Laws*

It is a fundamental principle of any democracy that it makes its laws, particularly those creating criminal offences, in an open and transparent manner and elected representatives are consulted in advance. Not surprisingly human rights principles require criminal laws to be clear, precise and understandable by those that have to obey them.

1. The Executive should always consult the Assembly on draft laws that create criminal offences, even if this has to occur after the implementation of those laws in an emergency. Any such drafts should be subject to specific advanced consultation with the PSNI, the Policing Board and the Northern Ireland Human Rights Commission. These principles should also apply to any proposed amendments to the law;
2. All laws, especially those having a significant effect on peoples' lives or creating crimes, should be accessible and written in a way that they are easy to understand;
3. Politicians and the Executive should link any key statements on what the public should do (or not do) directly to the guidance on the law and the law itself. Guidance needs to be directly aligned with the law;
4. Such Regulations and laws should include human rights principles and any guidance should make issues of overlap or contradictions with human rights clear and there should be an accompanying human rights assessment document;

5. The Department of Health should have a greater role in working with police on policing strategies where laws are designed to protect the health of the community.

## **PSNI**

### *Fixed Penalty Notices and the Coronavirus Regulations*

6. The PSNI should always initiate quality control mechanisms for urgent and novel laws (particularly those giving officers on the street significant discretion) and especially in urgent cases where there is bound to be a lack of time for officer training;
7. The PSNI and the Public Prosecution Service should review all of the Coronavirus Regulation cases, both Fixed Penalty Notices and possible prosecutions and ensure that:
  - (1) All those that involve peaceful protest are assessed as to their compliance with the Human Rights Act;
  - (2) All those where the subject's right to a family life (to leave home, travel, meet family members) was affected to check that any interference was not disproportionate and
  - (3) They are still clearly in the public interest, taking into account the fact the criminal laws that may have been breached have never existed as crimes ever before, are not likely to be crimes after this emergency has passed and, that the defendants are unlikely to commit the same offences again.

Note: It is understood that Fixed Penalty Notices were passed to the courts relatively quickly after they were issued and once that has occurred the PSNI would not have had any discretion to cancel them. This recommendation is particularly important in the first period covered by this review, before the Silver Command quality check procedure was in place.

8. The PSNI should review its records as far as possible to publish Section 75 statistics of those subject to the additional powers and the equipment that it used during the lockdown (including figures based on the community background of the people involved).

### *Human Rights*

9. Effective policing and human rights compliance do not have to be in conflict and a sophisticated approach will not constrain proactive and responsive policing or risk undermining the professional judgment of police officers. Despite the excellent processes and procedures within the PSNI to embed human rights into all of its operations, it needs to work even harder, perhaps involving the PSNI lawyers and human rights experts more in its operations policies and take the initiative of consulting the Policing Board on these challenges and become even more transparent about the challenges it faces with implementation. This process will need to include a transparent assessment of the human rights in more detail, including involving alternative strategies at the Gold, Silver and Bronze Commander levels;
10. PSNI should report to the Board on any lessons learnt from the apparent inconsistency in approach to the enforcement of all large gatherings of people during April, May and June 2020;
11. PSNI should hold discussions with the organisers of the Black Lives Matter protests on future co-operation to ensure peaceful protests are facilitated and that both sides understand the positive obligations of the police and the key role of the organisers;
12. It may also be useful for the PSNI to create an Independent Advisory Group on protests and to co-op representatives of those organisers (this IAG should not deal the traditional challenges and debates surrounding parades and protests in Northern Ireland which are the focus of many other forums and processes);

13. The PSNI should hold a seminar with OPONI, the Northern Ireland Human Rights Commission, human rights NGOs and the Policing Board to assist them with ensuring a consistent approach to all protests;

14. The Police Ombudsman is investigating a number of protests and is likely to consider whether there was any discrimination in relation to the treatment of individuals in the enforcement of the Regulations at the Black Lives Matter protests. The Human Rights Advisor will consider the report once published, as to whether the Board should support the recommendations and whether any further investigations are needed.

#### *Spit and Bite Guards*

15. In the light of the fact that the deployment of spit and bite guards was triggered by the COVID-19 emergency, spit and bite guards should now be phased out as soon as possible and officers who have been provided with spit and bite guards should, instead, be provided with the necessary Personal Protection Equipment (PPE) or other alternative. The PPE provided should be of sufficient quality to protect these officers from contamination from spitting, aerosol droplets and other bodily fluids reducing the risk of transmission of COVID-19 and other diseases. The use of spit and bite guards should, regardless, cease by 31<sup>st</sup> December 2020.

The PSNI should:

- Provide the Board with further scientific and professional evidence, including from police forces in other jurisdictions, to measure the extent to which spit and bite guards provide protection for police officers from COVID-19 transmission compared with that provided by the PPE supplied to officers;
- Complete a PSNI public consultation exercise on the deployment of spit and bite guards in line with Section 75 of the Northern Ireland Act 1998, and should include consideration of the criteria and guidance for their use; and



- Once these actions have been completed submit the evidence to the Board so that the Board can give its view to the Chief Constable on their use.

The Board should:

- Taking into account the findings of the Office of the Ombudsman's analysis, initiate an independent human rights-based assessment review to analyse each use of spit and bite guards since March 2020, taking into account Article 3 of the ECHR and the other human rights treaties ratified by the UK.

### *Addressing Vulnerability*

16. The PSNI should ensure that the innovation, progress and learning made in developing new approaches to collaborative working for vulnerable people during the pandemic emergency period is harnessed and used to inform better collaboration in the future.

## **Northern Ireland Policing Board**

### *Cooperation*

17. OPONI and Policing Board should plan and co-operate more often on significant or serious challenges confronting PSNI; and
18. The two organisations should therefore consider making joint or parallel submissions to the review of police oversight arrangements which is currently being led by the Department of Justice, whilst both ensuring their unique and independent roles.

## INTRODUCTION

This report is designed to capture the key challenges that faced the PSNI in complying with human rights in its response to the COVID-19 pandemic. The report deals with the period from 23 March until 30 June 2020. This report is not designed to be a definitive account of what happened during the period of review and does not attempt to adjudicate where there are competing accounts of what happened.

The COVID-19 virus reached Northern Ireland on 27 February 2020 with the first death recorded as occurring, as a result of the virus, on 19 March. According to the Northern Ireland Statistics and Research Agency (NISRA) there were 837 deaths with COVID-19 recorded on the death certificate between 1 March and 30 June 2020.

The virus spreads from person to person, usually as a result of close proximity (droplets moving from person to person from coughing, sneezing, talking and breathing). Reducing close contacts between people reduces the transmission of the virus around the community. Governments around the world put in place measures to try to reduce transmission by reducing the frequency of close contacts. In Northern Ireland and the rest of the UK, measures were introduced to criminalise many ordinary activities and to encourage people to stay at home.

The COVID-19 emergency resulted in police services throughout the UK being given very significant new powers. Perhaps more powers across the UK than any time since the Second World War and arguably even more than then.<sup>3</sup> Lord Sumption, previously a Supreme Court Justice, not noted for being a human rights activist, has said:

*"I have to say that the behaviour of the Derbyshire police in trying to shame people into using their undoubted right to take exercise in the country and wrecking beauty spots in the Fells so that people don't want to go there, is frankly disgraceful."*

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<sup>3</sup> In the Highest Degree Odious: Detention without Trial in Wartime Britain, A.W. Brian Simpson, 1992, OUP.

*This is what a police state is like. It's a state in which the government can issue orders or express preferences with no legal authority and the police will enforce Ministers' wishes. I have to say that most police forces have behaved in a thoroughly sensible and moderate fashion. Derbyshire police have shamed our policing traditions. There is a natural tendency of course, and a strong temptation for the police to lose sight of their real functions and turn themselves from citizens in uniform into glorified school prefects."*<sup>4</sup>

The general public in Northern Ireland accepted that these rules were necessary and complied with them. However, there have been examples of many members of the public not understanding what the rules require or not accepting them. Some police officers in the UK were also accused of not acting sensibly in their enforcement of them and problems occurred because people initially confused the Prime Minister's "instructions"<sup>5</sup>, the provisions of the Coronavirus Act 2020 and the new Health Protection Regulations.<sup>6</sup> A few weeks into the lockdown many police services suggested that they needed to use these laws more robustly. PSNI Chief Constable Simon Byrne told the daily press conference at Stormont that from the 9 April 2020:

*"The public would see more police patrols and "a different approach" from his officers in the coming days in order to prevent the spread of the virus."*

Assistant Chief Constable Todd stated that:

*"You have to have a reasonable excuse to have a need to leave home. It is not just a reason, but a need and I see no need for anybody to drive to take their daily exercise so that would be a breach. We will encourage you to go home. If not, you may face a fine."*<sup>7</sup>

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<sup>4</sup> BBC Radio 4, 30 March 2020.

<sup>5</sup> 23 March 2020 <https://www.telegraph.co.uk/news/2020/03/23/boris-johnson-announces-uk-lockdown-speech-full/>

<sup>6</sup> See Annex for more details. The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 which are made by the Department of Health under section 25 of the Public Health Act (Northern Ireland) 1967.

<sup>7</sup> 9 April 2020 <https://www.bbc.co.uk/news/uk-northern-ireland-52234994>

On 10 April the PSNI launched a dedicated web page for social distancing breaches and reported that from:

*“28 March until today (Friday, 10 April), the PSNI has received 906 complaints of the restrictions not being adhered to, including people making non-essential journeys, not adhering to social distancing or gatherings in public places.”<sup>8</sup>*

The PSNI’s approach to their new powers on this webpage appears to be generally proportionate:<sup>9</sup>

*What does this mean for you?*

*This means that if a person commits an offence of failing to comply with any such direction or restriction imposed on them without reasonable excuse, officers will consider an appropriate disposal. That may initially be advice and guidance or a Community Resolution Notice (CRN).*

*However, if required Police will enforce this legislation and issue a penalty notice of £60. The issuance of a penalty notice in the first instance is not in itself a criminal offence – the Police do not want to criminalise people - we simply want to ensure that people follow the Regulations. For those who continue to disregard the NI Executive directions, the fine can be doubled each time and summary prosecution can be sought for those who refuse to pay or comply. The £60 fine can fall to £30 if paid within 14 days. If a person has already received a fixed penalty notice, the amount will increase to £120 and double on each further repeat offence...*

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<sup>8</sup> <https://www.psni.police.uk/news/Latest-News/100420-police-service-ni-launches-dedicated-web-page-for-social-distancing-breaches/>

<sup>9</sup> See also the College of Policing sensible briefings <https://www.college.police.uk/News/College-news/Pages/Health-Protection-Guidelines.aspx>

*Where our officers encounter people outside who do not appear to be complying with social distancing, officers will use the new dispersal powers to protect the health of the public and as outlined already will do so using a four-phase approach - Engage with the public to encourage voluntary compliance; Explain why dispersal is vital to reduce the spread of this virus; Encourage people to disperse and Enforce where necessary when people do not listen and put others at risk. We will only do this when it is absolutely necessary.<sup>10</sup>*

Although the Coronavirus has had a devastating impact on people's lives, on the social fabric and on the economy, in some cases it has changed the ways that PSNI works for the better. For instance, the PSNI and Public Prosecution Service (PPS) have developed new approaches. These are set out in 'Joint PSNI and PPS Process Efficiencies and Innovation within the Criminal Justice System'.<sup>11</sup> What this has established is a more effective criminal justice system and a better and more efficient relationship between the two bodies.

Equally there is some data from PSNI which is more difficult to understand but cannot be explored in any detail in this report. For instance, the quarterly Misuse of Drugs Act stop and search figures for April to June was up 33% on the previous quarter of January to March but the overall arrest rate was now down to 5%. This seems surprising given the general lockdown and significant reduction in the numbers of people on the street. It also begs the question about the general profile of those subject to stop and search under these powers.<sup>12</sup>

## **The Laws**

### *The Health Protection Regulations*

The new key powers given to the PSNI were contained in the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020<sup>13</sup> which were made

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<sup>10</sup> [https://www.psnipolice.uk/advice\\_information/COVID-19/](https://www.psnipolice.uk/advice_information/COVID-19/)

<sup>11</sup> June 2020.

<sup>12</sup> Thanks to Dr John Topping, Queen's University Belfast, for raising this issue.

<sup>13</sup> Available here <https://www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-northern-ireland-Regulations-2020>



by the Department of Health under section 25 of the Public Health Act (Northern Ireland) 1967.<sup>14</sup> They first came into force on 28 March 2020. These rules, as is generally well known, provided that:

- Certain shops and businesses must close or must restrict their activities to online activities and delivery only (Regulations 3 and 4 and Schedule 2, Part 1, 2 & 3);
- Severe restrictions on people leaving their homes (Regulation 5); and
- Restrictions on gatherings of more than two people (Regulation 6).

Police officers (and some public health officials) “may take such action as is necessary to enforce any requirement imposed by Regulation 3, 4 or 6” (Regulation 7). Police officers can also give “prohibition notices” if the officer “reasonably believes that” a person is contravening Regulation 3 or 4 and it is “necessary and proportionate” to prevent the person continuing to contravene the requirement.

Officers can also direct a person to return home, remove a person to their home or disperse a gathering and can use reasonable force to do so.

A person who, “without reasonable excuse”, contravenes these provisions commits an offence as does a person who obstructs an officer carrying out these functions.<sup>15</sup> A police officer can also use their powers of arrest (PACE Order, Article 26).

### *Transparency, accessibility and consultation*

These Regulations were then amended eleven times with the last set of changes (for the purpose of this report) coming into force on 9 July.<sup>16</sup> Although there was considerable discussion, debate and guidance in the media and from politicians

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<sup>14</sup> There are very similar provisions in England, Scotland and Wales. These provisions are health based and therefore the power to create these powers is devolved.

<sup>15</sup> See the advice for England with similar provisions from the Crown Prosecution Service <https://www.college.police.uk/What-we-do/COVID-19/Documents/What-constitutes-a-reasonable-excuse.pdf>

<sup>16</sup> At the time of writing.

generally, there was very little discussion or consultation about either the details of the rules or the Regulations themselves. Neither a draft nor the final version of the first set of Regulations were considered by the Assembly. In fact, the first set of Regulations were made at 9.15 p.m. on 28 March 2020, laid before the Assembly at 10.00 p.m. on 28 March 2020 and came into force at 11.00 p.m. on the same day.

The eleven amendments to the Regulations were also made, laid and came into force in a similar manner – without consultation, without notice and with (virtually) immediate effect.

### **Content of the Report**

Chapter 1 of this report examines these lockdown rules and the PSNI's implementation in more detail. It also examines what happened during this period in the custody suites (Chapter 2) and also examines the issues that the introduction of Spit and Bite Guards caused during this period (Chapter 3). The report also examines issues that the PSNI faced in sourcing and providing Personal Protective Equipment during this period (Chapter 3). The report concludes with a review of the services provided by the PSNI over this period to those most vulnerable within our society (Chapter 4).

## **CHAPTER 1:**

# **THE HEALTH PROTECTION REGULATIONS AND PSNI'S IMPLEMENTATION**

The Coronavirus spread to the UK in late January 2020 and the virus reached Northern Ireland on 27 February 2020 with the first death recorded as a result of the virus on 19 March. In February, the Health Secretary for England and Wales introduced the first set of rules – the Health Protection (Coronavirus) Regulations 2020 (SI 129) - which came into force on 10 February for England and gave powers for screening and testing.

However, it was the Coronavirus Bill that became a key instrument of control across the UK. The Act that emerged from Parliament was 348 pages long and much of it applies to Northern Ireland and is very detailed in places because it amends many other statutory provisions.<sup>17</sup> The Government published a separate ECHR memorandum on the Bill which purported to explain its assessment of the compatibility of the Bill's provisions with the Convention rights.<sup>18</sup>

The Coronavirus Bill was published by the UK government on 19 March and obtained Royal Assent and became law on 25 March. This was enacted at incredible speed and it was difficult for anyone (except those very directly involved) to understand what it meant. However, in general, the provisions for the general public mirrored the Prime Minister's lockdown "instructions" given on 23 March although they were not the law.<sup>19</sup> There was additional confusion for police officers and public alike because there were differences in the laws and guidance of the four countries of the UK and the Republic of Ireland.<sup>20</sup>

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<sup>17</sup> <http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted>

<sup>18</sup> <https://publications.parliament.uk/pa/bills/cbill/58-01/0122/Memorandum%20to%20the%20Joint%20Committee%20on%20Human%20Rights%20-%20The%20Coronavirus%20Bill%202020.pdf>

<sup>19</sup> 23 March 2020 <https://www.telegraph.co.uk/news/2020/03/23/boris-johnson-announces-uk-lockdown-speech-full/>

<sup>20</sup> For instance, taking exercise provided a reasonable excuse to leave home but this was restricted in Wales to once a day but this restriction did not apply elsewhere.

However, for the purposes of the lockdown rules the legislative trail is even more complicated. Schedule 18 of the Coronavirus Act inserted additional provisions (as Part 1A) into another measure - the Public Health Act (Northern Ireland) 1967. The 1967 Act provided the authorities with general powers to deal with diseases:

*“The 1967 Act is one of the many and diverse laws that make up the field of public health law and is concerned primarily with the notification and prevention of certain infectious diseases. It gives some public bodies unusual powers for dealing with certain dangerous scenarios.”<sup>21</sup>*

The usual procedure for Regulations under this Act requires a draft of the Regulations to be first laid and approved by a resolution of the Assembly. The Regulations are then formally laid and are subject to the negative resolution procedure (that is they take effect immediately and remain the law unless they are successfully challenged in the Assembly).<sup>22</sup> There is, however, an emergency procedure which provides the Department of Health the power to make Regulations “by reason of urgency” without a draft having been laid before, and approved by a resolution of, the Assembly.<sup>23</sup> It is this power that allowed the Department of Health to introduce the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 as a response to the serious and imminent threat to public health.<sup>24</sup>

## **The Health Protection Regulations**

The new key powers were contained in the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020<sup>25</sup> (herein, “the Regulations”) which were made by the Department of Health under section 25 of the Public Health Act

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<sup>21</sup> Minister’s Forward, Review of the Public Health Act (Northern Ireland) 1967: Consultation document, September 2015

<sup>22</sup> Section 25P of the 1967, as amended in March by the Coronavirus Act 2020.

<sup>23</sup> Section 25Q.

<sup>24</sup> See Annex for more details. The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 which are made by the Department of Health under section 25 of the Public Health Act (Northern Ireland) 1967.

<sup>25</sup> available here <https://www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-northern-ireland-Regulations-2020>

(Northern Ireland) 1967 (as amended by the Coronavirus Act).<sup>26</sup> The use of Regulations, rather than primary legislation (a statute), to create such wide ranging restrictions and giving police such wide powers was controversial but also worried many constitutional lawyers who suggested it might be unlawful – ultra vires – because the ‘parent law’, in this case the 1967 Act, did not authorise such wide powers. However, the High Court in London did not accept a challenge to the English Regulations based on these kinds of arguments.<sup>27</sup>

### **Transparency, accessibility and consultation**

The public (and some police officers) can, perhaps, be forgiven for not being clear about what the law is or how it differs from the guidance promoted by the five governments of these jurisdictions.<sup>28</sup> For instance, the Crown Prosecution Service of England and Wales found that every one of the 44 cases charged by police officers under the Coronavirus Act was wrongly charged.<sup>29</sup> Added to this was the substance of the original Regulations which created more uncertainty. For instance, not being clear that travelling for exercise or for one of the other permitted purposes was lawful (and/or whether the time for travelling was proportionate in relation to that purpose).<sup>30</sup>

The first set of Regulations in Northern Ireland were made at 9.15 p.m. on 28 March 2020, laid before the Assembly at 10.00 p.m. on 28 March 2020 and came into force at 11.00 p.m. on the same day. The original basic Regulations were then amended

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<sup>26</sup> There are very similar provisions in England, Scotland and Wales. These provisions are health based and therefore the power to create these powers is devolved. For the specific issues in Northern Ireland see “From special powers to legislating the lockdown: the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020” NILQ Winter 71(4): OA1-OA 19 by Daniel Holder, Committee for the Administration of Justice

<sup>27</sup> Leave for judicial review was refused in R (Dolan and Ors) v Secretary of State for Health and Social Care, [2020] EWHC 1786 (Admin).

<sup>28</sup> Reports on the other jurisdictions include: House of Commons, Home Affairs Select Committee, Home Office preparedness for COVID-19 (Coronavirus) Policing, 15 April 2020; House of Commons Library, Briefing Paper, Policing the coronavirus lockdown, 22 April 2020; and several pieces of advice from the College of Policing and National Police Chiefs’ Council.

<sup>29</sup> <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws> and the CPS is to review every charge, The Times, 2 May 2020.

<sup>30</sup> Letter from the Attorney General to the Chief Constable, 16 April 2020 and letter from CAJ to the PSNI of 22 April 2020.



eleven times with the last set of changes (for the purpose of this report) coming into force on 9 July.<sup>31</sup>

The first amendments came on 24 April, removing the requirement to close burial grounds to members of the public. The second set of amendments also relaxed the rules slightly, including in relation to places of worship, but there were many technical amendments demonstrating that the original drafts were flawed.<sup>32</sup> There were many more amendments which, generally, relaxed the originally very strict rules as the pandemic receded and these can be traced through on the Department of Health's website.<sup>33</sup>

Owing to the fact that the Regulations and their amendments have been made under emergency procedure, they only come to the Committee for debate after coming into force and indeed to the Assembly even later. By 30 June ten sets of amendments to the Regulations had been made, laid and came into force in this manner without consultation, without notice and with (virtually) immediate effect. The immediacy of the amendments clearly presents challenges across society regarding the consistency in which they are understood, interpreted and applied and it appears that the PSNI was in no better position.

At the meeting of the Health Committee on 18 June 2020, consideration was given to the logistical difficulties presented to the PSNI where amendments required police enforcement. When asked about the timeframe for informing the PSNI of incoming changes, the Department of Health's Chief Environmental Health Officer advised;

*"[W]e do share with the PSNI and Councils, information on changes that have been made as soon as possible afterwards, usually the following day if the changes to the legislation were made in the evening."<sup>34</sup>*

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<sup>31</sup> At the time of writing.

<sup>32</sup> 15 May 2020.

<sup>33</sup> available at <https://www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-northern-ireland-Regulations-2020>

<sup>34</sup> Mr Nigel McMahon, Chief Environmental Health Officer, the Department of Health: Committee for Health, meeting on Thursday, 9 July 2020, available at <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=22729&eveID=11974>

PSNI has confirmed that there has been no formal consultation process ahead of the Regulations being tabled or passed during the reporting period. There were however informal contacts, mostly post-event as to the out-workings of the Regulations and what changes or updates might be required and indeed the possible impacts of proposed changes.

One commentator suggests:

*“Among other matters, this brings into focus the use of the ‘emergency procedure’ to make amendments to the Regulations. As set out above, the PHANI 1967 Regulation - making powers have a standard procedure, under section 25P, requiring prior Assembly scrutiny, and an ‘emergency procedure’ under section 25Q whereby ‘by reason of urgency, it is necessary to make the Regulations without a draft being so laid and approved’. To date, however, all amendments to the NI COVID-19 Regulations have relied on the section 25Q emergency procedure. In human rights terms, amendments that actually ease restrictions will raise few issues, however, the difference with the amendment to Regulation 6A was that it extended criminal offences. It is at best questionable whether this was necessary ‘by reason of urgency’ in advance of anti-racism protests, in a context whereby powers to enforce Regulation 6A had not been available for several weeks since its introduction and other large gatherings had taken place.”<sup>35</sup>*

The production of official guidance to explain these important Regulations (and the changes) was essential, but the first guidance available seems only to have been published on 5 June 2020, many weeks after the Regulations came into force and after several sets of amendments. There also did not seem to be any easily available ‘consolidated’ Regulations for many weeks, meaning that understanding the Regulations required home-made cuts and pastes carefully using each set of changes

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<sup>35</sup> Page 14, from special powers to legislating the lockdown: the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland), NILQ Winter 71(4): OA1-OA 19 by Daniel Holder, Committee for the Administration of Justice.

in chronological order to be able to understand what the criminal law actually meant at any particular time.<sup>36</sup>

In fact, the Board itself was so concerned about the difficulty of the public understanding the Regulations and police officers correctly interpreting them that the Chair wrote to the Minister of Health to support the PSNI:

*“...we support the Chief Constable’s request for clarity within the Regulations given the increasing negative public and media challenge to the legality of police actions and the potential damage this could have to public confidence in the service overall.*

*Your Department has primary responsibility for the Regulations. It is thus unequivocal that you have a duty to provide clarity (underpinned by legal advice) as to how Regulation 5 should be interpreted. It is imperative that both the PSNI and the public are provided with clear, comprehensive and unambiguous guidance as to what constitutes **unlawful** behaviour under the Regulations (and in particular Regulations 4, 5 & 6). Only on receipt of the same can the PSNI adequately and lawfully support the Department of Health in what is a public health response to COVID-19.”<sup>37</sup>*

## **RECOMMENDATION 1**

It is a fundamental principle of any democracy that it makes its laws, particularly those creating criminal offences, in an open and transparent manner and elected representatives are consulted in advance. Not surprisingly human rights principles require criminal laws to be clear, precise and understandable by those that have to obey them.

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<sup>36</sup> The up to date version of the amended Regulations was available on the UK Statute Law Data base – not an obvious place for members of the public to go to – and even this could not keep up with the changes as they happened.

<sup>37</sup> Dated 20 April 2020.

The Executive should always consult the Assembly on draft laws that create criminal offences, even if this has to occur after the implementation of those laws in an emergency. Any such drafts should be subject to specific advanced consultation with the PSNI, the Policing Board and the Northern Ireland Human Rights Commission. These principles should also apply to any proposed amendments to the law;

## **RECOMMENDATION 2**

All laws, especially those having a significant effect on peoples' lives or creating crimes, should be accessible and written in a way that they are easy to understand;

## **RECOMMENDATION 3**

Politicians and the Executive should link any key statements on what the public should do (or not do) directly to the guidance on the law and the law itself. Guidance needs to be directly aligned with the law;

## **RECOMMENDATION 4**

Such Regulations and laws should include human rights principles and any guidance should make issues of overlap or contradictions with human rights clear and there should be an accompanying human rights assessment document;

## **RECOMMENDATION 5**

The Department of Health should have a greater role in working with police on policing strategies where laws are designed to protect the health of the community.

## PSNI Practice

The PSNI had a robust internal system for daily briefings and communications on important incidents and changes in the Regulations. Senior officers in the districts also attended briefings at 9am and 9.30am each day (in addition to Northern Ireland wide Gold meetings which were two or three times a week).

The College of Policing, which is the professional body for police officers in England and Wales and provides training, research and guidance for police officers and the National Police Chiefs Council (NPCC) produced guidance for police officers on the new laws.<sup>38</sup> The PSNI sensibly followed this guidance on the new Regulations in Northern Ireland. This guidance recommended an approach based on the four Es:

- i. Engage – officers will initially encourage voluntary compliance;
- ii. Explain – officers will stress the risks to public health and to the NHS;
- iii. Encourage – officers will encourage compliance and emphasise the benefits to the NHS by staying at home, how this can save lives and reduce the risk for more vulnerable people in society; and
- iv. Enforce – if faced with non-compliance, officers will, if necessary and proportionate:
  - Direct those without reasonable excuse to go home, using reasonable force if necessary;
  - Issue a penalty notice;
  - Use prohibition notices to stop public gatherings; and
  - Use existing licensing powers where businesses and organisations fail to comply.

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<sup>38</sup> The PSNI often relies on its expertise, particularly where new laws are brought in across the UK.



In practice, once enforcement was necessary the key power used by the PSNI was the issue of a 'Fixed Penalty Notice" or FPN. The FPN process has been used often in the past for traffic and other non-serious crimes (including anti-social behaviour provisions).

Regulation 9 allows a police officer who reasonably believes that an adult has committed an offence under the Regulations to issue a fixed penalty notice.<sup>39</sup> The person subject to the notice can then either pay a fine of £60 (reduced to £30 for payment within 14 days) or to challenge the offence in the Magistrate's court (within 28 days). The subsequent prosecution then resembles the usual process for the prosecution of a non-serious offence in the court. The payment of the FPN constitutes an admission that the offence was committed and though this will be recorded, it is not a criminal conviction in practice.

Below are extracts taken from the standard FPN issued by PSNI:

*"You have been handed this notice because the issuing officer has reason to believe that you have committed the offence described overleaf.*

*Within 28 days of the date of issue you must either pay the penalty by completing Part A or request the matter be heard by a court by completing Part B...*

*If you do not either pay or request a court hearing within the permitted 28 day period... the sum payable will be automatically increased by 50% and registered against you in your local court for enforcement as a court fine, which if it remains unpaid, may result in the issue of a court warrant...<sup>40</sup>*

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<sup>39</sup> This is a description of the process under the original Regulations although the procedure for breaches subsequent amendments was very similar.

<sup>40</sup> Although many people may ignore this notice, these words are not likely to encourage anyone who believes they are innocent or have a "reasonable excuse" to challenge the notice in court.

*A penalty notice does not result in a criminal conviction or form part of criminal record. However a record will be kept on Police computer systems that will show you as being responsible for committing this offence and may be used for other policing purposes. If you go on to commit another offence this record will be reviewed to help decide how to deal with the matter and it's unlikely you would receive another penalty notice...*

*It may also be disclosed if deemed relevant as part of an enhanced Criminal Records Bureau check or shared for other purposes where deemed relevant and appropriate...*

*Police have statutory powers to disclose information to a third party where it would be in the interests of preventing or detecting crime, for example it can be disclosed in an Anti-Social Behaviour Order (ASBO) hearing if relevant to establish a pattern of behaviour or other court proceedings."*

It has been argued that the FPN process breaches the right to a fair trial (Article 6) because it puts the onus on the subject to challenge the notice, is not clear what the process is and threatens a higher penalty if it is challenged. However, once a challenge to the FPN is issued the case proceeds in the court with all the usual Article 6 provisions.<sup>41</sup> Secondly, the FPN must give "reasonable particulars of the circumstances alleged to constitute the offence". The subject of a FPN does, however, need to assess the risk that if he or she challenges it then there may be a criminal conviction as a result (albeit a non-serious one) and is likely to be given a higher fine and have to pay costs (as well as having to come to court and find lawyer etc.).

However, the PSNI is not obliged to continue the process once a FPN has been issued. Regulation 11 gives the PSNI a discretion, where a fine has not yet been paid, whether or not to issue a "certificate". Once issued, the certificate must be sent to the court and it is this that triggers a demand from the court to the subject to pay the fine (which by this point in the process will be increased to £90). The Regulations do not

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<sup>41</sup> See *Ozturk v Germany* and *Jordon Queen*, the Scottish Court of Session, 22 April 2020.

set out any criteria for the exercise of this discretion by the PSNI, but a person subject to the fine could write to the PSNI asking it not to issue the certificate. However, there is no mention of this alternative process in the notice (see above) and it is not clear whether this has ever been attempted and with what success.

It is therefore very important that officers set out the details of the allegations so that a person receiving an FPN can decide whether to pay or to challenge the notice. However, there are practical difficulties for officers, the notice has to be completed whilst the (unwilling) subject waits around and this can take some 10-15 minutes. Where officers are trying to deal with several people at the same time, some of whom may be becoming agitated, and where others may be milling around, but not being issued with tickets, the process can become very challenging.<sup>42</sup>

The lack of clarity on how the Regulations should be properly interpreted, particularly in relation to travel to undertake permitted activities, see below, meant that on 23 April a new quality control system required officers on the street to check in with a senior officer – the Silver Commander – an officer on duty for the whole of Northern Ireland, before a FPN could be issued.<sup>43</sup> This led to fewer enforcement notices being issued and this quality control measure continued through 30 June and beyond.

Those under 18 years of age cannot be issued with a FPN but instead can be given a Community Resolution Notice (CRN). The PSNI website describes a CRN in this way:

*“It provides a quicker, more victim tailored method of dealing with specific offences than a formal prosecution where a comparatively minor crime has been committed and an agreement (resolution) is reached regarding how the offender can make good the loss, damage or harm caused to the victim.*

*The aims of Community Resolution are to:-*

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<sup>42</sup> Apparently there was also a point early on during the policing of the pandemic when the PSNI discovered that some officers were not providing these details to the subject of FPNs in sufficient detail but the PSNI alerted officers to this.

<sup>43</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/psni-chief-tells-officers-to-seek-approval-before-issuing-coronavirus-fines-39151309.html>

- \*Improve the involvement and quality of service provided to victims by taking account of their views where reasonable and proportionate in the resolution;*
- \*Increase victim satisfaction in policing and criminal justice by providing a comparatively prompt and tailored resolution;*
- \*Provide a proportionate justice disposal for offenders with little or no previous offending history, to reduce the impact on their lives compared to other non-court disposals and encourages them to change their behaviour and not re-offend; and*
- \*Provide officers with a proportionate disposal for offences which are comparatively less serious.”<sup>44</sup>*

As is obvious from this list of objectives, the CRN is victim centred and whilst this approach is very sensible in general, it is not particularly useful when dealing with breaches of the lockdown rules. In practice, there was no follow up but the mere issue of the notice to a young person was believed to be regarded as a warning and in many cases should have been sufficient to resolve the issue.

## **Challenges**

At the time of writing there appears to have been no significant challenges to FPNs in the Magistrate’s court but, because of the pandemic, all cases in the courts had been subject to delays.

The policing of the Regulations have not been without controversy however. Reports in England have included police officers using drone footage, stopping vehicles, road blocks, closing parks and searching shopping trolleys for non-essential items.<sup>45</sup> In Northern Ireland the PSNI have also been subject to considerable criticism.<sup>46</sup>

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<sup>44</sup> [https://www.psnipolice.uk/advice\\_information/community-resolution/](https://www.psnipolice.uk/advice_information/community-resolution/)

<sup>45</sup> House of Commons, Home Affairs Committee, Home Office preparedness for COVID-19 (Coronavirus): Policing, 17 April 2020.

<sup>46</sup> Sam McBride: The police’s made-up Coronavirus law ought to unsettle anyone who understands democracy, Belfast Newsletter, 20 April 2020.

In Northern Ireland one of the first problems concerned the lawfulness of travelling for an essential purpose. In general, the original Regulations made no mention of travelling for exercise etc. and were, as a result, a little confusing. The PSNI took the view that there was therefore a question about the lawfulness of this activity if the travelling was not really an essential component of the reason for leaving home. The Attorney General took the view that the Regulations did not ban travelling to seek exercise – driving or walking to a park and that therefore exercise did not have to start at the garden gate.<sup>47</sup> The Regulations were subsequently amended to include the following:

*“A person who leaves the place where they are living does not do so with reasonable excuse under paragraph (2)(b) [taking exercise] unless any associated travel that is not itself exercise is reasonable, having regard to all of the circumstances including the nature of the exercise to be taken.”<sup>48</sup>*

In April, a Loyalist activist tried to challenge the original Regulations using judicial review, arguing that they were ultra vires the Public Health Act (Northern Ireland) 1967 Act, violated Articles 5 (freedom from arbitrary detention) and Article 8 (right to private life), and that the PSNI’s interpretation on the restriction on travelling was incorrect.<sup>49</sup> It is not clear how far this litigation was taken, but the recent and significant relaxation of the lockdown may have made it more and more artificial.

The PSNI was also subject to litigation by the owners of an off-licence which changed its business model and began instead to make home deliveries. The PSNI prevented the business from operating this service, but the litigation was complicated involving both the Regulations and licensing rules. Eventually the litigation was settled and the home delivery service was re-started.<sup>50</sup>

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<sup>47</sup> Letter to the Chief Constable dated 16 April 2020. See also letter to ACC Todd from CAJ dated 22 April. The National Police Chiefs Council and the College of Policing suggested that “Driving to countryside and walking (where far more time is spent walking than driving)” was likely to be reasonable but “Driving for a prolonged period with only brief exercise” would not be reasonable.

<sup>48</sup> The first set of amendments which came into force on 24 April.

<sup>49</sup> High Court challenge bid against PSNI interpretation of COVID-19 Regulations, Belfast Telegraph, 18 May 2020.

<sup>50</sup> A Belfast pub is today toasting victory..., Irish Post, 31 May 2020.

## **RECOMMENDATION 6**

The PSNI should always initiate quality control mechanisms for urgent and novel laws (particularly those giving officers on the street significant discretion) and especially in urgent cases where there is bound to be a lack of time for officer training;

## **RECOMMENDATION 7**

The PSNI and the Public Prosecution Service should review all of the Coronavirus Regulation cases, both Fixed Penalty Notices and possible prosecutions and ensure that:

- (1) All those that involve peaceful protest are assessed as to their compliance with the Human Rights Act;
- (2) All those where the subject's right to a family life (to leave home, travel, meet family members) was affected to check that any interference was not disproportionate and
- (3) They are still clearly in the public interest, taking into account the fact the criminal laws that may have been breached have never existed as crimes ever before, are not likely to be crimes after this emergency has passed "and, that the defendants are unlikely to commit the same offences again..

Note: It is understood that Fixed Penalty Notices were passed to the courts relatively quickly after they were issued and once that has occurred the PSNI would not have had any discretion to cancel them. This recommendation is particularly important in the first period covered by this review, before the Silver Command quality check procedure was in place.

## **RECOMMENDATION 8**

The PSNI should review its records as far as possible to publish Section 75 statistics of those subject to the additional powers and the equipment that it used during the

lockdown (including figures based on the community background of the people involved).

## Human Rights

**Annex 3** provides detail on the rights affected. There was, however, one gap in the understanding of how the Coronavirus Regulations needed to work and how its very strict rules and the Human Rights Act needed to be reconciled. The relatively absolute restrictions in the Regulations were taken by police officers, leading politicians and many members of the public as the ‘last word’ on the law and on what was or was not allowed. This is not quite accurate, as the Human Rights Act applies despite other legislation, particularly, secondary legislation, such as these Regulations.<sup>51</sup> Members of the public cannot be expected to understand the details of how the Human Rights Act interacts with other legislation, particularly because there was no reference to human rights in the Regulations, even in the general “reasonable excuse” provisions. However, for instance, the right to a private life (leaving home, travelling, visiting others), to celebrate religion, to assemble or protest can only be banned if such restrictions comply with Articles 8, 9, 10 and 11 of the ECHR. These are qualified rights; they can be restricted, but only where a restriction is lawful, legitimate, necessary and proportionate. Any restrictions based on Coronavirus transmission risks must be balanced against those fundamental rights.

The first question that needs to be considered is whether the restrictions are “lawful”. Although, in general, ignorance of the law is no excuse, the criminal law must be accessible:

*“As regards accessibility, the Court verifies whether the criminal “law” on which the impugned conviction was based was sufficiently accessible to the applicant that is to say whether it had been made public...”*

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<sup>51</sup> *RR v Secretary of State for Work and Pensions* [2019] UKSC 52. The Supreme Court found that there is “nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA.”



*An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission"*<sup>52</sup>

Similarly, restrictions on protests (assemblies) must be accessible:

*"The expression "prescribed by law" not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. In particular, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."*<sup>53</sup>

The rule of law is at the heart of the ECHR. No interference with a right protected under the ECHR is permissible unless the citizen is able to ascertain the legal basis for the interference. In the absence of a detailed set of restrictions by the law, any interference, however justified, will violate the Convention. In addition to being formally prescribed by law, the law itself must fulfil the substantive requirement that it has the appropriate 'qualities' to make it compatible with the rule of law.<sup>54</sup> In *Sunday Times v UK*:

*"Firstly, the law must be adequately accessible: the citizens must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct."*<sup>55</sup>

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<sup>52</sup> *Cantoni v. France*, para. 29; *Kafkaris v. Cyprus*, para. 140; and *Del Río Prada v. Spain*, para. 79).

<sup>53</sup> *Djavit An v. Turkey*, para. 65.

<sup>54</sup> *Kopp v Sweden* (1999), paras 55 and 64.

<sup>55</sup> (1979), para 49.

The accessibility rule is intended to counter arbitrary power by providing that a restriction cannot be justified, even if it is authorized in domestic law, unless the applicable law is published in a form accessible to those likely to be affected by it. Internal guidelines from government departments or agencies probably may not fulfil the requirements even if they are published or their content is made known.<sup>56</sup>

The certainty rule is intended to enable individuals likely to be affected by a restriction on their rights to understand the circumstances in which any such restriction may be imposed and to enable such individuals to foresee with a reasonable degree of accuracy the consequences of their actions.<sup>57</sup> Where the state covertly monitors its citizens it is still required to adhere to minimum safeguards to ensure that it does not wield its power arbitrarily.<sup>58</sup>

For instance, in *Gillan and Quinton v UK*, the Court found that the ‘stop and search’ powers under the Terrorism Act 2000, which gave the police extremely broad discretion both to authorise searches and to decide to carry them out, were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse; they were therefore not ‘in accordance with the law’.<sup>59</sup> The degree of certainty required will depend on the facts of the case, but it is clear that the ECHR does not require absolute certainty.

The difficulty with the COVID-19 Regulations is that they were rarely accessible to the general public, changed without notice, did not always align precisely with the statements made by government officials and senior police officers and gave considerable discretion to police officers as to what was a reasonable excuse (and gave the impression that only the activities listed were permissible).

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<sup>56</sup> *Govell v UK* (1999).

<sup>57</sup> *Silver v UK* (1983).

<sup>58</sup> *Weber and Saravia v Germany* (2006).

<sup>59</sup> (2010).

An additional difficulty is that members of the public who got it wrong committed criminal offences and could be arrested or forcibly taken back home. As the Northern Ireland Human Rights NGO stated:

*“As well as the common law principle of legal certainty, Article 7 ECHR (no punishment without law) requires that a criminal offence must be both foreseeable and accessible, and an individual should know from the wording of the relevant provision what acts and omissions will make him or her liable to criminal sanctions. It is essential that any new criminal offences are clear in their wording and consistently communicated so that individuals can understand what behaviour puts them at risk of criminal punishment.”<sup>60</sup>*

#### *Equality, discrimination and reasonable adjustment*

The Regulations also do not deal directly with differences. Particularly when it comes to issues of physical disabilities, people will need different methods of taking exercise and looking after themselves. Some people will have different needs to be with other people or not and will have mental health issues such as agoraphobia or claustrophobia. None of these issues are mentioned in the Regulations or the guidance. It is to be hoped that the good sense of police officers and the four Es approach is the reason that these issues have not led to challenges to the police during the pandemic.

There have, however, been allegations that members of the BAME community were treated differently by the police in connection with the Black Lives Matter protests (see below).

#### *Right to a private life, religion etc.*

It was sensible for the original version of the Regulations to include, not just a list of acceptable reasons for leaving home, but a catch-all discretion of having a reasonable excuse. This should (and did) allow police officers who understood the Regulations to

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<sup>60</sup> See letter to ACC Todd from CAJ dated 22 April.

exercise their discretion and to allow people their “right to a private life” where it was particularly important.

However, the Regulations imposed incredibly restrictive rules on people’s lives, but most people accepted these because they were in the public interest and protected themselves and others.

Similarly, for those who needed to manifest their religion by attending a ceremony or a funeral, adjustments to the strict nature of the Regulations were included or added subsequently.<sup>61</sup> Article 9 provides for a right to manifest a religion which often requires celebrating with others and, particularly, with a religious leader. This is particularly important for people in the context of funerals.<sup>62</sup> Social media and technology will mitigate the restrictions, but the restriction is a harsh one for some people to accept, but in general it is likely to be lawful. However, there are likely to be challenging and difficult cases which will require sensible decisions by police officers taking into account the key human rights principles.

This was also the case for the right to marry (and found a family) which was also curtailed.<sup>63</sup>

There was, of course, an incredibly important justification for the Regulations in general – to “stay home, protect the NHS, save lives” and this is likely to trump most other considerations. Restrictions which are “necessary in a democratic society” designed for a legitimate purpose. It is of course an obvious human right which is a key responsibility of the government and the police – set out in the right to life itself (Article 2). But the key question is why were some activities that increased the risk of transmission permitted – buying furniture or attending funerals (for those who did not attend for religious reasons)<sup>64</sup> – but advocating the importance of some lives (Black

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<sup>61</sup> At least partially complying with Article 9 of the ECHR, the right to religion and belief.

<sup>62</sup> See *Sabanchiyeva and Others v. Russia*, (2013) and *Ploski v. Poland*, (2002).

<sup>63</sup> Article 12 of the ECHR.

<sup>64</sup> Of course, those whose attendance at a funeral is necessary to manifest their religion, are protected by Article 9 of the ECHR.

Lives Matter) and the elimination of discrimination against black and ethnic minorities were not?

## RECOMMENDATION 9

Effective policing and human rights compliance do not have to be in conflict and a sophisticated approach will not constrain proactive and responsive policing or risk undermining the professional judgment of police officers. Despite the excellent processes and procedures within the PSNI to embed human rights into all of its operations, it needs to work even harder, perhaps involving the PSNI lawyers and human rights experts more in its operations policies and take the initiative of consulting the Policing Board on these challenges and become even more transparent about the challenges it faces with implementation. This process will need to include a transparent assessment of the human rights in more detail, including involving alternative strategies at the Gold, Silver and Bronze Commander levels;

### Protests

Everyone has the right to freedom of peaceful assembly and of association.<sup>65</sup> The authorities have a positive duty to take reasonable and appropriate measures to ensure the peaceful conduct of assemblies.<sup>66</sup>

*“Significant restrictions on public gatherings in terms of the numbers participating or the places in which they can occur have been upheld where the aim was to protect public safety or to preserve public order (see, e.g., Chappell v. United Kingdom (dec.), no. 12587/86, 14 July 1987 and Rai, Allmond and “Negotiate Now” v. United Kingdom (dec.), no. 25522/94, 6 April 1995). The dispersal of a gathering has also been found not to be in violation of the right to freedom of assembly where this was to protect the health and safety of those participating in it (see Cisse v. France, no. 51346/99, 9 April 2002). These have,*

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<sup>65</sup> Universal Declaration of Human Rights, Article 20 and ECHR Article 11.

<sup>66</sup> Kudrevicius v Lithuania (2015).

*however, been cases concerned with discrete events and not restrictions or even total bans that are applicable to gatherings occurring in a large part, or even the whole, of a State's territory.*

*Nonetheless, the Court has accepted that a general ban on demonstrations can be justified if (a) there is a real danger of these resulting in disorder which cannot be prevented by other less stringent measures and (b) the disadvantage of the ban's impact on demonstrations which do not by themselves constitute a danger to public order is clearly outweighed by the security considerations invoked to justify it (see *Lashmankin and Others v. Russia*, no. 57818/09, 7 February 2017, at para. 434). Similar considerations could also be invoked where gatherings in public of any size would generally pose a real risk of facilitating the spread of infection – even if some might not – and thus afford a justification for the resulting interference with political, religious or social gatherings that are protected by Articles 11, 9 and 8 ECHR respectively.*

*However, material considerations for determining whether or not the imposition of particular restrictions on gatherings for more than a short period of time is a proportionate response would not only be the continued duration of the threat of infection spreading but also whether this would lead to the complete suppression of rights that are essential foundations for a democratic society.”<sup>67</sup>*

In the context of the provisions of the Regulations a key issue is whether the event could be held without creating a significant danger of the transmission of the virus and whether any risk is proportionate (particularly when compared to the other permitted activities). This will be important if the organisers of the event intend (and are likely to succeed with) measures designed to reduce transmission to a minimum, particularly, the use of masks, social-distancing, etc.

In addition to these general issues there were some particular problems. For instance, “gathering” outside became a crime when the Regulations came into force but the

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<sup>67</sup> Jeremy McBride

Northern Ireland Regulations did not define what a gathering meant.<sup>68</sup> People were clear generally about the importance of social distancing – being at least two metres apart from others – despite that generally not being part of the law.<sup>69</sup>

### *Funerals and other gatherings*

Before focusing on the protests it is important to put these in to context. Questions obviously arise about whether the following are gatherings and were illegal:

- Clapping on the streets for the NHS;
- Queuing outside supermarkets;
- The hundreds “gathered” outside IKEA in Belfast when it opened;
- Crowded beaches or parks;
- Outdoor films or music concerts;
- Large funerals; and
- A socially-distanced protest.

Whether or not these are gatherings for the purpose of the Regulations or not they are obviously events where transmission of the virus is likely to occur. Irrespective of the approach of those involved in organising the events, travel to and from them will provide opportunities for close contact (including for accidental contact). As it is inevitable that there will be such gatherings logic would suggest that the greater the importance of the event the less likely it should be banned or outlawed either in the Regulations or by the police in enforcing those regulations. However different people will order the above list in different ways – having their own personal priorities. However it is not obvious going to a crowded beach is more important than attending an international protest to campaign for an end to racism in the police and to reduce

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<sup>68</sup> In England the Regulations (from 1 June at least) defined a gathering as “when two or more people are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other.”

<sup>69</sup> But see the introduction in Regulation 4A inserted by [The Health Protection \(Coronavirus, Restrictions\) \(Amendment\) Regulations \(Northern Ireland\) 2020 \(revoked\) \(S.R. 2020/71\)](#), advising that all reasonable measures should be taken to ensure a distance of at least two metres is maintained between every person <https://www.legislation.gov.uk/nisr/2020/55/regulation/4A/2020-04-24>



the disproportionate number of members of the BAME community members who die following interactions with police officers. Freedom of assembly and expression are fundamental democratic rights.

The relatives and friends of the deceased will, however, also have very important reasons to attend funerals, including to celebrate the life and achievements of the person who has died (and the manifestation of religion is itself protected by Article 9 of the ECHR). However, whilst the investigation of the PSNI's apparent inconsistency in enforcement between the Black Lives Matter protests and the large numbers attending some funerals is beyond the scope of this report, equally it cannot be ignored. It also should be noted that the Police Ombudsman's investigation only deals with inconsistency in relation to specific protests and does not include the policing of, for instance, large funerals.

This report attempts to assess the actions of the PSNI in restricting human rights rather than trying to investigate the cases when they allowed the events to occur (and where there were no breaches of human rights).<sup>70</sup> This approach is also bolstered by the fact that, at least in the case of the Funeral of Bobby Storey, there is an investigation of the PSNI by Deputy Chief Constable Mark Webster from Cumbria Police Service.

### *Black Lives Matter*

The recording of the death of George Floyd in the United States involving police officers was a very significant event and led to significant protests in the United States and an explosion of Black Lives Matter protests around the world. There were protests in the UK and in Northern Ireland, particularly in the first week of June. Larger protests were planned in five locations across Northern Ireland for 6 June. The PSNI, having the responsibility for enforcing the lockdown, contacted the organisers and tried to persuade them to call off the protests. This was partly

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<sup>70</sup> Obviously, the restrictions on gatherings were designed to protect the public and to ensure the right to life, Article 2 of the ECHR.

“successful” and only the protests in Derry/Londonderry and Belfast went ahead on that Saturday 6 June.

The responsibility of the PSNI was both to assist the Department of Health to protect lives, but also to support freedom of assembly and freedom of expression. There were obvious practical problems in resolving this conflict. Social distancing at the protest was a key solution, but how could this maintained if hundreds of people turned up – and once the protests were announced on social media – the organisers could not restrict the numbers that tried to join the protest. This was a practical policing problem and it is not a breach of the protesters’ human rights for the PSNI to try to restrict numbers to allow social distancing, nor would it be for the PSNI to use the first three Es to discourage others once the numbers attending were too large. With the benefit of hindsight (and had it been possible to predict the numbers in advance) other venues might have been chosen which might have allowed greater social distancing.

However, was it disproportionate to issue FPNs to those who expected to be able to social distance themselves or to prosecute those organisers who took genuine steps in the planning the event to ensure social distancing?

It needs to be remembered that at the start of June the R rate was high and the number of available resources in hospital was low. Politicians of the all the major parties and Ministers did try to encourage people to stay at home and not to attend the protests.

There were reports in the media that PSNI actually tried to prevent the organisers facilitating social distancing<sup>71</sup> and the exercise of enforcement powers for offences under the Regulations with reportedly 70 or so FPNs in Derry/Londonderry, but fewer in Belfast. It has been suggested that the difference in the number of FPNs may be as a result of a different approach by officers or a different kind of relationship between the police and the local community. It was also alleged that Black and Minority Ethnic protesters were subject to disproportionate policing.

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<sup>71</sup> CAJ and Amnesty International UK Joint Briefing note, June 2020.

Marija Stuke, on behalf of the North West Migrants Forum, wrote to the Board on 15 June 2020 stating that they joined other groups to organise the events in Derry/Londonderry and Belfast:

*“In the run up to Saturday 6 June 2020, we absolutely recognised the need for safety and put public health at the forefront of how we organised and communicated about the rally with messaging focused on how to stay safe and to protect public health as has been demonstrated by many testimonies of people attending and by photographic and other accounts, which we can share with you...”*

*“On the 3 June and the 5 June we pleaded with the PSNI to be a partner – to work with us to ensure the safety of the event and to show solidarity with us against racism, as was done by other police forces across the UK in response to Black Lives Matter protests...”*

*“The PSNI interventions hampered attempts to ensure social distancing at the event by disrupting stewards and in many cases standing closer than two meters from participants...”*

*“PSNI actions were discriminatory: they targeted people from ethnic minorities, young people women and families. These actions left participants – who were exercising their fundamental right to freedom of assembly – feeling intimidated and threatened. We firmly believe that the PSNI’s actions undermined our trust and confidence in the police and revealed to us that institutional racism does indeed exist in our justice system.”*

Another person who attended the Belfast event, was reported as saying:

*“I was invited to speak because the community needed a person who could articulate the feelings of the community – I am used to speaking to large groups of people. The rally was well organised and the volunteers were really sensitive*

*to what needed to be done in terms of respecting people's health and the Regulations."*<sup>72</sup>

He was interviewed in Musgrave police station as a volunteer but under caution. His solicitor stated that he was interviewed:

*"...in relation to the aiding, abetting and the procuring or counselling on the commission of an offence. The breach in question is the coronavirus Regulations. What police are saying is that by speaking at the protest he has kept people there in breach of the coronavirus Regulations..."*

*"My client went to both protests alone. He maintained distancing on both occasions, and in our view did not breach any Regulations."*<sup>73</sup>

At the time of writing decisions on whether or not to take further legal action against the organisers is still being considered.

The Ethnic Minority Police Association of the PSNI also believe that the PSNI adopted the wrong approach to the protests. The Association set out their position directly on two occasions to the Chief Constable in advance of the 6 June, concerned that the PSNI would be missing an opportunity to collaborate with the organisers and the BAME community of Northern Ireland more generally. This was a little ironic since there was evidence that the virus is more dangerous for BAME members, yet they were willing to take on the risk because the issue was so important to them. The Association believes that the protests on the 6 June were the largest ever gatherings in support of the BAME community in Northern Ireland. It appears that PSNI also missed an opportunity in failing to ensure that a representative from the Association was part of the Gold group on the day as they were willing to take part.

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<sup>72</sup> Irish News, 31 July 2020.

<sup>73</sup> Belfast Telegraph, 31 July 2020.

The Association, which has good connections with BAME communities outside the PSNI were “inundated” with calls and texts on the 6 June itself complaining about the policing approach. These were relayed to the Chief Constable in a third call the day after the protests. However, the PSNI did set up a meeting with BAME community representatives on the Tuesday after the event and involved the Association. 27 people attended, some of whom were organisers of the protest events or were people who had attended them, including at least one person cautioned by the police a few days earlier.

It is alleged that although in that meeting it was suggested that a BAME Independent Advisory Group be set up, the PSNI subsequently rejected this proposal because those attending were perhaps “not representative of the community”. In fact, many of those attending stated that they did not want to continue to work with the PSNI until the PSNI had made a public apology about its approach to the protests and the Fixed Penalty Notices and threatened prosecutions were dropped. The Association noted that the previous instruction to officers that no FPNs should be issued without consent from senior officers did not apply during these protests.

The PSNI however argue that the BLM protests held a couple of days before 6 June raised considerable transmission risks, that it was impossible, given the numbers, for social distancing to be ensured even with the lower numbers attending, not everyone wore masks and the police had to step in to help prevent transmission. It is understood, however, that no FPNs were issued at the time. The PSNI argue that it was this experience that led them to assess that the five protests planned for 6 June would be a significant transmission risk, especially given the social messaging circulating in the run up to that Saturday. There seems to be evidence that the PSNI’s actions, both in the days before and on the day itself, reduced numbers attending considerably.<sup>74</sup> Was the consequence that transmission of the virus was also reduced and if so, what was the balance between the ban on the fundamental right to protest on such an important issue (and ironically raising directly the issue of the right to life and policing practices) and the right to life protected by reducing contacts?

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<sup>74</sup> See interpretation of Article 2 implications in Annex 3

## Operational Order

There was a PSNI Operational Order “Day of Solidarity – Justice for George Floyd” for the protest in Belfast on 6 June. This had as its core objective:

*“The core objective of the policing operation is to keep people safe by policing with the community and in line with our responsibilities as set out on the ECHR, Section 32 Police (NI) Act 2000 and the PSNI Code of Ethics. This has a wider remit and import due to the current pandemic the Health Protection (Coronavirus restrictions) Regulations 2020.”*

Whilst it is important to see the reference to the ECHR, the core objective should have also included what was actually included as the 9<sup>th</sup> Strategic Objective:

*“To facilitate peaceful protest in accordance with Articles 9, 10 & 11 of the European Convention of Human Rights and provide a lawful and proportionate response to any protest, facilitating the needs and rights of protesters whilst balancing their rights with those of the wider community impacted by the protest activity.”*

The right to protest was further marginalised by the 6 objective

*“To maximise engagement with attendees en route to and present at the event to discourage their continued presence at the event due to the current COVID-19 pandemic and potential offences under The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (as amended).”*

The Preferred Outcome set out in the Order was that the events “do not take place.”

Obviously the PSNI have an essential duty to keep people safe and this is confirmed by the duty in Article 2 of the ECHR to protect the right to life. However, although this duty was initially significantly limited:

*“...it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”<sup>75</sup>*

The duty is now, however, wider and can encompass to members of the public who might be at risk – where that risk “may reasonably be anticipated.”<sup>76</sup>

*“What makes the COVID-19 pandemic particularly difficult in this regard is that the response can never be a localised one and indeed cooperation beyond frontiers is undoubtedly essential. In addition, while there could be responsibility for failure to take some coercive measures to restrain behaviour which puts the life and physical integrity of others at risk – such as by ignoring a requirement for social distancing – there will undoubtedly be limits as to the extent to which this is feasible when compared with behaviour by identifiable individuals disrupting the exercise by others of rights and freedoms under the Convention (cf *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015).”<sup>77</sup>*

### **Operational Order: Derry/Londonderry**

The Silver Tactical Plan for the day stated:

*“Previous protest events were held in Belfast on Sunday 31 May 2020 at Writer’s Square and on Monday 1 June 2020 and on Wednesday 3 June 2020 at Belfast City Hall. The event on 3 June attracted a crowd of approximately 1200 persons, which was unexpected to both the organisers and police resulting in a significant breach of Regulation 6 of The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (as amended).”*

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<sup>75</sup> *Osman v UK* (1998), para.116

<sup>76</sup> *Mastromatteo v Italy* (2002), paras. 72-77.

<sup>77</sup> Jeremy McBride <http://echrblog.blogspot.com/2020/03/an-analysis-of-COVID-19-responses-and.html>



Again it needs to be noted that there is no detailed reference to the right to protest here, Articles 10 or 11 of the European Convention of Human Rights or the Human Rights Act.<sup>78</sup> There is also nothing which would suggest that the Regulations are to be interpreted in line with human rights or that a protest that followed social distancing rules and took other protective measures might be lawful and that the PSNI had a positive duty to protect the right to protest.<sup>79</sup>

*“Organiser encourages participants to observe social distancing and bring PPE. It is believed to date that approximately 870 persons have expressed an interest in attending.”*

*“...advertised on Facebook as follows:*

*“The NORTH WEST MIGRANTS FORUM have posted a statement in relation to the planned event in GUILDHALL SQUARE on 06/06/2020. It states:- We are aware of the concerns raised around the "Black Lives Matter" rally that took place in Belfast earlier this week.*

*With this in mind we want to reassure the public of the steps and precautions we are taking to fully protect the wellbeing and safety of everyone in attendance at our peaceful rally on Saturday 6th June at the Guildhall Square....we have received numerous donations of PPE, and over 500 new bottles of hand sanitiser which will be made available for attendees to make use of on the day.*

*Our team of volunteer stewards currently standing at 45, will also be in place to ensure that everyone adheres to the rules of social distancing and there will be two meter markings displayed on the ground.....*

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<sup>78</sup> Though later the document does note: “In discharging our obligations above we will do so in line with the European Convention on Human Rights and within the framework of Legality, Necessity and Proportionality, with cognisance to the current Public Health Risks associated with the Coronavirus C-19 Pandemic and associated Health Protection Regulations.”

<sup>79</sup> There is a similar absence in the Bronze Deployment Plan.

*...Delighted that the Derry Trades Union Council are supporting the Socially Distanced Day of Solidarity tomorrow and they will also provide us with additional volunteers to ensure social distancing at the event. "*

The PSNI's Bronze Tactical Deployment Plan:

*"At time of writing, there are around 850 people indicating they will attend the protest on facebook. The protest is to commence at 15:00 hours and end at 17:00 hours on Saturday 6<sup>th</sup> June 2020. Police have engaged with the organiser, who says they will have upwards of 40 volunteers to assist with ensuring those in attendance comply with social distancing and Regulation 6 of the Health Protection Regulations around gatherings of no more than six persons. The organiser has stated that they will have PPE and hand sanitizer to hand out to those in attendance and that they intend to map out Guildhall Square to ensure social distancing. The organiser has no idea of how many people will be in attendance and stated she would be happy with 300 to 500, but there may be 1000 and she would not want more than that. On Thursday 4<sup>th</sup> June, it appeared there were around 500 indicating attendance on facebook. As of Friday 5<sup>th</sup> June, this has grown to 850. Engagement with the organiser today was not successful in respect of asking her to call the protest off and she insists they will be able to comply with Health Protection regulations."*

Some stakeholders from the Derry/Londonderry community and some political representatives commented that the police actions themselves may have contributed significantly to the risk of transmission by, without face masks, getting close to protesters, telling them to leave and spending time in close proximity collecting their details and issuing FPNs. They also commented that, because protesters were trying to social distance, it was easy for police officers to move from one to another issuing the FPNs.

Overall this seems to be a missed opportunity for the PSNI to show a positive approach to the right to assembly and expression and, one not contaminated by the usual tit for tact attacks on them which, all too often, originate from the leaders of one community or another. The irony of the actions of the police in preventing a protest which concerned unlawful and violent actions by police officers is not lost on those that tried to attend or their many supporters.

It might be thought that this detailed deconstruction of these Orders is mere pedantry, but it is aligned with the comments that participants made about the approach of the PSNI on the day. It is likely that many officers will have communicated this one primary objective even more robustly to those trying to attend the event and was likely to have failed to include any of the ECHR caveats.

CCTV and body worn videos provided by the PSNI from the two events on 6 June reflect the absence of any careful consideration of the right to protest. Protesters who raised their rights were told that the Regulations were the law and/or that Article 2 (the right to life) trumped their rights to freedom of assembly and expression. None of the police officers in the clips viewed appeared to consider the delicate balance required by the ECHR or the attempts by the protesters to obey the social distancing guidance and instead seemed to follow the approach dictated by senior officers in advance.

Furthermore, the approach sent the wrong message to protesters and damaged the reputation of the PSNI and the confidence of some members of the public. Whatever the rights and wrongs of going ahead with the protests and the difficulty of social distancing given the transmission rates for the virus at the time, this approach was not lawful.<sup>80</sup>

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<sup>80</sup> It is understood that there may be some five applications for judicial review from those involved pending, ultimately the courts will have to decide whether the PSNI took the correct approach in law.

It was also not the approach taken by other police services, for instance, in London.<sup>81</sup> The Metropolitan Police was careful to ensure that senior officers clearly supported the Black Lives Matter movement<sup>82</sup> and few enforcement actions were taken.<sup>83</sup>

This section has raised questions about the lawfulness of the PSNI's actions but most human rights judgements also raise ethical issues and many people will have their own assessment of the balance between the right to protest and the wider public interest. A court is likely to take into account the urgent nature of the protests and any possible alternative ways of assembling that do not involve large crowds or the possibilities of using media to get the message out. On the other hand a court will also want to see evidence that this difficult balancing exercise was carried out by the PSNI and was regularly reviewed during the run up to the 6 June and during the event. In the absence of this evidence a court might rule that the actions of PSNI were unlawful.

In practice, the issue has been resolved for the future because new Regulations have important exemptions and now the ban on gatherings of more than thirty people:

*“...shall not apply to a gathering which is organised or operated for cultural, entertainment, recreational, outdoor sports, social, community, educational, work, legal, religious or political purposes and which fulfils the conditions in paragraph (4).*

*(4) The conditions referred to in paragraph (3) are that the person responsible for organising or operating the gathering—*

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<sup>81</sup> See the following link for pictures of the protest in London <https://metro.co.uk/2020/06/06/10-police-officers-injured-clashes-black-lives-matter-protest-12815320/>

<sup>82</sup> See the statement from the Assistant Commissioner <http://news.met.police.uk/news/message-from-assistant-commissioner-neil-basu-404272>

<sup>83</sup> The Met Police statement said: "Officers engaged with those taking part, and on the whole the demonstration passed without event, and only a small number of arrests were made."

<https://www.mylondon.news/news/zone-1-news/metropolitan-police-issue-statement-black-18376521>

*(a) has carried out a risk assessment which meets the requirements of the Management of Health and Safety at Work Regulations (Northern Ireland) 2000(b), whether or not that person is subject to those Regulations; and*

*(b) takes all reasonable measures to limit the risk of transmission of the coronavirus, including implementing the preventive and protective measures identified in the risk assessment undertaken in accordance with sub-paragraph (a) and complying with any relevant guidance issued by a Northern Ireland Department.”<sup>84</sup>*

The allegations that the Black Lives Matter protests were dealt with by the PSNI in a different manner than other gatherings is however, a serious one.<sup>85</sup> These issues are not dealt with in more detail in this report because the Police Ombudsman of Northern Ireland has used a special power under section 60A of the Police (Northern Ireland) Act 1998 to carry out an investigation into these events:

- (1) The Ombudsman may investigate a current practice or policy of the police if—*
- (a) the practice or policy comes to his attention under this Part, and*
  - (b) he has reason to believe that it would be in the public interest to investigate the practice or policy.’*

The investigation began following complaints from members of the public who had attended Black Lives Matter protests.

The Ombudsman announced:

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<sup>84</sup> The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020. This came into force on 23 July 2020 available at <https://www.legislation.gov.uk/nisr/2020/150/contents>

<sup>85</sup> Belfast police face hypocrisy claims for not fining cenotaph protesters over breaches of coronavirus rules, 15 June 2020.

*“There has been particular concern about how consistent police were in their issuing of Fixed Penalty Notices, including suggestions of discriminatory practice.*

*It is in the public interest that there be an independent assessment as to whether the associated police policy was applied consistently,”*

The investigation is looking at the policy and guidelines put in place prior to these events by the police for their part in enforcing the COVID-19 Public Health Regulations by way of issuing Fixed Penalty Notices. It is seeking to determine if there were any modifications to this policy, and if so, why. It is also considering how effective police were in communicating this policy to their officers. The events which are being considered during the investigation are:

- The Black Lives Matter protests at Customs House Square in Belfast and at Guildhall Square in Derry/Londonderry on 6 June;
- The Black Lives Matter protests at Writers’ Square in Belfast on 31 May, and at Belfast City Hall on 1 and 3 June; and
- The Protect our Monuments event at Belfast City Hall on 13 June.<sup>86</sup>

#### *Regulation Changes on 5 June - the day before the major protests*

As discussed in Chapter 1, the Health Protection Regulations and subsequent amendments to them have been made by the Department of Health under the emergency procedure in the Public Health Act (Northern Ireland) 1967.<sup>87</sup> The original Regulations were made on the 28 March and restricted ‘gatherings’ to two people and breaches were subject to the enforcement powers in Regulation 7 and 8.<sup>88</sup> On 19 May

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<sup>86</sup> <https://www.policeombudsman.org/Media-Releases/2020/Police-Ombudsman’s-Office-outlines-focus-of-invest>

<sup>87</sup> Section 25Q.

<sup>88</sup> Regulation 7, The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (revoked) <https://www.legislation.gov.uk/nisr/2020/55/regulation/7/2020-04-24>  
Regulation 8, The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (revoked) <https://www.legislation.gov.uk/nisr/2020/55/regulation/8/2020-04-24>

a third set of amendments were made to the Regulations and a new Regulation 6A was added allowing outdoor gatherings of up to six people.<sup>89</sup> However, no amendment was made to the enforcement part of the Regulations to cover this new provision. This “gap” was not corrected on 21 May by the fourth set of amendments to the Regulations. However, the emergency procedure was used again for the fifth set of amendments made on 5 June and this gap was corrected and the correction came into force on the same day.<sup>90</sup>

It has been suggested that, perhaps, the provision was fast-tracked specifically for the Black Lives Matter protests. It has also been suggested that:

*“Participants in the anti-racism protests on 6 June are also far more likely to have heard the pronouncements of senior Ministers in the UK Government in relation to Black Lives Matter protests than have found any of the above information. Even in the aftermath of protests the UK Prime Minister Boris Johnson tweeted the Government line that “People have a right to protest peacefully and while observing social distancing.”<sup>91</sup>*

The allegations were however rejected by Gordon Lyons, a Junior Minister in the Executive Office. He told MLAs that there was no conspiracy and there was a drafting error in the third set of amendments to the Regulations which meant that it was not an offence to breach the restriction in Regulation 6A relating to outdoor gatherings of up to six people. The omission was noticed and corrected the same day Friday 5 June. He stated:

*“I understand that the amendments had the effect of putting the PSNI in the position that they thought they had already been in with regard to Regulation*

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<sup>89</sup> Regulation 6A inserted (19.05.2020 at 11.00pm) by The Health Protection (Coronavirus, Restrictions) (Amendment No. 3) Regulations (Northern Ireland) 2020 (S.R. 2020/84) <https://www.legislation.gov.uk/nisr/2020/55/regulation/6A/2020-05-19#commentary-c24048181>

<sup>90</sup> Other changes made by these amendments did not come into force until two days later.

<sup>91</sup> CAJ and Amnesty International Joint Briefing Note, June 2020.



*6A from the evening of 19 May, since they were unaware of the drafting error until it was drawn to their attention on the afternoon of 5 June.”<sup>92</sup>*

However Committee on the Administration of Justice (CAJ) and Amnesty International (AI) in their briefing, question why most of the changes made by fifth amendments designed to come into force on Sunday 7 at 11pm, but the enforcement powers gap correction to come almost immediately - at 11pm on Friday 5, the same day. Without accepting that there was any conspiracy, the lack of any democratic process, transparency, consultation or publicity for this changing of the criminal law cannot really be justified.

It should be noted however that the original Regulation 6 on “gatherings” had not been repealed at this stage and that therefore the PSNI were already entitled to use this as the basis for their enforcement powers (as set out in Regulations 7, 8 and 9).<sup>93</sup>

Fortunately, it is understood that, in any event, no FPNs were issued during this 17 day “gap”.

## **RECOMMENDATION 10**

The PSNI should report to the Board on any lessons learnt from the apparent inconsistency in approach to the enforcement of all large gatherings of people during April, May and June 2020;

## **RECOMMENDATION 11**

PSNI should hold discussions with the organisers of the Black Lives Matter protests on future co-operation to ensure peaceful protests are facilitated and that both sides understand the positive obligations of the police and the key role of the organisers;

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<sup>92</sup> Mr Gordon Lyons, Junior Minister, the Executive Office: Official Report: Tuesday 16 June 2020 <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2020/06/16&docID=302204>

<sup>93</sup> Subject, of course, to the wider issue of compliance with the Human Rights Act, as discussed above.

## **RECOMMENDATION 12**

It may also be useful for the PSNI to create an Independent Advisory Group on protests and to co-op representatives of those organisers (this IAG should not deal the traditional challenges and debates surrounding parades and protests in Northern Ireland which are the focus of many other forums and processes) ;

## **RECOMMENDATION 13**

The PSNI should hold a seminar with OPONI, the Northern Ireland Human Rights Commission, human rights NGOs and the Policing Board to assist them with ensuring a consistent approach to all protests;

## **RECOMMENDATION 14**

The Police Ombudsman is investigating a number of protests and similar events and will consider whether there was any discrimination in relation to the treatment of individuals in the enforcement of the Regulations at the Black Lives Matter protests. The Human Rights Advisor will consider her report once published, whether the Board should support her recommendations and whether any further investigations are needed.

## **CHAPTER 2:**

### **MANAGEMENT OF CUSTODY**

Police Custody suites are an area of significant risk for the PSNI both at a corporate and individual level. Managing and caring for detainees, some of whom will be out of control and in need of protection, often from themselves, creates constant challenges for those working within the custody environment. There is no doubt that these challenges increased for all involved when the pandemic was declared. In reviewing how Police Custody was managed during this time and the treatment of suspects and detainees the following key areas were assessed: Custody procedures in place including dealing with COVID-19 detainees; procedures to undertake interviews with detainees; healthcare provision in custody; and the operation of the Independent Custody Visiting Scheme during this time. Statistics relating to custody from both PSNI and the Board have also been provided from January to June for 2020 and 2019 to allow year on year comparisons.

To effectively assess these key areas PSNI provided all relevant documentation and interviews were held with key PSNI personnel within the Custody work area including ACC with responsibility for Custody, District Commander Belfast, Head of Custody Healthcare and Reducing Offending unit and PSNI lead on Custody. Independent Custody Visitors (ICVs) and Independent Community Observers (ICOs) also had the opportunity to contribute to the review through the completion of a questionnaire and participation in an online focus group.

#### **PSNI COVID-19 Operational Custody Plan and Custody Procedures**

PSNI advised that, from the start of 2020, COVID-19 was identified as a challenge and formed a weekly agenda item at custody team meetings in order to establish how it would be managed locally and nationally. The Custody Silver Plan was drawn up by the end of February 2020. From March 2020, the custody team fed into the PSNI Senior Executive Team's daily COVID-19 Response meetings, often twice daily, to ensure there was a link to frontline officers.

In terms of developing a custody-specific response, PSNI considered staffing; custody estates; equipment; booking in procedure; and healthcare provision. Developments to the response were primarily reacting to the national and Regulation changes. A PSNI COVID-19 Operational Custody Plan was drawn up on 18 March 2020 which outlined infection control and other general advice for those involved in investigating, receiving and caring for detained persons confirmed or suspected with COVID-19.

PSNI made the decision to reduce the number of operational custody suites at the start of the pandemic. The four suites that remained open were Musgrave, Lurgan, Omagh and Strand Road. A standalone COVID-19 wing was also set up in the top floor of Musgrave (TACT facility – 20 cells) as it had an embedded nurse-led healthcare team and 24hr cleaning. All officers and custody staff who physically interact with symptomatic detainees are required to wear full Personal Protective Equipment (PPE), comprising a body suit, face shield, respirator mask, glasses and gloves. Staff are also required to have detainees wear PPE when out of their cells.

Where there was a need to arrest, PSNI advised of additional safeguards implemented within the custody process in order to minimise the risk, for example, where possible, Custody Detainee Officers (CDOs) were not expected to take fingerprints/DNA from every detainee in order to minimise contact – including instances where the detainee is frequently detained with an existing record and if the biometric data would not have been necessary to confirm involvement in that particular incident etc. Another key change was that the Prison Service provided 12 Prisoner Escort Court Courier Service (PECCS) staff to assist with court arrangements which are now happening in custody suites. In the early stages, obtaining PPE was a challenge but this has since been overcome.

In relation to cell insertion and extraction Combined Operational Training (COT) produced two demonstration videos. One demonstrates how a cell extraction is performed for both a compliant person, who is confirmed or suspected to have COVID-19 in custody; the other shows tactics in dealing with a violent or deranged person who is confirmed or suspected to have COVID-19 in custody.

## **Revisions to the COVID-19 Operational Custody Plan / Custody Procedures**

The Operational Custody Plan was constantly being revised in the earlier stages of the pandemic which reflected the fast-paced changing environment the police were now operating within. These revisions were mainly due to updated medical guidance and through consultation with the Belfast Health and Social Care Trust (BHSCT) and stakeholder discussion. The focus of these amendments was primarily concerning PPE. Guidance on use of sporks in cells was also revised in line with medical guidance. They initially had to be disposed of and this policy changed to allow these items to be washed in a dishwasher and reused.

At the start of the lockdown period there was a huge reduction in arrests being taken to custody. There was also a significant decrease in normal police business which resulted in availability of Tactical Support Groups (TSGs). A decision was made to have a TSG with appropriate PPE remain within Musgrave COVID-19 Suite (Block D) to deal with non-compliant detainees. The number of detainees with suspected COVID-19 was much lower than the PSNI had planned for and as the vast majority of those detainees turned out to be compliant. Based on this the need for a full sub unit of TSG in the Custody Suite no longer existed and a decision was made that any non-compliant detainees could be dealt with by the COVID-19 arrest team comprising of officers from District Support Groups (DSGs) who had the skills and training to handle non-compliant detainees.

The number of operational suites was also regularly reviewed during this time period resulting in Antrim suite reopening on 21 April 2020 increasing the number of operational suites to five. Coleraine reopened on 19 May 2020 while Dungannon custody became operational on 8 June 2020 increasing the number to seven.

While the COVID-19 Operational Custody Plan formed the basis of the PSNI response, as time progressed more detailed procedures and guidance for staff were made available on 'Point', the PSNI intranet. A comprehensive COVID-19 site was constructed and includes a detailed section on Operational Guidance main topics

being: COVID-19 Related Police Powers; Guidance for first Responders; PPE; and Decontamination.

Statistics show that 11,032 detainees were held in custody during January to June which compares to 12,969 during the same period in 2019. This is a 14.9% decrease.

### **Procedures to carry out interviews with Detainees**

A key and ongoing challenge in Custody is the ability to interview detainees. Operational guidance advised that interviews should be carried out via booklet interviews through the door of the cell in order to minimise contact. However, if the interview was likely to be a protracted process then the detainee will be placed in the largest interview room and PPE should be worn by staff. To facilitate solicitors, PSNI installed WiFi in all 7 suites that are now operational and ensured they were able to facilitate Live Links, a video system to allow live communications / interviews between detainees, solicitors and police officers. However, when PSNI liaised with the Law Society and shared a draft protocol (similar to the one agreed in England and Wales), the Law Society would not sign up to it. Following a meeting with the Law Society, the legal profession have indicated a greater willingness to attend Designated stations that are equipped with interview rooms that cater for social distancing and have appropriate PPE or have remote interviews via video conferencing facility. Specific guidance for Police Officer and Police Staff has also been issued in relation to PACE 10 voluntary interviews. PSNI advised that they remain in dialogue with the Law Society despite no formal agreement having been reached. The Board has also recently written to the Law Society to request its views on any concerns or challenges around solicitors entering custody suites and is currently awaiting a response.

### **Court Hearings**

To reduce the risk of transmitting COVID-19 to detainees, court staff and PECCS, iPads and iPhones were introduced to the suites to allow courts to be held virtually through Sightlink technology. This technology has been routinely used to enable defendants to appear for first remand in Magistrate's court via live links from PSNI

custody suites. It has also enabled legal representatives, parties and witnesses to attend hearings visually.

In relation to bail recognizance all Court Operations staff were given procedures to follow, to be applied from Friday 27 March, for those defendants appearing by video link or telephone from PSNI custody suites to the court.

As part of the process if a detainee is granted bail, court require any bail address to be checked and accepted by police. In addition there are rare occasions where sureties are required. The detainee will then sign the bail paperwork in front of the Court Clerk (via video link) however courts wait until the end of the court day to carry out this process. This, along with time taken to check bail addresses results in detainees remaining in custody, as opposed to the court cells, until then.

PSNI is engaged in ongoing discussions with the judiciary, court staff and PECCS to smooth this process to reduce the time detainees have to spend in custody and ensure suites are not being unnecessarily filled with detainees.

### **Healthcare Provision in Custody**

At the start of the pandemic a Custody Healthcare group was formed to provide direction and leadership, and dynamically share information in respect of COVID-19. The group was chaired by the PSNI Head of Reducing Offending and Safer Custody and included representatives from Belfast Health & Social Care Trust (BHSCT), the Lead Nurse in Musgrave, Forensic Medical Officers (FMOs) and the Rowan Centre Clinical Director. The PSNI Chief Medical Officer also sat on the group in an advisory capacity. The Terms of Reference were quite short and focused, and considered two-way protective measures for both PSNI officers, Police staff and detainees.

In the early stages the group held conference calls on a daily basis to consider several issues including: what type of symptoms to look for which would indicate a degree of concern re: COVID-19; how to manage this; strategies for screening individuals on arrival in custody; how to transfer detainees; infectious control measures to be put in



place and supply and use of PPE. Input from the PSNI Chief Medical Officer also included advising on the dedicated COVID-19 wing in Musgrave, which when opened was of the same standard as the Infectious Diseases Unit in the Royal Hospital; collating input from staff, nurses, Health Trusts and virologists; and advising on clinical aspects such as health and safety to ensure a safe working environment.

Forensic Medical Officer (FMO) Custody Health Guidance was drafted on 22 March 2020 and updated on a regular basis to reflect changes in Public Health advice. Procedures included directions to Officers with reason to believe an individual has COVID-19. In this instance the COVID-19 response crew are detailed to the site of the incident and immediately taken to Musgrave for examination by the embedded healthcare practitioner. In incidents where officers do not have reasonable grounds to believe a person has COVID-19, the detainee will still be assessed by an FMO at the earliest possible opportunity and if they confirm risk of COVID-19, then the detainee is taken to Musgrave.

Within this process a need was identified to bring in systems which protected FMOs, Police Officers and staff if the detainee's temperature was high. This resulted in a system being developed to allow an electronic healthcare assessment to be undertaken without the FMO entering the room where the detainee is being held. Detainees were generally compliant, however in dealing with any non-compliance the staff defaulted to the highest possible protection, as detailed in the PPE matrix implemented by the healthcare system. There was also good connectivity between the FMOs and the nurses based in Musgrave to discuss COVID-19 related issues concerning any detainees.

As systems and guidance were put in place the Group conference calls reduced to twice weekly calls followed by weekly calls as time progressed. While the Group has now been stood down contact is still maintained on an ad hoc basis through WhatsApp.

During this time the PSNI also developed specific guidance for the use of Spit and Bite Guards (SBG). Procedures detailed that should a detainee spit / bite an officer while

claiming to have COVID-19, the priority will be having a healthcare assessment conducted. It is up to the individual officers whether a SBG is a necessary use of force in each case. Where a detainee arrives into custody with a SBG applied, the CDO must justify the continued need for the SBG which requires a further justification for that use of force, if there is no need for SBG to remain on the detainee then it is removed. However if there is a continuing need for the SBG to remain on the detainee, then that person may be transferred to the COVID-19 wing with SBG still applied and its use will continue to be reviewed. PSNI have advised that there are only three occasions in a custody suite where a SBG has been used and confirmed that there was CCTV of the three incidents.

### **Operation of Independent Custody Visiting Scheme**

The Board is responsible for the Independent Custody Visiting Scheme to make, and keep under review, arrangements for designated places of detention to be visited by lay visitors. Independent Custody Visitors (ICVs) are volunteers from the community who are unconnected with the police or the criminal justice system. They make unannounced visits to police custody suites to check the conditions, treatment and welfare of persons detained, by inspecting the facilities, checking custody records and, with consent, speaking to detainees.

At the beginning of the pandemic in March 2020 the Independent Custody Visiting Association (ICVA) in their role of leading, supporting and representing Custody Visiting Schemes issued guidance in partnership with the Home Office, National Police Chief's Council (NPCC) and UK National Preventive Mechanism (NPM) to all Schemes in England, Scotland, Wales and Northern Ireland indicating that local decisions should be made in relation to continuing visits in conjunction with guidance by Public Health Advice. ICVA advised that many Schemes had suspended visiting and at that stage alternative monitoring and oversight was being considered by ICVA which could include reviewing custody records at a distance.

As part of the PSNI planning in response to COVID-19, and in light of Government advice about non-essential public contact, the Chief Constable wrote to the Board

Chair on 18 March 2020 to request the Board consider the arrangements for Custody Visiting under the ICV Scheme throughout the pandemic period. The arrangements for Custody Visiting were discussed at the Partnership Committee meeting on the 19 March 2020 and Members agreed to recommend to the Board that the ICV Scheme should be suspended immediately. A Special Board Meeting followed on the same day and approval was given to suspend the ICV Scheme until further notice. All Custody Visitors were notified of the decision and were kept informed of any developments during this time.

Throughout the suspension of the ICV Scheme officials had ongoing, frequent collaboration with Stakeholders including ICVA, the National Preventative Mechanism (NPM), The National Experts Forum and the Terrorism Network via video conferencing and emails. Board Officials were also in weekly contact with PSNI to obtain information and provide remote monitoring to allow for any key concerns to be raised.

On 7 May 2020 the Board agreed that the ICV Scheme should be reinstated with face to face visits commencing in late May 2020. Up to 18 ICVs initially agreed to resume their roles and guidance for carrying out visits during COVID-19 was issued to all ICVs by the Scheme Manager. In this guidance it was recommended that when the COVID-19 suite was being visited Facetime conversations are undertaken instead of face to face visits. As agreed by the Board and the PSNI this is facilitated by moving the detainee to an area that is covered by Wi-Fi. If ICVs wish to carry out a face to face visit with a detainee in this block full PPE must be worn and ICVs will be doing so at entirely their own risk. To date no ICVs have visited the COVID-19 Block.

Since recommencing visits there had been an issue with ICV access to TACT detainees in Musgrave. This was due to the COVID-19 block sharing communal corridors and a communal reception area with the TACT Block resulting in contamination when COVID-19 detainees are moved until cleaning commences. This was resolved through custody staff using the back stairs to escort ICVs to the TACT Block.

Five ICVs participated in a stakeholder meeting held in June and discussions indicated that on resuming visits the ICVs have not noticed much difference since the COVID-19 outbreak. There had been an issue of custody staff not providing the necessary PPE for ICVs on arrival at the station, however this had been reported to the Board and subsequently rectified.

Statistics show (Annex 4) that during January to June 2020 148 Custody Visits were undertaken. This compares to 274 for the same period in 2019 which shows a drop of 45.9% in visits. This is undoubtedly due to COVID-19.

It is also useful to highlight results from a recent survey of Schemes undertaken by ICVA and though not entirely complete the overview shows that:

- 17 schemes are now visiting face to face;
- 21 schemes not currently visiting are planning their return to face to face, with most aiming for Aug/Sept return; and
- 34 schemes overall are speaking to detainees, either face to face or via remote monitoring.

## CHAPTER 3:

### SPIT AND BITE GUARDS

There is no doubt that the PSNI officers were, like NHS and care staff and many others at the front line, at real risk of COVID-19. Officers were charged with trying to police the lockdown when the majority were being told to stay safe at home. It is also unfortunately true that officers had to be in very close contact with those likely to have the Coronavirus, and in some cases, had to deal with individuals who either did not care whether or not they passed the virus on or actively sought to do this. This chapter seeks to analyse the use of Spit and Bite Guards issued to officers, but this introduction looks more generally the welfare of officers and at the provision of Personal Protection Equipment (PPE).

In a recent sentencing case involving a person spitting the Recorder of Belfast said<sup>94</sup>:

*“The current COVID-19 emergency has created an entirely new experience for the community. The public have become exposed to a virulent and highly contagious virus, with a significant risk of death. The efforts taken to combat it have resulted in a massive economic toll on the community, and significant sacrifices have been made by many individuals. The uncertainty about the disease has naturally led to widespread fear within the community at a level that is unprecedented.”*

He said that at any time spitting into another person’s face is a serious matter, but with COVID-19 it must be met with a robust penalty:

*“This will mean, in almost every circumstance, an immediate prison sentence. There is a need for a strong deterrent message to be sent so that those who would in any way be tempted to act in this way will desist. It is also necessary*

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<sup>94</sup> R v Burns, 30 July 2020.

*to re-assure the public, and in particular those working on the front line providing service and protection to others.”*

## **Personal Protective Equipment**

Like all those responsible for front line staff across the UK and throughout the world, PPE was not easy to obtain, particularly at the beginning of the pandemic. By early March, Platinum and Gold meetings were being held twice a week and dealt with PPE supplies. There was a logistics cell dedicated to secure stocks of PPE, develop guidance and communicate this to officers. Senior officers carefully considered the prioritisation of PPE (for public facing roles), the different types of PPE and compared this to national / international guidelines, in order to determine what PPE options were “suitable and sufficient”. Masks were tested to ensure they met the criteria they were supposed to meet, as per the manufacturer’s description – many masks had to be returned as they did not meet the required standard. This involves using a PortaCount machine, which tests the particles outside and inside masks, and can also test whether or not they are waterproof. The PortaCount is linked up to a computer system which has sensors and produces a report on particles outside/inside and filtration of the device they are testing. This can then be compared with the specification to see if the mask is meeting recommended guidelines.

The PSNI’s Director of Occupational Health and Well-being (OHW) and his team also assisted in the development of a risk management system in relation to screening calls coming into PSNI – to assess how they would triage those calls in terms of low/med/high risk and how to best respond (with PSNI COVID-19 crews / ambulance service). This was designed to let PSNI and ambulance service to work better together – frequently the ambulance service would need police support to keep them safe in particularly complex cases. Since the start of the Pandemic, OHW has been gradually worked on building stocks of PPE, replenishing stocks and are now at stage of stockpiling.

The Police Federation reported similar evidence of a lack of PPE for frontline officers which was a concern. PPE was ordered, however due to the lack of quality, it had to

be returned, more recently the PSNI were issuing PPE which was produced locally and built to last for a number of years and each officer receives their own PPE.

Following OHW advice PSNI did not spend a significant amount of money on antibody tests as they assessed that they would not be beneficial, rather they secured antigen (swab) testing through the Department of Health and started tests on 11 April 2020. In the beginning they focused on testing individuals who were off work with symptoms (or whose family members had symptoms) and then developed a live-test system. This continued until the middle of July, when PSNI's access to live-testing closed down (however all individuals displaying symptoms can still receive tests by self-referral).

Currently, only 20 officers<sup>95</sup> have tested positive for COVID-19 (out of approximately 700 officers who were tested after displaying symptoms or whose family members were displaying symptoms). This compares favourably to many other national police forces who could not secure access to antigen (swab) testing – therefore from a PSNI perspective they were well ahead of other police services.

More generally the Federation reported that laptops were supplied to support staff and detectives to ensure work could continue remotely and attendance rates during the pandemic had been around 91%. Feedback from officers regarding the communication of key messages from the centre is very positive. There was a consistent message across the organisation led by ACC Todd as Gold Commander. The 12 x 4 days on/off shift pattern was useful to ensure the policing response was effective, but also ensured officers had appropriate time off ensuring a positive approach to the wellbeing of officers and staff.

It is clear that from the start of 'Operation Talla', the name of the PSNI's overall strategy to deal with the pandemic, that the welfare of officers was a high priority. This was reflected in discussions in the PSNI Platinum Group. The key to the provision of PPE

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<sup>95</sup> Approximately 10,000 staff/officers in PSNI overall – lower than 0.2% PSNI staff/officers were infected.



was to prioritise delivery to those at greatest risk of exposure to the virus and to give consistent guidance on its use:

*“Unless there is a case of urgent operational need NO officer or staff member without the required PPE should engage with a member of the public who is confirmed to have or symptomatic with COVID-19.”<sup>96</sup>*

Initial calls to PSNI requiring an urgent response were also graded according to information about the risk of exposure to officers and this was a question posed in the initial call from the member of the public. This allowed the officers in the specialist COVID-19 Response Team to be deployed where appropriate. Detailed guidance was also provided to officers for safe dressing and undressing where officers came in contact with members of the public likely to be symptomatic or where ‘aerosol generating procedures’, were high.<sup>97</sup> Obviously, the use of PPE by officers also protects those that come into contact with them. A very useful PPE newsletter was also jointly issued by PSNI, the Police Federation, the Northern Ireland Public Service Alliance and the Superintendents Association.

### **Spit and Bite Guards**

Spit and bite guards (SBGs) are devices intended to cover the mouth, face and sometimes the head of a restrained person in order to prevent them spitting at, or biting others. Currently 42 of the 43 police forces in the UK use spit guards routinely to varying degrees with the primary purpose being to prevent the spread of Hepatitis C and HIV. This chapter is not intended to be a full human rights assessment of SBGs, but rather an assessment of their deployment and use during the pandemic by PSNI. A full human rights assessment will be carried out following the PSNI’s likely renewed proposal that SBGs should continue to be deployed after the COVID-19 risk has diminished.<sup>98</sup>

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<sup>96</sup> PSNI guidance- ‘Appendix F – Guidance to Other Operational response call signs’.

<sup>97</sup> PSNI guidance- ‘Appendix G – Guidance to specialist COVID-19 call signs’

<sup>98</sup> At the time of writing the PSNI were intending to report to the Board in October 2020.

## The Role of the Policing Board and the Chief Constable

The Board's role is to hold the Chief Constable and the PSNI to account for the policing of Northern Ireland.<sup>99</sup> This involves consideration of budgets, policing plans, Code of Ethics, strategies and, after the event analysis of operations (and, of course, assessments of the human rights issues). Quite rightly, the Chief Constable makes decisions about specific operations and the purchase of equipment. The Chief Constable and his colleagues take serious notice of the opinion of the Board and its members. The Chief Constable is however restricted in one way<sup>100</sup> and:

*“Any expenditure that is deemed to be novel or contentious as defined by HM Treasury should be notified to the Board and to the Department and Treasury approval obtained.”<sup>101</sup>*

The Chief Constable recognised that the purchase of SBGs could be viewed as novel or contentious in his first letter to the Board<sup>102</sup> on the subject. It is not clear what the process was for Treasury consent or who was consulted before this decision was made and who made the final decision.

It is worth noting that the introduction of TASERs by the PSNI over ten years ago was also regarded as novel or contentious and the process was challenged in the High Court as well as being subject to a detailed analysis by the then Human Rights Advisor.<sup>103</sup> The High Court (Lord Chief Justice) considered that:

*“...the Board had no authority to prevent the Chief Constable from procuring and deploying tasers...”<sup>104</sup>*

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<sup>99</sup> Section 3 of the Police (Northern Ireland) Act 2000.

<sup>100</sup> The power to make Regulations is in section 9 of the Police (Northern Ireland) Act 2000.

<sup>101</sup> The Secretary of State imposed these conditions in January 2003.

<sup>102</sup> 30 July 2019

<sup>103</sup> <https://www.nipolicingboard.org.uk/publication/human-rights-advisors-report-taser>

<sup>104</sup> Para. 50, JR1 [2011] NIQB.

Prior to the COVID-19 pandemic, the Board's Performance Committee had discussed the introduction of spit and bite guards into the service, following an approach by the Chief Constable to the Board in July 2019. The Committee considered issues relating to human rights and the use of force, vulnerability and age restrictions, equality considerations by PSNI and the evidence base used to by PSNI to consider their introduction.

The Chief Constable must ensure a safe system at work for his officers and refrain from infringing their ECHR rights. It is arguable that failing to provide protection from a foreseeable risk of contamination from spitting is a breach of the health and safety at work provisions and, the Board was advised that, it has caused officers considerable stress while awaiting medical results following an incident of spitting or biting.

A study<sup>105</sup> exploring the extent to which police services deploy spit and bite guards and the rationale underpinning their use shows there is lack of information readily available from police services in respect of quantifying the numbers of police officers who have contracted an infectious disease as a result of spitting and/or bites, despite the fact that risk of infection and the need for subsequent treatment is a driver of police services adopting the use of spit and bite guards, as is the case for PSNI. The study concludes that consideration must be afforded to the possibility that the use of the guards represents a form of mechanical restraint rather than a means to prevent transmission of infection, especially given the lack of information available from other police services. The study concludes that "there appears to be no current, overarching guidance from UK national police bodies such as the National Police Chiefs' Council (NPCC) or the College of Policing on the use of spit and bite guards that is readily and easily accessible to the general public, despite substantial professional public interest and concern on their usage. The NPCC describes the guards as '*... lightweight mesh garment that is placed over a person's head to help minimize the risks of communicable diseases (blood borne viruses (BBV)) and injuries associated with a suspect spitting and biting.*' It further concludes that "*The introduction of new devices*

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<sup>105</sup> Journal of Forensic and Legal Medicine (August 2019) "The use of spit guards (also known as spit hoods) by police services in England, Wales and Northern Ireland: to prevent transmission of infection or another form of restraint?"

*and systems of restraint should be subject to rigorous checks and balances, in terms of a) why they are needed, b) whether such devices vary in efficacy, and c) whether there are any medical implications or complications to their use, most particularly with regard to children and other vulnerable groups.”*

The Board were aware of a trial of visors in Musgrave Custody Suite in 2015 to protect officers from spitting and biting; however this was assessed by PSNI to be of limited value due to the cumbersome nature of the visors. The Board advised PSNI that they were of the view that given the societal impact of the use of a spit and bite guard in Northern Ireland, more information is necessary on alternative options that have been considered by PSNI and if so, the reason why they were not pursued.

Following consideration, the Board wrote to PSNI requesting that details be provided as to how the recommendations contained within the Human Rights Annual Report 2016-17, cited below, were to be implemented, further information on the rationale behind this decision and the human rights considerations taken to inform such a decision. At their meeting on 10 October 2019, the Board’s Human Rights Advisor provided a comprehensive briefing on his assessment of PSNI’s proposals. Following this, the Board wrote again setting out its concerns over the use of the guards on vulnerable people and seeking further information on the number of officers who have contracted an infectious disease as a result of a spit or a bite. A PSNI Assistant Chief Constable provided an update to the Board in November 2019 on the training required for officers to have the guards and a demonstration of the guard, following this the Board wrote again to PSNI to raise a number of concerns such as the guidance for officers, alternative options to guards to be explored, restriction on their use in respect of age, recording their use, supervision of officers using the guards, equality considerations taken, evidence base from other UK police forces and an update on the assault by spitting / biting figures for the service. Members considered PSNI’s detailed response at their meeting in February 2020.

Further correspondence was issued from the Board after the February meeting stating that in their view further examination of all available evidence (locally and nationally) relating to the experience of the detainee and the risks posed to particularly vulnerable

groups was necessary before the Board could consider the introduction of the spit and bite guards. The PSNI informed the Board in February 2020 that PSNI are committed to ensuring that thorough consideration is given to children and young people when developing the guidance and training. They stated that the guard will only be used in circumstances which pose significant risk to officers and where there is no other way to prevent spitting or biting. The Board requested further detail on the evidence base which established the perceived requirement for PSNI to introduce spit and bite guards. In respect of the data provided at that time (21 February 2020), no officer had contracted an infectious disease as a result of these types of assaults. The Board requested clarity regarding the data and a further breakdown showing; the incidence of each type of assault, the type of injury sustained, and where the assaults most commonly take place.

### **The Police Federation**

The meeting of the Board in February 2020 was followed by an informative discussion with the Police Federation on this issue, in which they strongly advocated for the introduction of the guards. It is understood that the Federation had indicated sometime before this meeting that it was willing to take legal action against the Chief Constable should SBGs not be issued to officers. The Human Rights Advisor met with the Police Federation during the collection of evidence for this report and they continued to urge the Board to support the deployment of SBGs both during the pandemic and after that threat has subsided. The Federation also encouraged the wider availability of the devices to all front line officers and, at the time of writing, had taken the first steps towards seeking judicial review of the PSNI to force the Chief Constable to take this action, had been given leave by Judge McAlinden on 9 July 2020 with the full hearing due to occur on 4 November 2020.<sup>106</sup>

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<sup>106</sup> It is understood that the first formal threat of legal action was by letter of 1 May 2020.

## Spit and Bite Guards Introduction

On 16 March 2020, in advance of his COVID-19 briefing to the Board, the Chief Constable advised, that it as part of PSNI's operational contingencies, the decision had been taken to issue spit and bite guards for use in custody suites. This was based on the risks associated with the COVID-19 pandemic and to the mitigate Article 2 and Article 3<sup>107</sup> risks faced by officers and staff. He further advised that the decision would be kept under continual review and the issuing of the guards would be accompanied by appropriate training and guidance. A number of video conference meetings took place with Board Members and the Human Rights Advisor, at which the Chief Constable advised them of these developments.

He reviewed his decision on 31 March following a discussion at the COVID-19 Platinum Group meeting and extended their to deployment to include COVID-19 response crews and cell vans.<sup>108</sup> The Platinum Group were informed that:

*“As well as the obvious potential injuries that could be sustained from biting, there is also the risk associated with the transfer of body fluids from both biting and spitting. The spread of saliva, particularly when it enters the eyes, mouth or an open wound of the victim has the potential to contaminate the victim with blood borne viruses carried by the subject. This is particularly relevant at this present time with the risk of contraction of COVID-19 during the current pandemic.”*

The Board provided feedback to the PSNI from the Human Rights Advisor in respect to the draft guidance for officers on the use of SBGs. In relation to the use of SGBs on children the PSNI Manual of Policy, Procedure and Guidance on Conflict

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<sup>107</sup> Article 2 is the right to life; Article 3 is the right not to be subjected to torture, inhuman or degrading treatment or punishment (European Convention on Human Rights (ECHR)).

<sup>108</sup> The Board was, at the same time, provided with a paper for the Platinum Group – ‘Proposed Introduction of Spit and Bite Guards: Briefing for the Senior Executive Team’ and a draft of Chapter 16, ‘Police Use of Spit and Bite Guards’ of the ‘PSNI Manual of Policy, Procedure and Guidance on Conflict Management’.

Management – Chapter 16, provides guidance to officers on the use of the guards and only states that “It cannot be applied to children under 10 years of age.”

In considering this guidance in April 2020, the Board’s Human Rights Advisor reiterated the concerns of the Board suggesting that further information was necessary in relation mental health factors. PSNI has since advised that the training video used asks officers to consider the vulnerability of the subject including apparent mental health. The Human Rights Advisor was also provided with a DVD which was used by the PSNI to deliver online training to officers. On 21 April the Chief Constable advised that he had decided to extend the deployment of SBGs to Armed Response Units.

The Children’s Law Centre (CLC) has submitted a comprehensive response to this review focusing solely on the temporary introduction of SBGs. CLC are concerned about the lack of information contained in PSNI’s initial equality screening for SBGs, for example, the number of incidences of spitting and biting were not disaggregated into Section 75 groupings, the screening document does not include any medical evidence on the impact of the use of SBGs on children and young people of different ages, racial and community backgrounds, children with disabilities and or mental health conditions. CLC point out that equality duties continue during the pandemic as provided for in the advice by the Equality Commission for public authorities developing policy during the COVID-19 crisis.<sup>109</sup> The CLC have requested the immediate withdrawal of the use of SBGs and that a comprehensive screening exercise be carried out in compliance with the Equality Commission’s guidance and PSNI’s equality scheme. The CLC are of the view that prior to any proposed introduction of SBGs on a longer-term basis, a thorough equality impact assessment must be carried out, including direct consultation with children and young people.

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<sup>109</sup><http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Public%20Authorities/S75dutiesCoronavirus.pdf>



## Human Rights Issues

The CLC also made very helpful references to the international human rights standards that are engaged. Some of these are dealt with below but they also raised concerns about compliance with a variety of treaties including the United Nations Convention on the Rights of the Child – Article 3 on the best interests of the child, Article 6 on the right to life, Article 19 on the protection from violence and Article 37 on the prohibition against ill-treatment. More of this detail will be considered in a further report once the PSNI has made its submission to the Board on SBGs in the autumn.

The Board's Human Rights Annual Report 2016-17 contained two recommendations in relation to PSNI's use of spit and bite guards as outlined below:

*“In the event that the PSNI considers introducing spit guards or hoods for use by officers it should first report to the Performance Committee outlining the need and the capability gap to be filled; whether there is potential for death or injury; a tactical and medical needs assessment; and an equality impact assessment.”*

*In the event that the PSNI intends to issue spit guards or hoods to officers it should report to the Performance Committee on the policy guidance in place; training developed (for all officers and civilian detention officers); the monitoring framework for the use of hoods; and the commitment to report on the use of hoods to the Board by the electronic use of force monitoring form.”*

Article 4 of the PSNI Code of Ethics, which draws upon the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, states:

*“Police officers, in carrying out their duties, shall as far as possible apply non-violent methods before resorting to any use of force. Any use of force shall be the minimum appropriate in the circumstances and shall reflect a graduated and flexible response to the threat. Police officers may use force only if other means remain ineffective or have no realistic chance of achieving the intended result.”*

The use of a spit and bite guard is a 'use of force'. The use of force by police officers in Northern Ireland is governed by the Criminal Law (Northern Ireland) Act 1967, the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE), the common law and the Human Rights Act 1998, incorporating the European Convention on Human Rights (ECHR). The ECHR applies directly because s.6(1) of the Human Rights Act 1998 requires the PSNI, as a public authority, to act compatibly with the ECHR. The 1967 Act, PACE and the common law apply to all uses of force by the PSNI and require that it should be "reasonable" in the circumstances. Reasonable in this context, given the engagement of Articles 2 (right to life) and 3 (the right not to be subjected to torture, inhuman or degrading treatment or punishment) should probably be interpreted as meaning "strictly necessary" in the execution of police duties.

As stated above the use of the guards brings the service into potential issues with Articles of ECHR; however PSNI states that this relates to a 'normal' scenario, and the COVID-19 is 'abnormal' territory and therefore the perception of risk is greater than normal. If a member of staff or officer was positive with COVID-19 they would pose a significant risk of infection to others. This abnormal situation affects the severity and perception of risk to officers and the frequency of deployment.

The use of force by police officers engages in a direct and fundamental way the rights protected by the ECHR such as Article 2 and Article 3. Police officers have the authority to use force in order to defend themselves or another person, to effect an arrest, to secure and preserve evidence or to uphold the peace, but any such use must be justified on each and every occasion. Consideration must always be given to whether there is a viable alternative to the use of force. As a general rule, force and restraints must only be used if and when absolutely necessary and where all other means to contain a specific situation have failed. Any recourse to physical force in respect of a person deprived of his liberty, not made strictly necessary by the conduct of the detainee, is in principle an infringement of Article 3 because it has the effect of diminishing the human dignity of the individual involved. Any method of restraint used as punishment or retaliation by the police will violate Article 3.

It is recognised that there may be times, for example during transit or to prevent serious harm to others, when the use of force and the application of restraint may be unavoidable. Where this is the case, several conditions must be met and the use of force or application of restraints must be very closely scrutinised to ensure that their use was lawful, necessary and proportional.

There is serious concern among mental health practitioners that the application of a guard to a person with a mental health condition or personality disorder will exacerbate the distress experienced by that person and result in for example hyperventilation, extreme behaviour and panic attacks. Furthermore, by obscuring a detainee's face, officers are prevented from identifying quickly whether the detainee has laboured breathing, is choking or has suffered a facial or head injury. Conversely, the alternative to the use of a guard, if police officers are to be protected from spitting or biting, is to restrain the head which, it is argued by the NPCC, likely to involve a greater use of force. Of course, the significant increase in availability of PPE to front line officers and greater necessity of officers using PPE reduces, to some extent, the need to use SBGs during the pandemic.

### *Key Principles*

Any use of force or restraint by police officers must be strictly necessary, be based on the previous behaviour of the detainee and the particular circumstances (specifically the risks to officers or members of the public) and cease once the circumstances requiring it cease. The use of restraints must not go beyond what can reasonably be considered to be necessary in the circumstances.

Any restraint used must be proportionate, and this includes the principle that the least restrictive method must be chosen. The hooding of detainees has been found to violate Article 3 and obscuring a detainee's sight for is likely to violate Article 3. If the police officers have taken control of a suspect so that a guard can be placed on that person then to some extent the justification for the use of the hood may have partly disappeared. The use of guards to make it is easier to control a suspect is unlikely to provide a justification in itself.

Any conduct or treatment that intends to humiliate or debase, and treatment that does humiliate or debase even without this being its purpose, can violate Article 3. Therefore, it is hard to justify a full head covering such as a spit and bite guard, which may be inherently humiliating even if this is not its purpose.

Whether the use of restraint is a violation of Article 3 also depends on the nature of the detainee (mental health issues, child, other possible vulnerabilities). Therefore, in the circumstances in police custody when spit and bite guards are used, it might not yet be known whether the person has any mental health issues / vulnerabilities, so it may be difficult to ensure they are not used on people with mental health issues or other specific vulnerabilities.

The PSNI need also to consider the rights of children and young people in this context and, in particular, that “the best interests of the child shall be a primary consideration.”<sup>110</sup> This principle does not seem to be reflected in the PSNI’s guidance on the use of SBGs and more consideration should be given to ensure that children, especially those who might have other vulnerabilities, do not have these hoods forced over their heads. The Children’s Rights Alliance for England commented in 2017:

*“Hooding children is distressing and dangerous. The evidence shows that the children who are in contact with the police are disproportionately likely to have experienced neglect, abuse, been in care, have language or learning difficulties or other vulnerabilities. Putting these children through more trauma by restraining and hooding them is not only damaging but potentially unsafe - adults have died following the use of spithoods. Alternatives such as visors or spit guards worn by police officers are used in other forces in England to deal with disgusting incidents of spitting. The Met says, understandably, it needs to protect officers from harm but that mustn’t come at the cost of children’s safety.”<sup>111</sup>*

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<sup>110</sup> United Nations Convention on the Rights of the Child, Article 3(1)

<sup>111</sup> <http://www.crae.org.uk/news/crae-responds-to-metropolitan-police-announcement-on-spit-hoods/>. See also Children’s Rights and policing: Spit-hoods and children’s rights, CRAE.

## **Current Use of Spit and Bite Guards**

The use of a spit and bite guard was recorded on the PSNI's electronic Use of Force system from 7 April and included in the bi-annual use of force statistical bulletin provided to the Board. The use of spit and bite guards is reviewed monthly by PSNI and a formal recommendation on whether their use should continue will be brought to the PSNI Service Management Board in September 2020 and provided to the Board for consideration. Any use of SBGs since April has been automatically referred to the Police Ombudsman for Northern Ireland (OPONI). OPONI staff have viewed the Body Worn Video for every use of a SBG and have not, so far, identified any breaches of conduct by the police officers involved. However, it is not clear whether this assessment of their use is going to be restricted to conduct issues or will also consider proportionality and the prohibition on ill-treatment and Article 3 of the European Convention of Human Rights.

The Human Rights Advisor was concerned that the PSNI's Guidance on the use of SBGs made it clear that the devices could be used on children as young as 10 years old and this concern was also raised by the Northern Ireland Commissioner for Children and Young People.<sup>112</sup> SBGs were used on at least two people aged 16 and 17 but no one younger. In April 2020 PSNI advised that during 2019 there were 183 incidences of spitting (28 of these in custody), 71 of biting (18 in custody) and 27 of both spitting and biting (5 in custody). He states that the injuries sustained are primarily psychological as officers wait for the results of blood tests.

Since their introduction there has been 32 incidents of spit and bite guard use (27 March – 30 June). There was 31 male detainees and 1 female detainee, all of white ethnicity, ranging in age from 16 years old to 55 years old. There was seven of these incidents were used in a custody suite, as set out in the table below. In the 32 incidents, 20 of these were related to drugs, 23 were related to alcohol and 12 were related to mental health.<sup>113</sup>

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<sup>112</sup> Letter to Board, 2 July 2020.

<sup>113</sup> PSNI weekly statistics on uses of Spit and Bite Guards [not public].

District	Total Recorded use of SBG	Times used in Custody Suite		Gender		Age				Ethnicity		
		Y	N	M	F	<18	18-34	35-49	>50	White	Other	
A	Belfast City	5	2	3	5	0	3	2	0	0	5	0
B	Lisburn and Castlereagh	0	0	0	0	0	0	0	0	0	0	0
C	Ards and North Down	1	0	1	1	0	0	1	0	0	1	0
D	Newry, Mourne and Down	4	0	4	4	0	2	2	0	0	4	0
E	Armagh City, Banbridge and Craigavon	6	0	6	6	0	0	5	1	0	6	0
F	Mid-Ulster	5	0	5	4	1	0	3	1	1	5	0
G	Fermanagh and Omagh	0	0	0	0	0	0	0	0	0	0	0
H	Derry City and Strabane	3	2	1	3	0	0	2	1	0	3	0
J	Causeway Coast and Glens	0	0	0	0	0	0	0	0	0	0	0
K	Mid and East Antrim	3	0	3	3	0	0	3	0	0	3	0
L	Antrim and Newtownabbey	5	2	3	5	0	0	4	1	0	5	0
<b>Totals</b>		<b>32</b>	<b>6</b>	<b>26</b>	<b>31</b>	<b>1</b>	<b>5</b>	<b>22</b>	<b>4</b>	<b>1</b>	<b>32</b>	<b>0</b>

## Effectiveness

The PSNI accepts SBGs are not a form of PPE, instead they accept them as a use of force. From an health perspective, there are two main aspects that must be considered:

- The degree to which a SBG would protect from the biological risk (in this case, COVID-19); and
- The extent of the psychological impact of being spat at or bitten.

While a SBG obviously reduces the exposure to spitting and therefore the risk of infection through an officers mucus membranes – it has not yet been established that they can offer sufficient protection from a biological perspective in terms of the airborne particles of COVID-19.

However, the OHW advised that research is being progressed to decipher whether SBGs can offer protection from a psychological perspective, which will be the first project of its kind – it is being conducted as part of a Masters dissertation for the Faculty of Occupational Medicine at Manchester University. This research will include psychometric testing on subjects who have been bitten or spat at, the researcher is completing a pilot which will be presented to in early autumn. The longer term piece of research, which will be of a higher statistical power, will be conducted prospectively as opposed to retrospectively. The research will also include a literature review including any evidence base regarding biological risk although it appears that there is not much research around spitting/ biting or with regard to the transmission of COVID-19 through SBGs. It is hoped that this research will be available in time for the PSNI to add to its review of the use of SBGs due in the autumn and for the Board to assess this in due course.

When the Coronavirus was identified as a risk to the people of Northern Ireland it appears that there was an assumption that SBGs would protect police officers from transmission from suspects and detainees with COVID-19. There were a number of examples of threats to police officers with individuals spitting, coughing or biting (or trying to do so) claiming that they had the virus but no examples at the time of writing of officers contracting the virus in this way.

Amnesty International (AI) has raised questions about the effectiveness of SBGs in protecting officers from the virus in correspondence with PSNI. In a letter from a PSNI ACC on 9 June 2020 AI were told that the PSNI had been in contact with the manufacturer of the SBGs issued to PSNI officers and that the:

*“manufacturer of the Spit Guard Pro is a company called Kit Design and they have responded as follows:*

*“The Spit Guard Pro works by, if worn correctly, preventing the wearer from spitting directly at officers. The Spit Guard acts as a barrier and therefore prevents transfer to the officers through the act of spitting. It is not designed to stop airborne pathogens or respiratory droplets etc. (COVID-19). The product*



*has been extensively tested for its intended purpose and we have had no known issues regarding its use.”*

*PSNI took the decision to issue Spit Guard Pro to protect against the physical hazard of spitting and/or biting. We are aware that the product will not counter a viral hazard, other than if a virus is possibly present in saliva or blood when spitting or biting.<sup>114</sup>*

In response AI stated:

*“...we believe that the use of spit and bite guards may result in increased risk to individuals who may have compromised respiratory systems due to result of Covis-19 infection. Therefore, we advise against any continuation of their use during the pandemic and in the absence of a full, independent human rights-based assessment of possible future usage.”*

And

*“We believe any struggle involved in applying the hood, which is a foreseeable risk in light of known observed behaviour from using these devices, is much more likely to produce a significant aerosol generating event (such as forced exhalation and coughing) in the transmission of the virus from an infected individual.”<sup>115</sup>*

In the latest letter from the PSNI Assistant Chief Constable they state:

*“Although Spit and Bite Guards are not anti-viral PPE, they are a piece of equipment used as a transmission-based precaution to reduce the likelihood of droplet virus particles being distributed where individuals display a disregard for the transmission of disease by spitting of coughing deliberately at officers...*

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<sup>114</sup> Letter dated 9 June 2020.

<sup>115</sup> Letter dated 23 June 2020

*“If the individual is generating deep lung air in spitting this may create aerosols which increase the risk to officers and staff as aerosols remain airborne for longer than droplets as they are smaller in size. The scientific evidence is not developed enough yet (as the virus is new) but, where the aerosols are generated, there is a requirement for a higher level of PPE which officers and staff may not be able to fit properly in high intensity confrontational incidents. Sputum is also produced from deep lung air and can contain high concentrations of SARS-Cov-2. Spitting can contain muco-salivary secretions.”*  
*(letter 15 July 2020 to AI)*

The PSNI also states that the SGBs are also important because spitting and biting generates droplets which will spread the virus if they enter the eyes, mouth or nose, or fall on clothes or other surfaces.

### **PSNI and Board Review**

The PSNI have established a ‘Spit & Bite Guards Working Group’ to assist the Chief Constable with monitoring the deployment of SBGs and reviewing their use every month. The Board were invited to join this working group but the Board agreed that, given its role in considering any future proposal from PSNI, it should not attend the meetings, although all minutes and papers of the Group have been provided to the Human Rights Advisor. At the time of writing the PSNI intends to review the use of SBGs in October and to make a submission to the Policing Board about their use in the future.<sup>116</sup>

The working group’s terms of reference include a requirement to review each and every use of Spit and Bite Guards and each incident review also involves a representative from the working party watching any available body worn video of the incident.

The PSNI did begin a semi-public consultation exercise at the end of June on the deployment of SBGs as part of this review but it is not clear how this has been pursued.

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<sup>116</sup> Working Group Strategy.

The SBGs online training for officers was reviewed by the Police College but the results are not yet available.

## **RECOMMENDATION 15**

In the light of the fact that the deployment of spit and bite guards was triggered by the COVID-19 emergency, spit and bite guards should now be phased out as soon as possible and officers who have been provided with spit and bite guards should, instead, be provided with the necessary Personal Protection Equipment (PPE) or other alternative. The PPE provided should be of sufficient quality to protect these officers from contamination from spitting, aerosol droplets and other bodily fluids reducing the risk of transmission of COVID-19 and other diseases. The use of spit and bite guards should, regardless, cease by 31<sup>st</sup> December 2020

The PSNI should:

- Provide the Board with further scientific and professional evidence, including from police forces in other jurisdictions, to measure the extent to which spit and bite guards provide protection for police officers from COVID-19 transmission compared with that provided by the PPE supplied to officers;
- Complete a PSNI public consultation exercise on the deployment of spit and bite guards in line with Section 75 of the Northern Ireland Act 1998, and should include consideration of the criteria and guidance for their use; and
- Once these actions have been completed submit the evidence to the Board so that the Board can give its view to the Chief Constable on their use.

The Board should:

- Taking into account the findings of the Office of the Ombudsman's analysis, initiate an independent human rights-based assessment review to analyse each use of spit and bite guards since March 2020, taking into account Article 3 of the ECHR and the other human rights treaties ratified by the UK.

## CHAPTER 4: ADDRESSING VULNERABILITY

One of the most important duties that police carry out is in respect of protecting victims of crime and supporting those most vulnerable or at risk in our society.<sup>117</sup> Article 1 of the ECHR provides that States undertake to ‘*secure to everyone within their jurisdiction*’ the rights and freedoms set out in the Convention (and its protocols). In certain circumstances, the police may have a positive obligation to intervene to protect an individual’s rights. Victims of crime are entitled to access the mechanism of justice and to prompt redress.<sup>118</sup> This support must be provided without discrimination. Children and other vulnerable individuals are entitled to special protection<sup>119</sup> as are victims of trafficking and slavery.<sup>120</sup> Where there is a real and immediate threat to life the police must act to protect individuals whose lives are at risk from others and even to take steps to protect from self-harm and suicide.<sup>121</sup>

This work is ongoing and carried out in conjunction with the Board’s monitoring of police performance against the Northern Ireland Policing Plan 2020-2025 and Annual Performance Plans. A measure in the Annual Performance Plan 2020-21 considers how the police service support repeat victims<sup>122</sup> of (i) Domestic Abuse, (ii) Child Sexual Abuse and Exploitation (CSAE) and (iii) Hate Crime.<sup>123</sup> The PSNI must provide the Board with evidence and analysis of the activities undertaken to improve the service provided to the identified groups and across society. Within this reporting framework the Board also expects the PSNI to demonstrate how effectively it collaborates with a range of key partners in the public, private and voluntary sectors.

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<sup>117</sup> *Annual Performance Plan 2020/21*, Northern Ireland Policing Board, available at [https://www.nipolicingboard.org.uk/sites/Policing Board/files/publications/policingplan2020-25.pdf](https://www.nipolicingboard.org.uk/sites/Policing%20Board/files/publications/policingplan2020-25.pdf)

<sup>118</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 4.

<sup>119</sup> *Stubbings v UK* (1996), *Z and others v UK* (2001), *Opuz v Turkey* (2009), and *Identoba and others v Georgia* (2015).

<sup>120</sup> ECHR, Article 4.

<sup>121</sup> *Osman v UK* (1998) and *Keenan v UK* (2001).

<sup>122</sup> The PSNI defines a repeat victim as “*a person who has been a victim of a crime on more than one occasion in a 12 month period. The repeat victimisation rate is the percentage of all victims who are repeat victims*”.

<sup>123</sup> *Annual Performance Plan 2020/21*, Northern Ireland Policing Board, available at <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/policingplan2020-25.pdf>

This chapter focuses on those ‘victims in lockdown’ specifically vulnerable people and outlines policing practices during this time period (23 March 2020-30 June 2020) to deal with incidents of domestic violence and abuse, continuing to safeguard older people and also maintaining a focus on protecting children at risk.

According to PSNI statistics overall crime levels in Northern Ireland had dropped by one third during the COVID-19 lockdown. Most categories of offences showed significant falls, with one major exception being the number of murders. The figures compare the five weeks which followed lockdown on 23 March with the same period last year. There were 3,000 fewer offences reported during lockdown - a one third reduction on normal levels. PSNI reported that sex offences, drug offences and robberies showed some of the biggest differences - each down between 40-50%. PSNI outlined that there had been six killings in the lockdown period, compared to two for the corresponding weeks last year with half of the murders being domestic incidents.

Through the engagement process of this COVID-19 review, Board officials spoke with multiple agencies, partners and PSNI to ensure a coherent approach in information gathering in order to showcase PSNI initiatives during the lockdown period (for more details see Annex 2, Methodology). The Board undertook a series of fact finding meetings with PSNI leads in Public Protect Branch (PPB) who outlined the role of PPB as adult safeguarding, specifically surrounding vulnerable people including victims of domestic abuse, children at risk and looked after children, older people and offender management. PSNI advised that in order to assess what impact COVID-19 would have on repeat victims, repeat offenders and to maximise criminal justice outcomes, they developed a PPB Action Plan for COVID-19, with a focus on domestic abuse, CSAE and adult safeguarding. They reported that during the lockdown period an internal PSNI group met regularly to evaluate and assess trends and patterns and determine what actions would be taken following the analysis of data. They have since reported that the weekly meetings are ongoing.

## Domestic Abuse

As outlined in the 2016 Northern Ireland Government Strategy ‘Stopping Domestic and Sexual Violence and Abuse in Northern Ireland’ the PSNI adopted the definition of domestic abuse as:

*‘threatening, controlling, coercive behaviour, violence or abuse (psychological, virtual, physical, verbal, sexual, financial or emotional) inflicted on anyone (irrespective of age, ethnicity, religion, gender, gender identity, sexual orientation or any form of disability) by a current or former intimate partner or family member’.*

To support the application of this definition further clarity was provided in relation to; “*Incident*” - an incident anywhere and not confined to the home of one of the partners/family members; “*Family members*” - including mother, father, son, daughter, brother, sister, grandparents, whether directly or indirectly related, in-laws or stepfamily; and “*Intimate partners*” - meaning there must have been a relationship with a degree of continuity and stability. The relationship must also have had (or reasonably supposed to have had) a sexual aspect, such as in the relationship between husband and wife or between others generally recognised as a couple including same sex couples.

PSNI state that,

*‘...a crime will be recorded as domestic abuse where it meets the definition provided above. Not all domestic abuse incidents will result in the recording of a crime. Domestic abuse crimes are classified according to the Home Office Counting Rules and form a subset of the overall police recorded crime statistics.’*

Domestic abuse support organisations observed increases in domestic violence due to the COVID-19 situation which forced coexistence, economic stress, and fears about the virus. It was widely reported that increased isolation could create an escalation in abuse, where those who were living with an abusive partner or family member, may

be less likely to ask for help. It highlighted how fewer visitors to the household could mean that evidence of physical abuse could have gone unnoticed.

The pandemic also curtailed access to support services for survivors of domestic abuse, particularly in the health, social care, police and justice sectors with the emergency services experiencing an overstretched workforce concentrated on tackling the pandemic. The impact of self-isolation had a direct impact on specialist services, including voluntary and community, who are already operating in an extremely challenging funding climate and were concerned about how to continue delivering life-saving support during the pandemic. They evidenced challenges in funding, staff shortages and further demand for their help. To support this reporting, a statement by Women's Aid, noted that,

*'We know that the government's advice on self or household-isolation will have a direct impact on women and children experiencing domestic violence and abuse in Northern Ireland. Home is often not a safe place for survivors of domestic violence and abuse. We are concerned that social distancing and self-isolation will be used as a tool of coercive and controlling behaviour by perpetrators and will shut down routes to safety and support. Safety advice and planning for those experiencing domestic abuse should be included in the national government advice on COVID-19 19.'*

On 13 May 2020 the PSNI published an exceptional release presenting weekly management information on domestic abuse calls received by PSNI since the COVID-19 lockdown measures were introduced on 23 March<sup>124</sup>. In summary, key statistics of this time period show that:

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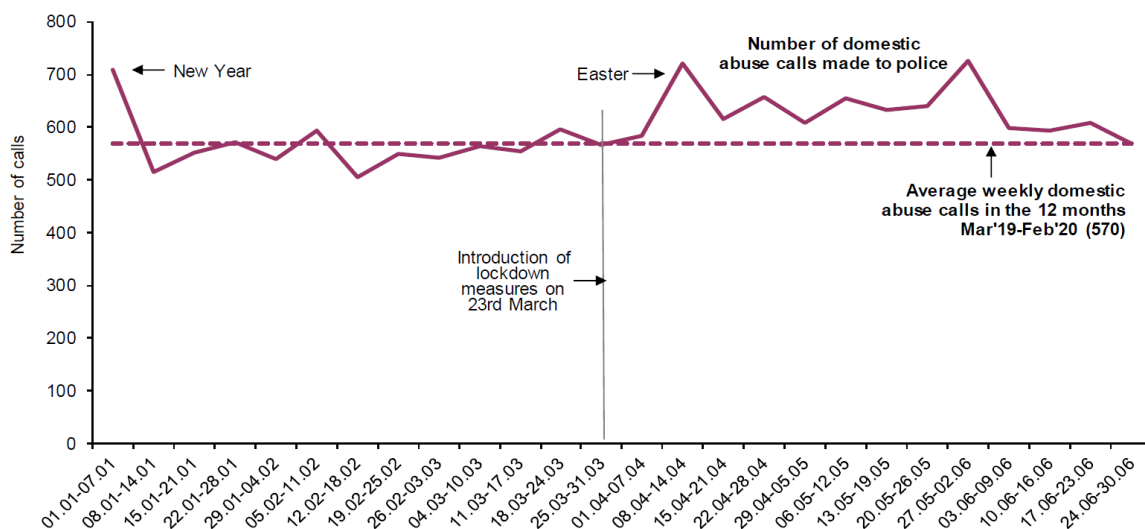
<sup>124</sup> Domestic Abuse Calls Received by Police in Northern Ireland, *Weekly management information on domestic abuse calls received by PSNI since COVID-19 lockdown measures introduced on 23 March 2020*, Available online at: <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/domestic-abuse-statistics/COVID-19/domestic-abuse-calls-to-30.06.20.pdf>



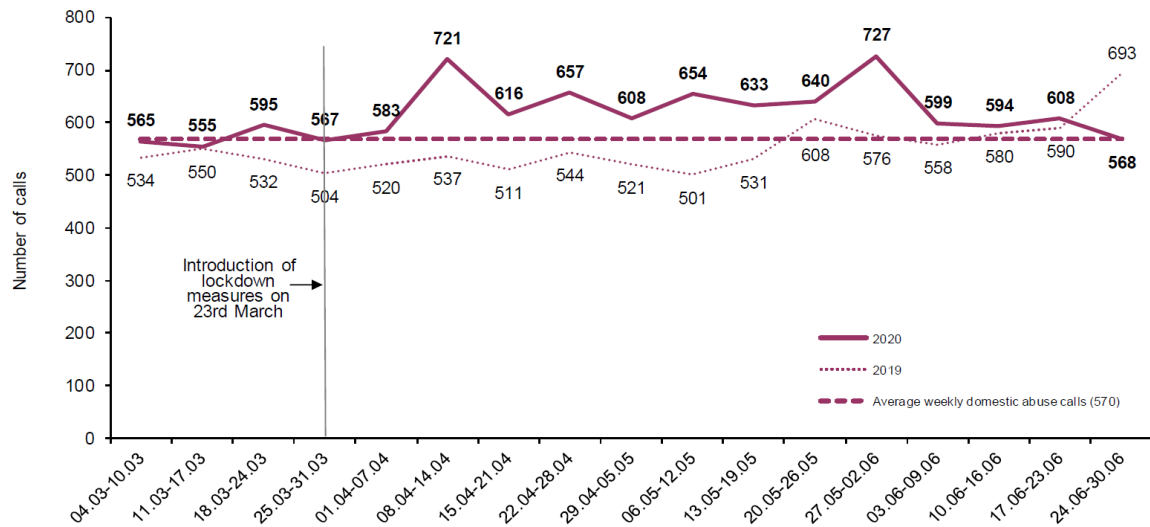
- The weekly average number of domestic abuse calls received by police is 570 (March 2019 to February 2020);
- During lockdown PSNI observed a spike in domestic abuse calls at the start of June 2020 with the highest number of calls being 727, compared to 576 in the same time period in 2019; and
- In the week 24-30 June the number of domestic abuse calls was 568, slightly lower than the previous week when 608 calls were received. This was also significantly lower (125) than the same week in 2019 when 693 domestic abuse calls were received;

The levels in calls within the overall lockdown time period illustrated an upward trend as records were completed with the weekly total at the end of the lockdown period showing a slight fall below the weekly average of 570. These statistics are further illustrated through Figure 1 and Figure 2 below:

**Figure 1 Domestic abuse calls received by police, weekly trends from Wednesday 1<sup>st</sup> January 2020 compared with the average weekly number of calls in the 12 months March'19 to February'20**



**Figure 2 Domestic abuse calls received by police, weekly trends from Wednesday 4<sup>th</sup> March 2020 compared with the same time period in 2019**



Since the start of the data series in 2004-05 there had been increasing levels of domestic abuse incidents and crimes recorded by the police, with incident levels in 2019/20 being 52% higher than those at the start of the series and crime levels 93% higher<sup>125</sup>. There were 17 domestic abuse incidents and 10 domestic abuse crimes per 1,000 population. Five of the 11 policing districts showed an increase in incidents and all districts had higher levels of crimes.

With regard to the Board’s COVID-19 engagement with relevant domestic abuse stakeholders through the Domestic Abuse IAG<sup>126</sup>, Board officials were updated on the scale of domestic abuse calls from NEXUS, Men’s Advisory Project (MAP), Rainbow Project, Victim Support and Hourglass. As of the 24 June 2020, NEXUS reported to have received a 155% increase in calls since the lockdown began, of which there were a high percentage of repeat calls and from victims displaying high anxiety. MAP received an unprecedented number of calls during lockdown (as of the 24 June, 500 additional calls, at times reaching 34 calls in one hour) with 30% of the calls from

<sup>125</sup> PSNI, *Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2018/19*, Annual Bulletin published 08 November 2019, Available online at: <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/domestic-abuse-statistics/2018-19/domestic-abuse-incident-and-crimes-in-northern-ireland-2004-05-to-2018-19.pdf>

<sup>126</sup> Current Membership includes: the Public Prosecution Service, the NI Courts and Tribunal Service, Women’s Aid NI, NEXUS NI, Men’s Advisory Project, the Rainbow Project, Victim Support, Action on Elder Abuse NI, NSPCC and Safeguarding Board for Northern Ireland.

individual's living in a rural setting. There was also a noticeable increase in calls from older victims of domestic abuse. Parental alienation was been identified as the reason for a number of calls, especially when the guidance was unclear in the early stages of lockdown, where court orders were in place and parents were unsure if children could be moved from different homes. Inter-familia abuse has seen a significant increase with a representative of the Rainbow project reporting to seeing an increase in those seeking help during lockdown and an increase in inter-familia abuse.

A key issue was the lack of appropriate accommodation for victims, only being offered hostel accommodation, which was not appropriate and therefore the victim often stayed in the family home with the abuser. Victim Support experienced a 21% increase in domestic abuse referrals during April/May. Finally, Hourglass initially saw a 33% spike in contact above normal levels with approximately 20% of contact, through emails late at night. The organisation also saw an increase in domestic abuse of older men, with older children being the main perpetrators of abuse.

At the start of the lockdown period, Women's Aid urged a "guaranteed commitment" from Stormont Ministers following restrictions imposed on movement and official encouragement to stay at home. PSNI also anticipated more cases of domestic violence as homes could be put under strain by extended periods of self-isolation. Women's Aid released a social media statement at this time stating that,

*'We need resources and a guaranteed commitment across the whole of the UK to support all victims of domestic violence and abuse. We are in uncharted territory and all domestic violence charities are bracing themselves for a marked increase in numbers of people coming forward.'*

In undertaking discussions with PSNI leads on the response to lockdown and safeguarding vulnerable people, PSNI reported that in collaboration with Women's Aid, 'crash pads'<sup>127</sup> were established to allow for a safe environment of self-isolation for women suffering with coronavirus. This initiative was done in conjunction with the

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<sup>127</sup> Three crash pads developed where in Belfast, Lisburn and Ballymena.

Northern Ireland Housing Executive (NIHE). In order to continue collaborative and effective working relationships the PSNI met weekly with the Domestic Abuse IAG<sup>128</sup> on the level of demand and pressures on resource on PSNI and other relevant bodies during this time. This proactive and reactive approach ensured that the weekly meetings were strategically outcome focused. During such discussions, PSNI outlined that trends illustrated an increase in reporting of domestic abuse between family members.

Furthermore, Women's Aid had made provisions to continue their key frontline work and also put major contingency plans in place by nine local groups across Northern Ireland in a bid to continue to support women and children<sup>129</sup>. Moreover, PSNI maintained continuous reassurance to victims of domestic abuse that, even during the unprecedented times due to the COVID-19 pandemic, help remained available. To support this they ensured a strong online presence and continued collaborative and partnership working with key stakeholders such as Women's Aid, Men's Advisory Project (MAP) and the Rainbow Project, including spreading awareness to crucial details for victims of abuse. In doing this, the PSNI and stakeholders spread information on the 24-hour Domestic and Sexual Abuse Helpline<sup>130</sup>, available to anyone with concerns about domestic or sexual abuse.

Furthermore, PSNI continued the Safe Place initiative, which provides support in a range of settings for people requiring information on domestic violence. As such all PSNI stations are designated Safe Places and as a Safe Place Organisation the PSNI ensure to:

- Support the Safe Place Campaign Pledge: never to commit, condone or stay silent about domestic violence;

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<sup>128</sup> Current Membership includes: the Public Prosecution Service, the NI Courts and Tribunal Service, Women's Aid NI, NEXUS NI, Men's Advisory Project, the Rainbow Project, Victim Support, We Are Hourglass, NSPCC and the Safeguarding Board for Northern Ireland.

<sup>129</sup> Women's Aid, *PSNI help always available for domestic abuse victims*, Available online at: <https://womens-aid.org.uk/psni-help-always-available-for-domestic-abuse-victims/>

<sup>130</sup> More information on 24-hour Domestic and Sexual abuse helpline, Available online at: <https://www.psni.police.uk/crime/domestic-abuse/who-can-help-me/>

- Provide a safe place for victims of domestic violence to confidentially access information; and
- Acknowledge domestic violence is a problem that impacts on all of us as a society, and will be prepared to play our part in supporting victims and state clearly to perpetrators that we will not tolerate abuse in our community.

Following from the knowledge that there was a rise in the number of domestic abuse incidents reported in a single year (PSNI recorded 31,682 incidents between 1 April 2018 and 31 March 2019), PSNI created an animated video for their 'Behind Closed Doors' campaign which explained how domestic abuse can take many forms, including financial and psychological abuse as well as physical and sexual violence, which launched on social media and media platforms in July 2019. The video was created to encourage more people to "recognise domestic abuse" and seek help. It was widely circulated during the lockdown period and due to the rise in calls involving domestic abuse over lockdown the PSNI further outlined a domestic abuse social media plan for summer 2020 which included the dissemination of this campaign on media and social media.

In regards to support for victims, PSNI reported that they, pre-COVID-19, normally initiated 'victim call back' where they would 'call back' victims within approximately 10 days. However, PSNI revised this during the lockdown period with the average time PSNI took to call victims was within 24 hours. To put this into context, police officers and staff dealt with approximately 2,000 calls and made 100 referrals to support organisations. PSNI reported that although it is a resource intensive exercise, there is a possibility it could be rolled out as business as usual.

### **Children and Young People at Risk**

The importance of identifying potential victims of child sexual abuse and exploitation (CSAE) or those who may be at risk throughout Northern Ireland is led by district police who are supported by an aide-memoire/guidance produced by the PSNI's CSAE officers to assist in the identification of indicators when conducting return home

interviews for young people. This continued to be the case for the PSNI during the COVID-19 lockdown period as they undertook a range of initiatives to continue to safeguard those vulnerable children at risk of CSAE.

As lockdown was initiated, given the already prevalent nature of online criminality, specifically where it concerned children and online grooming, risks have been previously reported by PSNI as been difficult for adults to detect and control<sup>131</sup>. This is particularly important considering the changing nature of CSAE and the surge in online offences.

PSNI reported that over the lockdown period and in conjunction with rising calls of domestic abuse incidents 24% of domestic abuse incidents were involving a parent and child, and of this percentage, 14% saw the child being the perpetrator of abuse. By way of comparison, according to a new Scottish Government COVID-19 intelligence report<sup>132</sup> on children, young people and families, domestic abuse has been identified as a factor in more child protection cases in 2020 compared with 2019 as a result of a spike in reports.

PSNI developed a specific crime prevention strategy during the COVID-19 phase for those children and young people where home is not a place of safety. This was crucial given the significant reduction of child abuse reports since lock-down measures were introduced, circa 30-40%. PSNI ensured that:

- Contact details were exchanged between Assistant Directors within the Trust and District policing vulnerability leads for children to address any urgent operational matters that may arise at a Trust/District level;
- Weekly engagement with the Assistant Directors Group for all Trusts and the Health and Social Care Board;

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<sup>131</sup> Barnardos: *What works in responding to child sexual exploitation*, 2019, Available online: <http://www.barnardos.org.uk/what-works-in-responding-to-child-sexual-exploitation.pdf>

<sup>132</sup> Children, Young People and Families COVID-19 Evidence and intelligence report, Available online at: <https://www.gov.scot/publications/children-young-people-families-COVID-19-evidence-intelligence-report/>

- An external media strategy devised focusing on child abuse/neglect, CSAE, and keeping children safe online. The Safeguarding Board for Northern Ireland (SBNI) and others had contributed to this with key messaging disseminated from the social media platforms of PSNI, SBNI, EA, NSPCC and Barnardos;
- Guidance was circulated to operational officers to raise awareness of child abuse/neglect and assist in their operational response;
- Initial engagement took place with the Education Authority in respect of those schools that remained open and teachers who continued to engage with children. Work was also undertaken to secure PSNI involvement in this, in addition to maximising opportunities for engagement with those children who continue to avail of free school meals during the pandemic;
- A tangible action plan was devised focusing on protecting children within communities and those looked after. It focused on those children on the child protection register, those identified at risk of CSAE, those offenders who are on bail for child abuse offences or who are subject to CAWN<sup>133</sup>, RoSHO<sup>134</sup> or SOPO<sup>135</sup>, and those who are currently outstanding and wanted for arrest for child abuse offences; and
- Ongoing work to identify those children and persons posing a risk with an online footprint as an opportunity for proactivity.

PSNI processes were developed for specific actions for District policing based on themes. This was done in partnership with Health & Social Care Trusts (HSCT) who focussed on a minimum of 5 families per Trust every 2 weeks, where children were subject of the Child Protection Register. As such, a written brief / plan was provided to the local policing district regarding each family. Individuals subject to CAWN,

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<sup>133</sup> **Child Abduction Warning Notice (CAWNs)** are used to disrupt an adult's association with a child or young person. Previously called 'Harbourer's Notices', a CAWN warns the adult that they have no permission to associate, contact or communicate with the young person, and that if they continue to do so, they may be arrested and prosecuted.

<sup>134</sup> **The Risk of Sexual Harm Order (RoSHO)** was another preventative order created by the Sexual Offences Act 2003. New civil orders to contain sexually harmful behaviour in the community The Risk of Sexual Harm Order could be applied to any individual who poses a risk of sexual harm in the UK or abroad, even if they have never been convicted.

<sup>135</sup> **Sexual Offences Prevention Order (SOPOs)** are a type of civil order. They were introduced in their current manifestation by section 104 of the Sexual Offences Act (2003). Prior to this, there had been similar orders available to the courts under section 5 of the Sexual Offenders Act 1997.



RoSHO or SOPO were briefed to District policing for passing attention and proactive patrolling of areas of concern, vehicles of concern and addresses of concern. Specific actions were also enacted in relation to suspects on bail for child abuse offences and ensured bail checks were being conducted in conjunction with local districts. Specific actions were also established in relation to individuals identified at risk of CSAE and considering wider vulnerability as highlighted by HSCT, for example, young people assessed at level 3 who are not accessing high level interventions.

Following from the work undertaken by PSNI through 'Collectively Preventing Harm' collaborative meetings which will be outlined in more detail below, discussions with the service lead in PPB outlined that the development of a risk register<sup>136</sup> for children at risk and the weekly meetings with partners in social services allowed for a targeted and collaborative approach to dealing with children at risk. However, during the lockdown period it was also reported that social services were unable to carry out business as usual in regards to visiting those children at risk. To counteract this and demonstrate a proactive approach where other organisations didn't have the capacity to do so, PSNI outlined that during this period PSNI officers called to approximately 50 children who were on the risk register. As stated at the beginning of this chapter, overall crime fell in the early stages of the COVID-19 lockdown and therefore the PSNI demonstrated flexibility in adapting their priorities to focus more on preventive work and thus ensured that those at risk, children in care and children on the protective register were safeguarded.

Locally, Causeway, Coast and Glens PCSP launched a digital wellbeing and safeguarding resources pack<sup>137</sup> aimed at parents to help keep themselves and their children safe online. This was effective working with the aim of ensuring that children

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<sup>136</sup> PSNI previously reported through 2019/20 police performance monitoring that quarterly CSAE Team meetings are co-chaired by Social Services & PSNI in order to focus on suspects, hotspots, emerging trends, issues and best practice and reflective review which involves Trust inspectors, a CSAE Sergeant and the Trust Lead Social Worker. PSNI state that police and Social Services organise bi-monthly CSAE risk management meetings to review those young persons that are flagged at high risk of CSAE, review investigative strategy and set specific actions and current risk level for each young person.

<sup>137</sup> The pack was created in partnership with the NSPCC, Northern and Western Health and Social Care Trusts, PSNI and the Education Authority.

and families who may be vulnerable to online abuse and scams know how to protect themselves.

During the summer Include Youth<sup>138</sup> carried out a survey of young people which asked the young people to consider a number of questions which were designed to gauge young people's experience of policing during recent months, including how they felt policing during COVID-19 had impacted on their confidence in policing, how they believed the PSNI had dealt with the crisis and if they had had much contact with the police in relation to COVID-19 regulations. 24 young people completed the survey. 50% (12 young people) of the young people felt that the COVID-19 crisis had impacted the relationship between young people and the police; however nine young people said their confidence in the police had increased with five young people saying their confidence had decreased. When asked how they thought the police had treated young people during COVID-19 crisis, 8 out of 21 young people thought the police had not treated young people fairly with several young people feeling that the police should take more time to consider the individual circumstances of young people and not make assumptions or jump to conclusions. However, other young people felt that the police had acted in a balanced and fair way with 5 young people saying that young people had been treated fairly while 8 expressed no opinion.

### **Older People at Risk**

Older people are overall less likely to be victims of violent crime, however when it comes to crimes such as burglary, criminal damage, vehicle theft and violence without injury, older people are more at risk of these forms of criminality. These are crimes which intrude on what might be considered 'safe spaces' and can cause severe and lasting harm. When older people become victims of crime, they need to be able to have confidence in the response of the PSNI, in partnership with key statutory agencies, including the PPS and the court system. However, the PSNI have reported

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<sup>138</sup> Include Youth is an independent non-governmental organisation that actively promotes the rights, best interests of and best practice with disadvantaged and vulnerable children and young people.

during 2019/20 that their outcomes<sup>139</sup> for the crimes outlined above continue to be lower for older people than for other age groups.

During 2019/20, the Board welcomed the PSNI's Older People and Crime Strategy which was developed to raise awareness of older persons and crime issues and to develop understanding of the impacts of crime on older people, as well as the drivers of crime where older people are victims.

During lockdown the PSNI issued an urgent warning after a spate of hoax calls from fraudsters claiming to be from the HMRC demanding money. They also reported that almost 300 reports were received of HMRC scams between April-June 2020 and criminals stole more than £11,000 between June-July 2020. In order to protect those vulnerable victims of crime during the period of lockdown the PSNI undertook greater collaborative working with partners to raise awareness through the ScamWiseNI partnership<sup>140</sup>. They also continued partnership working with a range of stakeholders<sup>141</sup> to reduce harm and to protect those vulnerable older victims of crime. The PSNI released multiple social media and media pleas to encourage people to take extra precautions to protect themselves and appealed to family members to do all they could to let loved ones know, especially those older and vulnerable, to never give out their financial details without official verification from their bank.

The PSNI also undertook another positive and effective initiative in the 'Nominated Neighbour Scheme'. A partnership scheme with the Commissioner for Older People NI (COPNI) to ensure that if/when an unrecognised caller comes to the address of an older person, when they are alone in the house, the caller will be handed a card instructing them to contact their Nominated Neighbour. In turn, the nominated

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<sup>139</sup> The percentage of recorded offences in which an offender is identified and there is a further identifiable outcome to the case including prosecution, a financial penalty or a diversionary alternative.

<sup>140</sup> More information on ScamWiseNI partnership, Available online at:

<https://www.nidirect.gov.uk/campaigns/scamwiseni>

<sup>141</sup> Trading Standards, AgeNI, Department of Justice, the Commissioner for Older Persons NI, Women's Aid, Victim Support NI, NI Direct, Consumer Council, Northern Ireland Fire & Rescue Service, Gumtree, Health and Social Care Trust, Age Sector Platform, Irish League of Credit Unions, PBNI, Dementia NI, Action on Elder Abuse, Banks, Libraries NI, Charities Commission and the National Association of Postmasters.

neighbour will then try and check the caller's identity. The scheme seeks the help of neighbours or relatives to check whether unexpected callers are genuine, especially those calling on more vulnerable members of the community.

## **Innovation and Partnership**

### *Collectively Preventing Harm*

The COVID-19 crisis and subsequent social distancing measures and restrictions created the need for an increased and co-ordinated focus on those who were most likely to have particular and additional vulnerabilities during the lockdown period. This included those who may be subject to domestic and sexual violence and abuse; children and young people where home may not be a place of safety or who have particular vulnerabilities with regard to exploitation; and those who may come to the attention of a number of agencies for complex vulnerabilities via Support Hubs<sup>142</sup>.

PSNI led a multi-agency meeting on Collectively Preventing Harm, attended by: PSNI, Department of Justice (DoJ), the Policing Board, Department for Communities (DfC), Education Authority (EA) and Health and Social Care Trust (HSCT); and Safeguarding Board NI. The group met, and continue to meet, to ensure connectivity between key agencies and the various support mechanisms available to those with increased vulnerability as a result of COVID-19 and social distancing measures. Through the multi-agency approach a number of successful initiatives were enabled, including support as outlined throughout this chapter. The main benefit and impact of this forum was that as issues were identified by the main statutory bodies, actions and solutions were identified and initiated on a weekly basis thus speedily addressing and resolving issues and problems as they arose throughout the emergency period.

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<sup>142</sup> Support Hubs provide an early intervention for vulnerable individuals identified predominantly by statutory agencies. The Support Hub brings together key professionals including blue light services, health and social care staff and the voluntary sector as a cross agency group, to share information and make decisions to improve a person's situation. Indicative evidence from Support Hubs shows how a collaborative approach can produce successful outcomes which cannot necessarily be achieved through one agency.

## *Support Hubs*

Throughout the response to COVID-19 Support Hubs demonstrated the critical service and opportunity they provide to give support to those most vulnerable. With ten Support Hubs working within their District Council area, PSNI reported that the growth took partnership working, to support the most vulnerable, to an accelerated and more effective level.

Over the COVID-19 crisis period Support Hubs adapted and innovated to respond to the ways in which the unprecedented time saw vulnerabilities exacerbated. By way of example, amongst the key concerns discussed and addressed included the drop-off in child protection referrals which was a collective fear of the PSNI and other key partners, was simply through a lack of visibility of the harm being inflicted behind closed doors. Hub partners worked to identify families and young people on the ‘at risk’ register seen to be at particular risk during COVID-19 and identified actions to try and reduce the risk. As a result, the Hubs were, and continue to be, critical in plugging strategic gaps and concerns brought about by the crisis. The Hubs also formed a close link and referral mechanism into the “Collectively Preventing Harm” forum where issues could be referred to and solutions could be identified quickly.

Local PCSPs also contributed to supporting the Hubs as well as continuing to implement supportive projects as part of their programmes of work. For example, in regards to supporting resilience groups, innovative working through the COVID-19 lockdown was demonstrated by Derry & Strabane PCSP<sup>143</sup>, who used £16,000 of re-routed funds and their Community Safety Wardens to support community and resilience groups throughout the district during the pandemic. Alongside providing funding, PCSP staff helped to manage the Community Hub, which acted as a liaison between referral agencies like AdviceNI and the Health Service, the Community

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<sup>143</sup> More information on: Inpartnership, The Policing & Community Safety Partnership (PCSP) Newsletter, Available online at: <https://www.pcsp.org/sites/pcsp/files/publications/Inpartnership%20Issue%201%20-%20Aug-Sept%2020%20-%20WEB.pdf>

Resilience Groups and the clients who needed support. Community Safety Wardens continued to be active during the period, responding to referrals and concerns for the public, helping to advise on social distancing, transporting food parcels and working with the PSNI Neighbourhood Teams to deal with anti-social behaviour. This quick response enabled successful intervention in two suicide attempts and overall it is reported that there were a total of 2,915 patrols and 1,360 referrals in this time period.

Finally, research from the Mental Health Foundation suggested that 4 out of 10 young people felt lonely due to the COVID-19 restrictions, a potentially common feeling across society for many people. Mid & East Antrim PCSP identified this risk early and enabled positive local policing in action through the ‘Loneliness Project’ which distributed mental health boxes to vulnerable people<sup>144</sup>. As a result, a total of 125 mental health boxes were distributed and 50 growing kits which signalled positive intent in aiding those vulnerable people who suffer from mental health issues through the lockdown period<sup>145</sup>.

## **Summary of Impact**

During the lockdown period the PSNI saw an increase in demand for service, including a significant increase in domestic abuse calls. The evidence throughout this chapter illustrates that the PSNI reacted proactively and timely to initiate solutions to this increased demand in order to maintain and deliver services. Indeed, during this period of emergency and increased pressure of policing demand the evidence would point to additional services being provided to those who were most vulnerable.

The new collaborative partnership of Collectively Preventing Harm was vital in

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<sup>144</sup> The boxes contain 7 days of fun activities and resources designed to improve mental wellbeing. The project also distributed salad growing kits to older residents to help them reconnect with nature and improve their mental health.

<sup>145</sup> More information on: Inpartnership, The Policing & Community Safety Partnership (PCSP) Newsletter, Available online at:  
<https://www.pcsp.org/sites/pcsp/files/publications/Inpartnership%20Issue%201%20-%20Aug-Sept%2020%20-%20WEB.pdf>

highlighting and addressing needs, issues and concerns of the most vulnerable as they arose during the COVID-19 lockdown period and to finding quick and effective solutions. This partnership approach highlights the benefits of collaboration between the statutory partners to collectively pool resources in order to achieve effective and efficient solutions to issues as they arose on a weekly basis. The PSNI are to be commended in taking the initiative to make this happen and assuming the leadership role in making this happen at a time of emergency. This also included embarking on multiple social media campaigns to highlight issues surrounding COVID-19, pinpointing services available and expediting victim call back. It is this proactive partnership and accelerated approach under the challenging circumstances from the PSNI that the Board welcomes.

#### **RECOMMENDATION 16**

The PSNI should ensure that the innovation, progress and learning made in developing new approaches to collaborative working for vulnerable people during the pandemic emergency period is harnessed and used to inform better collaboration in the future.

#### **RECOMMENDATION 17**

OPONI and Policing Board should plan and co-operate more often on significant or serious challenges confronting PSNI; and

#### **RECOMMENDATION 18**

The two organisations should therefore consider making joint or parallel submissions to the review of police oversight arrangements which is currently being led by the Department of Justice, whilst both ensuring their unique and independent roles.



## **ANNEX 1: TERMS OF REFERENCE**

### **NORTHERN IRELAND POLICING BOARD: THEMATIC REVIEW OF POLICING RESPONSE TO COVID-19**

The overarching aim is to assess the impact of the policing response on public confidence. The review will consider the extent of the application the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 along with the temporary introduction of spit and bite guards, the suspension of the Independent Custody Visiting Scheme and the health and safety issues for both PSNI and the public.

The review will consider:

- Whether the operational use of the powers and new equipment is:
  - in accordance with the law and compliant with human rights;
  - being used proportionately and whether officers can be protected in any other ways;
- Whether PSNI training and guidance for officers is adequate and has sufficient detailed consideration of the human rights issues;
- The protection of those required to remain at home;
- The impact on community confidence; and
- Whether there are any recommendations that should be made or lessons that could be learned (including whether the use of spit and bite guards by the PSNI should be restricted or should cease completely).

## **ANNEX 2: METHODOLOGY**

Following agreement on 7 May 2020 by the Policing Board to carry out a thematic review of the policing during COVID-19, the Board's Human Rights Advisor and Board officials considered that the most appropriate method to carry out the review would be to conduct a series of one-to-one interviews with a range of key stakeholders from the statutory, voluntary and community sectors across Northern Ireland. This would enhance the Board's understanding of their policing experience during the lockdown. This engagement has been invaluable in guiding the drafting of this report and in providing the Board with a perspective of how the more vulnerable members of our community experienced policing during these unprecedented times and how day to day policing had to adapt and change as a consequence of the lockdown. Include Youth provided the Board with a report on the experiences of young people and policing during COVID-19, which has been incredibly helpful in drafting the report.

To complement this engagement, the Board sought and analysed numerous sources of statistical information on police performance and interviewed key leads across PSNI in order to understand how the service implemented the Regulations while providing a police service across Northern Ireland.

The Board wishes to thank those who took the time to meet with the Human Rights Advisor or to provide a written response:

Amnesty International  
Children's Law Centre  
Commissioner for Older People for Northern Ireland  
Committee of the Administration of Justice  
Criminal Justice Inspection Northern Ireland  
Education Authority Youth Service  
Equality Commission for Northern Ireland  
Ethnic Minority Police Association  
Include Youth  
Independent Custody Visitors

Men's Advisory Project

NEXUS

Northern Ireland Commissioner for Children and Young People

Northern Ireland Human Rights Commission

Northern Ireland Youth Forum

Office of the Police Ombudsman for Northern Ireland

Police Federation for Northern Ireland

Policing and Community Safety Partnerships for Antrim and Newtownabbey; Ards and North Down; Armagh, Banbridge and Craigavon; Causeway Coast and Glens; Derry and Strabane; Fermanagh and Omagh; Newry, Down and Mourne; North Belfast; and West Belfast

The Rainbow Project

Start 360

The Law Society for Northern Ireland

The Public Prosecution Service

Victim Support

We are Hourglass

Youth Work Alliance

Finally, the Board would like to thank Chief Constable Simon Byrne, Assistant Chief Constable Alan Todd and Assistant Chief Constable Mark McEwan, and all PSNI staff and officers, who provided extensive and invaluable support throughout this review.

## ANNEX 3: HUMAN RIGHTS CONSIDERATIONS

Most human rights treaties allow the states that are bound by them to “derogate” from some the rights in emergencies. The UK has not taken advantage of the ‘derogation’ provisions of any treaties, including Article 15 of the ECHR. However courts, in Northern Ireland and the European Court of Human Rights, always take into account the overall context in dealing with human rights. As one Council of Europe expert, Jeremy McBride, stated:

*‘... it will be worth bearing in mind that the Court was ready to accept – even without a derogation under Article 15 ECHR – an extensive interference with a right where a State adopted measures in response to “the existence of an exceptional crisis without precedent” (albeit a financial one; Koufaki and Adedy v. Greece). While, this approach occurred in relation to the interference with the right to property as a result of measures cutting wages and salaries to safeguard the national economy, it would not be surprising if extensive restrictions to preserve the health infrastructure were not also accorded a fairly generous, if not unlimited, margin of appreciation. This is likely to be especially so given the apparent need for generalised measures rather than those taken against just specific individuals, as seen in the limited cases so far before the Court that have dealt with related issues.’<sup>146</sup>*

Only those human rights that directly relate to policing issues are described below.

### *Freedom of Movement*

It is freedom of movement that is the most obvious casualty of the Health Regulations. The European Convention of Human Rights does contain a freedom of movement right in Article 2 of Protocol 4 but this has never been ratified by the UK and is not,

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<sup>146</sup> <http://echrblog.blogspot.com/2020/03/an-analysis-of-COVID-19-responses-and.html>

therefore, included as one of the rights protected by the Human Rights Act.<sup>147</sup> However, the UK has ratified the United Nations International Covenant on Civil and Political Rights and Article 12 of this treaty contains a right to freedom of movement. There are also references to this right in the provisions of the UN treaty prohibiting race discrimination (CERD) and discrimination against women (CEDAW) and a substantive right for people with disabilities in the UN CRPD.

*Right to life and Ill-treatment: Article 2 and 3*

The general idea of the right to life has been one of the obvious reasons for imposition of the Health Regulations and the extent to which that it has been sufficiently strictly complied with is likely to feature in the subsequent inquests and public inquiries. It is likely to be raised by the relatives of those died who believe that more could have been done to protect them – care staff who were not provided with Personal Protection Equipment or those in residential care who, it is alleged, were forgotten.

In the context of policing these provisions could apply to ensure that the policing response is directed, as part of the overall response by the state, to protect people by reducing transmission rates. However, not surprisingly, these duties do not require the state to violate other rights to achieve this aim. The duty on the police also continues to apply to protect people from attacks by others.<sup>148</sup>

Finally, however, the right to life will apply to the activities of the police arresting and detaining suspects. As a general rule persons in custody are in a vulnerable position and the authorities are under a duty to protect them. There is also a positive duty to protect a detainee if the authorities:

*“...knew or ought to have known at the time of the existence of a real and immediate threat to life of an identified individual by a third party or himself and*

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<sup>147</sup> Article 2 of Protocol 4, this was never ratified because of concerns that some people with British Nationality but not already resident in the UK would be able challenge the fact that they could not travel and live in the UK.

<sup>148</sup> Osman v UK (1998)

*they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.” (Keller v Russia (2013), para. 82)*

The European Court of Human Rights has also adopted a principled approach in respect of the medical treatment of vulnerable persons under the care of the State when the domestic authorities, despite been aware of the appalling conditions that later led to the death of persons institutions, had nonetheless unreasonably put the lives of these people in danger (Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania (2014)). The Court has stated:

*“...the Court reiterates that the authorities have an obligation to protect the health of persons who are in detention or police custody ... and whose relationship with the State authorities is therefore one of dependence. That entails providing prompt medical care where the person’s state of health so requires in order to prevent a fatal outcome.” (Tenkin and Arslan v Belgium, para.85)*

The obligation on the authorities for the treatment of an individual in custody is particularly stringent where that individual dies or suffers from conditions that constitute a violation of the standards provided by Article 3 (A and Others v UK (2009)

The courts will have taken into account the incredibly difficult circumstances that the Government faces and that the facts of the cases referred to about are very different. Nevertheless, the responsibility for the lives of those in prison lies with those involved in detention.

The absence of appropriate medical and other necessary care for those in custody also engages Article 3 (also an absolute right) – the prohibition of torture, inhuman and degrading treatment and punishment. The jurisprudence from the Court requires the state to provide “requisite medical assistance” for those in custody (Ramirez Sanchez v France, (2006) para. 120) and to “protect the physical well-being of persons deprived of their liberty” (Khudobin v Russia (2006), para. 93). Where the lack of this

assistance gives rise to a medical emergency or “otherwise exposes the applicant to severe or prolonged pain” there will be a violation of Article 3 (McGlinchey and Others v UK (2003)). The state needs also to provide a place of detention tailored to the needs of those “mentally disabled”, “physically disabled” persons with a serious physical illness, and the elderly (Dybeku v Albania(2007), WD v Belgium (2016), MS v UK (2012), Price v UK (2001, Mouisel v France (2002), and Papon v France (No 1) (2001)).

In *Wedler v Poland* (2007) the Court decided that if a prisoner’s state of health becomes such that adequate medical or nursing assistance cannot be provided in detention, Article 3 requires the prisoner to be released (see also *Arutyunyan v Russia* (2012); *Farbtubs v Latvia* (2004); *Enea v Italy* (2009); and *Gelfmann v France* (2004)).

In parallel with the duty to protect life under Article 2 and protect prisoners from Article 3 violations there are strict investigatory duties which are particularly important for learning lessons for the future and, there is some concern that this duty may be lost sight of during the current emergency.

Article 3 is also relevant to the use of Spit and Bite Guards and the issues are set out in more detail in chapter 3.

#### *Detention: Article 5*

Article 5 of the ECHR restricts the power to arrest or detain a person but includes the power to arrest a person if they have committed a criminal offence, are about to commit an offence or are fleeing after committing an offence. Furthermore, Article 5(1)(e) allows “the lawful detention of persons for the prevention of the spreading of infectious diseases...”.

In addition, there are the more general tests for compliance with Article 5 which require:

- Precise and foreseeable law



- The duty to provide the reasons for detention -5(2) –given to the individual
- Regular review of detention by a court - 5(4)
- Compensation for unlawful detention - 5(5)

Freedom from arbitrary arrest and detention, Article 5, applies to house arrest and there are arguments that the strict nature of the Health Regulations, especially the original set of rules, might constitute house arrest. Furthermore, with regards to the duration of detention under Article 5, the UK’s Supreme Court has found that daily 18 - hour curfews do constitute a breach.<sup>149</sup> On the other hand there are arguments that Article 5(1)(e) is designed to allow the state to detain people who are infectious and need to be detained to protect the general population. It is not designed to allow the state to detain people not infectious and who are not a threat to others.

However, because the Regulations allow the opportunity to leave home for a variety of reasons, making it an offence only in the absence of a “reasonable excuse” and, unlike in a prison-type situation, there are no locks, no guards and no 24 hour type surveillance they might not violate Article 5.<sup>150</sup> The Court’s approach has also been to apply the article specifically designed for the issue in question rather than other articles – this tending to suggest the lockdown rules are an issue to be addressed under the freedom of movement provision not Article 5.<sup>151</sup> This is not to say that there might be circumstances where Article 5 applies,<sup>152</sup> for instance if a person was prevented from leaving a care home or hospital.

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<sup>149</sup> *SSHD v JJ* [2007] UKHL 45.

<sup>150</sup> The Court’s guidance on Article 5 states “The requirement to take account of the “type” and “manner of implementation” of the measure in question enables the Court to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good (*De Tommaso v. Italy* [GC], § 81; *Nada v. Switzerland* [GC], § 226; *Austin and Others v. the United Kingdom* [GC], § 59).”

[https://echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://echr.coe.int/Documents/Guide_Art_5_ENG.pdf)

<sup>151</sup> *Lex specialis*.

<sup>152</sup> In the case of *Jollah*, he “had not been locked into his house, there were no guards to prevent his leaving, and there were no other way in which he was physically prevented from leaving home. The Supreme Court disagreed and defined false imprisonment as an act of a defendant that directly and intentionally causes the confinement of a claimant within an area delimited by the defendant” see <https://ukhumanrightsblog.com/2020/04/10/leviathan-unshackled/>

### *Fair trial: Article 6*

The limitations on the restrictions on court processes and procedures provided for in Article 6 is complex and not dealt with in detail here. However, the right to a fair trial in criminal cases also encompasses the collection of evidence by the police and the process of questioning in police custody. Solicitors in Belfast have alleged that the protections provided in custody suites are inadequate and they therefore could not visit their clients. See chapter 2 for more details.

*Articles 8, 9, 10, 11, 12 and Article 1 of Protocol 1 are qualified rights<sup>153</sup> and one of the justified limitations is the protection of health.*

### *Private and family life: Article 8*

It needs to be noted first that social distancing and general advice not to visit relatives and to self-isolate are not legal requirements or set out in the Regulations and could not be enforced by police officers. The list of lawful movements in Regulation 5 is relatively long and, in any event, subject to a 'reasonable excuse' provision. Some of the challenge for officers occurred because individuals wanted to assert other socio-economic and cultural rights (not contained in the Human Rights Act)<sup>154</sup> as a basis for leaving their home and for travel – their duty to comply with employment and other contracts or to earn a living etc. There were also a series of actions by police officers which engaged the privacy provision in Article 8:

- Requests under the Regulations to explain to officers why you are outside your home
- Some reasons being particularly sensitive involving medical needs, relationships, who you live with and your religion
- Some explanations about who a person is travelling with and who they are gathering with

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<sup>153</sup> Qualified rights can be subject to limitations provided the limitation is sufficient prescribed by law, for a legitimate purpose and is proportionate.

<sup>154</sup> However, these are likely to be in other UN treaties that the UK government has ratified.

- Also reasons relating to what kinds of employment need to travel for and whether they can be carried out online or at home

In relation to the right to family life, restrictions on visiting relatives will engage but might not violate Article 8.<sup>155</sup>

### *Religion: Article 9*

Article 9 provides for a right to manifest a religion which often requires celebrating with others and, particularly, with a religious leader. This is particularly important for people in the context of funerals.<sup>156</sup> Social media and technology will mitigate the restrictions but the restriction is a harsh one for some people to accept but in general it is likely to be lawful. However, there were challenging and difficult cases which will require sensible decisions by police officers taking into account the key human rights principles.

### *Speech, Assembly and Protest: Articles 10 and 11*

Traditional parades or other gatherings are not completely exempt nor would any kind of protest or demonstration.

*“Significant restrictions on public gatherings in terms of the numbers participating or the places in which they can occur have been upheld where the aim was to protect public safety or to preserve public order (see, e.g., Chappell v. United Kingdom (dec.), no. 12587/86, 14 July 1987 and Rai, Allmond and “Negotiate Now” v. United Kingdom (dec.), no. 25522/94, 6 April 1995). The*

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<sup>155</sup> Council of Europe expert, Jeremy McBride: “The impact of the influenza quarantine on the possible contact between a father and his child was only partially the basis for the interference with the applicant’s family life that was considered in *Kuimov v. Russia*, no. 32147/or, 8 January 2009. In that case, much of the period concerned was the result of the child being taken into temporary care for her physical and psychological health. However, as regards the quarantine period – which lasted just over 3 months – the Court emphasised that it did “not last an unreasonably long time and, in addition, the applicant was allowed to come and see A. through the glass window on a weekly basis” (para. 103).” <http://echrblog.blogspot.com/2020/03/an-analysis-of-COVID-19-responses-and.html>

<sup>156</sup> See *Sabanchiyeva and Others v. Russia*, no. 38450/05, 6 June 2013 and *Ploski v. Poland*, no. 26761/95, 12 November 2002.

*dispersal of a gathering has also been found not to be in violation of the right to freedom of assembly where this was to protect the health and safety of those participating in it (see Cisse v. France, no. 51346/99, 9 April 2002). These have, however, been cases concerned with discrete events and not restrictions or even total bans that are applicable to gatherings occurring in a large part, or even the whole, of a State's territory.*

*Nonetheless, the Court has accepted that a general ban on demonstrations can be justified if (a) there is a real danger of these resulting in disorder which cannot be prevented by other less stringent measures and (b) the disadvantage of the ban's impact on demonstrations which do not by themselves constitute a danger to public order is clearly outweighed by the security considerations invoked to justify it (see Lashmankin and Others v. Russia, no. 57818/09, 7 February 2017, at para. 434). Similar considerations could also be invoked where gatherings in public of any size would generally pose a real risk of facilitating the spread of infection – even if some might not – and thus afford a justification for the resulting interference with political, religious or social gatherings that are protected by Articles 11, 9 and 8 ECHR respectively.*

*However, material considerations for determining whether or not the imposition of particular restrictions on gatherings for more than a short period of time is a proportionate response would not only be the continued duration of the threat of infection spreading but also whether this would lead to the complete suppression of rights that are essential foundations for a democratic society.”<sup>157</sup>*

However, in justifying a restriction on processions, protests and parades the courts will need to assess the link between the restriction itself and the aim of the restriction. A protest that can be justified as needing to happen urgently and one that can be organised with social distancing (and therefore with restricted numbers in attendance) might be lawful, despite the strict nature of the Regulations.

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<sup>157</sup> Jeremy McBride <http://echrblog.blogspot.com/2020/03/an-analysis-of-COVID-19-responses-and.html>.

The relatively absolute restrictions in the Regulations was taken by police officers (and leading politicians) as the 'last word' on what was or was not allowed. This is not quite accurate as the Human Rights Act applies despite other legislation, particularly, secondary legislation, such as these Regulations.<sup>158</sup> Thus if, for instance, the right to assemble or protest can only be banned if such a restriction complies with Articles 10 and 11 of the ECHR. In the context of the provisions of the Regulations a key issue is likely to be whether the event be held without creating a significant danger of the transmission of the virus. This will be important if the organisers of the event intend (and are likely to succeed with) measures, including social-distancing, that will significant reduce the possibility transmission of the virus despite the proposed 'gathering'.

#### *Marriage: Article 12*

Attending or participating in a marriage is not exempt from the restrictions but because a delay is unlikely to impair the very essence of the right this may be justified, especially if the event is allowed but the numbers allowed to attend is regulated.

#### *Discrimination: Article 14*

Article 14 protects people from restrictions on the other rights in the ECHR that are discriminatory (including indirect discrimination). This might be an issue if some groups like people with disabilities are disproportionately impacted by the Regulations.<sup>159</sup> Obviously, the rules must be applied equally to all. Enforcing the Regulations against some groups and not others without a legitimate reason will be unlawful.

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<sup>158</sup> *RR v Secretary of State for Work and Pensions* [2019] UKSC 52. The Supreme Court found that there is "nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA."

<sup>159</sup> <https://www.bindmans.com/news/government-guidance-changed-to-permit-people-with-specific-health-needs-to-exercise-outside-more-than-once-a-day-and-to-travel-to-do-so-where-necessary>

*Education: Protocol 1, Article 2*

The right to education is primarily a right for children and young people and although this right has been curtailed is likely to be justified and it is unlikely that this is an issue for police officers.

Although no legitimate aims are specified as the basis for imposing restrictions, public health is likely would be regarded as a proper basis for doing so. Continuing teaching using online means will mitigate the likelihood of a court finding a violation as will a short period without education.

*Loss of livelihood: Protocol 1, Article 1*

Article 1 of Protocol 1 contains the right to peaceful possession of property and for compensation from the state for loss.<sup>160</sup> These are separate rights. The right to peaceful possession is a qualified right and would be to be justified and proportionate. The PSNI could be subject to a claim that its action (even if lawful under the Regulations) is disproportional and has led to loss which has not been compensated.

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<sup>160</sup> See here for the Court's own detailed guidance [https://echr.coe.int/Documents/Guide\\_Art\\_1\\_Protocol\\_1\\_ENG.pdf](https://echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf)

## ANNEX 4: CUSTODY STATISTICS

### Number of Detainees held by Suite January 2020 – June 2020

Custody Suite	Jan 20	Feb 20	Mar 20	Apr 20	May 20	Jun 20	Total
Antrim	252	239	102	87	254	187	<b>1121</b>
Antrim First Floor	49	79	1	0	6	16	<b>151</b>
Banbridge	219	239	14	0	0	0	<b>472</b>
Bangor*	0	4	0	0	0	0	<b>4</b>
Coleraine	84	47	94		71	142	<b>438</b>
Dungannon	165	148	88	4		106	<b>511</b>
Lurgan	67	0	184	189	224	214	<b>878</b>
Musgrave First Floor (TACT Detainees)	138 (3)	96 (9)	66 (2)	67 (0)	110 (6)	69 (7)	<b>546 (27)</b>
Musgrave Ground Floor	869	829	699	751	852	864	<b>4864</b>
Omagh	147	148	123	129	223	115	<b>885</b>
Strand Road	211	210	166	177	190	208	<b>1921</b>
<b>Total</b>	<b>2201</b>	<b>2039</b>	<b>1537</b>	<b>1404</b>	<b>1930</b>	<b>1921</b>	<b>11032</b>

\*Contingency Suite



**Number of Custody Visits undertaken by Suite Jan 2020 – June 2020**

<b>Station</b>	<b>Jan-20</b>	<b>Feb-20</b>	<b>Mar-20</b>	<b>Apr-20</b>	<b>May-20</b>	<b>Jun-20</b>	<b>TOTAL</b>
Antrim	7	8	1	0	0	5	<b>21</b>
Banbridge	2	3	1	0	0	0	<b>6</b>
Bangor	0	0	0	0	0	0	<b>0</b>
Coleraine	4	2	3	0	0	3	<b>12</b>
Dungannon	5	4	3	0	0	1	<b>13</b>
Lurgan	1	0	2	0	0	4	<b>7</b>
Musgrave	12	9	7	0	0	10	<b>38</b>
Musgrave SCS	3	3	1	0	2	8	<b>17</b>
Omagh	3	5	3	0	0	1	<b>12</b>
Strabane	1	0	0	0	0	0	<b>1</b>
Strand Road	6	5	2	0	2	6	<b>21</b>
<b>Total</b>	<b>44</b>	<b>39</b>	<b>23</b>	<b>0</b>	<b>4</b>	<b>38</b>	<b>148</b>

\*Contingency Suite

### Number of Detainees held by Suite January 2019 – June 2019

Custody Suite	Jan 19	Feb 19	Mar 19	Apr 19	May 19	Jun 19	Total
Antrim	222	165	251	212	220	228	<b>1298</b>
Antrim First Floor	4	0	17	0	2	0	<b>23</b>
Banbridge	161	134	184	166	184	169	<b>998</b>
Bangor*	0	0	0	1	4	0	<b>5</b>
Coleraine	164	151	173	164	148	167	<b>967</b>
Cookstown	0	0	0	0	0	1	<b>1</b>
Dungannon	129	116	138	132	117	148	<b>780</b>
Lurgan	159	153	146	131	175	142	<b>906</b>
Musgrave First Floor (TACT Detainees)	126 (22)	69 (10)	140 (6)	126 (21)	84 (12)	111 (16)	<b>656 (87)</b>
Musgrave Ground Floor	866	861	970	937	969	883	<b>5486</b>
Omagh	103	122	157	153	116	182	<b>833</b>
Strabane*	141	110	6		3	0	<b>260</b>
Strand Road	0	21	174	196	172	193	<b>756</b>
<b>Total</b>	<b>2075</b>	<b>1902</b>	<b>2356</b>	<b>2218</b>	<b>2194</b>	<b>2224</b>	<b>12969</b>

\* Contingency Suite

### Number of Custody Visits undertaken by Suite January 2019 – June 2019

Station	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	TOTAL
Antrim	4	4	5	4	3	5	<b>25</b>
Banbridge	4	4	4	4	4	4	<b>24</b>
Coleraine	6	5	5	7	6	3	<b>32</b>
Dungannon	5	5	5	5	5	4	<b>29</b>
Lurgan	6	3	5	4	4	3	<b>25</b>
Musgrave	8	7	9	9	12	9	<b>54</b>
Musgrave SCS	5	3	2	4	5	6	<b>25</b>
Omagh	5	5	5	5	5	4	<b>29</b>
Strabane	6	6	0	0	0	0	<b>12</b>
Strand Road	0	1	5	4	4	5	<b>19</b>
<b>Total</b>	<b>49</b>	<b>43</b>	<b>45</b>	<b>46</b>	<b>48</b>	<b>43</b>	<b>254</b>

\*Contingency Suite

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