The normative and practical obstacles to effective prosecution of ill-treatment by official persons

Northern Ireland Report

Brian Gormally – Committee on the Administration of Justice

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1. Acknowledgments

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1 Dickson, B and Gormally, B, *Human Rights in Northern Ireland: CAJ Handbook* (Hart, 2015)

2. Questionnaire Part I – Overview of the criminal legal system and regulation of the police

2. 1. Background

From the mid-sixties to the end of the millennium, Northern Ireland was gripped by a violent political conflict whose direct impact was felt in Britain and the Republic of Ireland and which cost over three and a half thousand deaths, scores of thousands of injuries and up to forty thousand people imprisoned. In a population of one and a half million, this was a long term, deep trauma for a small region in Western Europe albeit with a historically divided community. The Provisional Irish Republican Army (IRA) was the main armed group on the republican side and the Ulster Defence Association (UDA) and the Ulster Volunteer Force (UVF) were the two main loyalist armed groups. This is not the place to examine theories and views about the conflict, nor about policing during it. However, the Royal Ulster Constabulary (RUC) was an armed combatant during the conflict and was subject to accusations of routine torture during interrogations, a "shoot to kill" policy of "taking out" known republicans and active collusion with loyalist assassination squads. In particular, RUC Special Branch was called 'a force within a force' and operated secretly and apparently unaccountably from the more 'normal' elements of policing.

Without dwelling on the details or giving detailed references for what is, for present purposes, general background, the following excerpt from 'The Crowned Harp: Policing Northern Ireland' by Graham Ellison and Jim Smyth (2000) ISBN 0-7453-1393-0 gives a flavour of the policing climate in the 70s.

'The exigencies of the political situation and the use of emergency legislation replaced any pretence at normal policing and anyone living in a republican area was a likely target for police attention. In a twelve-month period during 1977-78, 2,800 people were arrested under the three-day detention powers, of which 35 per cent were subsequently charged, usually on the basis of confessions extracted during interrogation. Of those arrested under all the various pieces of emergency legislation - four-hour, three-day or seven-day detention - 90 per cent were released without charge. Anyone, whether a resident or not, found frequenting bars, clubs, or even visiting friends in republican areas was automatically suspect and likely to attract the attention of the security forces.

'Effectively, emergency powers were used to impose blanket policing in republican areas. The usual police practices for gathering intelligence, information and evidence were replaced by the use of emergency powers of arrest, detention and interrogation to gather information. Incidents of normal crime were dealt with in this fashion: 40 per cent of those charged before Diplock courts were charged with 'ordinary', that is, non-terrorist related, crimes. The evidence against most of those charged (75 per cent) was based upon confessions made during interrogation, many of which would not have been admissible under common law.

'The attitude of the RUC was to treat all Catholics as potential IRA supporters, until they could prove otherwise. Such markers as address, occupation, dress, age, gender

and general demeanour were used by officers on the ground to make decisions which could lead to the immediate arrest and detention of anyone, particularly young males, who might have aroused the slightest suspicions in the mind of the police officer. Such police practices were rendered invisible by a generally compliant media and the constant barrage of state propaganda.'

The first Human Rights Annual Report from the Policing Board, published in 2005, gave the following brief account of past abuses of detainees:

'In the 1970s, allegations of abuse, threats and intimidation of detained terrorist suspects in Northern Ireland culminated in the Report of the Committee of Inquiry into Police Interrogation Procedures for Northern Ireland chaired by Judge Bennett. This led to the introduction of a number of safeguards for detainees, including the establishment of the office of the Independent Commissioner for the Holding Centres by the Secretary of State in January 1993. The Patten Report [see below] subsequently recommended that the three holding centres at Castlereagh, Gough Barracks and Strand Road be closed and all suspects detained in Custody Suites based in police stations. In 2001, following the closure of Gough Holding Centre, then the only remaining holding centre, the title of the office was amended to Independent Commissioner for Detained Terrorist Suspects.'

This post was abolished in 2005 and its functions mainly taken over by the Independent Custody Visitors Scheme (see below).

In these circumstances, when the peace process began, it was clear that a thorough reform of policing would have to be part of a successful settlement, including tight supervision over the treatment of detainees, especially those accused of terrorist offences.

The Independent Commission on Policing for Northern Ireland was established in 1998 as part of the Belfast Agreement, intended as a major step in the Northern Ireland peace process. Chaired by Conservative politician Chris Patten, the Commission was wholly independent of the UK Government and the local political parties and had a number of international experts sitting on it. Its report amounted to a radical and fundamental reform of policing in Northern Ireland.

On September 9th 1999 the Commission produced its report, entitled A New Beginning: Policing in Northern Ireland (Crown 1999) popularly known as the Patten Report, which contained 175 symbolic and practical recommendations. Key recommendations included:

- renaming the Royal Ulster Constabulary the Northern Ireland Police Service (later changed to the Police Service of Northern Ireland – PSNI);
- a new Policing Board and District Policing Partnership Boards to ensure accountability;
- creation of a Police Ombudsman and a Complaints Tribunal;
- removal of most visible symbols of Britishness from the police service and a new badge incorporating diverse symbolism;
- a temporary 50-50 recruitment policy for Catholics and Protestants;
- a new code of ethics and oath of office, including a strong emphasis on human rights;

- an emphasis on community policing and normalisation;
- proposals for training, community liaison, cooperation with other police services, and recruitment from outside Northern Ireland; and
- repeal by the Gaelic Athletic Association of its rule 21, which prohibited members of the police or Army in Northern Ireland from being members of the Association.

The rest of the criminal justice system also required reform. Another group was set up comprised of civil servants "with an independent element." It was therefore not as independent as the Patten Commission but nonetheless produced the Criminal Justice Review which was one of the most important and far-reaching assessments of criminal justice in Northern Ireland. There were nearly 300 recommendations for change (Review of the Criminal Justice System in Northern Ireland. NIO. 2000). Key recommendations included the promotion of a human rights culture within the criminal justice system; a new independent Public Prosecution Service to replace the current Director of Public Prosecutions; the establishment of an independent Judicial Appointments Commission and an independent Criminal Justice Inspectorate. Other issues to be addressed were the needs of victims of crime, an independent Law Commission, improvements to arrangements for young people and the integration of restorative justice into the justice system. Many but not all of its recommendations were implemented through the Justice Act (Northern Ireland) 2002, and the Justice Act (Northern Ireland) 2004.

Taken together, these reforms marked a clear break with the past and a desire to establish the criminal justice structure of Northern Ireland on a human rights basis and to forge a new relationship between all the people and the institutions of state. As part of this process an "Oversight Commissioner"(in practice an independent, international person with policing experience) was set up to oversee the implementation of the Patten Commission (the mandate concluded in 2007). However, it took six years from the Patten Report and the St Andrews Agreement between the UK and Irish Governments and Northern Ireland political parties, before all main parties supported the new policing and criminal justice dispensations and their devolution to Northern Ireland control.

In December 2009, the Northern Ireland assembly passed the Northern Ireland Act 2009. This subsequently led to the devolution of policing and justice powers, the establishment of a Department of Justice and the appointment of a Minister for Justice. Policing and justice affairs were finally devolved to the Northern Ireland Assembly on 12 April 2010.

2. 2. Brief description of the criminal legal system

The overall purpose of the criminal justice system in Northern Ireland is to support the administration of justice, to promote confidence within the system and to alleviate crime and the fear of crime. The criminal justice system consists of a number of main bodies. The Police Service of Northern Ireland (PSNI) is tasked with making Northern Ireland a safer place through a policy of progressive and community focused policing. The Director of Public Prosecutions (DPP) considers the information enclosed in police investigation files and takes a decision to prosecute or not prosecute. The duty of the Northern Ireland Prison Service is to provide prison services. Statutory duties are set out in the Prison Act 1953 (Northern Ireland). The Probation Board of Northern Ireland (PBNI) carries out risk assessment and presents pre sentence reports to the courts. They also seek to integrate offenders successfully into communities by reducing re-offending.

The Northern Ireland Courts and Tribunals Service is responsible for the administration of justice through supporting the judiciary and maintain the court estate.

2. 3. Brief description of how the police system is regulated

It is the general duty of police officers to protect life and property, to preserve order, to prevent the commission of offences and that where an offence has been committed, to take effective measures to bring offenders to justice. This is detailed in the Police (Northern Ireland) Act 2000.

All serving police officers within the PSNI are required to comply with the Code of Ethics. Where an allegation of misconduct against a police officer is made, the standards against which the officer will be measured are those contained within the Code of Ethics. All complaints about the police are investigated by the independent Office of the Police Ombudsman. However, as part of its human rights monitoring work, the Performance Committee of the Policing Board also monitors internal disciplinary proceedings and breaches of the Code of Ethics. In doing so, the Committee is able to assess the extent to which individual officers are paying due regard to human rights principles and the action that PSNI as an organisation takes in response to those breaches. Furthermore, this monitoring work enables the Committee to assess the effectiveness of the Code of Ethics should the Board consider revising the Code. Torture and ill treatment by official persons is covered under the Code of Ethics.

Article 1.4 of the Code of Ethics declares,

> "Police officers shall not subject any person to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatsoever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.
>
> (Sourced from: Article 5 United Nations Universal Declaration of Human Rights; Article 3 European Convention of Human Rights; Principle 6 United Nations Body of Principles for the Protection for All Persons under any Form of Detention or Imprisonment.)"

Article 5.1, 5.2 & 5.3 of the Code of Ethics declare,

> "Police officers shall ensure that all detained persons for whom they have responsibility are treated in a humane and dignified manner. Arrest and detention shall only be carried out in accordance with the provisions of the European Convention on Human Rights, relevant legislation and associated codes of practice. In their dealings with detained persons, police officers shall, as far as possible, apply non-violent methods before resorting to any use of force. Where force is required, such use of force shall be the minimum required in the circumstances and shall be lawful, proportionate and necessary for the maintenance of security and order; to prevent escape, injury, damage to property or the destruction of evidence; or where the detained person resists the taking of items or samples for criminal justice purposes as authorised by law. Police officers shall take every reasonable step to protect the health and safety of detained persons and shall take immediate action to secure medical assistance for such persons where required."

The Code of Ethics defines the parameters of conduct within which the discretion of officers should be exercised. Any breach of the Code of Ethics may therefore result in

disciplinary action being taken, which in serious cases, could result in dismissal. The Police Ombudsman also has powers with regards to disciplinary matters as well as investigation of complaints. The Ombudsman can direct that charges be brought and invoke a special procedure known as a directed tribunal.

The Police Ombudsman has a primary statutory duty to secure an efficient, effective and independent complaints system and in doing so to secure the confidence of the public and the police in that system. Complaints are dealt with in a manner which is free from any police, governmental or sectional community interest and which is of the highest standard.

Also, in accordance with section 41 of the Police (Northern Ireland) Act 1998, the Department of Justice (DOJ) may commission Her Majesty's Inspectorate of Constabulary (HMIC) to inspect and report on the efficiency and effectiveness of the Police Service of Northern Ireland (PSNI).

The Northern Ireland Policing Board is the police authority for Northern Ireland, charged with supervising the activities of the Police Service of Northern Ireland (PSNI). It is a non-departmental public body composed of members of the Northern Ireland Assembly and independent citizens.

2. 4. Preventive measures and solutions including legal provisions regulating police misconduct

2.4.1. Powers of Detention

2.4.1.1. The power to detain under the ordinary law

If a person voluntarily attends at a police station – to help the police with their inquiries – he or she must be allowed to leave whenever wanting to do so. The person can only be stopped from leaving by being arrested (article 31 of the Police and Criminal Evidence (NI) Order 1989 (PACE Order)). An arrested person can be detained for questioning or released on bail. If the arrest took place under a warrant, the warrant itself may have been endorsed with a note authorising bail. Otherwise the police officer in charge of the station concerned may release the person on bail if satisfied that this will not lead to an injustice.

By article 32 of the PACE Order an arrested person has to be taken to a designated police station if it may be necessary to keep him or her in detention for longer than six hours. Article 32(13), however, makes it plain that the duty to take an arrested person to a police station as soon as practicable after the arrest does not apply if the presence of the person is necessary elsewhere in order to carry out immediate and reasonable investigations. Once arrested and taken to a police station, a person can be arrested there for an additional offence (article 33).

2.4.1.2. Custody officers and searches

Until his or her release the arrested person is the responsibility of the station's 'custody officer', who must have at least the rank of sergeant. It is this officer who must authorise the initial detention and any release. Under article 55 of the PACE (NI) Order 1989 the custody officer must ascertain everything the arrested person has in his or her possession, may require the arrested person to be searched and may seize and retain anything found, except that clothes and 'personal effects' may be seized only if the custody officer believes that the arrested person may use them to cause physical injury to someone, damage property, interfere with evidence or assist in an escape or that they may be evidence relating to an offence. Searches must be carried out by a police officer of the same sex as the person searched and before intimate searches are allowed special conditions must be satisfied (article 56). These require an officer of at least the rank of inspector to have reasonable grounds for believing that the arrested person may have concealed something which he or she could use to cause injury to someone or a Class A drug. An intimate search which is only for drugs must be conducted by a doctor or nurse at some place used for medical purposes and other intimate searches must be supervised by a doctor or nurse. The arrested person's custody record must give details of the searches conducted. If a person has been arrested his or her home can be searched too, or the place where the arrest occurred, provided that there is some connection between that place and the suspected offence.

2.4.1.3. Reviews of detention

Throughout the period of detention the position of the arrested person must be reviewed. The first review must be carried out six hours after the detention begins and later reviews must be conducted at least once every nine hours (article 41(3)). The review officer must be a police officer of at least the rank of inspector who has not been directly involved in the investigation up to that point (article 41(1)(b)) and it can be conducted by telephone (article 41A) or, once the requisite regulations have been issued, by video-conference (article 46A). As soon as the grounds for detention cease to exist, an arrested person must be released or charged (article 35(2)). Once charged, he or she must be released on police bail or brought before a magistrates' court on that day or on the following day.

2.4.1.4. Permitted periods of detention

The maximum permitted period of detention without charge is normally 24 hours (article 42(1)), but in the case or persons arrested for an indictable offence this can be continued by up to 12 hours if a police officer of at least the rank of superintendent, and who is responsible for the police station concerned, has reasonable grounds for believing that continued detention is necessary to secure evidence and that the investigation is being conducted diligently and expeditiously (article 43(1).

Further detention beyond 36 hours is allowed only if authorised by a magistrates' court. The court can initially require allow it for up to 36 hours, but a second court order can then be applied for, bringing the total permitted period of detention since the time of the arrest to 96 hours (articles 44 and 45).

2.4.1.5. Information, legal advice and visits

Under article 57 of the 1989 PACE Order a person arrested and held in custody is entitled, if he or she so requests, to have one friend, relative or other person who is known to the person or who is likely to take an interest in the person's welfare told, as soon as is practicable, that the person has been detained and where the detention is taking place. In the case of persons arrested for an indictable offence, a police officer of at least the rank of inspector can delay the exercise of this right for up to 36 hours provided he or she has reasonable grounds for believing that telling the named person of an arrest will lead to interference with evidence or with other persons, will lead to other suspects being alerted, will hinder the recovery of any property obtained as a result of the offence or will hinder the recovery of the value of property which has benefited the person detained (article 57(5) and (5A)).

An arrested person also has the right, if he or she so requests, to consult a solicitor privately at any time (article 58). Such a request must normally be recorded in the person's custody record and consultation with a solicitor must then be permitted as soon as practicable and in any event no longer than 36 hours after the arrest. As in the case of the right to inform someone about the detention, access to a solicitor can be delayed for up to 36 hours on the grounds listed in the previous paragraph (article 58(8) and (8A)). If delay is authorised, the reason for it must be noted in the detainee's custody record (article 58(9)).

While a person is in custody he or she may be visited by custody visitors, that is, people who are appointed by the Northern Ireland Policing Board under section 73 of the Police (NI) Act 2000. Custody visitors can speak to detainees in private and can report to the Board on the conditions they find in the police stations' custody suites, but they cannot themselves investigate any complaints raised by detainees.

Detention for a period longer than that permitted by the law will leave the police open to be sued in a civil action for false imprisonment.

2.4.1.6. Medical needs and examination

Section 9 of PACE Code C governs the medical needs of detainees and Section 9 of PACE Code H, which governs the detention of terrorism suspects, is virtually identical. There is no requirement for routine medical examination of a detainee. However, section 9.2 prescribes:

> 'If a complaint is made by, or on behalf of, a detainee about their treatment since their arrest, or it comes to notice that a detainee may have been treated improperly, a report must be made as soon as practicable to an officer of inspector rank or above not connected with the investigation. If the matter concerns a possible assault or the possibility of the unnecessary or unreasonable use of force, an appropriate healthcare professional must also be called as soon as practicable.'

A detainee will not therefore always be medically examined. He or she should be medically examined if there is some indication of injury, vulnerability or if a request is made. If a claim is made of ill-treatment during an interrogation that will be recorded

and medical examination will be directed by the custody sergeant. If such a claim is made the matter will be immediately referred to the Police Ombudsman who will attend and investigate the claim (there is 24 hour availability and call-out of Ombudsman investigators).

In Northern Ireland "an appropriate healthcare professional" will normally be a Forensic Medical Officer. These are independent doctors, usually General Practitioners, who are contracted by the PSNI to provide a service to detainees. They are all members of the Faculty of Forensic and Legal Medicine (FFLP) of the Royal College of Physicians which is a professional body with relevant codes of conduct. Section 9.8 of Code C also notes: 'The detainee may also be examined by a medical practitioner of their choice at their expense.'

2.4.1.7. The power to detain under the anti-terrorist laws

The power to intern someone without trial in Northern Ireland, which was last exercised in 1975, was abolished altogether by section 3 of the Northern Ireland (Emergency Provisions) Act 1998. The Anti-terrorism, Crime and Security Act 2001 allowed the indefinite detention without trial of foreigners reasonably suspected of involvement in terrorism, but that power was never used in Northern Ireland and after its use in England was declared incompatible with Article 5 of the European Convention on Human Rights it was allowed to lapse.

Persons arrested under section 41 of the Terrorism Act 2000 can be detained for up to 48 hours (section 41(3)), 12 hours longer than the police can hold suspects under the PACE Order. If the arrest occurs while the person is being examined at a port or border control, the 48-hour period is deemed to begin not at the time of the arrest but at the time the examination begins.

2.4.1.8. Detainees' rights

The detainee's rights while in detention are set out in paragraphs 6 to 15 of Schedule 8 to the Terrorism Act. The detainee can have one named person (who is known to the detainee) informed as soon as is reasonably practicable that he or she is being detained at a particular police station. The detainee also has the right to consult a solicitor as soon as is reasonably practicable, privately and at any time. In certain circumstances the exercise of these two rights can be delayed if a police superintendent has reasonable grounds for so authorising (Para. 8). The circumstances in question are those which apply to persons detained under the 'ordinary' law (see above) but in addition they include situations where the senior police officer reasonably believes that granting the right will interfere with the gathering of information about acts of terrorism or will alert someone and thereby make it more difficult to prevent an act of terrorism or to secure a person's apprehension, prosecution or conviction in connection with terrorism. The rights must, however, be permitted to be exercised before the first 48 hours of detention have elapsed (Para. 8(2)).

Moreover, an assistant chief constable can direct that a detainee's consultation with his or her solicitor must take place in the sight and hearing of a uniformed police officer of at least the rank of inspector who has no connection with the detainee's case (Para. 9). In Brennan v UK (2001)[2] the European Court held that there had been a breach of Article 6(3)(c) of the European Convention on Human Rights because a police officer had been within hearing during the applicant's first consultation with his solicitor after his arrest. But on the facts the Court awarded no compensation and it affirmed that, under the Convention, the right of access to a solicitor may be subject to restrictions for good cause.

Following consideration of the issue in the light of Article 6 and European Convention case law, the Court of Appeal of Northern Ireland has held that whilst no general rule requires a legal representative to be present during every police interview of a criminal suspect, where a solicitor has not been present an assessment has to be made of the particular facts in order to decide whether a breach of Article 6 arose.[3]

The right to have a legal representative present during police questioning now has to be read in the light of more recent case law of the ECtHR. In a path-breaking judgment which gave stronger expression to the general right of access to a lawyer during police questioning, the ECtHR held in Salduz v Turkey (2008) that:

> 'in order for the right to a fair trial to remain sufficiently 'practical and effective' … Article 6(1) requires that, as a general rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police unless it is demonstrated in the light of the particular circumstance of each case that there are compelling reasons to restrict this right.'[4]

A unanimous seven judge panel of the UK Supreme Court in Cadder v HM Advocate (2010)[5] confirmed that the ECHR requires that a person who has been detained by the police has the right to have access to a lawyer prior to being interviewed unless in the particular circumstances of the case there are compelling reasons to restrict the right.

2.4.1.9. Reviews of detention

Paragraphs 21 to 28 of Schedule 8 to the Terrorism Act 2000 provide for people arrested under section 41 to have their detention reviewed. The first review must be carried out as soon as is reasonably practicable after the person's arrest and thereafter at intervals of not more than 12 hours (compared with nine hours in the case of 'ordinary' detainees). The review officer has to be a police officer who has not been directly involved in the investigation of the matter in connection with which the person has been detained. The detention cannot continue unless authorised by the review officer and unless the person detained or his or her solicitor has been given the opportunity to make oral or written representations about the detention. The review officer must make a written

2 Brennan v UK [2001] ECHR 596

3 R v Blaney [2004] NICA 28

4 Salduz v Turkey [2008] ECHR 27

5 Cadder v HM Advocate [2010] UKSC 43

record of the review in the presence of the detainee and inform him or her at that time whether and, if so, why detention is being continued.

2.4.1.10. Permitted periods of detention

Paragraphs 29 to 37 of Schedule 8 to the Terrorism Act 2000 regulate the extension of detentions beyond the initial maximum of 48 hours. Prior to the coming into force of these provisions the power to extend detentions vested in the Secretary of State and could lead to the detainee being kept in detention for a further five days in total. This necessitated the UK's 'derogating from' (i.e. opting out of) Article 5 of the ECHR, but the derogation was withdrawn in 1984. The European Court of Human Rights then held in Brogan v UK (1988)[6] that detentions for longer than four days and six hours, without the authorisation of a judicial authority, were a breach of Article 5. A new derogation notice was therefore lodged in Strasbourg and its validity – i.e. whether it was made in accordance with Article 15 of the ECHR – was upheld by the European Court in Brannigan and McBride v UK (1993)[7]. It was set out in Schedule 3 to the Human Rights Act 1998. But with the commencement of the Terrorism Act 2000 in 2001, and the removal of government involvement in the authorising of detentions, the derogation notice was again withdrawn.

An extension of detention is now possible only if a police officer of at least the rank of superintendent applies successfully to a county court judge or a designated district judge for the issue of a warrant of further detention. An application for an extension can be made during the six-hour period following the initial maximum of 48 hours, but the application must then be dismissed by the judge or magistrate if he or she considers that it would have been reasonably practicable to make the application during that 48 hour period. Moreover an application cannot be heard unless the detainee has been given notice of it as well as an opportunity to make oral or written representations and to be legally represented at the judicial hearing, although the judge can exclude the detainee and/or his or her legal representative from any part of the hearing. Such an exclusion must occur if the police officer applying for the extended detention asks for an order that specified information upon which he or she intends to rely be withheld from the detainee and his or her legal representative.

The initial extension can be for any period, provided that it does not end more than seven days after the date of the detainee's initial arrest (or the beginning of his or her examination at a port or border control if the arrest took place during such examination). Further applications for extended detention can then be made provided that the total detention does not end more than 14 days after the detainee's initial arrest. This new maximum was imposed by the Criminal Justice Act 2003 (section 306). It was further increased to 28 days by the Terrorism act 2006 (section 23(7)), and Prime Minister Tony Blair wanted it increased to 42 or even 90 days, but when the coalition government took office in 2010 it quickly reduced the maximum back to 14 days, where it remains today. The Protection of Freedoms Act 2012 confirms that maximum (section 57) but adds that at times when Parliament is dissolved or has just been elected the Secretary of State

6 Brogan v UK ECHR [1988] Ser. A, No. 145-B, 11 EHRR 117

7 Brannigan and McBride v UK [1993] ECHR 26

may allow for 28 day detentions if he or she considers that this 'is necessary by reason of urgency' (section 58); the consent of the Director of Public Prosecutions would then be required for any such prolonged detentions in Northern Ireland.

2.4.1.11. Visits and compensation for over-holding

The mechanisms described above for allowing 'ordinary' detainees to be visited by custody visitors and to claim compensation for over-holding also apply to persons detained under the anti-terrorism laws.

2. 5. Rules on Police Questioning

2.5.1.1. Guidance and codes

Guidance on police questioning is incorporated in Code of Practice C for the Detention, Treatment and Questioning of Persons by Police Officers, issued under article 65 of the Police and Criminal Evidence (NI) Order 1989 (the PACE Order). This Code of Practice applies to all suspects, except those arrested and detained under the Terrorism Act 2000, for which a revised Code of Practice H has applied since 2008. There are differences in the degree of protection offered to suspects under each of these Codes.

The Code contains detailed rules on how interviews are to be conducted. It requires that an accurate record be made of each interview with a person suspected of an offence and that the record be signed by the suspect as correct. Interviews in police stations cannot be conducted without the consent of the custody officer, who must be an officer not involved in the investigation of the offence and whose responsibility is the treatment of detained persons.

In any detention period of 24 hours, a suspect must be allowed at least eight hours of continuous rest. When an interviewing officer considers that there is sufficient evidence to prosecute a suspect and that the suspect has said all that he or she wishes to say about the offence, the officer must bring him or her before the custody officer, who is then responsible for considering whether the suspect should be charged. On being charged the suspect should again be cautioned and given a written notice showing particulars of the offence and stating the terms of the caution. Questions relating to the offence should not be put to him or her after charge unless they are necessary to prevent harm to some other person, to clear up an ambiguity in a previous answer, or because it is in the interests of justice that the detainee be given an opportunity to comment on information that has come to light subsequent to his or her being charged. There are provisions for post-charge questioning in the Counter-Terrorism Act 2008. They were brought into force for England, Wales and Scotland in 2012 but they do not yet apply in Northern Ireland.

2.5.1.2. Audio-taping and Video Recording

A further Code of Practice has been issued under article 60 of the PACE Order requiring that in certain circumstances interviews at police stations should be audio-recorded

(Code E). Under this Code, which first became effective in 1996 and was revised in 2007, 2012 and 1 June 2015, interviews should be audio-recorded where a person has been cautioned in respect of any indictable offence, save for the offence of driving whilst uninsured. Interviews with persons cautioned for other offences may be recorded at the police's discretion. A uniformed officer not below the rank of inspector may authorise an interview not to be recorded if the equipment is faulty and the interview should not be delayed, or where it is clear that there will not be a prosecution. The audio recording may also be switched off at the request of the interviewee without any obligation on officers to ascertain the reason for the request (R v Blaney, 2004).[8]

Article 60A of the PACE Order provides for the visual recording with sound of some interviews and Code of Practice F has been issued to regulate this. It applies to interviews regarding indictable offences (or offences which can be tried either on indictment or summarily) which take place when the interviewee:

- — has (exceptionally) already been charged or informed that he or she may be prosecuted;
- — is deaf, blind or speech-impaired, and uses sign language to communicate;
- — requires the help of an 'appropriate adult' (see below) or
- — has requested (perhaps through his or her legal representative) that the interview be visually recorded

2.5.1.3. Young and Mentally Disordered Persons

The PACE Code of Practice C requires that a person under the age of 18, or a person who is 'mentally disordered,' whether suspected of an offence or not, must not be interviewed or asked to provide or sign a written statement in the absence of an 'appropriate adult,' unless an officer of the rank of superintendent or above considers that delay would involve an immediate risk of harm to persons or a serious loss of property, the alerting of other suspected persons, or the hindering of the recovery of property. In the case of a juvenile, an 'appropriate adult' means the juvenile's parent or guardian, a social worker or a responsible adult over 18 who is not a police officer or an employee of the Policing Board, or a solicitor or independent custody visitor who is otherwise present at the police station in that capacity. In the case of a person who is mentally disordered or vulnerable, 'appropriate adult' has a similar meaning, substituting for a social worker someone who is experienced in dealing with mentally disordered or mentally vulnerable people but is not a police officer or an employee of the Policing Board.

Article 10 of the Criminal Justice (Children) (NI) Order 1998 imposes a duty, where a child is in police detention, to take such steps as are practicable to ascertain the identity of a person responsible for his or her welfare and to inform that person, unless it is not practicable to do so, why and where the child is being detained. This does not, however, oblige the child to provide his or her identity to the police (Chief Constable of the PSNI v Devlin , 2008)[9]. A 'child' is defined by section 2 as a person under the age of 18.

8 R v Blaney [2004] NICA 28

9 CC of PSNI v Devlin [2008] NICA 22

2.5.1.4. Questioning under anti-terrorism legislation

There is a specific Code of Practice on the detention, treatment, questioning and identification of persons detained under the Terrorism Act (Code H, revised and published 1 June 2015). A further Code of Practice has been issued to govern the actions of examining officers at ports and airports under the Terrorism Act. Like the Codes of Practice issued under the PACE Order, the Codes issued pursuant to the Terrorism Act lack the full force of law, but failure by police officers to comply with them may make them liable to disciplinary proceedings (unless criminal proceedings are pending against them) and the provisions of the Codes may be taken into account by the courts when deciding whether to admit confessions.

PACE Code H contains detailed provisions relating to custody records, initial action, the detainee's property, the right not to be held incommunicado, the right to legal advice, conditions of detention, care and treatment, cautions, interviews, interpreters, reviews and extensions of detention, and charging. Annexes deal with delays in notifying arrest or allowing access to legal advice, restrictions on adverse inferences from silence, written statements under caution, mentally disordered or otherwise mentally vulnerable people and fitness to be interviewed.

There remain key differences between Codes C and H, including the possibility of restrictions upon confidential access to legal advice (as explained above). Unlike previous codes, however, Code H does allow those detained under the Terrorism Act to talk on the telephone with anyone, to have writing materials, to receive visits, and to be medically examined by a Medical Officer of their own choosing (and at their own expense). There is no longer any provision allowing for a medical examination requested by a detainee to be delayed where the custody officer believes this would prejudice the investigation. In addition, after many years of refusing to extend the rules on recording of interviews to suspects arrested under emergency legislation, the government issued Codes of Practice for both the audio and video recording of such interviews in 2001 (Terrorism Act 2000, Sch 8, paras 3 and 4). The result is that all interviews by police officers of persons detained under the Terrorism Act 2000 must now be audio and video-recorded.

An Independent Reviewer of Terrorism Legislation has the power to visit all specialist terrorist detention centres, including Antrim Serious Crime Suite, and the current postholder, David Anderson QC, has emphasised that 'the historical reputation of terrorist detention centres, particularly in Northern Ireland, is such as to require the highest standard of protection to be in force at all times ' . (Report on the Terrorism Acts in 2011, para 7.40.) Section 117 of the Criminal Justice Act 2009, when in force, will extend the powers of the Independent Reviewer to consider, as part of his annual review, whether the requirements of Codes of Practice have been complied with in relation to persons detained under section 41 of the Terrorism Act. It will also require custody visitors to give a copy of their reports to the Independent Reviewer, and allow them to listen to and view audio and video recordings of detainees being interviewed.

2.5.1.5. Enforcement of the rules on questioning

The police must conduct their questioning of suspects within the law and it is always open to a person who has been assaulted in the course of police questioning, perhaps for the purpose of extracting a confession, to bring a civil action against the police officers involved. A further question is whether ill-treatment of a detained person in the course of questioning renders his or her detention unlawful.

The House of Lords in Cullen v Chief Constable of the Royal Ulster Constabulary (2003)[10] stated that the power to hold a suspect must be exercised solely for the purpose of lawful questioning. On the facts of the case the power had been exercised for a different and wrongful purpose, namely unlawful questioning due to the use of force to extract a confession, making the exercise of the power unlawful. The use of force may therefore make the grounds for detention unlawful.

For many years, the most significant restriction on the power of the police to question suspects was the rule that a statement could be used as evidence only if it had been made voluntarily. In a major change brought about by article 74 of the PACE Order, the prosecutor now has to prove that a confession made by an accused was not obtained by oppression of the person who made it or in consequence of anything said or done which was likely to render it unreliable. The voluntariness principle no longer applies.

In R v Brown (2012)[11] the Court of Appeal of Northern Ireland cited approvingly Lord MacDermott ' s description of 'oppressive questioning' in his 1968 address to the Bentham Club:

'questioning which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent.'

For the purposes of article 74 of the PACE Order, 'oppression' is defined to include torture, inhuman or degrading treatment and the use or threat of violence, whether or not amounting to torture (art 74(8)). This seems a narrower definition than at common law, but the word 'includes' entitles the courts to extend the categories of oppression to the kinds of conduct and circumstances considered oppressive at common law.

Aside from the requirement to exclude confessions which are rendered inadmissible under article 74 of the PACE Order (see above), judges have a discretion under the common law (i.e. non-statutory law) to exclude from court proceedings any statement which has been obtained unfairly. It is their duty to see that the accused has a fair trial according to law (R v Sang, 1979)[12]. In addition, article 76 of the PACE Order states that in any criminal proceedings the court may refuse to admit evidence on which the prosecution proposes to rely if it appears that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of

10 Cullen v Chief Constable of Royal Ulster Constabulary [2003] UKHL 39

11 R v Brown [2012] NICA 14

12 R v Sang [1979] HL 25

evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. The effect of this is that, just as the courts have a broad common law discretion to exclude statements that have been obtained unfairly, they also have a broad statutory discretion to exclude statements obtained in breach of a Code of Practice issued under the Order.

It is also important to note that as a consequence of the Human Rights Act 1998 courts are required to give effect to European Convention rights, including the right to a fair trial guaranteed by Article 6 of the Convention. If evidence has been obtained in breach of the right to a private and family life under Article 8 of the Convention this is regarded as relevant but not determinative when establishing whether there has been unfairness under article 76 of the PACE Order or a breach of the right to a fair trial (R v Fulton , 2006)[13].

2. 6. Police Complaints Procedures

2.6.1.1. The origin and aims of the Police Ombudsman

The organisation set up to deal with complaints against the police by members of the public is the Office of the Police Ombudsman for Northern Ireland (OPONI). This is a statute based, wholly independent body constituted as a 'corporation sole,' meaning that its powers and prerogatives are vested in the person of the Police Ombudsman. It has its own independent corps of investigators and receives all complaints about police misconduct or criminality.

Although widely believed to be an emanation of the Independent Commission on Policing for Northern Ireland (the Patten Commission) set up by the Belfast Good Friday Agreement, OPONI was actually initially proposed by Dr Maurice Hayes in his 1997 report, A Police Ombudsman for Northern Ireland? Hayes recommended that complaints against the police should be investigated, not by the police themselves, but by a new and independent office. The watchwords of this office were to be 'Independence, Independence, Independence', and Hayes proposed a raft of measures to ensure that this independence could be realised in practice. These included the power to undertake investigations in the public interest even in the absence of a specific complaint. Although the system for handling complaints against the police forms only one aspect of police accountability, the Patten Commission, which reported in 1999 on new arrangements for policing in Northern Ireland, saw this office as ' key to the effective governance of Northern Ireland.'

Initial legislation establishing OPONI, the Police (NI) Act 1998, was drawn up while the Patten Commission was still carrying out its deliberations. The legislation failed to replicate key aspects of Hayes' proposals, as regards safeguarding the independence of OPONI and the extent and robustness of its powers. It ultimately took an endorsement by the Patten Commission of Hayes' original proposals, extensive lobbying and two further Police Acts, in 2000 and 2003, to put OPONI on a footing similar to that recommended by Hayes.

13 R v Fulton [2006] NICC 35

Hayes recognised that faith in complaint processes can easily be diminished where they revolve too exclusively around individual complaints against individual officers, and where lengthy and overly legalistic processes often prove incapable of substantiating genuine complaints to any real degree. OPONI has tried to counteract some of these traditional failings by recognising the need for informal resolution and mediation processes in appropriate cases and by being alert to the fact that individual complaints might be symptomatic of broader institutional or systemic failings, which need to be addressed by further research and recommendations to change specific policies and practices.

The Police (NI) Act 1998 (as amended) directs OPONI to:

- secure an efficient, effective and independent complaints system
- secure the confidence of the public and members of the police force
- observe all requirements as to confidentiality
- receive complaints and other referred matters and to decide how to deal with them
- receive and record policy complaints and refer them to the Chief Constable
- make recommendations to the Director of the Public Prosecution Service (PPS) for criminal action
- make recommendations and directions in respect of disciplinary action against police officers
- notify the Department of Justice (and the Secretary of State in some circumstances), the Policing Board and the Chief Constable of the outcome of certain complaints, referred matters and any investigation which the OPONI initiates without a complaint, and
- report to the Department of Justice annually.

Under the terms of the Police (NI) Act 2000 (as amended), OPONI must also:

- carry out inquiries as directed by the Department of Justice or Secretary of State in certain circumstances, and
- supply statistical information to the Policing Board.

The Police (NI) Act (2003) belatedly gives OPONI power to:

- investigate a current practice or policy of the police if the practice or policy comes to his or her attention under the Act and he or she has reason to believe that it would be in the public interest to investigate the practice or policy.

The operation of OPONI is also affected by several pieces of primary legislation over and above the Police (NI) Acts. These include the Human Rights Act 1998, the Northern Ireland Act 1998, the Regulation of Investigatory Powers Act 2000 (RIPA) and the Freedom of Information Act 2000. A number of Orders in Council also apply, such as the Police and Criminal Evidence (NI) Order 1989 (as amended) and the Policing (Miscellaneous Provisions) (NI) Order 2007. On top of these, a raft of regulations has been enacted making provision for specific aspects of the complaint system. These include:

- the Police and Criminal Evidence (Application to Police Ombudsman) Order (NI) 2000
- the RUC (Conduct) Regulations 2000 and 2001
- the RUC (Unsatisfactory Performance) Regulations 2000
- the RUC (Appeals) Regulations 2000
- the RUC (Complaints etc.) Regulations 2000
- the RUC (Complaints) (Informal Resolution) Regulations 2000
- the RUC (Conduct) (Senior Officer) Regulations 2000
- the PSNI (Conduct) Regulations 2003
- the PSNI (Appeals) (Amendment) Order 2004, and
- the PSNI (Conduct etc) (Amendment) Order 2004.

2.6.1.2. Structure of OPONI

The Police Ombudsman has two investigations directorates - the Current and Historical Investigations directorates. The Current Directorate deals primarily with complaints made to the Office about incidents which have occurred in the previous year (members of the public have one year from an incident in which to make a complaint about it, unless the complaint is about a matter deemed by the Police Ombudsman to be grave or exceptional).

The Current Directorate consists of four teams, of around 80 staff in total. The teams include two Current Investigations Teams, a Significant Investigation Team and the Initial Complaints Office. The Initial Complaints Office receives complaints over the phone, by email, via a website, and from members of the public who call to make a complaint in person at OPONI offices in Belfast City Centre.

The Current Investigation Teams investigate about 1,500 complaints a year. The largest category of complaint dealt with by these teams is failure of duty, involving allegations that police failed to do their job as they should (e.g. failed to respond quickly enough to a 999 call, or failed to conduct a thorough investigation). The next largest category involves allegations of oppressive behaviour, which includes allegations of assault and harassment. Other allegations include that officers were rude or uncivil.

The Significant Investigation Team deals with complex or serious matters, including some complaints relating to incidents which occurred more than one year ago. These are complaints deemed by the Police Ombudsman to be grave and exceptional, and relating to incidents which happened outside of the period 1968-1998. Grave or exceptional matters related to the actions of police officers during the conflict in Northern Ireland between 1968 and 1998 (commonly known as "The Troubles") are investigated by the Historical Investigations Directorate. This is a highly important area in terms of the UK's obligation under Articles 2 and 3 ECHR to investigate unlawful killings and torture and is of continuing major public and political significance in Northern Ireland. It is, however, outside the scope of this study which deals with contemporary measures to deal with possible ill-treatment of people by police officers.

The Police Ombudsman's Office has the remit to investigate complaints about officials from a number of bodies. These include police officers and 'designated civilians' within the PSNI, police officers with the Northern Ireland Airport Constabulary and Belfast Harbour Police, and from 16th March 2015 officials within the UK Border Force. More recently in 2015/16 the Office's remit has been extended to include officers from the National Crime Agency (from 20th May 2015).

Most of OPONI's investigating officers are employees of the Office (many are ex-police officers but usually from outside Northern Ireland) but some are seconded police officers from services other than the PSNI. Investigators have full police powers when investigating possible criminal offences and hence can arrest serving officers and search premises as necessary.

2.6.1.3. What constitutes a complaint?

The Police Ombudsman has the power to investigate any complaint from a member of the public about how police officers behave in the course of their duty. A complaint could involve anything from an allegation of criminal activity by a police officer to a minor breach of the PSNI Code of Ethics. The Ombudsman cannot, however, investigate:

- conduct which has already led to criminal or disciplinary action, unless there is new evidence that was not available at the time of the original investigation
- complaints about off-duty officers, unless the fact of being a police officer is relevant to the complaint
- complaints about non-police officers acting with police officers or separately in a policing role (e.g. soldiers and agents of MI5)
- complaints about traffic wardens or other civilian employees of the police
- complaints about the direction and control of the police by the Chief Constable
- complaints which are not made by or on behalf of a member of the public
- anonymous complaints
- complaints made 'out of time' (i.e. more than 12 months after the event, except in grave and exceptional circumstances where investigation is warranted in the public interest)
- vexatious, oppressive or repetitious complaints
- complaints where the complainant refuses to co-operate with an investigation
- complaints where there is a lack of information necessary to conduct an investigation, and
- complaints which have been withdrawn by the complainant

If a complaint is outside his or her legislative remit, the Police Ombudsman can, as a matter of discretion, refer it to the Chief Constable, the Policing Board or the Minister of Justice and notify the complainant accordingly. These bodies can then deal with the issue (or not) as they see fit. If the behaviour or issue reported is deemed not to come

within the definition of a complaint that can be investigated by OPONI, the only way currently to challenge this is through an application for judicial review.

OPONI also deals with matters referred to it by the PSNI Chief Constable. The following are incidents that the Chief Constable is required to refer to the Police Ombudsman:

- Any discharge of a police firearms (including those used in riot situations);
- Any fatal road traffic collisions involving police officers;
- Any death which may have occurred as a result of the actions of a police officer; and
- Any other serious allegation

It also deals with matters referred to it by the Northern Ireland Policing Board, the Department of Justice and the Public Prosecution Service. The Police Ombudsman also has the power to initiate an investigation without a complaint having been made if it appears to him to be desirable and in the public interest (Police (NI) Act 1998 s. 55).

2.6.1.4. What Happens to a Complaint?

If the matter is classified as a complaint by OPONI, steps must be taken by the Chief Constable and the Ombudsman's office to preserve any relevant evidence. A complaints investigator may arrange to meet with the complainant to take further details. This meeting should take place somewhere where the complainant feels comfortable. It might be at the office of the Police Ombudsman, an advice centre, a police station, a local hotel or some other suitable place. After this meeting a complainant should be told how the Police Ombudsman proposes to deal with the complaint and should be given the name of the OPONI staff member responsible for dealing with the complaint.

A complaint can be dealt with either by informal resolution or by formal investigation.

The informal resolution process is governed by section 53 of the Police (NI) Act 1998 and relevant regulations. The legislation provides for informal resolution of 'suitable' complaints, that is, where the matter is 'not serious' and the complainant has consented. These will be cases where the behaviour complained of, even if proved, would not justify criminal proceedings. At this point, the matter is handed over to the Chief Constable (or to the Policing Board in the case of senior officers) for the appointment of a senior police officer to carry out informal resolution procedures. The Police Ombudsman will simply monitor that this is done and receive a copy of a report of the outcome in due course. Only 6% of complaints in 2014/15 were pursued in this way (Annual Statistical Bulletin OPONI 2014/15).

An investigation will occur where the complaint is not deemed suitable for informal resolution. If a complaint is deemed to be serious (i.e. it involves death or serious injury) the Ombudsman must conduct an independent formal investigation. In other cases he or she can refer the matter to the Chief Constable for investigation by the police. The Ombudsman can continue to supervise the Chief Constable's investigation if he or she deems it in the public interest to do so. It does not appear that this power is actually used in practice and the Ombudsman has indicated that only severe budgetary restraints would make him consider using it. Effectively, then, all investigation of all complaints against the police is carried out by the Ombudsman.

Where investigation is carried out by an investigator from OPONI, he or she has the same powers and duties as any police officer of equivalent rank as regards how the investigation is carried out (see the Police and Criminal Evidence (Application to Police Ombudsman) Order (NI) 2000, Sch 2). This includes the right to search, arrest and detain suspects and to use reasonable force where necessary. The Police Ombudsman and his or her staff have a right of access to all PSNI information and documents deemed necessary for their investigation.

2.6.1.5. Numbers and Outcomes

The number of complaints received by the Police Ombudsman's Office in 2014/15 and matters referred for independent investigations was 3,367. This was a decrease of 10% from the previous year when the Office received the highest number of complaints since it opened. A person who makes a complaint may express a number of different concerns about the exchange they have had with a police officer. The Police Ombudsman's Office will record this as one complaint broken down into a number of 'allegations'. In 2014/15 the Police Ombudsman's Office received 5,587 allegations (all figures and tables from 2014/15 Statistical Bulletin).[14]

Types of Allegations	**2010/11**	**2011/12**	**2012/13**	**2013/14**	**2014/15**
Failure in Duty	2,513	2,167	1,981	2,278	2,381
Oppressive Behaviour	1,906	1,952	1,536	1,994	1,440
Incivility	696	623	508	550	421
Police Searches	295	271	258	312	308
Unlawful/ Unnecessary Arrest/ Detention	245	224	204	232	250
Mishandling of Property	105	107	105	156	126
Malpractice	115	124	110	144	103
Discriminatory Behaviour	74	81	77	107	73
Traffic Related	71	65	69	47	50
Section 55 Referrals	45	51	58	48	55
Other	266	342	378	303	380
Total	**6,331**	**6,007**	**5,284**	**6,171**	**5,587**

14 https://www.policeombudsman.org/Statistics-and-Research/Complaint-Statistics-in-Northern-Ireland

Complaint closures, 2010/11 to 2014/15 2010/11	**2010/11**	**2011/12**	**2012/13**	**2013/14**	**2014/15**
Complaints closed	**3,585**	**3,325**	**3,244**	**3,440**	**3,537**
Complaint closed following initial assessment	**490**	**489**	**519**	**472**	**423**
Not a matter for the Police Ombudsman	423	413	442	406	361
Call in/Call out - no further action	20	31	36	26	25
Other	47	45	41	40	37
Complaints closed following initial inquiries	**1,390**	**1,512**	**1,462**	**1,702**	**1,564**
Complainant did not fully engage	942	1,119	1,057	1,310	1,085
Ill-founded	221	187	219	221	310
Withdrawn	204	169	155	160	152
Other	23	37	31	11	17
Complaints resolved informally	**369**	**250**	**250**	**211**	**219**
Informally resolved	321	213	213	179	191
Locally resolved	48	37	37	32	28
Complaints fully investigated	**1,336**	**1,074**	**1,013**	**1,055**	**1,331**
complaint not substantiated or an issue of concern identified	1,054	812	789	842	963
complaint substantiated or an issue of concern identified	282	262	224	213	368

Complaints will be closed when the Police Ombudsman's Office has reached a view on the matter involved, when the complainant and the police officer have reached a level of agreement on the contested matter or when the person who made the complaint no longer wishes to engage with the process. Unfortunately, the nature of closure of complaints is not correlated with the nature of the allegations.

Around one in ten (12%) complaints closed in 2014/15 were closed after the initial assessment. These complaints tend to be closed fairly quickly, and often involve issues which are not a matter for the Police Ombudsman's Office. A larger proportion of complaints (44%) were closed after initial inquiries. Initial inquiries can occur prior to an investigation commencing or at the start of an investigation. It involves getting more information from the complainant, looking for evidence regarding the matter complained about or making initial contact with the police officer(s) involved. Complaints closed at this stage are normally those where the complainant ceases to engage with the Office. Complaints that were informally or locally resolved accounted for 6% of all complaints closed. This is an alternative way to resolve less serious complaints e.g. rudeness or incivility. Nearly four in ten (38%) complaints closed were fully investigated. This is when a Police Ombudsman's Investigator looks into each allegation within the complaint and reaches a conclusion about it. The Office found evidence to substantiate all or part of the complaint, or identified another concern during the investigation in 28% of these complaints in 2014/15.

If the evidence shows that a police officer may have committed a crime, OPONI will recommend to the Director of Public Prosecutions (DPP) that he or she prosecute the officer. The DPP will take the decision whether to prosecute on the basis of the standard Prosecutorial Test, which is the same whoever the alleged perpetrator. The Test for Prosecution is met if the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the Evidential Test – and prosecution is required in the Public Interest – the Public Interest Test. If the DPP decides to prosecute, the criminal proceedings will be conducted as they would be against any individual — in the magistrates ' court if the offence is a fairly minor one (a summary offence), with the right of appeal to a county court and, if necessary, to the Court of Appeal. In the case of a serious (ie indictable) offence, the case will begin in a magistrates ' court prior to being transferred to the Crown Court, with a right of appeal to the Court of Appeal. Where the offence charged is one covered by anti-terrorist legislation, the officer may be tried by a judge sitting without a jury in a special court. In 2014/15 12 recommendations were made by OPONI to the DPP that a police officer be prosecuted.

If the evidence shows that a police officer may have broken the police's Code of Ethics, OPONI will decide what disciplinary charges could be brought against the police officer and will recommend disciplinary action. The conduct of the police officer in respect of attempts at mediation will be taken into account by the OPONI when deciding whether to recommend disciplinary action. The PSNI is not obliged to accept OPONI's recommendations on disciplinary action but any discrepancy will generally be made public. In 2014/15 OPONI recommended disciplinary action against 380 officers. In addition to these recommendations made about officers, the Police Ombudsman made 67 policy recommendations to the Chief Constable in the PSNI. These included recommendations that would help ensure people's safety in custody suites, help ensure the safety of police vehicles, and about policing of public order situations.

2.6.1.6. Reports

The Police Ombudsman produces an annual report referring to the allegations he or she has dealt with during the previous year. The Ombudsman can also write a report on anything he or she thinks the Minister of Justice should know about, in the public interest. In addition, the Minister of Justice and Secretary of State can ask OPONI to carry out any necessary research and report on any matter. Any report that OPONI makes under this power must also be sent to the Northern Ireland Assembly or UK Parliament and published. OPONI must also send a copy of any report it makes to the Chief Constable and to the Policing Board and it must supply the Policing Board with any statistics which it thinks they should receive.

Since its inception, OPONI has published a number of important and often controversial reports, though generally about the past problems in policing. A particularly dramatic report was prepared by the first Ombudsman (now) Baroness Nuala O'Loan in 2007. This dealt with serious malpractice in covert policing which led to an overhaul of the running of informants across the PSNI. The Ombudsman's 'Operation Ballast' investigation into the death of Raymond McCord Jr. uncovered collusion between RUC Special Branch officers and a unit of a loyalist paramilitary group. It revealed that police intelligence reports and other documents, mostly rated as 'reliable and probably true' linked police

agents and one informant in particular to ten murders. Among other matters Ballast reported failure to arrest informants for crimes to which those informants had allegedly confessed, or to treat such persons as suspects for crime; concealment of intelligence indicating that on a number of occasions up to three informants had been involved in a murder and other serious crime; arresting informants suspected of murder, then subjecting them to lengthy sham interviews at which they were not challenged about their alleged crime, and releasing them without charge; creating interview notes which were deliberately misleading; failing to record and maintain original interview notes and failing to record notes of meetings with informants.[15] This power to issue narrative reports which can examine the context, as well as the detail, of complaints, together with the Ombudsman's ability to investigate issues and themes of his or her own motion and to make recommendations to the Chief Constable, is of major importance in regulating policing in Northern Ireland.

2. 7. Northern Ireland Policing Board

The 'Report of the Independent Commission on Policing for Northern Ireland' (Patten Report) recommended the establishment of a Policing Board whose primary function would be 'to hold the Chief Constable and the police service publicly to account' (Para. 6.9 et seq.). The concept of accountability incorporated in the role of the Policing Board is a tri-partite structure involving prior accountability (through an agreed Policing Plan and budget allocation), the absolute operational independence of the Chief Constable and post-hoc accountability through reports of the Chief Constable to the Board and public and private questioning around the conduct of operational matters. The structure and functions of the Board are set out in Section 3 of the Police (Northern Ireland) Act 2000 as amended by the Police (NI) Act 2003.

The Board has nineteen members, ten of whom are political appointees, selected by political parties on the basis of their strength in the NI Assembly, and nine of whom are independents appointed through a public appointments process. So far, the Chair and Deputy Chair of the Board, appointed by the members, have always been independents.

The main statutory duties and responsibilities of the Policing Board are to:

- secure an effective and efficient local police service;
- appoint (and dismiss, if necessary) the Chief Constable, Deputy Chief Constable, Assistant Chief Constables and senior civilian staff;
- consult widely with local people on how their area is policed;
- set priorities and targets for police performance;
- monitor the work of the police and how well they perform against the targets set by the Policing Board;
- publish a rolling three year policing plan each year which informs people what they can expect from their police service and reports on police performance every year;

15 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters' (Operation Ballast Report), Nuala O'Loan, Police Ombudsman for Northern Ireland, 22nd January 2007.

- ensure local people get best value from the police;
- oversee complaints against senior officers;
- discipline senior officers.

In addition, the Board has a statutory duty under section 3(3)(b)(ii) of the Police (Northern Ireland) Act 2000 to monitor the performance of the PSNI in complying with the Human Rights Act 1998. In this work it is assisted by an independent human rights advisor who is security cleared and has access to all PSNI documents and can observe operations such as public order policing.

The Board's human rights monitoring work is based upon:

- A Human Rights Monitoring Framework which was devised by the Board's Human Rights Advisors in 2003. It sets out in detail the standards against which the performance of the police in complying with the Human Rights Act 1998 is to be monitored by the Board and identifies key areas to be examined. There are currently 14 key areas of policing examined.
- The standards set out in the PSNI Code of Ethics This document lays down standards of conduct and practice for police officers and is intended to make officers aware of rights and obligations arising under the Human Rights Act 1998. Breaches of the Code therefore provide an essential mechanism by which to monitor human rights compliance.

Each year the Board publishes a Human Rights Annual Report which contains an overview of the human rights monitoring work carried out during the year, highlighting both good police practice and areas in which practice could be improved. Formal recommendations are made where it is believed that PSNI action is necessary. Since 2005 (the year the first Human Rights Annual Report was published), the PSNI has implemented 192 recommendations contained within Human Rights Annual Reports. The Performance Committee of the Board, with the assistance of the Board's Human Rights Advisor, oversees PSNI's implementation of these recommendations.

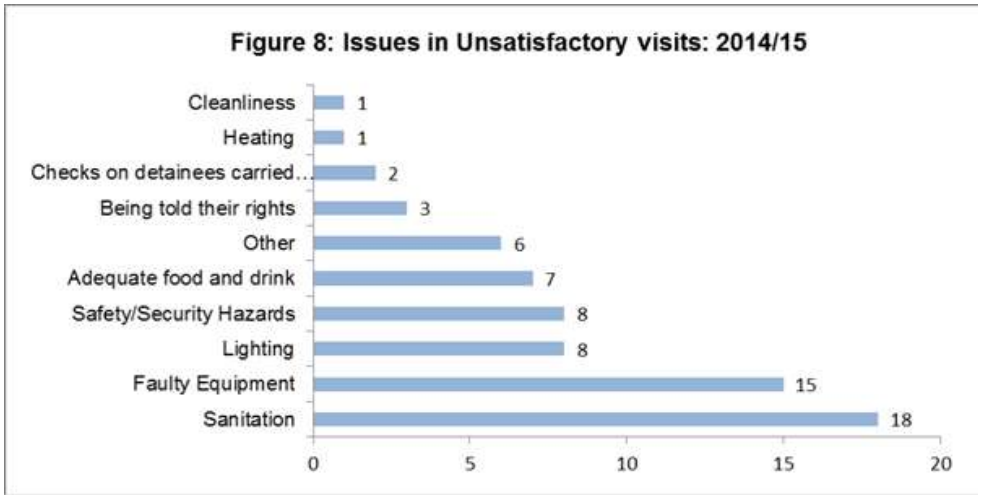
Under section 3(3)(c)(i) of the Police (Northern Ireland) Act 2000 the Board must keep itself informed as to the measures in place to deal with PSNI complaints and disciplinary proceedings; and to monitor trends and patterns in complaints. This work is taken forward by the Performance Committee.

The Committee has a key role in monitoring professional standards. In order to conduct this work, a Professional Standards Monitoring Framework was developed in 2011 which provides the Committee with a structure to undertake their key role and to address broader quality of service concerns identified by Members. In accordance with the Framework, the Committee monitors the outcome of PSNI internal disciplinary procedures to ensure that lessons are learned and best practice is promoted across the service.

2.7.1.1. Independent Custody Visiting Scheme

There is an Independent Custody Visiting Scheme in Northern Ireland, which provides a further layer of civilian oversight and is a designated part of the UK's National Preventative Mechanism under the Convention on the Prevention of Torture. The Policing Board is obliged, by virtue of section 73 of the Police (Northern Ireland) Act 2000, to make and keep under review arrangements for designated places of detention to be visited by lay visitors. That function is discharged by the Policing Board's Independent Custody Visiting Scheme. Custody Visitors are volunteers from across the community who are unconnected with the police or the criminal justice system who work in pairs to monitor how people being held in police custody are treated. Custody Visitors make unannounced visits to designated police custody suites where they inspect the facilities and with consent speak to detainees and check custody records. They can also view, with consent, live interviews with detainees held under terrorism legislation by remote video link. Custody Visitors report to the Policing Board and the PSNI on the welfare and treatment of persons detained in custody and the adequacy of facilities. Reports on visits to terrorism detainees are also provided to the Independent Reviewer of Terrorism Legislation. The Policing Board's Performance Committee receives quarterly reports on the work of the Scheme which highlight any issues raised and the remedial actions taken by PSNI to address them. The reports cover 3 distinct areas: the rights of the detainee; the health and well-being of the detainee; and the conditions of detention. Custody Visitors discharge a critical function in ensuring the protection of the human rights of detained suspects and enable the Committee to monitor the treatment of detainees and the conditions of their detention. Any specific concerns identified by Custody Visitors are raised with PSNI. They also report on any delay in gaining access to the detainee and the reason for the delay. The Policing Board publishes quarterly statistics and an annual report on the work of Custody Visitors, all of which are made available for public viewing through the Policing Board's website: www.nipolicingboard.org.uk

In 2014/15, 705 visits were made to custody suites and in 91% of those conditions were found to be satisfactory. In the case of 65 visits, a total of 69 issues were raised as follows (source NI Custody Visiting Scheme Annual Report 2014/15):



As far as can be ascertained, since the Human Rights Monitoring Process started in 2005, there have been no complaints made to Independent Visitors about physical assault or ill-treatment.

In February 2013, the National Preventive Mechanism annual report made a formal recommendation to the Minister of Justice for Northern Ireland to bring by way of legislative provision, non-designated police cells in Northern Ireland within the remit of the Policing Board's Independent Custody Visiting Scheme. It should only be in limited circumstances that a person is detained in a station that has not been designated and it is unlikely to be for longer than six hours, the inability of custody visitors to visit non-designated cells means there is no monitoring of the treatment of those detainees or the condition of their detention. The NPM recommendation mirrored concerns of the Policing Board in a number of Human Rights Annual Reports in which PSNI were encouraged to make arrangements (by permitting Custody Visitors to visit non-designated suites) in advance of legislative provision. The NPM recommendation was therefore endorsed by the Board. The Department of Justice has indicated that it will implement the necessary legislative amendment required. Clause 41 of the draft Justice No. 2 Bill, which passed its second reading on 8 September 2015, will extend the remit of the Board's Custody Visiting Scheme to include non-designated police stations. That is a positive development but a failing in the scheme to date has been the inability of visitors to visit non-designated suites.

2. 8. Healthcare provision

In April 2014, the PSNI carried out a review of healthcare provision in police custody suites. PSNI recognised, in that review, that custody healthcare was about much more than safer detention (albeit that it is critical). Rather, the PSNI suggested that a more sophisticated approach which identifies and addresses complex needs would protect the detainee and break the cycle of offending. Ultimately, they suggested that would lead to safer communities. PSNI also recognised however that it was reliant on other partners, particularly healthcare professionals such as psychiatric nurses. PSNI also committed to making better use of available technology so that medical professionals could be provided with access to medical records when attending to detainees. In support of the PSNI's proposals and to ensure that momentum was not lost the Committee recommended that "the PSNI should report to the Performance Committee within 6 months of the publication of the 2014 Human Rights Annual Report on the progress or otherwise of its review of healthcare within custody suites including the extent to which it has secured the necessary input of healthcare professionals."

The PSNI reported to the Performance Committee, in December 2015, on the progress made in the reform of healthcare. Policing Board Members were afforded access to the detention facilities at Musgrave Road Police Station for a visit. The work undertaken has been considerable and impressive. That work can be summarised as follows. The PSNI has been able to secure, at least for the period April 2015 to April 2017, the engagement of 60 Forensic Medical Officers which will ensure appropriate and timely medical assistance can be provided to detainees. As noted in Para 31, these are independent doctors, usually General Practitioners, who are contracted by the PSNI to provide a service to detainees. They are independent from the PSNI and most "double job" (i.e.

carry out other medical roles unconnected with the police). They are all members of the Faculty of Forensic and Legal Medicine (FFLP) of the Royal College of Physicians which is a professional body with relevant codes of conduct. Furthermore, the PSNI is working with DHSSPS to develop a new model of healthcare which will improve upon information sharing protocols and greater use of referrals to appropriate partners. The PSNI has also reviewed and revised all custody policies and procedures to ensure consistency across all custody suites. Refresher training is continuing for all custody officers. The PSNI is participating in a healthcare working group comprising representatives from a range of stakeholders and healthcare professionals and has established a Custody Operational Group which will meet bi-monthly with, amongst others, the Policing Board's Custody Visitors and Appropriate Adults. Within that, the PSNI is working with police services in England to identify best practice in the delivery of healthcare in custody. Another positive development is the monthly analysis of trends and patterns in custody so that empirical evidence can be collated to better inform resources required and a sustainable approach to providing excellence in custody healthcare provision. The review is extremely positive but progress has been slower than hoped. Unless and until the review is complete and implemented there remains a concern about the health needs of vulnerable detainees. In particular, there is concern that there has not been a comprehensive training needs analysis for all Custody Staff to ensure that all staff have received sufficient training on the identification of and appropriate response to: detainees presenting with physical or mental health issues and/or addictions and on child protection issues.

The adversarial court system, which permits complainants to engage their own lawyer with the assistance of legal funding and can commission their own independent medical and other expert reports, is another mechanism for ensuring that ill-treatment is uncovered and dealt with. (Commentary from the Independent Human Rights Adviser to the Policing Board).

3. Questionnaire Part II – The experience of police ill-treatment and torture in Northern Ireland

In 2014/15, 24,377 people were arrested and detained by the PSNI under the PACE Order. Of these 62 were held for longer than 24 hours of whom 17 were subsequently charged and 45 released without charge. 227 people were arrested under Section 41 of the Terrorism Act (TACT) of whom 35 were charged; no information is available on the length of detention (source PSNI website: https://www.psni.police.uk/inside-psni/Statistics).

The general statistics from the Police Ombudsman relating to complaints are given above at Para 85; those from the Independent Custody Visiting Scheme are given at Para 101.

The Police Ombudsman does not record complaints about assaults in custody as a separate category. Such complaints would be recorded under the general category of Oppressive Behaviour allegations and under the specific category of Serious Non-sexual Assault. There were 16 such complaints recorded in 2014/15.

Oppressive Behaviour allegations	2010/11	2011/12	2012/13	2013/14	2014/15
Other Assault	858	887	708	986	687
Oppressive Conduct (not involving assault)	742	755	580	711	541
Harassment (series of like incidents)	243	241	184	226	158
Sexual Assault	35	36	36	40	38
Serious non-sexual assault	28	33	28	31	16
Total	1,906	1,952	1,536	1,994	1,440

As noted in Para 85, the Ombudsman does not publish outcomes against specific categories of allegation. We asked the Office, however, about the outcomes of the 16 cases recorded in the year 2014/15. We have been told that 8 cases were closed because the claimant did not cooperate or fully engage with the process and 8 were investigated but found "not substantiated." We have also been told that only one of these cases related to an incident in a custody suite.

3. 1. Part II/2 Criticism concerning the legal system and practice plus specific issues

The remarkable fact about Northern Ireland relevant to this report is that there are no allegations about any kind of systematic or frequent ill-treatment of persons in police custody. The last time the CPT visited Northern Ireland was in 2008. In its "Report on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008" (CPT/Inf (2009) 30) the CPT said:

> 'In the course of the visit, the CPT's delegation received no allegations of ill-treatment of persons detained by the Police Service for Northern Ireland. On the contrary, most persons interviewed stated that they had been well treated by members of the PSNI at the time of their apprehension and during custody.' (Para 131)

Earlier in the Report it noted:

> 'In 2008, the CPT found a remodelled police service - the Police Service for Northern Ireland (PSNI) - which bore little resemblance to the former Royal Ulster Constabulary (RUC), in terms of staffing and organisation; there was also a robust oversight system in place.' (Para 127)

CAJ has received no complaints about ill-treatment in police custody in the years since this report. As noted above, the Annual Human Rights Reports written by the Policing Board's Independent Human Rights Adviser, have not expressed concern about ill-treatment (as opposed to poor conditions) of persons held in police custody.

3.1.1.1. Procedural status of the victim

1. Is there any concern as to the status of the victims of police ill-treatment? (e.g. rights victims should have but they do not, or the practical shortcomings of the otherwise good-quality legal framework)

If the case comes to trial, the victim would have the same status as any other victim. Otherwise, they would be kept informed of the progress of an investigation by the Police Ombudsman. A new Victims Charter is under preparation for Northern Ireland and the Ombudsman's Office would wish to be a designated authority under it.

3.1.1.2. Investigation of complaints of torture and ill-treatment

1. Is there any criticism as to the independence of the investigation of police ill-treatment or torture cases? If so, please explain the merits of the concerns.

All investigations into allegations of ill-treatment by the police are carried out by the Office of the Police Ombudsman (See Paras 58-87). In general, there is little complaint about the independence of the Office in terms of investigations into contemporary allegations. There was, however, criticism in the past of its work on legacy cases (unresolved cases of police misconduct or criminality during the conflict). In 2011, CAJ published a highly critical report (available here: http://www.caj.org.uk/contents/962) which was followed by two government reports which accepted that the Office's independence had been "lowered" in regard to legacy cases. The then Ombudsman resigned, was replaced and a subsequent inspection by Criminal Justice Inspection gave the body a clean bill of health in regard to historic cases.

2. Do you think if the investigative body fails to carry out a thorough investigation the available remedies offer effective avenues for the victims to have the perpetrators punished? If not, what are the reasons for the shortcomings?

There is no independent complaints process about Ombudsman investigations. The Office is, however, subject to inspection by the independent Criminal Justice Inspection and this body has carried out critical reports (see above). Like any public authority, actions of the Office are subject to judicial review (on the grounds of unreasonableness, acting ultra vires etc.) The Office would be sensitive to public criticism but there has been no major example of this with regard to contemporary cases; in practice, legacy cases are much more controversial. Outside of the Police Ombudsman, there are few available remedies for individual complainants beyond a civil case for damages. However, this is in the context of this Office itself being a hard-fought for response to massive past shortcomings in preventing ill-treatment by police officers.

3. Are there any legal provisions prohibiting or limiting psychological ill-treatment or torture (e.g. threatening with ill-treatment or torture, or threatening pre-trial detention if a suspect remains silent)?

See Paras 12 and 13 above with regard to the Police Code of Ethics and Paras 51 to 57 on enforcement of the rules on questioning.

4. How long does the whole legal procedure typically last (from the day an investigation was launched against officers who have allegedly ill-treated or tortured a victim until the delivery of the final court decision)?

Given the lack of examples of such cases in contemporary Northern Ireland, it is impossible to answer this question.

3.1.1.3. Medical examination and medical documentation

1. Is there an obligation for the police officials to examine those detained upon admission or is it carried out only upon complaint/request?

There is no obligation to have all detainees medically examined. PACE Code C, section 9.5 (9.6 in PACE Code H) says:

'The custody officer must make sure a detainee receives appropriate clinical attention as soon as reasonably practicable if the person:

(a) appears to be suffering from physical illness; or

(b) is injured; or

(c) appears to be suffering from a mental disorder; or

(d) appears to need clinical attention.'

See also Para 30 above.

2. Is there any criticism regarding the possibility of, or the quality of, the medical examination upon admission to a police station/police detention facility? If yes, please explain the concerns raised in this matter.

We are not aware of any concerns of this nature.

3. What is the status of the medical doctors examining the victims? Has the status of the medical doctors examining the victims ever been criticized? If so, what is the reasoning of the criticism?

See Para 31 and Paras 104 to 106. We are not aware of any criticism of the status of medical doctors.

4. If it is possible for the victim to request a doctor of their own choosing, what is the proportion of examinations carried out by independent doctor?

A detainee can request to be examined also by a doctor of their own choosing and at their own expense (see Para 31). The proportion of such examinations is unknown, but they are likely to be very rare. Forensic Medical Officers would normally be regarded as independent of the police.

5. If it is possible for the victim to request a doctor of their own choosing, is there any evidence that the quality of these examinations is better than those carried out by doctors employed by the police?

We have no evidence one way or the other. As noted above, we have no information on the number of private medical examinations of people in detention but this is likely to be a very rare occurrence.

6. Do doctors receive special training on how to document injuries in case of possible or alleged ill-treatment or torture? (i.e. do doctors know which factors will be treated as relevant by the forensic medical experts, the prosecution or the court?)

Yes. Forensic Medical Officers are members of the Faculty of Forensic Medical Medicine of the Royal College of Physicians which is responsible for training and continuous professional development of forensic practitioners.

3.1.1.4. Prosecution by the complainant

1. If it is possible for the victim to act as "prosecutor" under any circumstances (basic rules to be detailed under I.5.), how frequently is this special legal remedy used?

It is theoretically possible to bring a private prosecution in Northern Ireland but state legal aid is not available for such an enterprise. It is believed that only one private prosecution has ever reached the Crown Court in Northern Ireland, where it failed. Private prosecution is not an effective remedy in this jurisdiction.

It is, however, always open to a complainant to take civil proceedings against the police for the tort of assault or for breach of the Human Rights Act (the European Convention on Human Rights applied in domestic law). In principle, such proceedings would be the same as for any other defendant. Civil cases were regularly taken in the past, during the conflict, when police complaints processes were inadequate and tainted. At that time, the practice of the state was very often to settle the case through the offer of payment of compensation without admitting liability and to avoid the issues being aired in court. Nowadays, a civil case for financial compensation would normally be another step in addition to the complaints process. It cannot be seen as an alternative to the complaints process since such a case would be highly unlikely to succeed unless the complaint had been upheld by the Police Ombudsman. There are no statistics published on civil proceedings categorised by the status or nature of the defendant, but since there are hardly any complaints about ill-treatment in custody, there are unlikely to be any relevant civil cases.

2. Is there any difference in the success rate of the cases prosecuted by prosecutors as opposed to those prosecuted by (supplementary) private prosecutors?

See above.

3. Are there any powers or rights a (supplementary) private prosecutor should have beyond her existing powers?

See above.

3.1.1.5. Consequences

1. Is it possible for an officer to continue to be employed as a police officer after they have been found guilty of a criminal offence involving ill-treatment or torture of a person?

Serving police officers found guilty of serious criminal offences will generally be dismissed or required to resign. There have been not been any convictions of police officers for ill-treatment of detainees in the last decade but it is inconceivable that any officer so convicted would be permitted to continue serving.

2. Is there any criticism of the gravity of typical sanctions imposed in ill-treatment or torture cases?

As we have noted before, we have no information about any such cases.

4. Questionnaire Part III: Analysis of the relevant provisions of the legal system with a view to a hypothetical case

4.1.1.1. Recording of police action

1. Would there be a recording of the actions of the police in the street (stopping and apprehension) e.g. through body or dash board cameras?

In 2014, the PSNI piloted a scheme for the deployment of body-worn cameras for police officers on operational duty. At the end of February 2016, it was announced that this would be rolled out across the service over a period of months. In the future, then, such incidents would be recorded by cameras worn by the officers concerned. There are wider questions about how deletion later on should be managed. Data protection legislation should obviously be applied. The main purpose of these cameras is to capture evidence but they have effectiveness in working both for scrutiny of offenders and police actions also.

2. Would there be a recording of what happened in the police car?

There is no routine recording of what happens in a police car.

3. Would there be a recording of what happened in the custody cell and in other parts of the police station/police detention facility?

Yes, all suites are fitted with sound and vision equipment – everywhere but in the toilets and medical room. Custody suites are a vitally important tool for the work of the Police Ombudsman. It is important to make sure there are no blind spots or gaps in our powers to scrutinize custody suites and detention facilities. There are also alarm buzzers in cells. CCTV records are kept for 90 days in general but if required for evidence are kept indefinitely.

4. Would there be a recording of the interrogation?

There is a sound recording of all interviews with detainees.

5. Would outsiders (e.g. people walking on the street) be entitled to record the police action by their cell phones or other suitable equipment? Would the person subject to the measure be entitled to do so?

Yes, outsiders would be allowed to do this. However, under PACE article 21 a police officer may seize any video equipment as such if they have reasonable grounds for believing it may have been obtained in consequence of the commission of an offence or that it is evidence in relation to an offence which he/she is investigating. Seizure can happen also if an officer is being impeded. The police do have power to seize the equipment if it is used for the purposes of e.g. collecting information for use to a terrorist. This would have to be shown by reference to the particular circumstances and the unjustified seizure of mobile phones can be quite a serious offence for a police officer to commit. It is acceptable to seize phones for good cause but deleting any material or content is wrong. Once you get into the process of arrest and detention you have a remedy of getting the equipment back. If officers delete material this is serious misconduct and

has severe repercussions. The main question to ask here, is the phone impeding the officer? Is the officer being obstructed?

6. With regard to all the different types of recording above: would it be possible for the officers to turn off the cameras at any point? If there would be a recording, for how long would it be kept and would the authority investigating the ill-treatment claim and the victim have unhindered access to it?

Custody suites don't have a facility for officers to turn off cameras. With regards to holding recordings, the Ombudsman has statutory powers and they could hold it as evidence. In ordinary circumstances they can provide it to all concerned if a case happens or a complaint is made.

In respect of the body worn video referenced above police officers can turn off the cameras at any point. In fact, guidance dictates that the cameras are not switched on all the time to avoid collateral infringement of e.g. article 8 rights. If switched off the camera records the date and time at which it is switched off and back on again. Each camera records the details of the officer to whom it was issued.

4.1.1.2. Medical examination and medical documentation

1. Would the complainant always be examined by a doctor upon admission to the police station/police detention facility or at any other time (e.g. what happens if he complains that he was beaten up during the interrogation)?

See Para 104 to 106 above. Risk assessments would be carried out by the custody sergeant. They decide whether the person needs to see medical staff. Doctors must respond in under one hour. They are independent from the PSNI and most double job (i.e. carry out other medical roles unconnected with the police). If a claim is made of ill-treatment during an interrogation that will be recorded and medical examination will be directed by the custody sergeant. If such a claim is made the matter will be immediately referred to the Police Ombudsman who will attend and investigate the claim.

2. Would he have to ask for it, or is it mandatory?

See above. If a person was refused a medical examination, this would be a case of serious misconduct.

3. If a medical examination would take place, would it be by a doctor employed by the police or would it be in an independent civilian health care institution? Would it be possible for the victim to request to be examined by a civilian doctor or be transferred to a civilian hospital for the purposes of the examination?

The examination would be carried out by a Forensic Medical Officer. The detainee can ask for examination by a doctor of his own choosing at his own expense. See Para 31 above.

4. Would someone from the police be present at the examination? If yes, would it be those officers who have apprehended the complainant, or different officers? Would the complainant or the doctor have the right to request that police officers escorting the complainant to leave so that they were out of sight and/ or hearing?

Police officers would not normally be in the room for a medical examination. Only if the detainee were violent would the custody sergeant take appropriate measures. Once

"booked in," the detainee is the responsibility of the custody sergeant and he or she is in command of any officers who may be engaged in restraint. If a complaint is made, Police Ombudsman investigators would interview the complainant with no PSNI officers present.

5. If there would be a medical examination, would the doctor ask the complainant about the reason for his injuries and would he/she be likely to record the injuries accurately?

Yes doctors would ask about all aspects of the treatment of the detainee.

6. Would the doctor record what he/she thinks to be the most plausible origin of the injuries if that differs from what the complainant states (e.g. if the complainant is afraid to tell what has happened)?

Yes.

7. Would photographs be taken by the doctor or by another member of the relevant law enforcement agency of the injuries of the victims?

Yes, injuries are observed, photographed and drawn by the Forensic Medical Officer where appropriate. Ombudsman investigators may also photograph injuries.

8. Would the doctor forward the medical documentation to the prosecutor (or to any other entity responsible for the investigation of police brutality) if

   a) the complainant complained of ill-treatment,

   b) injuries are detected but the complainant did not allege to have been subject to ill-treatment?

Yes. The Ombudsman is entitled to copies of any of this type of documentation. Doctor's reports are automatically passed on to the Ombudsman. FMO's can complain to the custody sergeant or directly to the Ombudsman's office. If the FMO had concerns and raised them with the custody sergeant, this conversation would be recorded unless it took place in the medical room. FMO's could also contact the civilian manager who is Head of Reducing Offending and Safer Custody and responsible for their contracts and custody policy.

9. Would the complainant receive a copy of the medical files? If so, would it be free of charge?

Yes to both questions if there was a complaint and investigation.

10. Could the complainant submit opinions by experts commissioned by them, or is only the opinion of the expert appointed by the investigating authority taken into account?

If a complaint is made the Ombudsman may direct an independent examination. If the complainant issues legal proceedings he or she will be entitled to submit an independent expert's report. While the court has power to direct one single joint expert, that is highly unusual in Northern Ireland. It is the norm in England and Wales for one joint expert to be appointed but that joint expert will be independent of the police.

11. Would the forensic opinion be conclusive as to the decision of the court, i.e. is it required for the expert to establish that what the complainant said about the way the injuries had been sustained were true beyond reasonable doubt for the court

to sentence the suspect, or is it enough if the forensic expert opinion provides that it is possible that the victim's story is true?

If the complainant issues civil proceedings the court can accept or dismiss the expert opinion if not satisfied on the balance of probabilities that the injury was sustained in the manner described by the complainant. If criminal proceedings are brought the court must be satisfied beyond a reasonable doubt.

12. Could the complainant be prosecuted (e.g. for "false accusation") for telling the doctor that he has been ill-treated if the accused officers are acquitted or the criminal investigation is terminated for want of evidence?

There is a possibility that the complainant could be prosecuted for perjury if the court is satisfied that he or she lied about the injury. This is, however, very rare and it would require to be proved beyond reasonable doubt that the complainant deliberately and maliciously lied.

4.1.1.3. Right to a lawyer

1. Would the complainant have a right to a lawyer whilst in police detention?

Yes. See Para 26. Section 6 of Pace Codes C and H contains the regulations around access to legal advice. Of the 24,377 persons detained under PACE in 2014-15, 13,910 made requests for a lawyer to be present at the police station. In the same period, 227 persons were arrested under Section 41 of the Terrorism Act (TACT) of whom 35 were subsequently charged. There are no published statistics of the proportion of these detainees which requested legal representation, but it is safe to assume that the vast majority arrested under such legislation would request access to a lawyer.

2. Would the complainant's lawyer be present at the interrogation from the very first moment of the interrogation?

Yes – see Paras 34-38 above. Lawyers who attend at the police station to give legal advice to detainees thereby become instructed by their client (the detainee). That means that they are under a professional, and generally unbreakable, obligation to represent the client to the best of their ability. They would therefore always attend at sessions of questioning by the police unless the client expressly instructed otherwise.

3. Are there any rules establishing a minimum period between informing the lawyer about the scheduled interrogation and the actual start of it?

There is no fixed period but we are not aware of any complaints from lawyers about lack of sufficient notice.

4. Would the police wait for the arrival of the defence lawyer before starting the interrogation?

Yes.

5. Would the complainant have the possibility to consult the lawyer before the interrogation starts?

Yes.

6. Would the lawyer be likely to take any action in relation to the complainant's claim of ill-treatment (insisting that it be placed on the record, taking photographs, filing a report with the competent authority, etc.)?

It would be open to the lawyer to do all those things and in addition could contact the 24 hour on-call Ombudsman investigator to attend immediately at the police station.

7. Would there be any difference in the course of action in relation to all the above depending on whether the lawyer was a retained or a legal aid lawyer?

The vast majority of lawyers in Northern Ireland will be legal aid lawyers and would be expected to follow exactly the same procedure as a privately retained lawyer. Whether those steps are followed may depend on the quality of the lawyer. The cuts to legal aid has had an impact on the availability of lawyers, the time it takes to secure a lawyer and the degree of assistance offered at that early stage.

4.1.1.4. Right to inform a third person

1. Would anyone inform a third party of the fact that the complainant has been arrested by the police? If so, who would call the third person, the police or the complainant?

A detainee has the right to inform or have informed a third party of their arrest – see Para 27. This might be done in person by telephone or by the police. How this right is exercised must be recorded.

2. What would be the latest time that the third person would be informed? What would happen if the person nominated by the complainant was not available?

If the person is a solicitor, access must be granted after a maximum of 36 hours but delay to that extent is only allowable on narrow grounds detailed in the PACE Codes. Alternatives to the first person nominated would normally be allowed if there was a problem over availability.

4.1.1.5. Investigation of the complaint of ill-treatment

1. What are the possible avenues by which investigation of the complainant's claim of ill-treatment would start? (E.g. would the doctor send the medical documentation to the competent authority, would the lawyer make a claim, would the interrogating officer report to his/her superiors or the prosecution, etc.?)

All the persons mentioned, any member of the public and a range of public authorities can make a complaint to the Police Ombudsman. If any complaint is notified to the custody officer he or she must refer on the complaint to the Ombudsman. The Ombudsman may also "call himself in" to any case where it seems appropriate. An example given is of an Ombudsman official hearing on the news that a CS spray had been used on a schoolboy in a classroom and immediately investigating without a complaint or referral (the use was found to have been justified).

2. Which state organ would investigate the alleged ill-treatment? (police, prosecutors, special part of the prosecutor service, special judge, special independent body, etc.) If there is any special feature about the investigative body's role, competence or independence, please elaborate on this aspect.

The Office of the Police Ombudsman investigates all complaints against the police – see Paras 62 et seq.

If there is a special body/institution for investigating such complaints, could any other investigative organ investigate the case under any circumstances? If so, can the evidence collected in course of its action be used by the prosecutor/court?

The Northern Ireland Health and Safety Executive might have a role in certain circumstances but in general this is the preserve of the Ombudsman.

3. Would there be any remedy against a decision that no criminal action should be taken against the police officers?

The Ombudsman carries out all investigations of the police and, where they believe a crime may have been committed, forward the file with a recommendation to the Public Prosecution Service. PPS have their own review procedures and if a decision was held to be unreasonable a judicial review would be possible. If a file goes to the PPS and it decides a criminal offence has not been committed, or there is insufficient evidence or it is not in the public interest to prosecute (there is a Prosecutor's Code governing these decisions) the Ombudsman could still recommend a misconduct proceeding.

4. Does the complainant run the risk of being accused by the officers of violence against them if he files a complaint against the officer?

This is always a possibility. In such a case, the Ombudsman's investigation into the complaint about the police would run in parallel to the police investigation of the alleged offence by the complainant. This fact would mitigate against any manipulation of evidence or perjury by police officers.

4.1.1.6. Procedural status of the complainant

1. Would the complainant have a legal standing in any criminal proceedings taken against the police officers? If so, what rights would the complainant have?

See Para 113.

2. If the complainant was a member of a vulnerable group, would he be heard under special circumstances?

A juvenile, a person who is mentally disordered or otherwise mentally vulnerable, has the right to have an appropriate adult attend at the police station and any interview with the detainee. If relevant, such a person could communicate with, or facilitate the communication of the detainee with investigators from the Ombudsman.

3. Would the victim be entitled to any kind of protection measures? (who can have access to victim's personal data recorded in the case files, what happens if there is a real risk of retribution by the perpetrators, etc.)

The victim would be entitled to all the usual protections of a victim in a criminal case.

4.1.1.7. Prosecution by the complainant

1. Would it be possible for the complainant to act as "private prosecutor" against the police officers? If yes, under what legal conditions?

As noted in Para 124, private prosecution is not an effective remedy in Northern Ireland.

2. If prosecution by the complainant is possible, is it a prerequisite that the police officers be formally charged in the criminal proceedings or does he have an independent right to initiate criminal proceedings against them? Does the qualification of the crime by the prosecutor have any relevance in terms of the availability of (supplementary) private prosecution? (e.g. in Hungary a person falsely accused of having committed a crime may not act as a private prosecutor, on the basis that the primary aim of sanctioning false accusation is to protect the justice system, and not the falsely accused person)

See above.

3. If prosecution by the complainant is possible, would legal representation be mandatory? Would the complainant be entitled to legal aid? If so, under what conditions?

See above.

4. If prosecution by the complainant is possible, would there be any problems for the complainant in doing so, for example, restrictive time limits?

See above.

5. Would there be any relevant differences between the rights of the public prosecutor and those of the private prosecutor?

See above.

6. Apart from prosecution, what other remedies for the police ill-treatment might be available to the complainant?

The actions of the Police Ombudsman can lead to a wide variety of sanctions such as dismissal, decrease in pay, disciplinary interviews, advice and guidance etc. Complainants should take their case to the Police Ombudsman in all circumstances. Civil proceedings for financial compensation can also be taken – see Para 124.

4.1.1. Evidentiary issues

(please indicate if there are any differences in cases prosecuted by private prosecutor)

1. Would police officers involved in the incident be required to write a report on the police measure/use of means of restraint?

Yes, they must record why they used force. They will be interviewed also under caution and with the observation of PACE rules. Officers investigating them will be analysing CCTV also.

2. Could these reports be used as evidence in any criminal prosecution of the police officers? If so, would there be any difference in terms of the "evidentiary force" of these reports compared to evidence provided by the complainant?

If the police in question were thought to be involved in a case of ill-treatment they would be regarded as suspects and interviewed under caution. Any reports would be treated as their evidence.

3. Would all the police officers involved in the incidents of ill-treatment be heard as witnesses?

As witnesses and possible suspects they can be cross examined and interviewed under PACE. Their evidence can be challenged also by the Ombudsman's investigators during interview. The Public Prosecution Service decides on prosecutions but when a case comes back to the Ombudsman they decide on the nature of misconduct. The processes run parallel to each other. If there is no prosecution, the Ombudsman will examine whether there should there be misconduct proceedings. An officer cannot be disciplined until any criminal procedure is complete.

4. Would the complainant and the police officers be confronted (would they be cross-examined) in any criminal proceedings?

See above.

5. Would identity parades be held in the case? Would it be done in person or by showing photographs?

The ombudsman does not in general hold identity parades but has the power to do so.

6. Would the doctor(s) who examined the detained person be heard as witnesses?

Yes

7. Would the complainant have the right to propose any question to be asked of other witnesses in the proceedings?

Yes

8. What would happen if the complainant alleged that he had been subjected to ill-treatment in order to extract a confession? In a prosecution of the complainant for assault on the police, would the allegation of ill-treatment by the police be relevant to whether the evidence of his interrogation was admissible or to the weight given to that evidence (assume for the purpose of this question that the complainant confessed to assaulting the police in the interrogation)?

See Paras 55 to 61 above for a brief account of the rather complex law on the admissibility of evidence obtained through unlawful interrogation. Essentially, if it were demonstrated that force was used in order to extract a confession, that would make the detention itself unlawful. Furthermore, it would be impossible for the prosecution to demonstrate that the questioning which led to the confession was not "oppressive." The confession would therefore be inadmissible. If the detainee was prosecuted for assault on the police and the confession was to that charge, it would therefore be inadmissible if it had been extracted by force or oppressive questioning. In a situation in which both the police and the detainee were alleging violence by the other during an interrogation, it would be up to the court to determine the case on the facts. However, if there were an admitted exchange of violence during a police interview, even if it were demonstrated that the police used only necessary force to restrain the detainee, the court would probably take a dim view of a confession given and recorded during that session. Good practice would be to end the session in which violence took place and re-start questioning after a break and in a calm and unthreatening atmosphere.

9. Is there any relevant difference in the procedure where a police officer is accused of assaulting an accused compared to where a person is accused of assaulting a

police officer (eg., higher evidential threshold, difference in the level of sentence/ sanction, etc)?

No, except for the fact that the Police Ombudsman would be investigating the first case and the police would be investigating the second. There would be no higher evidential threshold or difference in sanctions except that a police officer could suffer disciplinary as well as criminal sanctions.

4.1.1.1. Conclusions

1. With regard to the ways in which police ill-treatment is dealt with in your jurisdiction, please identify those things that work well and those things that do not work well, i.e. that increase or decrease the efficiency of investigation of ill-treatment and torture. Include in your answer laws, procedures, practical arrangements and institutions and provide statistical evidence if probable.

The evidence demonstrates that, from a situation in which torture of terrorist detainees appeared to be routine and casual violence against detainees tolerated, ill-treatment of persons held in police custody has been virtually eradicated in Northern Ireland. It would be repetitive to detail again all the legislation and procedures described in this report, but the combined result is a situation in which police detainees are as safe as it is reasonably possible to make them.

5. Annex

5. 1. International standards relating to ill-treatment as applied to Northern Ireland

Prepared by Dr Neil Graffin, Lecturer in Law, Open University

5.1.1. International instruments

Torture, inhuman treatment and degrading treatment (IDT) are prohibited under various international instruments applicable to the law in the United Kingdom and Northern Ireland. These include Article 5 of the Universal Declaration of Human Rights (UDHR) 1948,[16] Article 3 of the European Convention of Human Rights (ECHR) 1950,[17] Article 7 of the International Covenant on Civil and Political Rights (ICCPR)[18] 1966, and Articles 2, 4 and 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT).[19] Other relevant legal instruments include the UN Istanbul Protocol,[20] the CPT standards,[21] The UN Code of Conduct for Law Enforcement Officials 1979,[22] the Council of Europe's Declaration on the Police 1979,[23] and the European Code of Police Ethics 2001.[24]

In the UK the highest source of power is Parliament, and unlike in other states, the courts do not have the power of striking down legislation which breaches human rights. The only exception to this is where provisions contained within an Act are deemed to be not compliant with the EU Charter of Fundamental Rights.[25] Individuals in Northern Ireland, as within the UK and the rest of the Council of Europe, also have the right to individually petition the European Court of Human Rights under Protocol No. 11, which came into force in November 1998. The United Kingdom is not party to the Optional

16 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A.

17 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

18 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999.

19 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465.

20 Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

21 CPT Standards, CPT/Inf/E (2002) 1 – Rev 2011.

22 UN Code of Conduct for Law Enforcement Officials, UNGA Res A/34/169 (19 September 1979)

23 Council of Europe Parliamentary Assembly, Resolution 690 (1979) on the Declaration on the Police

24 Council of Europe, Recommendation Rec(2001)10 of the Committee of Ministers to Member States on the European Code of Police Ethics.

25 European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

Protocol to the International Covenant on Civil and Political Rights 1966[26] and so the Human Rights Committee does not have competence to receive individual complaints for breaches of the ICCPR.

5.1.2. The Complaints system

In Northern Ireland complaints against a police officer for ill-treatment are handled by the Office of the Police Ombudsman for Northern Ireland (OPONI) or the PSNI Professional Standards department. A complaint to the Ombudsman can come from any member of the public, the Department of Justice, the Public Prosecution Service, or the Policing Board. The Ombudsman can directly take a case on themselves if they have received evidence from elsewhere (such as from CCTV). Complaints from other police officers and complaints relating to the actions of off-duty police officers are investigated internally within the PSNI's Professional Standards department. Civilian detention officers are considered, for the purposes of complaints, to fall within the same statutory framework as the police (these are referred to as designated officers). A complaint can involve a minor breach of PSNI Code of Ethics, to an allegation of criminal activity.

5.1.3. Informal Resolution

OPONI or the PSNI Professional Standards department can make an assessment of whether the outcome should be dealt with formally or informally. Informal resolution is governed by section 53 of the Police (NI) Act 1998. The vast majority of complaints will fall within the 'informal' route. Informal complaints arise where there is, for example, a quality of service issue, or an administrative failing. Examples include officers using inappropriate language, not responding to members of the public, or keeping them up to date with investigations. In the case of OPONI, they will decide on whether informal resolution is appropriate within three days and will contact the Chief Constable (or the Policing Board in cases involving senior officers) to appoint a senior officer to carry out informal resolution procedures. Informal complaints have a mixture of outcomes, including a superintendent's warning, advice and guidance from the Professional Standard's Department, or an informal discussion with the police officer.

5.1.4. Formal Investigations

If a complaint is unsuitable for formal resolution an investigation will occur. If a complaint is considered to be serious – if it involves death or serious injury and is received in a manner which warrants it – the Ombudsman must conduct a formal investigation. Where an investigation is carried out by OPONI the officer has the same powers as a police officer, including, for example, the rights to search or arrest suspects. Under s. 55(1) of the Police (NI) Act 1998, if the Secretary of State, the Minister of Justice, the Policing Board, or the Chief Constable considers that a police officer may have committed a serious offence they may refer the matter to OPONI to investigate. In the absence of a complaint, under s. 55 (6)(b) of the Police Act 1998, OPONI have the right to investigate a matter if there is reason to believe a police officer may have committed a criminal offence or breached the Code of Ethics. The PSNI Professional Standards

26 Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

department can also instruct investigations into the criminal activity of police officers as covert operations.

5.1.5. Outcome of complaints

If there is no evidence to support a complainant's allegation, the complaint will not be investigated any further. If there is evidence that the police officer may have committed a crime, OPONI will forward the file to the DPP for further investigation and any criminal trial will take place in the same way as it would for any civilian. If the evidence shows that a police officer may have broken the PSNI's Code of Ethics, OPONI or the Professional Standards department may recommend that disciplinary proceedings are conducted. OPONI can insist disciplinary actions are taken against the will of the Chief Constable, but in practice this has only happened on one occasion.

5.1.6. Disciplinary hearings

Formal complaints are dealt with in misconduct hearings which are conducted internally within the police. Part II, regulations 7 and 11 of the PSNI (Conduct) Regulations 2000 legislate that the 'supervising member' shall refer a case to a formal misconduct hearing and shall be at least rank of Superintendent. Police misconduct hearings are not held within a courtroom or tribunal, but take place within a formal environment, which is not unlike a courtroom in its set-up and appearance.

5.1.7. Investigations in Northern Ireland and International Standards

The European Court has confirmed that there is a duty to investigate incidents of ill-treatment. The procedural obligation requires an 'effective official investigation' that will be thorough and 'capable of leading to identification and punishment of those responsible'.[27] This obligation is derived from the similar procedural duty of Article 2.[28] There are a number of duties imposed on investigators. It is the CPT's view that even in the absence of a formal complaint authorities may be under a legal obligation to undertake an investigation.[29] This is also contained within the Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment.[30]

5.1.8. Independence and impartiality

For an investigation into possible ill-treatment to be effective, it is essential that the persons responsible for carrying it out are independent from those implicated in the events. Independence is to be interpreted in practical terms, not only the absence of hierarchical or institutional connections. Independence can cover anyone making

27 Assenov v Bulgaria, (1999) 28 EHRR 651, para 102.

28 *McCann v United Kingdom* (1996) 21 EHRR 97.

29 14th General Report on the CPT's activities, CPT/Int (2004), para 27.

30 Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para 2.

a decision, including those assigned to particular investigative steps,[31] doctors,[32] and prosecutors.[33] The European Court is silent on who should investigate complaints by the police. However, the Human Rights Commissioner for the Council of Europe[34] and the CPT[35] have supported the creation of independent police complaints systems, which are unconnected from the police and who have the power to refer cases to the prosecuting services of the State. The Council of Europe, working in conjunction with the EU have stated that any complaints body should be fully independent from the police in terms of legal basis, composition, appointment of members etc, should have adequate means, and should have appropriate competences to handle complaints against the police.[36] As a concluding mark they stated:

> An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as a fundamental protection against ill-treatment and misconduct. An independent police complaints body should form a pivotal part of such a system.[37]

The international standards remain silent on the type of independence required, and whether on occasion investigations can take place within police departments internally. Northern Ireland meets the international standard for ensuring the independent investigation of complaints. OPONI is novel within in the context of the United Kingdom because it can deal with complaints entirely separately from the police.[38] If a complaint is outside his or her legislative remit, the Police Ombudsman can, as a matter of discretion, refer it to the Chief Constable, the Policing Board, or the Ministry of Justice. The Ombudsman can refer matters to the police for investigation under s. 57 of the Police (NI) Act 1998, but in practice this power has never been used. The Conduct Regulations states that if the investigator is not from OPONI they must not belong to the same sub-division or branch as the police officer under investigation.

In relation to informal resolution a key concern might arise over how far it is police led – this may not inspire confidence as a complainant may feel that his or her complaint

31 *Mikheev v. Russia* (Application 77617/01) Judgment of 26 January 2006, (2006) para 116.

32 *Barabanshchikov v. Russia*, (Application 36220/02), Judgment of 8 January 2009, (2009) para 62.

33 *Ramsahai and Others v. the Netherlands*, (Application 52391/99) Judgment of 15 May 2007, (2007) paras 62-63.

34 CommDH (2009)4.

35 The CPT's report on the visit to the United Kingdom and the Isle of Man from 8 to 17 September 1999, CPT/Inf (2001) 6, para 55 (In E Svanidze, 75). This currently can happen in Northern Ireland where the Police Ombudsman has the power to remit a case directly to the CPS.

36 Council of Europe and EU 'Complaints against the police: their handling by the national human rights structures: workshop debriefing paper' (2008); Available at: http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/proceedings_StPetersburg_May2008.pdf (accessed 20/02/2016).

37 Comm. DH (2009) 4.

38 Under the previous system members of the RUC were investigated by other members of the police.

is not being dealt with in a way which is independent from the police or it does not warrant the attention of OPONI. A survey of complainants carried out by OPONI in 2005 found that while every two out of three complainants found the informal complaint officer to be helpful, 73% felt that their complaint should not have been handled by the police.[39] However, this does not mean the international requirement that investigations of ill-treatment should be conducted independently and impartially is not met, because credible allegations of ill-treatment will be treated as formal complaints. Further studies conducted suggested that the majority of police officers felt they had been treated fairly by the PONI.[40] In practice, investigating officers in OPONI are seconded or former police officers.[41] This may raise cause issues about the independence of the complaints process - the use of former police officers by the Independent Police Complaints Commission (IPCC) in England and Wales has raised concerns.[42] The rehiring of ex-RUC officers has also been a contentious issue in Northern Ireland.[43]

5.1.9. Thoroughness

An investigation into possible ill-treatment by public officials must comply with the criterion of thoroughness. It must be capable of leading to a determination of whether force or other methods used were or were not justified under the circumstances, and to the identification and, if appropriate, the punishment of those concerned. Investigative bodies must have full competence to establish the facts of the case and to identify and punish those responsible where necessary. The persons conducting the investigation must have at their disposal all the necessary budgetary and technical resources for effective investigation.

OPONI has wide-ranging powers to investigate all complaints against the Police Service of Northern Ireland (PSNI). The OPONI also has a right to of access to all PSNI information and documents necessary for their investigation. This includes the ability to compel the police to provide evidence to them and to attend crime scenes. It can also refer cases to the Director of Public Prosecutions in Northern Ireland, but it does not have powers to convict police officers. OPONI cannot deal with complaints arising from non-police officers, for example, within MI5, the army, informants or civilians. This has caused some concern within OPONI because if police officers work in joint enterprise with non-police officers, two parallel investigations may be taking place – by the PSNI and the

39 Dickson, B and Gormally, B, *Human Rights in Northern Ireland: CAJ Handbook* (Hart, 2015) p. 107.

40 Porter, L. E. and Prenzler, T. (2012) 'Police oversight in the United Kingdom: The balance of independence and collaboration', *International Journal of Law, Crime and Justice*, vol. 40, no. 3, pp. 152–171.

41 Dickson, B and Gormally, B, *Human Rights in Northern Ireland: CAJ Handbook* (Hart, 2015) p. 111.

42 House of Commons, Home of Affairs Committee 'Independent Police Complaints Commission: Eleventh Report of Session 2012-2013: Independent Police Complaints Commission', p. 71.

43 BBC News 'Ex-RUC in 'sensitive' policing jobs' (*BBC News, 17 January 2012*).

Ombudsman. It also hampers OPONI in dealing effectively with some areas of inquiry, such as intelligence gathering or the handling of informants.[44]

The authority to oblige those in an official capacity to appear and to testify, and for witnesses to do the same, is also an important role within an investigation. Article 6(3) (d) of the European Convention guarantees to everyone charged with a criminal offence the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him',[45] although there is acceptance that in certain circumstances witnesses will be unable to testify. All police officers in Northern Ireland involved in allegations of incidents of ill-treatment will be heard as witnesses and will be cross-examined and interviewed under the Police and Criminal Evidence Act (Northern Ireland) Order 1989 (PACE). They can also be challenged by the Ombudsman. OPONI appears to be adequately funded, although allegations into historic police misconduct impact resources – in 2013-2014 its budget was £7,163,000 with a further £2,085,000 allocated for historical work. The PSNI Professional Standards department's budget for 2009 was £371,866.

5.1.10. Promptness

Evidence may lose its evidentiary value or become impossible to recover after time, so promptness is key to the investigation of ill-treatment. This is recognised in relevant international instruments, including, the UN Principles on Right to a Remedy[46] Articles 12 and 13 of UNCAT, CPT guidance,[47] and the Istanbul Protocol.[48] The European Court does not prescribe time limits, but the standards followed should reflect the Court's approach under Article 5(3) of the ECHR, whereby the Court interprets the concept of 'reasonable time' as requiring 'special diligence' and 'particular expedition'.[49] In the case of Mikheev v Russia[50] the European Court viewed with concern that that the police officers complained of were brought before the applicant for identification only two years after the incident.[51] In Northern Ireland, according to the data available for 2009-2010 the average period of time for an investigation to be concluded was 109 days, with many cases taking much longer than this.[52] This seems to be satisfactory by the international standard.

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44 Dickson, B and Gormally, B, *Human Rights in Northern Ireland: CAJ Handbook* (Hart, 2015) p. 97.

45 Article 6 (3) (d).

46 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.

47 14th General Report on the CPT's activities, CPT/Int (2004) 28 para 35.

48 See paras, 14, 83, 179.

49 See *mutatis mutandis Wemhoff v. Germany* (Application no. 2122/64), Judgment of 27 June 1968, para. 17.

50 *Mikheev v. Russia* (Application 77617/01) Judgment of 26 January 2006.

51 Ibid, para 131

52 CAJ Handbook, p.108.

5.1.11. Suspension from duty

Investigative bodies should have the power to suspend from service or from particular duties persons under investigation of ill-treatment. This has been confirmed by the European Court.[53] The Istanbul Protocol provides:

> Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.[54]

In Northern Ireland, the suspension of officers with the rank of Assistant Chief Constable and above is governed under Part II of the RUC (Conduct) (Senior Officer) Regulations (as amended). The RUC (Conduct) Regulations 2000, deal with the suspension of officers below this rank. The Chief Constable (or the Policing Board in serious cases) has the power to suspend an officer where there is a report, allegation or complaint that a police officer did not meet the required standard of conduct. In the case of a senior officer there are further considerations to be taken into account, such as the public interest considerations in their suspension. The approval of OPONI is also required for the suspension of a senior officer. If a complaint has been made OPONI should provide all relevant information for consideration of suspension. Police officers may also be repositioned to a different district.

At the time of writing approximately 30 police officers are suspended or repositioned to another police district by the PSNI (although not on grounds of ill-treating detainees). The PSNI Professional Standards department explained that a decision to suspend is taken largely on the facts of the allegation – in some cases the evidence will be clear, whereas in other situations it might warrant further investigation. It was suggested that when there is sufficient evidence of ill-treatment the police officer will be suspended.

5.1.11.1. Penalties

When ill-treatment has been proven, the imposition of a suitable penalty should follow. The European Court has held that

> . . . the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents. However, it must still exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.[55]

The European Court has commented on the inappropriateness of sentences. In a case where police officers threatened an individual with ill-treatment and sexual violence it was held:

> [I]mposing almost token fines of 60 and 90 daily payments of EUR 60 and EUR 120 respectively, and, furthermore, opting to suspend them, cannot be considered an adequate response to a breach of Article 3, even seen in the context of the

53 *Gäfgen v Germany* (2010) 52 EHRR 1, para125.

54 Istanbul Protocol, para 80.

55 *Okkali v. Turkey*, judgment of 16 October 2006, application no. 52067/99, para. 71.

> sentencing practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.[56]

The CPT's view is as follows:

> It is axiomatic that no matter how effective an investigation may be it will be of little avail if the sanctions imposed for ill-treatment are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity.[57]

If an officer faces a criminal trial, he or she will be punished in accordance with the law in the same way as an ordinary citizen. Outcomes from formal misconduct hearings include dismissal, requirement to resign, loss of earnings, loss of rank, a fine (of up to 13 days' pay), a reprimand (meaning that the individual is also unable to apply for a promotion or repositioning to a specialist department within a specified period of time) or a caution. An officer may lose their pension in limited circumstances (e.g. treason). An officer can appeal against a decision.

5.1.11.2. Recording

The European Court has not stipulated that police interviews should be audio or visually recorded but the CPT are in favour of audio and/or video recording of police interviews.[58] Section 100 of the Istanbul Protocol also states that, '[T]he investigator should tape-record a detailed statement from the person and have it transcribed'. Further to this, Code E of PACE applies to the audio-recording of interviews and there are detailed instructions as to how audio and visual recordings should be conducted.[59] In Northern Ireland it is mandatory to audio record interviews, subject to exceptions. These include, under section 3.3A:

It is not reasonably practicable to audio record, or as the case may be, continue to audio record, the interview because of equipment failure or the unavailability of a suitable interview room or recording equipment; and

The authorising officer considers, on reasonable grounds, that the interview or continuation of the interview should not be delayed until the failure has been rectified or until a suitable room or recording equipment becomes available.

CCTV with audio is used within all custody suites in Northern Ireland, but is not used in medical examination rooms or toilets. Body worn cameras are used in England and Wales. It is the perceived intention of the PSNI to introduce body worn cameras.

5. 2. Custody Records

56 *Gäfgen v Germany*, (2010) 52 EHRR 1, paras 123-124.

57 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 44.

58 CPT standards, s. 36.

59 Police and Criminal Evidence Act 1984, sections 61 & 62.

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment state that authorities must keep up-to-date official registers of all detainees, both at each place of detention and centrally.[60] The European Court has stated:

> Adequately kept custody records are of crucial importance for the administrative or judicial determination of any question or claim in relation to a person taken into detention, including a claim that a person has been ill-treated or killed, or has disappeared after having been apprehended by the authorities. The Court considers that a failure to record accurate holding data concerning the date, time and location of detainees, as well as the grounds for their detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention.[61]

The CPT also recommends that there should be a complete custody record:

> The CPT considers that the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, the fact of being told of one's rights and of invoking or waiving them), the signature of the detainee should be obtained and, if necessary, the absence of a signature explained. Further, the detainee's lawyer should have access to such a custody record.[62]

Custody records must be kept in Northern Ireland. These are mandatory and detailed explanations of how they should be kept, including a need to keep them regularly up to date, are given in s.2 of Code C of PACE.

5.2.1. Participation in the investigation

The relevant international standards emphasise the need for victim involvement, particularly from the standpoint of the public scrutiny requirement.[63] The CPT has also stated that victim involvement is important:

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60 UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly*, 9 December 1988, A/RES/43/173, Principle 12.

61 *Ahmet Özkan and Others v Turkey* (Application no 21689/93) Judgment of 6 April 2006, para 371.

62 2nd General Report on the CPT's activities, CPT/Inf (92) 3 para 41.

63 *Güleç v. Turkey* (54/1997/838/1044), judgment of 27 July 1998, para 82

> In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.[64]

Complainants do not generally have the right to access to statements or documents collected during an investigation in Northern Ireland. Complainants are also not permitted witness statements until, at the earliest, its conclusion. In Northern Ireland a complainant may be called as a witness in the criminal trial. Apart from this, they will have no involvement in the criminal process.

5. 3. Access to Medical Professionals

In Barabanshchikov v Russia, the European Court highlighted the importance of medical practitioners to the process of investigation:

> The Court further reiterates that proper medical examinations are an essential safeguard against ill-treatment. The forensic doctor must enjoy formal and de facto independence, have been provided with specialised training and been allocated a mandate which is broad in scope. When the doctor writes a report after the medical examination of a person who alleges having been ill-treated, it is extremely important that the doctor states the degree of consistency with the history of ill-treatment.[65]

It has been noted by the European Court that denial of access to a medical practitioner may amount to inhuman and degrading treatment. [66]The European Court note promptness as vital to an effective medical investigation. The prompt examination of individuals is also important. The European Court has noted with concern:

> [A]number of investigative measures were taken very belatedly. The report on the forensic medical examination of the applicant, for instance, was dated 26 October 1998, that is, more than five weeks after the alleged ill- treatment.... the applicant's psychiatric examination was carried out only in 2001, despite the fact that his mental condition was advanced by the authorities as the main explanation for his attempted suicide, and as the basis for the discontinuation of the proceedings.[67]

Medical examinations in Northern Ireland are conducted by Forensic Medical Officers (FMOs) who have de facto independence from the police. Some FMOs reside within police stations, particularly in rural areas. They are registered by the Faculty of Forensic and Legal Medicine of the Royal College of Physicians and so have a separate point of reference. Historically medical examiners have uncovered instances of ill-treatment in police station in Northern Ireland.

Other relevant international standards include the following:

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64 CPT standards, para 36.

65 *Barabanshchikov v Russia* (Application no 36220/02), Judgment of 8 January 2009, para 59.

66 *Bati v Turkey* (2006) 42 EHRR 37, para 10.

67 *Mikheyev v Russia* (2006) ECHR 78, para 113.

Each detainee must be examined in private. Police or other law enforcement officials should never be present in the examination room. This procedural safeguard may be precluded only when, in the opinion of the examining doctor, there is compelling evidence that the detainee poses a serious safety risk to health personnel. Under such circumstances, security personnel of the health facility, not the police or other law enforcement officials, should be available upon the medical examiner's request. All examinations should be conducted out of the hearing, and preferably out of the sight, of police officers.[68]

In Northern Ireland a complainant will always be examined by a doctor if he or she has injuries or if he or she complains about having injuries. This is mandatory under s.9.8 of Code C of PACE and is usually carried out by a FMO who is checking for consistency with the allegation/s made. FMOs provide 24/7 cover on a rota basis and will promptly attend to police stations – they have a service time of one hour – this meets the international standard. The detainee has the right to have their own medical practitioner at their own expense. FMOs are civilians who work with the police and on occasion may be stationed within a police station. Failure to conduct a medical examination is a form of serious misconduct. It is the decision of the custody sergeant whether a police officer is present during the medical examination. In practice, it has been stated by the PSNI, that police officers will only enter the medical examination room if the FMO predicts violence and that this is a rare occurrence.

The results of every examination as well as relevant statements by the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer. Colour photographs should be taken of the injuries of persons alleging that they have been tortured.[69]

The doctor will make a record of the examination and the Ombudsman or the FMOs will take photographs if any injuries are observed. The length of the injuries will be measured and they will be drawn. If the detainee complains of assault by police officers the custody sergeant must notify the Ombudsman straight away. If the complaint concerns ill-treatment the Ombudsman and prosecuting authorities are entitled to receive the medical reports. The complainant is also entitled to receive a copy of the medical files, free of charge.

The CPT also states that persons who are released from police custody without being brought before a judge have the right to directly request a medical examination/ certificate from a recognised forensic doctor.[70]

The PSNI state that do not 'leave anyone on their own' and ensure that individuals are safe before releasing them from custody. They provide advice on further issues. There is no current procedure in place for providing formal support for individuals beyond

68 CPT standards, s.42; Istanbul Protocol, s. 124.

69 Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, s. 6.

70 CPT standards, s. 42.

the police station. Most detainees, it has been stated, visit a doctor within the custody suites.

5. 4. Access to a lawyer

There are various standards in international human rights law concerning the right to access to a lawyer. The ICCPR states everyone charged with an offence must be given 'adequate time and facilities …to communicate with counsel of his (or her) own choosing'.[71] The European Court states:

> [A]s a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6.[72]

The CPT states:

> The possibility for persons taken into police custody to have access to a lawyer is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons. Further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.[73]

The CPT also note that a lawyer should be guaranteed from the outset of liberty,[74] the right must include the ability to meet him in private,[75] and should include a right to have a lawyer present during police questioning.[76] The CPT recognises that it may be exceptionally necessary to delay access for a certain period of time to a lawyer of the detainee's choice,[77] and the police should be able to start questioning a detainee before the lawyer arrives if there is 'extreme urgency'.[78] Code C of PACE states that 'when a person is brought to a police station under arrest or arrested at the station having gone there voluntarily, the custody officer must make sure the person is told clearly about the following continuing rights which may be exercised at any stage during the period in (i) the right to have someone informed of their arrest as in section 5; (ii) the right to consult privately with a solicitor and that free independent legal advice is available'.[79] Under Code C of PACE, Annex B there may be a permitted delay in notifying arrest or allowing access to legal advice where:

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71 ICCPR, Article 14 (3) (b).

72 *Salduz v Turkey* (2009) 49 EHRR 19, para 55.

73 CPT Standards, para 18.

74 *Ibid*, para 19.

75 *Ibid*, 23.

76 *Ibid*, 24.

77 *Ibid*, 23.

78 *Ibid*, 24.

79 Code C of PACE, para 3.1.

> An officer of superintendent rank or above, or inspector rank or above only for the rights in Section 5, has reasonable grounds for believing their exercise will:
>
> (i) lead to:
>
> • interference with, or harm to, evidence connected with an indictable offence; or
>
> • interference with, or physical harm to, other people; or
>
> (ii) lead to alerting other people suspected of having committed an indictable offence but not yet arrested for it; or
>
> (iii) hinder the recovery of property obtained in consequence of the commission of such an offence

In Northern Ireland lawyers are permitted to attend from the onset of a police interview (although will normally speak to their client beforehand), however this does not exclude the possibility that an individual may be questioned in the police car. In exceptional circumstances the Annex B provisions will be permitted, although these seem not to contradict international standards. As a matter of practicality, if someone is arrested when intoxicated their solicitor may not speak to them until they have sobered up.

5. 5. Notification of a third party

The European Court has stressed the importance of access to a third party in the case of Aksoy v Turkey:[80]

> [T]he Court… would take judicial notice of the fact that allegations of torture in police custody are extremely difficult for the victim to substantiate if he has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence. Furthermore, having been ill-treated… an individual will often have had his capacity or will to pursue a complaint impaired.[81]

The CPT attaches particular importance the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate).[82] Under PACE C an individual shall be given the right to telephone one person for a reasonable time (s. 5.6), however, this may be denied under exceptions within Annex B, for example, if the person might jeopardise an on-going investigation. Telephone calls may be listened to and used as evidence (excluding those to a solicitor) (s. 5.7).

5. 6. Witness Protection

The Istanbul Protocol provides: 'Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.' The Protocol also aims to protect them 'from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation'. The ECHR does not explicitly require that witnesses be protected, but considers that the human rights of

80 *Aksoy v Turkey*, (1997) 23 EHRR 553.

81 *Ibid*, para 97.

82 CPT Standards, para 36.

witnesses are protected under other substantive Articles.[83] The Council of Europe has recommended that witnesses are protected in 'The Appendix to Recommendation No R (97) 13 of the Committee of Ministers of the Council of Europe.

In Northern Ireland a complainant is not entitled to any formal protective measures. However, in the case of death the family would be entitled to a family liaison officer. The PSNI Professional Standards department has stated that they have not had to deal with issues of witness intimidation, but if they were aware of any, they would make a referral to OPONI for further investigation.

5. 7. Training

The police are encouraged to train officers in human rights.[84] The Council of Europe has produced handbooks within the area.[85] The PSNI provide human rights training to all police officers.

83 *Doorson v Netherlands*, 26 Mar. 1996, Reports of Judgments and Decisions, para 70.

84 European Code of Police Ethics, para 26.

85 http://www.coe.int/t/dghl/cooperation/capacitybuilding/source/documentation/europeanconventionhandbookforpolice.pdf