

Your Ref: TJ/C130/21

Mr John Kelpie
Chief Executive
Derry City and Strabane District Council (DCSDC)

By Email

21 April 2021

Dear Mr Kelpie

The Committee on the Administration of Justice ('CAJ') is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

We are writing in response to your correspondence of Friday 16th April 2021 in reference to the following motion passed by the Council (by 31 votes to 6, 2 abstentions) on the 25 March 2021:

That following a number of incidents involving violence and human rights violations against women, DCSDC will write to the Northern Ireland Human Rights Commission and the Committee on the Administration of Justice, asking them to conduct an immediate investigation into recent complaints of inappropriate policing tactics used against women and vulnerable children in Creggan.

CAJ first became aware of this motion through the media. We consequently made contact with the Council and sought copies of the complaints in question and consent to look into them. In response we received your correspondence of Friday the 16th April 2021 which contains extracts from the draft Minutes of the Council meeting in question in relation to this motion - and a previous motion on the same issues - in which elected representatives discuss the matters in question. It is this information, plus relevant information available through the media on which we base this response.

CAJ is a small independent non-governmental organisation (NGO), and consequently we do not have any investigations powers as such (for example to compel the disclosure of documentation, footage or to interview officers). We can however assess the extent to which the matters described comply or conflict with human rights standards in specific reference to the PSNI. This includes relevant standards in the European Convention on Human Rights (ECHR) and its incorporation into domestic law through the Human Rights Act 1998. It also includes UN human rights standards relating to policing, on matters such as the

use of force, including the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials as well as the (Council of Europe) European Police Code of Ethics. We can also comment on the extent to which such standards are codified into policy binding on the PSNI, particularly in relation to the PSNI Code of Ethics, published in 2008. PSNI officers are required to comply with the provisions of the Code of Ethics, which forms part of the standards against which a complaint of PSNI misconduct will be assessed.¹

The Northern Ireland Human Rights Commission (NIHRC) has formal powers of investigation in relation to its functions that include keeping under review the effectiveness of law and practice relating to the protection of human rights. The NIHRC has formal investigation powers under s69A of the Northern Ireland Act 1998. These includes powers to compel the production of information, documents and oral evidence. The NIHRC is to publish reports of its investigations. There are some qualifications on these powers, including a range of ‘national security’ qualifications under s69B.

The Police Ombudsman has the statutory function to investigate complaints of misconduct and criminality against PSNI Officers. To this end, the Ombudsman has formal policing powers – including in relation to questioning PSNI officers and recovering evidence and footage in order to investigate such complaints. The Current Investigations Directorate undertakes this.²

We are conscious that reference has been made to the Ombudsman not upholding previous complaints regarding the use of stop and search that may be deterring other complaints from being lodged. We would draw attention however to the problems we have identified with stop and search (and particularly those using ‘no-suspicion’ powers under the Justice and Security NI Act 2007) relating to the legislation itself affording very wide discretion. Whilst this risks arbitrary usage of the powers it is less likely to constitute individual ‘police misconduct’ as such as the rules the legislative scheme makes are so broad officers are likely to be acting within them. The present complaints relate to matters of alleged disproportionate use of force, where it may be easier to demonstrate internal rules have been broken and hence misconduct has been committed.

In addition to the individual complaints function, under powers inserted as a result of s13 of the Police Act NI 2003, the Police Ombudsman has broader powers to conduct a ‘thematic investigation’ into current practices and policies of the PSNI where it is in the public interest to do so. These particular ‘thematic’ powers are relevant to circumstances where an area of policing could be investigated relating to matters that are systemic.

Turning to the particulars of the present complaints, which relate to a specific policing operation in the Ballymagowen area of the Creggan Estate to conduct a house search. From the material provided by Elected Representatives the main issues we have identified, can be summarised as follows, into three thematic areas which we assess in turn:

¹ <https://www.nipolicingboard.org.uk/psni-code-ethics>

² <https://www.policeombudsman.org/About-Us/Current-Investigations>

1: That the police deployment for the search operation was disproportionate.

Concerns are expressed by elected representatives that the deployment for the search operation was disproportionate. Around twenty armoured police vehicles were involved in the operation, officers were heavily armed and it is implied a broader than needed area was sealed off to facilitate the search. A concern was expressed by a Councillor that the search operation was collective punishment in the form of an attack on the community in the Creggan. Another Councillor indicated that the deployment was proportionate to the threat faced by officers.

The key principles that can be drawn from human rights in relation to this are that the deployment should only consist of what is proportionate and necessary to undertake the search in its particular context. This would relate to the equipment and personnel deployed, and the length of time of the deployment. Records should be kept that record the rationale of the decision making. The proportionality question in relation to the deployment will be related to the threat officers may face of attack, including from firearms, and also the potential for disorder in relation to the search. There should be an emphasis on the supply of defensive equipment to keep officers safe rather than equipment to facilitate the use of force. A cordon should only be set up using a lawful power to do so and the investigation leading to the search should take place on the basis of 'reasonable suspicion' and the search on the basis of a lawfully granted power.

General human rights principles, including under the ECHR, support the proportionality principle regarding deployments. The normalisation provisions of the Patten Commission report also support the demilitarisation of the police service, subject to the prevailing security situation. The UN Principles on the Use of Force provide, for officers to be "equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation" for the purpose of reducing the need to use force or weapons of any kind.³ The Council of Europe Code of Police Ethics provides that: "*Police investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime.*"⁴ Such standards are reflected in the binding PSNI Code of Ethics, including in the following provisions:

2.1 Police investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime. They shall be conducted in a prompt, thorough, impartial and careful manner so as to ensure accountability and responsibility in accordance with the law.

3.2 Police officers shall exercise powers of search and surveillance only when it is lawful, necessary and proportionate to do so.

4.2 Police officers responsible for the planning and control of operations where the use of force is a possibility shall so far as possible plan and control them to minimise recourse to the use of force...

³ Principle 2 <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>

⁴ Recommendation 47 <https://rm.coe.int/16805e297e>

In relation to the Creggan deployment, whilst we are not privy to specific threat assessments, it is clear that there remains a general threat to the lives of PSNI officers from residual republican armed groups. This itself will affect the proportionality of the deployment as clearly in the absence of such a threat such a heavy armed deployment could not be justified. The public order considerations relating to the operation could also have considered questions such as the viability of a more limited deployment with the broader team waiting at a distance or officers remaining in vehicles, shorter cordons, or a more time limited operation. Further examination of the Tactical and Deployment orders by a competent investigative body with a full picture of the broader circumstances, including from the local community would be better placed to make an assessment as to whether the deployment in this circumstance was proportionate. In relation to the disputed purpose of the operation, this could also be subject to scrutiny by an oversight body or a court with sufficient powers to ensure any warrants/authorisations and powers were used lawfully and for a permitted purpose of investigation on the basis of reasonable suspicion.

2: The use of force by officers was disproportionate

The second set of issues raised by elected representatives relates to the use of force.

This includes concerns that a child was assaulted, and an arrested man being hooded (presumably a spit/bite hood). There are concerns that bystanders were “pushed and accosted with one being seriously assaulted” and “attacked by batons with one person receiving a serious head injury.” A specific concern relates to a woman being pinned to the ground by three male PSNI officers.

In general, human rights standards set out that Police officers “*may use force only when strictly necessary and to the extent required for the performance of their duty*”.⁵ This includes acting with “*particular consideration for the situation of individuals belonging to especially vulnerable groups*” – including children- and carrying out tasks in a non-discriminatory manner.⁶ The gender-based considerations to this end are important, including in circumstances where persons are protesting or otherwise assembling.⁷

These principles are reflected in the PSNI Code of Ethics including Article 4.1 which states: “*Police officers, in carrying out their duties, shall as far as possible apply non-violent methods before resorting to any use of force. Any use of force shall be the minimum*

⁵ See Article 3 UN Code of Conduct for Law Enforcement Officials:

<https://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx>

⁶ Recommendation 40, 44 European Code of Police Conduct <https://rm.coe.int/16805e297e>

⁷ See for example *Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns on the proper management of assemblies*, UN Doc A/HRC/31/66 (4 February 2016), available at http://freeassembly.net/wp-content/uploads/2016/02/A.HRC_31.66_E_with_addendum.pdf Paragraph 16 “Particular effort should be made to ensure equal and effective protection of the rights of groups or individuals who have historically experienced discrimination. This includes women, children and young people, persons with disabilities, non-nationals (including asylum seekers and refugees), members of ethnic and religious minorities, displaced persons, persons with albinism, indigenous peoples and individuals who have been discriminated against on the basis of their sexual orientation or gender identity (A/HRC/26/29). This duty may require that authorities take additional measures to protect and facilitate the exercise of the right to freedom of assembly by such groups.”

appropriate in the circumstances and shall reflect a graduated and flexible response to the threat. Police officers may use force only if other means remain ineffective or have no realistic chance of achieving the intended result.” Article 6.1 also covers non-discrimination in carrying out police duties. Section 3 of the Criminal Law Act (NI) 1967 also provides that force can only be used when it is reasonable in the circumstances. At present, the use of a ‘Spit hood’ – which the Policing Board have recommended phasing out, must be automatically referred by the PSNI to the Ombudsman. There are also duties on PSNI officers to record the use of force, including the drawing and use of batons.

The incidents as described above would raise significant concerns about disproportionate use of force. This includes reference to an assault on a child, a serious assault, the use of a Spit hood and the pinning down of a woman by male officers. Such actions, if substantiated, are highly likely to have conflicted with the Code of Ethics and could be subject to further investigation examining the use of force in light of all the circumstances.

3: Officer conduct was unprofessional and inappropriate

The third area relates to complaints that PSNI officers engaged in unprofessional and inappropriate conduct including being “quite aggressive” and had proceeded to “taunt and abuse residents whilst proudly displaying automatic weapons in a sinister and threatening manner.”

The Council of Europe Code of Police Ethics provides that “Police personnel shall act with integrity and respect towards the public”⁸ and there are a number of detailed provisions in the PSNI Code of Ethics that provide that:

6.1 Police officers shall act with fairness, self-control, tolerance and impartiality when carrying out their duties. They shall use appropriate language and behaviour in their dealings with members of the public, groups from within the public and their colleagues...

7.1 Police officers shall act with integrity towards members of the public and their colleagues so that confidence in the Police Service is secured and maintained. They shall avoid all forms of behaviour that may reasonably be perceived to be abuse, harassment, bullying or victimisation.

Clearly, the conduct as described above would not be in keeping with these provisions of the Code of Ethics and if substantiated, as with concerns of disproportionate use of force could constitute sanctionable misconduct.

We hope this response to your correspondence addresses the request made by the elected body at its March meeting.

CAJ 21 April 2021

⁸ Paragraph 44 <https://rm.coe.int/16805e297e>