

FROM THE OFFICE OF THE JUSTICE MINISTER



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27 January 2015

Dear Members

NATIONAL CRIME AGENCY

I am placing the attached paper in the library in relation to ongoing discussions around the National Crime Agency.

A handwritten signature in black ink, appearing to read 'David Ford'.

DAVID FORD MLA
Minister of Justice

NATIONAL CRIME AGENCY – PROPOSALS FOR OPERATION IN NORTHERN IRELAND – First paper issued 8 September 2014

This paper sets out a revised proposal for the operation of the National Crime Agency (NCA) in Northern Ireland in keeping with the established policing architecture here.¹ It seeks to ensure the primacy of the Police Service of Northern Ireland in policing operations and to recognise the role of the Northern Ireland Policing Board and other accountability bodies. At the same time it takes account of the structures already in existence for the NCA in the Crime and Courts Act, and the fact that the NCA has powers which are not devolved. The proposals have been developed in conjunction with stakeholders including the Home Office, Northern Ireland Office and NCA. If agreed by the parties final approval will of course be required from the Justice Minister and Home Secretary as well as the Executive and ultimately the Assembly and Westminster as the proposals would in many cases require legislation.²

Constabulary Powers

2. The PSNI has primacy in Northern Ireland. To recognise this, the Director General (DG) of the NCA, unlike in England and Wales, will not have powers of a constable in Northern Ireland. Furthermore the DG will not be able to direct the Chief Constable of the PSNI, as he can chief officers of police forces in England and Wales. Under these arrangements all PSNI officers would remain under the direction and control of the Chief Constable and would not be subject to direction by the DG.

3 To cement police primacy NCA officers, by statute, will only be able to carry out activities in Northern Ireland where they exercise constabulary powers in relation to an offence if the NCA officer does so with the agreement of the Chief Constable³.

¹ Taking account in particular of the arrangements in the Police (Northern Ireland) Act 2000 as amended, and the Report of the Independent Commission on Policing in Northern Ireland.

² Some through an Order under the Crime and Courts Act 2013 and a related Legislative Consent Motion.

³ An exception to this requirement to seek agreement would be a case involving investigation of alleged PSNI corruption

On foot of notification of such activity, the PSNI would be required to produce, a community impact assessment and when carrying out activities in relation to an offence the NCA officers must then take account of that community impact assessment⁴.

4. Unlike at present, the remit of the Police Ombudsman (OPONI) would be extended to cover complaints about NCA officer conduct. This would apply to both devolved and non-devolved matters. Furthermore it would extend to the NCA's role on civil recovery.

5. There is currently a duty on the NCA to co-operate with the PSNI. Legislation would place a reciprocal duty on the PSNI to co-operate with the NCA. These would complement the duty on the Director General to keep the Chief Constable informed of information, including intelligence, relevant to the Chief Constable's functions.

6. Under the legislation for SOCA the Department of Justice had a power to direct the Chief Constable of the PSNI to provide specified assistance to SOCA. The Minister will not be seeking such a power for the NCA. In contrast to the position elsewhere the NCA and PSNI may ask each other to assist the other but may not direct. The NCA is committed to working in partnership with other law enforcement agencies and would be an active member of the Organised Crime Task Force.

7. The Crime and Courts Act 2013 provides that NCA officers may only be designated with the powers and privileges of a constable in Northern Ireland with the agreement of the Department of Justice. The Minister would require such officers to have appropriate levels of training, including on ethical issues and human rights.⁵ This will be set out in the general authorisation (schedule 5 para 4).

8. Having reflected on the importance of community support for law enforcement, the Minister would also intend that Section 31A of the Police (Northern Ireland) Act 2000 would be extended to NCA officers in carrying out their functions in

⁴ An exception to this requirement to carry out a CIA would be a case involving investigation of alleged PSNI corruption

⁵ PSNI will be involved in delivering at least some of this training.

Northern Ireland. This provides for officers to secure the support of, and act in co-operation with, the local community. The DG would also be required to ensure that all his officers operating in Northern Ireland have read and understood the PSNI's Code of Ethics as currently in force (Section 52 of the 2000 Act).

RIPA/ Police Act Powers

9. At present the NCA has powers to operate under Part II of the Regulation of Investigatory Powers Act 2000 (RIPA) and under Part III of the Police Act 1997. These cover covert investigations including the use of surveillance and covert human intelligence sources (CHIS).

10. The NCA would be required to secure the agreement of the PSNI prior to commencing covert investigations.⁶ The NCA authorising officer (AO) would be required to consider, for example, whether activities are necessary and proportionate; particular sensitivities in the local community; and that arrangements are in place for the individual's safety and welfare. This would involve detailed engagement in terms of the operational plan, the investigative strategy and the intended outcomes.

11. The Human Rights Advisor of the Policing Board currently has access to the Surveillance Commissioner's report on the PSNI in an un-redacted form and members of the Board to a redacted version of the report. The same arrangement would be applied to Surveillance Commissioner's report on any NCA work associated with criminality in Northern Ireland⁷.

12. In addition, as already noted, the Police Ombudsman would have power to investigate any alleged misconduct here. More generally, the existing accountability mechanisms under RIPA and the Police Act would apply including oversight by the office of the Surveillance Commissioner and the ability of the Investigatory Powers Tribunal to hear and determine human rights claims about unlawful use of covert

⁶ An exception to this requirement to seek agreement would be a case involving investigation of alleged PSNI corruption.

⁷ A CHIS in NI may be providing information on matters outside the jurisdiction. .

techniques regulated by RIPA. The NCA will also be bound by the RIPA codes of practice.

Policing Board

13. In recognition of the role of the Policing Board, there will be a number of measures to provide for oversight. First the Police Service, by giving agreement to operations, then become accountable to the Board for that activity. The second is that the DG of the NCA would attend meetings, including urgent meetings, with reasonable notice. This would be a statutory requirement. This would enable him to brief the Board or for the Board to ask him questions. This could include on his proposals for his Annual Plan and on his performance against the Plan insofar as it extends to Northern Ireland.

14. At present the police are required to report to the Board every six months on organised crime and the DG could schedule his attendance to coincide with these reports.

15. In addition, the DG would be prepared to meet the Board, with PSNI if thought appropriate by the Board (or a Board Committee), to discuss the new arrangements for the NCA's role here. These meetings might be more frequent initially.

16. In terms of the planning cycle for the NCA and its activity in Northern Ireland a number of points would be addressed. First, the DG would be required to take account of the Northern Ireland Policing Plan when preparing the NCA Annual Plan as it relates to activities in Northern Ireland. He would also need the Board's "prior consent" for the aspects of his plan which refer specifically to Northern Ireland. This is in addition to securing the "prior consent" of the Minister to aspects of the NCA Annual Plan relating to the activities in Northern Ireland.

17. The arrangements between the Board and DG could be backed up by a memorandum of understanding (MOU) between them.⁸

⁸ The Policing Board may also need to amend its Standing Orders.

18. The Minister of Justice would be consulted by the Home Secretary on the NCA's strategic priorities – the Minister would propose to consult the Policing Board on these before responding. Again an MOU would be appropriate.

19. Reflecting the position in the Police (Northern Ireland) Act 2000, a duty would be placed on the Policing Board to assess the level of public satisfaction with the performance of the NCA in Northern Ireland and to make arrangements for obtaining the co-operation of the public with the NCA in the prevention of crime. The Board would be required to cover these issues in its Annual Report (as it is for PSNI).⁹

Civil Recovery

20. On civil recovery, where the NCA cannot take on devolved cases, the DG has confirmed that he would be prepared to discuss the NCA's approach (although not live cases) with the Policing Board. In addition, as noted, the Police Ombudsman's remit would extend to this work. The Order to commence the powers of the NCA would be used, in addition to extending civil recovery powers to the devolved field, to correct the jurisdictional difficulties created by *Perry and others v SOCA*. Proceedings here currently can only cover property/ assets in Northern Ireland and not property/ assets in GB or elsewhere. (This problem has been resolved for the rest of the United Kingdom through the Crime and Courts Act 2013.)

21. It has been suggested that a local approach to civil recovery would be more appropriate. To address that view the Minister will, within a year of the NCA becoming fully operational in Northern Ireland commission research into the role of NCA, as compared with the approach taken elsewhere, to see if there are adjustments required or, indeed, a whole new approach.

Criminal Justice Inspection

22. The Minister will seek to extend the role of the Criminal Justice Inspector to the NCA.

⁹ The changes to NIPB's powers would require legislation. This could be achieved through the Order-making power in schedule 24 to the Crime and Courts Act 2013.

HMIC

23. The NCA¹⁰ and PSNI are subject to inspection by HMIC. HMIC currently must inspect the NCA. It may also be required to do so generally, or on a particular matter, by the Home Secretary. The Home Secretary, before triggering an inspection of NCA activities in Northern Ireland, is required to consult the Justice Minister. The Minister proposes to seek a memorandum of understanding with the Home Secretary so that any request from him for an inspection of the NCA in Northern Ireland will be treated positively. This would enable him to make a request or the Policing Board to invite him to make such a request.

Section 75, Northern Ireland Act 1998.

24. The NCA would be covered by Section 75.

Counter-terrorism Role

25. The Crime and Courts Act 2013 contains an order making power to extend the functions of the NCA to counter-terrorism United Kingdom-wide (with a caveat that the Chief Constable must agree the exercise of the functions). The Home Secretary has indicated her intention to review counter-terrorism policing arrangements in England and Wales in due course. Counter-terrorism policing arrangements in Northern Ireland are a matter for the Secretary of State for Northern Ireland. The Government will continue to be guided by the principles in Annex E to the St Andrews Agreement. The Minister of Justice's approach will also be guided by these principles.

¹⁰ Section 11 of the Crime and Courts Act 2013.

NATIONAL CRIME AGENCY – PROPOSALS FOR OPERATION IN NORTHERN IRELAND – Second paper issued 12 January 2015

1. The Justice Minister has been considering the comments made by political parties and others on the 8 September NCA Proposal Paper, attached, concerning the NCA's operation in the devolved sphere in Northern Ireland.
2. The following are additional proposals and points of clarification. In putting them forward the Minister recognises the importance of appropriate accountability within a local context. At the same time the Minister has to recognise that the NCA is a body founded in Westminster and he does not want to arrive at an arrangement which tips into political interference in law enforcement operational decisions.

Detail

3. (i) Code of Ethics:

The 8 September Proposal states that the NCA officers will have to read and understand the PSNI Code of Ethics. The question has risen as to whether or not they will be bound by it. The DG of the NCA has made a commitment to seek to make NCA officers operating in Northern Ireland bound by the Code subject to the practicalities being worked out.

(ii) Reporting to the Policing Board

The DG will be required to attend the Policing Board with suitable notice. He will report on the delivery of his Annual Plan. The Director General is on record as saying that "... It would follow that there is an implied obligation to provide information and answer questions". Allied to that, the Board would have a statutory responsibility to monitor the performance of the NCA in carrying out the Annual Plan as it relates to Northern Ireland.

Having reflected on views expressed we would now propose to provide in statute that the DG "shall supply the Board with such information and documents as the Board may require for the purposes of, or, in connection with the monitoring of the performance of the NCA in carrying out its Annual Plan as it relates to Northern Ireland". This effectively mirrors Section 33A of the Police (NI) Act 2000 and, as with it, we would need to provide provisos in connection with the sort of information that the DG would not have to provide e.g. information that would put an individual in danger.

(iii) Board to Monitor Performance

As mentioned above, we would place a statutory duty on the Board to monitor the performance of the NCA in carrying out its Annual Plan as it relates to Northern Ireland (this is not mentioned in the 8 September paper).

(iv) Duty to Report/ Inquiry Power

Section 59 of the Police (NI) Act 2000 places a general duty on the Chief Constable to report to the Board, with certain exceptions. Section 60 enables the Board, having considered a report, to instruct an inquiry into a matter because of its gravity or exceptional circumstances. It must consult the Chief Constable and there are exceptions set out in the Act.

These sections were not covered in the 8 September proposal. We would, therefore, propose to include in statute words to the effect that “the DG shall, whenever so required by the Board, submit to the Board a report on any matter connected to the performance of the NCA in carrying out its Annual Plan as it relates to Northern Ireland”. There would be a requirement for the Board to secure the agreement of the Home Secretary. There would also be an inquiry power, subject to consultation with the DG and agreement of the Home Secretary, to enable the Board to cause an inquiry to be held. We would provide for similar exemptions/ exceptions as are given to the Chief Constable under sections 59 and 60.

(v) Covert Policing/Community Impact Assessments

In the 8 September paper it provides that the NCA must secure PSNI agreement to an operation. When they request this the PSNI must carry out a community impact assessment and the NCA must “take account of” it. It has been suggested “have regard to” should be used rather than “take account of”. The Police (NI) Act 2000 refers to the Chief Constable having “regard to the Policing Plan in discharging his functions”, this is in Section 33(2) and a similar formula is repeated in Section 52(2) and 52(3). The Minister has no difficulty substituting “have regard to”.

(vi) Civil Recovery

The steps highlighted above on accountability will, if agreed, bolster the accountability arrangements.

Police Ombudsman

Additional points on the Police Ombudsman are:

(vii) Call in Power

We are proposing that the Department or the Home Secretary may, after consulting the Ombudsman and DG, refer a matter to the Ombudsman for investigation if it is in the public interest to do so. A similar power would be given to the DG to call in the Ombudsman. These mirror the arrangements for the police in Section 55 of the Police (NI) Act 1998.

(viii) Cooperation on Disclosure

As the DG informed the Policing Board the NCA would cooperate with the Ombudsman in providing information, including intelligence information where relevant, connected to a complaint/conduct in Northern Ireland.

Department of Justice

12 January 2015