Brian Rea MBE JP
Chair

Date: 10 September 2012

Ms Christine Darrah
Clerk to the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
BT4 3ZZ

Dear Christine

CRIMINAL JUSTICE BILL

Thank you for providing the Board with the opportunity to comment on the Criminal Justice Bill. Members discussed the Bill at the Board meeting on 6 September 2012 and agreed the response attached to this letter. I would be grateful if you would bring the response and this cover letter to the attention of the Committee for Justice.

Two of the key issues covered by the Bill - sexual offences and human trafficking - are very serious crimes which blight our community. Tackling these crimes requires a multi-agency approach which would arguably be enhanced if a statutory duty was placed upon public bodies, including the police, to have due regard to the likely effect on crime and anti-social behaviour when exercising their functions and to do all that they reasonably can to enhance community safety.

The Committee for Justice will be aware that such a duty was originally included at clause 34 of the Justice Bill but was subsequently removed from the final version of the Bill (which became the Justice Act (Northern Ireland) 2011). It seems that whilst the general principle behind 'clause 34' received wide support from the Assembly, it was concern regarding the workings of the principle, specifically the wide scope of the clause and the corresponding potential for costly legal challenges, that led to the clause being removed from the final version of the Bill.

The Board discussed 'clause 34' at its meeting on 6 September 2012 and agreed that, whilst there may be further discussion required in respect of specific details, it supported the general principle behind the clause. The Board agreed to raise the issue of 'clause 34' with the Committee for Justice when responding to the consultation on the Criminal Justice Bill.

The Board calls on the Committee for Justice to propose an amendment to the Criminal Justice Bill to include a 'clause 34' type duty on public bodies. As with the other provisions of the Bill, the 'clause 34' provision need not come into force until such day as the Department of Justice by order appoints, with the order containing such transitional, transitory or savings provisions as the Department thinks appropriate. This would give the Department and the Committee for Justice time to consider the specific workings of the duty but would reduce delay in implementing the provision once the finer details were agreed.

Given the concerns regarding the potential for costly legal challenge and the enforceability of such a duty, consideration could be given to introducing a complaints type mechanism for aggrieved individuals which would, at least in the first instance, avoid the need for that individual to seek a judicial remedy. An example of this in practice is the way in which complaints concerning the equality duties of public bodies are dealt with. Public bodies are required to submit an equality scheme to the Equality Commission outlining, amongst other matters, the way in which the public body complies with its duty under section 75 of the Northern Ireland Act 1998. The Equality Commission has statutory power under Schedule 9 of that Act to investigate complaints arising from a failure by a public body to comply with its equality scheme.

The Board will follow the progress of the Criminal Justice Bill as this important piece of legislation makes its passage through the Assembly. Members welcome any further engagement with the Committee for Justice on the matters covered by the Bill and also on the issue of a 'clause 34' type duty.

Yours sincerely

BRIAN REA
Chair

Northern Ireland Policing Board
Waterside Tower, 31 Clarendon Road, Clarendon Dock, Belfast BT1 3BG
Tel: 028 9040 8500 **Fax**: 028 9040 8533 **Textphone**: 028 9052 7668
Email: information@nipolicingboard.org.uk **Web**: nipolicingboard.org.uk

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POLICING BOARD RESPONSE TO CONSULTATION ON CRIMINAL JUSTICE BILL

General Comments

- The Board welcomes the opportunity to comment on the contents of the Criminal Justice Bill and is grateful to the Committee for Justice for agreeing to extend the deadline to accommodate the Board's response on this important piece of legislation.
- The Board recognises the need to introduce legislation in respect of each of the three key strands contained within the Bill, not least because they provide a response to a Supreme Court judgment, an EU Directive and a European Court of Human Rights judgment.
- The proposals to subject persons from European Economic Area (EEA) countries outside of the United Kingdom to sex offender notification requirements and the proposals to create offences in respect of trafficking outside of the United Kingdom are particularly relevant to Northern Ireland given the all-island nature of these crimes.
- The Board's submission is made without prejudice to individual political party submissions.

Sex Offenders (Clauses 1 – 4 and Schedule 1)

- Schedule 1 of the Criminal Justice Bill contains a new Schedule – 'Schedule 3A' – to be inserted into the Sexual Offences Act 2003 (the 2003 Act). If implemented, Schedule 3A will provide a mechanism for the review of indefinite notification requirements for sexual offences. This will have implications for policing, not least because it specifies that it is the Chief Constable to whom application for review must be made.
- The Board's Human Rights & Professional Standards Committee has previously sought views from the PSNI on the proposals set out in the Department of Justice (DOJ) July 2011 consultation paper on sex offender notification. PSNI advised it was supportive of the proposals and that whilst the proposed manner of dealing with reviews would create additional duties for police officers involved in Public Protection, PSNI believed that the proposal outlined by DOJ was the most suitable way of ensuring that the Supreme Court ruling is complied with. The Board will continue to engage with PSNI on this issue.
- The review mechanism has been designed in response to a Supreme Court judgment which held that in the absence of a review mechanism for indefinite notification requirements, section 82 of the 2003 Act was incompatible with Article 8 of the European Convention on Human Rights (ECHR) – the right to respect for private and family life. However, simply putting a review mechanism in place is not in itself the end of the matter as regards human rights compliance. A range of issues will emerge each and every time the Chief Constable is required to determine a review application and the correct balance between upholding individual rights (of both perpetrators and victims) and protecting the public from harm must be struck. To that end, there are a number of inbuilt safeguards within the proposed review mechanism including:
  - The requirement upon the Chief Constable to discharge the notification requirements unless he/she is satisfied that the offender poses a risk of sexual harm and that the risk is such as to justify the notification requirements continuing in the interests of the prevention or investigation of crime or the protection of the public;
  - The list of factors in paragraph 3(2) of Schedule 3A which the Chief Constable must take into account when reaching a

decision;
- The limitation preventing the Chief Constable from delegating his functions to officers below Superintendent rank;
- The requirement upon the Chief Constable, where he decides not to discharge notification requirements, to state his reasons in the decision notice to the offender;
- The availability of review on application to the Crown Court;
- The availability of a further review within 8 years of a decision not to discharge notification requirements; and
- The requirement that the Department of Justice issues guidance to both offenders and the Chief Constable.

- Clause 3 of the Criminal Justice Bill amends the Sexual Offences Act 2003 to ensure that relevant sexual offenders coming to Northern Ireland with convictions/cautions from European Economic Area (EEA) countries outside of the United Kingdom are subject to sex offender notification requirements. Such persons must notify the police within 3 days once he or she has stayed for a qualifying period. The fact that the police will no longer be required to apply to court for a notification order in respect of such persons ought to, in theory, deliver a cost saving and reduce bureaucracy. However, how will a failure to notify the police within 3 days be identified and enforced? How will relevant persons from EEA countries be made aware of their obligation to notify the police and are there any language/literacy/communication considerations in this regard?

- Clause 4 of the Criminal Justice Bill amends the Sexual Offences Act 2003 so that a person subject to a Sexual Offences Prevention Order (SOPO) can be required to undertake a particular action. A person will commit an offence if, without reasonable excuse, they fail to do anything which is required by the SOPO. Clearly any such positive obligations imposed must be lawful, proportionate and necessary, something which the police must bear in mind if suggesting conditions on application to the court for a SOPO in respect of a sex offender. Ultimately, it is for the court to decide what the terms of a SOPO will be.

- PSNI was supportive of Violent Offender Orders (VOOs) which were included in the DOJ's July 2011 consultation paper. VOOs are not unlike SOPOs and they place restrictions on offenders who pose a risk of very serious violent harm. PSNI believes that VOOs could be a particularly useful tool in risk managing serial domestic abusers and those who move from partner to partner and commit violent crimes. This would allow the PSNI to be more pro-active in situations where the victim is too fearful to apply to court for Non-Molestation Orders as it would not necessitate the victim's cooperation. The DOJ has indicated that VOOs will be included in future legislation although they have not been included in the Criminal Justice Bill. The Board believes that provision for VOOs should be included in the Bill. This could be, for example, on the basis that the relevant provisions will not come into force until such day as the DOJ may by order appoint.

POLICING BOARD RESPONSE TO CONSULTATION ON CRIMINAL JUSTICE BILL

Human Trafficking Offences (Clauses 5 & 6)

- The Board's Community Engagement Committee previously responded to the DOJ's April 2012 consultation on amendments to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. In that response the Committee advised that the Board supported the introduction of the new human trafficking offences outlined in the consultation document. Those new offences are included in clauses 5 and 6 of the Criminal Justice Bill and are thus welcomed by the Board.

- Trafficking for sexual exploitation; it is already an offence to traffick someone into, within or out of the United Kingdom for sexual exploitation purposes. If implemented, clause 5 will make it an offence for a person to intentionally arrange or facilitate for a person to be trafficked into, within or out of a country other than the United Kingdom for the purpose of sexual exploitation.

- Trafficking for other exploitation purposes: it is already an offence to traffick someone into or out of the United Kingdom for exploitation purposes such as slavery and forced labour. It is also an offence to traffick a person within the United Kingdom for such purposes if the trafficker believed that the victim had previously been trafficked into the United Kingdom. Clause 6 will make it an offence for a person to intentionally arrange or facilitate for a person to be trafficked into, within or out of a country other than the United Kingdom for exploitation purposes. Clause 6 will also make it an offence to traffick someone within the United Kingdom for exploitation purposes – i.e. it will remove the existing requirement for the offence of trafficking within the United Kingdom that the trafficker believed that the victim had previously been trafficked into the United Kingdom.

- These new offences, created by the Northern Ireland Assembly, purport to apply to British citizens, British subjects, British overseas territories citizens by virtue of a connection with Gibraltar, a person who at the time of the offence was habitually resident in Northern Ireland and to bodies incorporated under the law of a part of the United Kingdom. Clarification would be helpful on whether it is within the Assembly's legislative remit to create an offence in respect of all British citizens, subjects and overseas territories citizens, particularly where they have no connection with Northern Ireland and no element of the unlawful act takes place within Northern Ireland? For example, as currently drafted, the Bill appears to mean that if a British Citizen living in London, not connected in any way with Northern Ireland, trafficks a person for exploitation purposes within Spain, they will be committing an offence under the law of Northern Ireland. If similar legislation is introduced in England and Wales, it seems that the same person living in London, trafficking in Spain, will also have committed an offence under the law of England and Wales and could thus, in theory, be prosecuted twice within the United Kingdom, albeit within 2 different legal jurisdictions, for the same unlawful act. Should the new offences be limited to apply to all persons who at the time of the offence are habitually resident within Northern Ireland, to bodies incorporated under the law of a part of the United Kingdom with a registered office address in Northern Ireland or to situations where part of the chain of events amounting to the offence take place within Northern Ireland e.g. an email making arrangements is sent from within Northern Ireland. Clarification on these points would be helpful.

POLICING BOARD RESPONSE TO CONSULTATION ON CRIMINAL JUSTICE BILL

Retention of fingerprints, DNA profiles etc. (Clause 7 & Schedule 2 & 3)

- The Board's Human Rights & Professional Standards Committee responded to the DOJ's March 2011 consultation on the retention and destruction of fingerprints, DNA profiles and samples. In that response the Committee was supportive of the DOJ proposals. The legislative framework put forward in the Criminal Justice Bill is broadly the same as that included in the consultation document and, in the spirit of the European Court of Human Rights judgment in *Marper*, it distinguishes between the offences and the offenders, it distinguishes between adults and children and it provides for an independent Biometric Commissioner to be appointed. It will also apply to fingerprints, DNA profiles and samples currently retained, not just those taken after the legislation is enacted.

- It is proposed in the Criminal Justice Bill that the DNA profiles and fingerprints of persons arrested *but not charged* of a serious offence may be retained for up to 3 years, extendable on application to a court by a further 2 years, provided prescribed circumstances apply. DOJ is to set out these prescribed circumstances by order. This was not proposed in the framework set out in the consultation document, under which the DNA profiles and fingerprints of persons arrested but not charged would be destroyed immediately, regardless of seriousness of charge or extenuating circumstances. The change made in the Criminal Justice Bill was advocated by PSNI who felt that the threshold for retention in the consultation document for serious offences was too high. As a safeguard, the Bill proposes that if the Chief Constable wants to retain fingerprints or profiles of persons arrested for, but not convicted of, a serious offence to which prescribed circumstances apply, consent must be sought from the Biometric Commissioner.

- The Human Rights & Professional Standards Committee has engaged considerably with PSNI on the issue of DNA and fingerprint retention and has made recommendations in consecutive Human Rights Annual Reports since 2009. In particular, the Committee was keen that PSNI take proactive steps to review its policy to make it ECHR compliant rather than simply await a new legislative framework to be enacted – the Supreme Court has made clear that Parliament conferred a *discretion* on police services to retain data and that it is open to them to reconsider and amend their policy pending government action (*R (on the application of C) (FC) (Appellant) v The Commissioner of Police of the Metropolis* [2011] UKSC 21). PSNI's response to the Board to date has been that it intends to await the introduction of legislation before changing its policy. However, PSNI has fully consulted with the DOJ over the proposed legislative amendments and is broadly supportive of the DOJ proposals. More recently PSNI has advised that it has started to review and change its systems and processes in anticipation of the introduction of the new legislative framework.

- Given the time that has already passed since the ECtHR judgment was handed down in *Marper* (almost 4 years), it may be expected that once the Criminal Justice Bill becomes an Act, there will be no undue delay in the DOJ issuing the relevant orders

to bring into force the provisions relating to the DNA and fingerprint.

- Once the new legislative framework is in force, it will require PSNI to determine whether to continue to retain, and if not to destroy, existing fingerprints and DNA material. According to the Explanatory and Financial Memorandum to the Criminal Justice Bill, this will cost the PSNI in the region of £2.5 million and will be sought from within existing resources for the 2013/14 financial year.

- Fingerprint and DNA retention is an issue which remains the subject of ongoing discussion between the PSNI and the Human Rights & Professional Standards Committee and it will be further reported upon in the Board's Human Rights Annual Report 2012.

- The DOJ sought views on the issue of photographs in its March 2011 consultation on DNA and fingerprint retention. Further to this, DOJ indicated that it was of the view that photographs cannot be treated in the same manner as DNA and fingerprints. DOJ concluded that photographs should not form part of the proposed new framework unless there is an authoritative judicial ruling to the contrary.

- In a recent English High Court case (R (*RMC and FJ) v Commissioner of Police of the Metropolis*, [2012] EWHC 1681 (Admin)), the court found that the Met's retention of the claimants' photographs, which had been taken upon the claimants' arrest but retained even after the claimants were released without charge, amounted to an unjustified interference with the claimants' right to respect for their private life and was a breach of Article 8 ECHR. The court rejected the Met's argument that keeping the photographs was necessary for preventing crime and disorder. The court suggested that the Met's unlawful policy should be revised within months, not years. Whilst this decision is not binding on the Northern Ireland Courts, the Northern Ireland High Court previously stated (in *JR 27's Application* [2010] NIQB 143 at para. 55 of the written judgment) that there is "substantial force in the view that the retention of the Applicant's photographic images by the Police Service [PSNI] for a minimum period of seven years, which may be extended indefinitely, unconnected in any concrete or rational way with any of the statutory purposes, interferes with his right to respect for private and family life guaranteed by Article 8(1)." In light of this, has the DOJ given any further consideration to introducing a legislative framework for the retention of photographs by the PSNI?