**Policing and Human Rights**

*Speaking notes*

**INTRODUCTION**

Police play a vital role in defending some of our most fundamental human rights. They support our ability to live free from violence, crime and fear, and help create an environment within which other rights and freedoms can be enjoyed.

Since it was established in 2008, the Scottish Human Rights Commission has worked closely with police in Scotland and since its creation, with Police Scotland.

There have been a number of very welcome changes over recent years, with law changes relating to police questioning and the minimum age of prosecution. There have been positive practice changes in things like discontinuing the practice of stop and search of under 12s and in introducing new human rights training.

Police Scotland have developed a new code of ethics and through Scotland’s National Action Plan for Human Rights, have committed to embed better protection of human rights within police structures and culture.

There are still things that can be done to improve policing in Scotland, and Police Scotland. There are also some things that need urgent attention. I would like to focus on five areas:

1. Creation of Police Scotland

2. SNAP

3. UN reporting

4. Stop and Search

5. Armed Officers and Taser

**1. Creation of Police Scotland**

The Commission took no position for or against a single police force, but rather saw it as an excellent opportunity to develop best practice in the implementation of new arrangements to ensure both effective policing and public confidence.

In our advice on the creation of Police Scotland we stressed the importance of international best practice, the broad European framework and relevant developments in both Northern Ireland and in England and Wales.

There are a range of international Conventions and Codes which recognise that the primary purpose of policing includes the protection of human rights, for example:

* Article 2 of the United Nations Code of Conduct for Law Enforcement Officials[[1]](#footnote-1) states that in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
* The European Code of Police Ethics 2001 states that the main purposes of the police in a democratic society governed by the rule of law includes the requirement to protect and respect the individual’s fundamental rights and freedoms as enshrined, in particular, in the European Convention on Human Rights (ECHR).[[2]](#footnote-2)
* The Human Rights Act 1998 (HRA) requires all public authorities – including the police – to act in a way which is compatible with the individual rights and freedoms contained in the ECHR.[[3]](#footnote-3) Article 2 and 3 of the ECHR are particularly relevant in this context.

In relation to police accountability mechanisms, there are also a number of international instruments that recognise the importance of current monitoring and measurement based on human rights indicators against which police policies are assessed. In particular:

 1. The European Code of Police Ethics, which requires accountability mechanisms, based on communication and mutual understanding between the public and the police, to be promoted.[[4]](#footnote-4)

 2. The 2011 Laxenburg Declaration, which reiterates the need to ensure transparency, accessibility, accountability, legitimacy, impartiality and integrity in all systems created for police oversight and specifically promotes respect for the rule of law and human rights through and within all police oversight activities. It also calls for strong civil society participation in police oversight. [[5]](#footnote-5)

In other jurisdictions the benefits of introducing human rights into every day policing have been highlighted. For example, the former Northern Ireland Police Ombudsman, Dame Nuala O'Loan, reported that adopting a human rights based approach to policing in Northern Ireland made a significant difference, observing that '[w]hen human rights are factored into everyday policing, things change':

*People are now coming forward to help police in a way that has not happened in the past. Complaints of abuse of force, intimidation and harassment by police officers fell over seven years from 52% to 36% of complaints… People and police officers are safer, and suffer less injury. Part of this can be attributed to wider political events; however much of the improvement is clearly the result of the introduction of human rights-compliant policing in a context of real leadership and of strong accountability mechanisms*.[[6]](#footnote-6)

The Commission made a number of recommendations in relation to the establishment of Police Scotland, not least that a commitment to upholding human rights should be explicitly included in the policing principles of the Scottish Police Service.

There are distinct human rights obligations for the police under the HRA and the Scotland Act 1998 makes clear that any decisions by both the Scottish Government and the Scottish Parliament in relation to policing must be in compliance with Convention rights, but it would have been beneficial to embed this further.

The Commission considered that a statutory duty could be best supported by a code of ethics developed by the Scottish Police Authority and laying down standards of conduct and practice for police officers based on human rights principles and ECHR obligations.

Ethical standards are the cornerstone of good governance. The Commission considers that best practice would be a statutory code of ethics for the Scottish Police Service to inform and guide the conduct of police officers. The Police (Northern Ireland) Act 2000[[7]](#footnote-7) for example requires the Northern Ireland Policing Board (the Policing Board)[[8]](#footnote-8) to issue - following consultation- a code of ethics for the Police Service for Northern Ireland (PSNI) laying down standards of conduct and practice for police officers and making officers aware of the rights and obligations arising out of the ECHR.[[9]](#footnote-9) Police officers must be guided by the Code of Ethics in carrying out their duties.[[10]](#footnote-10) The Police Ombudsman also uses the Code of Ethics to classify complaints made against the police.[[11]](#footnote-11)

While we welcome the adoption by Police Scotland of a Code of Ethics which includes human rights with specific references to ECHR, the Commission considers there is value in the Northern Irish approach.

<http://www.scotland.police.uk/about-us/code-of-ethics-for-policing-in-scotland/>

There is certainly scope for improvement of the code of ethics, to include wider references to all human rights, and we will be working with Police Scotland to help develop a human rights based approach to policing.

The Commission also called for a new police oath with an explicit commitment to upholding and protecting human rights and fundamental freedoms. We welcome the fact that the Police and Fire Reform (Scotland) Act 2012 which at section 10 sets out the Constable’s declaration includes a commitment to uphold fundamental human rights and accord equal respect to all people, according to law. It is important that police officers understand that their commitment to human rights means all human rights, not just those contained in ECHR.

Another aspect that we would like Police Scotland to develop further is the use of impact assessments as a tool for evaluating the effect of policies, practices. A number of the practices that I will discuss later could certainly benefit from human rights impact assessment.

*Police Authority and* Police Investigations and Review Commissioner – (see submission on Act – but leave out due to time)

**2. Scotland’s National Action Plan on Human Rights (SNAP)**

Scotland’s National Action Plan for Human Rights (SNAP) is a roadmap for the realisation of all internationally recognised human rights. It is based on evidence and broad participation. It has been developed by a Drafting Group from across the public and voluntary sectors and overseen by an Advisory Council whose members reflect the diversity of Scottish civic life.

Police Scotland has been heavily involved in SNAP and is involved in a number of aspects of it - including the Leadership Panel, Better Culture Action Group and Better Lives – Justice and Safety Action Group.

As part of its commitments under SNAP for 2014 Police Scotland has committed to:

 “identify opportunities to further embed human rights within the structures and culture of policing, including strengthening accountability for the respect of human rights as well as training on human rights for the police. It will, for example, help ensure legality and proportionality in the use of force and stop and search by Police Scotland through adequate training and monitoring, including the collection of disaggregated statistics.”

The Justice and Safety Action Group will be holding roundtable sessions scrutinising the progress that Police Scotland has made against these commitments in December 2014 and in early 2015.

**3.** **UN Reporting**

One of the important roles of an NHRI is to provide a bridge between the international and national human rights frameworks. One of the ways in which the Commission does this is to

Most recently, in July 2014 the Commission submitted its list of issues on the United Kingdom’s 7th periodic report under the International Covenant on Civil and Political Rights (ICCPR) to the United Nations Human Rights Committee. In particular the Commission suggested that the Committee consider:

What mechanisms are in place to enhance accountability in the deployment and use of potential lethal force, including stringent safeguards, full transparency and responsibility - if the arming of police officers with electro-shock weapons and guns is to continue or further roll out in Scotland.

1. describe how it is intended to ensure that there will be institutional learning regarding deaths in custody following the creation of Police Scotland.
2. To explain the measures it has taken to ensure that the use of stop and search powers, with specific reference to non-statutory stop and search, by Police Scotland is within the framework of the Covenant.

 . Police Scotland was formed in April 2014 amalgamating the previous eight police forces throughout Scotland. Responsibility for the delivery of healthcare within police settings also moved to the National Health Service (NHS Scotland) in April 2014. 2013 figures show three deaths in custody, 18 deaths following police contact, and eight serious injuries following police contact from April to the end of September, far higher than it anticipated.[[12]](#endnote-1) It is currently unclear how much ‘institutional’ learning has taken place as a result of previous deaths in custody across different police settings or cross-border.

18.1. SHRC recommends the Committee ask the United Kingdom how it intends to ensure that there will be institutional learning regarding deaths in custody following the creation of Police Scotland.

The Commission noted concerns over deaths in custody, Taser and firearms and stop and search.

Following media reports surrounding the Commission’s list of issues, the Commission met with

Deputy Chief Constable Iain Livingstone - who has responsibility for Crime and Operational Support to discuss the issues raised.

**4. Stop and Search**

*Getting it Right* highlighted concern over the increased use of stop and search on a non-statutory basis, without any reasonable suspicion.

Police officers in Scotland have the legal power to stop and search people in a number of specific circumstances. Police in Scotland also ask individuals to "consent" to a search in circumstances where there is no statutory power to require a person to be searched. Police officers carried out 2,912 searches on children between April and December 2013. 79% of the searches were consensual (the child searched is claimed to have agreed to be searched and an officer did not require reasonable suspicion).[[13]](#endnote-2) A total of 519,213 searches were carried out in Scotland between April and December 2013. This figure is almost two times higher than the 312,645 searches conducted by London's Metropolitan force for all 2013, which polices a population greater than that of Scotland.[[14]](#endnote-3) The Scottish Police Authority has highlighted a number of areas for improvement around targeting, proportionality, training, data gathering, transparency and consent.[[15]](#endnote-4)

In January 2014 the Commission issued a press release in response to recent figures on stop and search and a report from Scottish Centre for Crime and Justice Research highlighting the large number of non statutory stops and searches, particularly in relation to children. <http://www.scottishhumanrights.com/news/latestnews/article/stopandsearch2014>

As part of SNAP Police Scotland committed to ensuring legality and proportionality in the use of force and stop and search. They have created the Police Scotland’s National Stop and Search Unit and an external reference group.

They have also discontinued the practice of searching children under 12 without statutory basis.

While acknowledging moves by Police Scotland to address concerns, there are still significant questions as to the legality and proportionality of non statutory stop and search, particularly given its widescale use, especially in relation to children.

Stop and Search interferes with the full enjoyment of a wide range of civil, political, economic, social and cultural rights.

In seeking to fulfil the positive duty to protect the public, the police at times infringe certain individual rights, right to personal liberty, the right to personal integrity or to freedom of movement and association.

Any limitation on these rights must be provided by law, be non-discriminatory, necessary and proportional.

When we talk about non-statutory stop and search – voluntary, by consent – we mean “without positive legal basis” – but it cannot be seen as simply a consensual action between two individuals – one is an actor of the state with the authority of the state behind them, interfering with the rights of an individual.

There are a number of human rights considerations, but given the time constraints. I want to focus on the right to respect for private and family life as protected in Article 8 of the European Convention and brought into domestic law by the Human Rights Act and the Scotland Act

*Is Article 8 engaged?*

The concept of “private life” is a broad term which covers the physical and psychological integrity of a person – the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.[[16]](#footnote-12)

The Article also protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world.

The European Court of Human Rights has held that

 “any search effected by the authorities on a person interferes with his or her private life.”[[17]](#footnote-13)

The fact that search is undertaken in a public place, does not mean that it isn’t part of private life. In fact, in the Court's view, the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment.

 Items such as bags, wallets, notebooks and diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public.

SO – recognising stop and search as an interference of our human right to respect for private life the question becomes – can non-statutory search be justified?

IS IT:

 1) In accordance with the law

 2) Does it pursues one or more of the legitimate aims (such as the prevention of crime and safety or public order)

 3) “necessary in a democratic society” in order to achieve the aim or aims[[18]](#footnote-14)

*In accordance with law?*

The position of Police Scotland is that is no need for a statutory basis for such stop and searches – and that the legal basis for such interference is consent. This creates a serious barrier in terms of being in accordance with the law.

The fact that there is no law against the police doing something is not the test.

The exercise of power by public officials, as it effects us as individuals, must be governed by **clear and publicly-accessible rules of law**. The public must not be vulnerable to interference by public officials acting on any personal whim, malice, predilection or purpose other than that for which the power was conferred – in other words it cannot be arbitrary - the antithesis of legality.

In order to justify breaching the right to private life of an individual there needs to be a basis in domestic law AND it must also being compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8.

Therefore the law must be:

 Accessible[[19]](#footnote-15)

 Foreseeable

 Precise

Those affected must be able to foresee the circumstances in which the law applies and the extent to which their rights will be interfered with in a given situation – so they may make choices (and perhaps take advice) accordingly[[20]](#footnote-16)

There must also be sufficient safeguards to avoid the risk of the power being abused or exercised arbitrarily.

Bearing in mind the large numbers of people, particularly children that are being subjected to this interference - the broad scope of non-statutory stop and search in Scotland – along with the scale at which it is used means brings the legality of the practice into question.

Do we in this room know the limits on the power of non-statutory searches? How far a police officer could go – if we gave our consent? The report on Stop and Search commissioned by the Scottish Police Authority suggests that some police officers aren’t even clear on the issue of legality.

**If we in this room lack clarity – and some police officers lack clarity – how can we be confident that those subjected to searches have clarity.**

There are further tests – which apply even if the legality test was met – which need to be consider even where there is a clear statutory framework.

*Legitimate Aim?*

On this point I am sure that we are all agreed – protecting the public, reducing crime. As I said at the start, the police do an important job, and stop and search may have its place – with appropriate safeguards.

But the way in which it is done must be *Necessary in a Democratic Society?*

The Court has held that the notion of necessity implies two things:

 (1) that an interference corresponds to a pressing social need;

 (2) that it is proportionate to the legitimate aim pursued.

*The Doctrine of Proportionality?*

If our aim is to detect crime, or to deter public disorder, is it proportionate that all people engaged in lawful business in any public place could, without any prior notice or any reasonable suspicion of wrongdoing whatsoever, be required to submit all their personal effects to a detailed coercive examination?

Is the use of non-statutory stop and search proportionate to the aim pursued? Given the huge numbers, it certainly would not seem that it is.

The issue of consent also needs further consideration. The whole basis for non-statutory search is that it is conducted by consent, so there is no need for a legal framework. But **consent must be knowing, intelligent and unequivocal**

I have a great deal of sympathy for the challenge of busy uniformed officers stopping children or vulnerable people in the street to ensure that they understand their rights? Particularly if, as the evidence suggests, some struggle to understand it themselves.

In order to be valid, consent must be knowing, intelligent and unequivocal. The person being searched must be fully informed of the right not to be searched, and the consequences of waiving that right.

In the context of stop and search – particularly of children and other vulnerable people, what provisions are made to ensure they can access the advice necessary to enable him/her to be “fully informed”.

When the criminal justice mechanisms of the state engage children, they have to be dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacity.

While I know that Police Scotland are working to improve the way in which they conduct stop and search on children including statements of rights and letters to take home to parents, it does not deal with the underlying issue that informed consent is very difficult to ensure.

Police Scotland has been quick to point out that here have been a very low levels of complaints. That worries me – if people know their rights, are empowered, and have the right support and advice, they are quite appropriately very vocal about it when their rights are breached. A lack of complaints is not necessarily the sign a something is working well.

**5. Armed Officers & Taser**

*Getting it Right* highlighted concerns in relation to the increased use of Taser in the former Strathclyde police force.

In 2010, Scotland’s largest police force introduced a pilot programme to deploy electro-shock weapons to non-firearms trained officers.[[21]](#endnote-5) In response to this the Commission encouraged key actors, such as Strathclyde Police and Police Authority, the Scottish Government and Parliament, to participate in the development of a human rights framework of responsibilities for the roll out and use of electro-shock weapons under strictly limited and regulated circumstances in Scotland.[[22]](#endnote-6) Given the fact that electro-shock weapons are potentially lethal devices, it is critical that a clear and specific framework for rolling out these type of weapons is set out, in conjunction with an independent and full investigation process.[[23]](#endnote-7) There are also concerns, including from fifty nine Highland councillors, of routine arming of officers with firearms in the Highlands area.[[24]](#endnote-8) Strathclyde Police, Tayside Police and Northern Constabulary allowed specialist officers to routinely carry guns before the launch of the new single force. Police Scotland has adopted this approach across the country since its launch in April last year. Previous policy on firearms indicated that officers had to retrieve their weapons from locked safes in armed response vehicles with permission from a senior officer.

The Scottish Police Authority and Her Majesty’s Inspectorate for Constabulary are both investigating the issue. The Commission issued a press release welcoming the reviews and highlighting concerns over lack of public engagement: <http://www.scottishhumanrights.com/news/latestnews/article/armedpolicepolicyreview>

In the meantime Police Scotland has reversed the decision. The Scottish Human Rights Commission welcomes Police Scotland’s announcement that armed police officers will now only be deployed to firearms incidents or where there is a threat to life. However, we remain of the view that decisions of this kind are not simply an operational matter for Police Scotland. Changes to police policies and practices that increase the presence of lethal weapons on Scotland’s streets should only happen with appropriate governance, scrutiny and meaningful dialogue with the public. The Commission therefore looks forward to the outcome of the pending inquiries into these issues by HM Inspectorate of Constabulary in Scotland and the Scottish Police Authority.

There are important lessons to be learned from recent events for all concerned with policing in Scotland and we look forward to working with Police Scotland and others, through Scotland’s National Action Plan for Human Rights, to embed better protection of human rights within police structures and culture.

HMICS reported to Parliament on 27 October 2014, finding that Police Scotland has fully complied with all relevant United Kingdom armed policing guidance, and that the decision represented best practice. The report did however raise concerns and make recommendations in relation to the role of the Scottish Police Authority and the way that Police Scotland engaged with the public in relation to communicating changes to operational practice. <http://www.hmics.org/publications/hmics-review-standing-firearms-authority-armed-response-vehicle-crews-within-police>

The Commission is currently considering this report.

1. Adopted by General Assembly resolution 34/169 of 17 December 1979. [↑](#footnote-ref-1)
2. Appendix to Recommendation Rec (2001)10 on the European Code of Police Ethics adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers’ Deputies (the European Code of Police Ethics). [↑](#footnote-ref-2)
3. Human Rights Act 1998, s.6. [↑](#footnote-ref-3)
4. Recommendation Rec(2001)10 adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers’ Deputies. [↑](#footnote-ref-4)
5. Adopted by the key representatives of the national Police Oversight Bodies and national Anti-Corruption Authorities of the Member States of the Council of Europe and the European Union at the Eleventh Annual Professional Conference of the European Partners Against Corruption, including the EU’s Anti-Corruption Contact-point Network, in Laxenburg, Austria, 22 to 25 November 2011. [↑](#footnote-ref-5)
6. Dame Nuala O’Loan, The Guardian, *My Lessons for the Police*, 26 June 2009, available at: <http://www.guardian.co.uk/commentisfree/2009/jun/26/human-rights-police-northern-ireland> [↑](#footnote-ref-6)
7. Section 52 of the Act. [↑](#footnote-ref-7)
8. Established under the Police (Northern Ireland) Act 2000, s.2. [↑](#footnote-ref-8)
9. This follows a recommendation by the Patten Report that a new Code of Ethics, integrating the European Convention on Human Rights into police practice, replaces the existing, largely procedural code: Paten Report, para.4.8. [↑](#footnote-ref-9)
10. Police (Northern Ireland) Act 2000, s.32(4). The PSNI Code of Ethics has been fully integrated into the work of PSNI Professional Standards, incorporated within the new annual appraisal process and referenced in PSNI training materials. Further, all misconduct charges are worded to reflect the Code of Ethics and all outcomes of misconduct hearings are reported with reference to the specific article of the Code which was breached [↑](#footnote-ref-10)
11. See, for example, Northern Ireland Policing Board, Human Rights Annual Report 2008, pp.78-79. [↑](#footnote-ref-11)
12. See http://www.scotsman.com/news/politics/top-stories/police-talks-sought-over-number-of-deaths-1-3148732 [↑](#endnote-ref-1)
13. Police Scotland stopped and searched thousands of children, BBC, 30 May 2014 [↑](#endnote-ref-2)
14. Scots police have twice stop and search rate of Met. The Scotsman, 16 January 2014, available at http://www.scotsman.com/news/scotland/top-stories/scots-police-have-twice-stop-and-search-rate-of-met-1-3269358 [↑](#endnote-ref-3)
15. SPA publish review into Police Scotland's use of stop and search, 30 May 2014, available at http://www.spa.police.uk/news/2014/may2014/230686/ [↑](#endnote-ref-4)
16. *Pretty v. the United Kingdom,* no. 2346/02, § 61, ECHR 2002-III [↑](#footnote-ref-12)
17. *Foka v. Turkey* [↑](#footnote-ref-13)
18. L*iberty and Others v. the United Kingdom,* no. 58243/00, § 58, ECHR 2008 [↑](#footnote-ref-14)
19. The Sunday Times v United Kingdom (1979) 2 EHRR 245 [↑](#footnote-ref-15)
20. Malone v United Kingdom (1984)7 EHRR 14; (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ [↑](#footnote-ref-16)
21. In 2010 Strathclyde Police ran a pilot project on electroshock weapons known as Tasers, which saw 30 officers, who were not specialists in handling firearms, issued with the weapons following brief training. Since 2013 Scotland has a single police force. [↑](#endnote-ref-5)
22. The Framework of Responsibilities intends to answer three fundamental questions: 1) what are the human rights standards the UK (and Scotland) is required to meet when arming the police with potentially lethal weapons; 2) what those standards mean in practice, and 3) which public authorities and relevant organisations bear responsibility for implementing those standards effectively. See more at

<http://scottishhumanrights.com/ourwork/publications/article/tasers> [↑](#endnote-ref-6)
23. SHRC considered that there were/are significant concerns and risks associated with Taser use, including concerns about the risks of injuries or death resulting from Taser use; the potential for excessive or inappropriate use; and the possibility that certain groups, such as those with mental health issues, children and young people, may be disproportionately affected. [↑](#endnote-ref-7)
24. Further information can be found at http://www.bbc.co.uk/news/uk-scotland-highlands-islands-28055249 [↑](#endnote-ref-8)