Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The Home Secretary has announced significant changes aimed at strengthening the exercise of police powers of stop and search in response to the rise in knife crime in England and Wales**

- **In its decision in *Jamaicans for Justice (Appellant) v Police Service Commission and Another (Respondents) (Jamaica)* [2019] UKPC 12, the Judicial Committee of the Privy Council held that there is a common law duty on a body taking a decision on the promotion of a senior police officer to ensure that allegations of criminality against the officer in question are fully and independently investigated.**

- **The recent and final progress report of the Irish Policing Authority on the implementation of extensive recommendations for reform in the Garda Inspectorate's report, *Changing Policing in Ireland*, conveys a disappointing picture of the pace and direction of much-needed police reform in Ireland.**

Stop and Search

Fatal stabbings in England and Wales rose last year to the highest point since records began. Understandably, the government has felt under intense pressure to be seen to be responding effectively as the sustained rise in knife crime shows no sign of abating. Part of its strategy, announced a few weeks ago by the Home Secretary, is aimed at strengthening the exercise of police powers of stop and search. This reflects the adoption of a tough 'law and order' approach in which 'stop and search' is presented as "a hugely effective power when it comes to disrupting crime, taking weapons off our streets and keeping us safe".

The reality is that police officers in England and Wales already possess and use an extensive array of powers to stop and search. Not only have they proved ineffectual in combating knife crime, but they also have a notorious record of alienating and provoking violence among low-income, ethnic minority and marginalised communities. There are compelling reasons to think that the announced changes will have no effect on the former, but will further deepen the latter.

Police powers of stop and search in England and Wales can be traced at least as far back as the Vagrancy Act 1824. Today, they can be found across a range of statutes, most notably the Police and Criminal Evidence Act 1984 (PACE), the Criminal Justice and Public Order Act 1994 (CJPO), the Misuse of Drugs Act 1971 and the Terrorism Act 2000. At their height in 2008/09, these powers were used to effect more than 1.5 million searches in a single year. As a result of reforms introduced by Theresa May, as Home

Secretary in 2014, that number fell steadily to 277,000 in 2017/18; although it appears to be on the rise against.

The vast majority of stops are made under section 1 of PACE. This empowers a police officer to stop and search anyone whom he or she has reasonable cause to suspect is carrying an offensive weapon or an article with a blade or point (among other things), either of which will readily encompass a knife.

Critically, the section 1 power requires the officer to suspect, and to have reasonable grounds to suspect, that the person is carrying a knife (or other relevant item). Nevertheless, very few such searches result in finding a knife, and less than ten percent of the searches actually result in an arrest. This suggests that the power is used excessively and unnecessarily. Indeed, scrutiny by HMIC shows that in more than one quarter of the incidents in which the power was used, the constable in question did not have reasonable grounds for the search. In other words, the stops were not predicated on evidence that the targeted persons were carrying a knife (or other prohibited item). It is hardly surprising, therefore, that the section 1 power is not proving an effective tool in combating knife crime.

An even deeper concern with this search power, and search powers generally, is the compelling evidence that it is used in a grossly discriminatory manner against black people. In 2014/15 a black person was 4 times more likely to be stopped and searched than a white person. Bizarrely, as the number of stops and searches dropped pursuant to the 2014 reforms, their disproportionate targeting of black people actually increased. Home Office figures show that the multiple of 4 in 2014/15 had increased to a multiple of 8.5 in 2016/17 and again to 9.5 in 2017/18. Yet, research carried out by the London School of Economics shows that there is no robust evidence that black people are more involved in crime than white people. Indeed, the searches of black people are less likely to reveal prohibited items etc than the searches of white people. It is difficult to avoid the deeply disturbing conclusion that the colour of a person's skin will be a vital factor in a police officer's decision whether to subject him to a stop and search in a relevant situation.

The disproportionate targeting of stop and search against black persons (especially young black males) and marginalised ethnic minority communities is not new. Resentment caused by such practices fuelled the Brixton riots in 1981, and was a factor in the 2011 London riots. More broadly, it is readily identified as a key ingredient in alienating such communities from the police and the State. There is very sound reason to believe that the government's strategy to expand the use of stop and search will fail to curb knife crime, and will further target black people unfairly and disproportionately.

Significantly, the government is intent on expanding the stop and search power under section 60 CJPO, instead of that under s.1 PACE. The former is distinctive in that it empowers a police officer of at least the rank of inspector to issue an authorisation in respect of any locality in his or her police area. An authorisation can be issued where he or she reasonably believes that incidents involving serious violence may take place in the locality and that it is expedient to issue an authorisation to prevent their occurrence. An authorisation can also be issued in other circumstances, including where the officer reasonably believes that persons are

carrying dangerous instruments or offensive weapons (such as knives) in that locality.

Typically, an authorisation will apply to designated streets or public places in an urban area and will last for up to 24 hours. They can be extended for up to 24 hours by an officer of at least superintendent rank

When an authorisation is in force in respect of a locality, any constable in uniform may stop and search any person for a dangerous instrument or offensive weapon in that locality. Critically, the constable does not need to have any prior suspicion against the person stopped and searched. It is a power to stop and search at random. This contrasts markedly with the section 1 PACE power where the constable must suspect that the person is carrying a relevant item (eg. a knife) and must have reasonable grounds for that suspicion. By removing these pre-requisites for a stop and search, section 60 CJPO effectively makes the constable master of the street in a locality covered by an authorisation. He or she can stop and search any person there at random and for any purpose. It is a criminal offence for the person concerned to refuse to submit.

The section 60 power is clearly more intrusive on the freedom, bodily integrity and privacy of the person than the much-abused section 1 PACE power. Significantly, the European Court of Human Rights in *Gillan and Quinton v United Kingdom* (2010) found a similar power under the Terrorism Act 2000 in violation of the Article 8 ECHR right to privacy because it could be used in the absence of reasonable suspicion against the person concerned. Admittedly, there were some differences in the regimes surrounding the two powers, but the key flaw identified in *Gillan and Quinton* was the fact that the power could be used to stop and search persons on the street arbitrarily. Section 60 suffers from the same flaw.

It can also be expected that the section 60 power will be even less productive in terms of finding knives, and much more discriminatory against people of black skin, than section 1 PACE. Freed from the (admittedly weak) shackles of the reasonable suspicion standard, the section 60 power is likely to be used more frequently in situations where there are little prospects of finding a knife. At least the section 1 PACE stops are supposed to be evidence based in the sense that they should only be used where there is a prior reasonable suspicion that the targeted person is carrying a knife etc. The section 60 CJPO stops, by contrast, can be effected lawfully on an entirely random basis; with no need for a prior suspicion of any kind that the targeted person is carrying a knife etc. Anyone in a locality subject to an authorisation can be stopped and searched at any time on the street in that locality at the whim of any unformed constable.

A key question is which localities are likely to be the subject of an authorisation from time to time. The current statistics on stop and search as a whole point the finger unmistakably at localities in which there is a high concentration of young black males. As the section 60 option is expanded and used more frequently, these will become 'suspect' communities in which the residents are controlled by a regime of random stops and searches on their own streets. Not only is this a gross assault on the rights and status of the individuals and communities affected, but it will also alienate and marginalise them even further.

The government's strategy will merely accentuate these negative consequences of section 60 operations without producing any tangible benefits in reducing knife crime. It reverses key policy reforms which were introduced in 2014 in an attempt to inject greater transparency into the use of stop and search powers and to increase public confidence that the powers were being used fairly, lawfully, effectively and, ultimately, in a non-discriminatory manner. Key changes being introduced now are that section 60 authorisations can be issued by an officer of at least inspector rank and that he or she can issue an authorisation on the basis of a reasonable belief that incidents of serious violence *may* occur.

It will be noticed, of course, that these changes do not entail any change in the law. They do, however, reflect a significant reverse in the policy reforms introduced in 2014. The latter reserved the issue of authorisations to senior officers above the rank of chief superintendent, and restricted them to a reasonable belief that incidents involving serious violence *will* occur. By relaxing these constraints, the government has cleared the way for a more intensive use of the draconian section 60 power. The changes will be introduced initially for up to one year across seven major urban police areas, namely: London, West Midlands, Merseyside, South Yorkshire, West Yorkshire, South Wales and Greater Manchester.

The reality is that section 60 searches have been rising steeply long in advance of the announcement of the government's new strategy. It rose from a low of 630 in 2016/17 to 2500 in 2017/18; a quadrupling in a single year. This reflects the fact that the London Metropolitan Police LMP had already increased their use of section 60 searches in 2017/18 in response to the spike in stabbings there. It is painfully obvious that they have had no tangible effect in reducing knife crime. There is no reason to believe that the more extensive and intensive use of section 60, heralded by the government's strategy, will have any greater success. One would have to suspect that the new policy is being driven by political expediency, and the price for that will be paid in the even deeper alienation and marginalisation of the very people and communities that the police and government must reach in order to turn the problem around.

Ultimately, we cannot stop and search our way out of the knife crime problem. Indeed, more intensive use of arbitrary stop and search is much more likely to be counterproductive as it will accentuate underlying factors that are fuelling knife crime. More positive and creative approaches that target these underlying factors are required. Scotland offers a promising lead on this front. It adopted a public health approach to knife crime with the establishment of a Violence Reduction Unit in 2005. Ten years later, fatal incidents had more than halved. The new Unit has worked to divert actual and potential gang leaders and members from their violent activities through the development of alternative outlets such as youth clubs, training and work. This is combined with doctors and teachers taking a direct role in educating and alerting young people to the harsh reality of knife crime.

The public health approach does not dispense with the need for police powers of stop and search, but it offers a more positive alternative to a policy that has already shown itself to be more part of the problem than the solution. It is highly unlikely that the latter will pay dividends in combating knife crime, but it will almost certainly ensure that stop and search remains a matter of acute concern in policing, the rule of law and the health of our democracy.

Police Promotions and Human Rights

At first sight, internal police promotions to senior ranks might not seem to be a topic likely to generate public concern. In practice it can and does generate acute suspicions of nepotism and political influence. This has been particularly acute at times in Ireland, with its national police force. Public concern can also be spiked by cases in which police officers are promoted after having been associated with instances of serious corruption or abuse. There have been several examples of this in high profile cases in these islands over many decades. Inevitably, victims of the corruption or abuse are dismayed by what they perceive as a failure of the system to render the officers involved accountable. Dismay turns to anger when they subsequently discover that the same officers are promoted. Typically, they interpret this as the police officers being rewarded for their corruption or abuse, and the police and political establishments protecting and taking sides with their own corrupt officers.

All of this raises the question whether it is possible to mount a judicial challenge against decisions to promote officers while there are still unanswered questions over complaints about their alleged involvement in incidents or operations that have led to serious injury or loss of life in controversial circumstances. This issue was addressed a few weeks ago in *Jamaicans for Justice (Appellant) v Police Service Commission and Another (Respondents) (Jamaica)* [2019] UKPC 12, a decision of the Judicial Committee of the Privy Council in respect of a challenge to the promotion of a senior officer in the Jamaican Constabulary.

Appointments to, and promotions in, the Jamaican Constabulary come under the remit of the Police Service Commission (PSC). The latter is an independent body which can be equated broadly for these purposes with Police and Crime Commissioners in England and Wales, the Policing Authority in Ireland, the Policing Board in Northern Ireland and the Scottish Police Authority. It was established to insulate the Jamaican police against political influence. The PSC considers each application for promotion to the senior ranks in the Constabulary and makes a recommendation to the Governor General who makes the formal appointment.

In *Jamaicans for Justice*, the Chief of Constabulary nominated a superintendent for promotion to the rank of senior superintendent, largely because he had a reputation for success in tackling the criminal gangs responsible for a high level of homicides in his police area which was considered to be the "murder capital of Jamaica". The country as a whole has been suffering from a very high level of homicides. In dealing with that situation, the constabulary have acquired a reputation for summary killings almost with immunity. Complaints against the police in respect of fatal shootings rarely result in prosecutions against the officers involved.

In 2010, INDECOM was established as an independent body to investigate actions of the police which resulted in death or injury or the abuse of the rights of persons. It is similar in many respects to the Independent Office of Police Complaints in England and Wales, and the Irish Garda Síochána Ombudsman Commission. The Act establishing INDECOM was intended to reverse:

> ".. the longstanding status quo of ineffective investigations into questionable shootings and allegations of excesses by agents of the state, and to address certain controversial societal concerns. It was meant to represent a paradigm shift from what went before."

The indications are that it is not proving effective. Of the 20 senior officers reported by INDECOM to the PSC between 2013 and 2017 for disciplinary

breaches, none were subject to disciplinary charges. In fact, INDECOM received no response in any of the cases, apart from one where it was asked to conduct further investigation. Having done that, it received no further response.

The superintendent's police unit had a particularly notorious reputation in responding to the violence. When the superintendent was being considered for promotion, the appellant, a non-governmental, non-partisan, human rights organisation, informed the PSC that he had been the subject of multiple complaints of unprofessional conduct which included the circumstances surrounding ten fatal shootings. A Report from the UN Special Rapporteur on Torture, Inhuman and Degrading Treatment or Punishment complained of very obstructive, uncooperative and openly threatening conduct by the superintendent and his officers to the Special Rapporteur and his team when they visited his police station. They urged that disciplinary action should be taken against him. Accordingly, the promotion decision raised a sharp conflict between the importance of cracking down hard on violent crime and being seen to respect human rights standards.

Before making a decision on the promotion, the PSC requested a report on the fatal shootings from the Constabulary's special investigations unit (BSI). The report revealed that the superintendent had been involved in 37 incidents. In five of these, there was a verdict of justifiable homicide. In the remainder, the investigation was incomplete, or a decision was awaited from the DPP or a case was pending before the Coroner's Court. The PSC also invited the appellant to forward any further information they might have on the superintendent. They forwarded a list of 28 complaints that they had received, but these did not correlate with the list compiled by the BSI. Later the DPP decided against prosecution in any of the remaining cases identified by the BSI. The PSC proceeded to recommend the promotion.

The appellant sought judicial review of the PSC's decision. In particular, they sought an order of certiorari to quash the decision, and an order of mandamus to compel the PSC to conduct an effective, thorough and impartial investigation into the 28 allegations of misconduct and to reconsider its decision. On appeal, their application shifted from an order to conduct an effective, thorough and impartial investigation to causing such an investigation to be undertaken by INDECOM. It should also be noted that the superintendent retired after promotion so the question of quashing the decision and asking the PSC to reconsider was academic. Nevertheless, the Judicial Committee went on to consider whether there is a duty to conduct further inquiries before making a promotion decision in a case such as this.

The Jamaican regulations on promotion are quite detailed on the matters that the PSC should take into account. They empower it, among other things, to call for a report from INDECOM into allegations against an officer being considered for promotion. The question for the purposes of the appeal was whether the PSC was under any duty at common law or under the Jamaican Constitution to make such an inquiry, or any other inquiry, in order to properly inform itself before making a decision.

The Jamaican Constitution contains a binding charter of fundamental rights which is substantially similar to the ECHR and the personal and due process rights in the Irish Constitution. The Judicial Committee of the Privy Council (the Board) was satisfied that the charter required the PSC (and INDECOM and other organs of state) to "exercise its functions in a manner which is compatible with the fundamental rights of all persons, including the right to life, the right to equality before the law and the right to due process of law." Moreover, the right to equality before the law "affords every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power." The Board went on to

hold that there are also "fundamental common law principles governing the exercise of public functions."

The Board acknowledged that there was no *express* statutory duty on the PSC to make further inquiries before making its decision. The real question, however, was whether the PSC was under a duty to make such inquiries in the *proper discharge* of its statutory functions with respect to the promotion. Critically, the Board held that, in the circumstances, the PSC was under such a duty at common law. There was grave concern that some members of the Constabulary were overly inclined to take the law into their own hands in dealing with violent crime, thus risking violations of the right to life, to due process of the law and to equality before the law of the people involved. The superintendent was involved, as team leader, in a large number of fatal incidents. No independent investigation of those incidents had taken place. The PSC had the power to ask INDECOM to investigate them, and it would be irrational for INDECOM not to respond. Such an investigation might reveal a different picture from the very summary table of incidents with which the PSC had been provided by the BSI. It would serve to put in context the statements of the Police Commissioner (and the superintendent himself) on the superintendent's effectiveness in fighting crime. The final decision would still be that of the PSC, but there was a reasonable prospect that a properly informed PSC might have made a different decision. In these circumstances, it would be a breach of the PSC's duty not to request an independent investigation from INDECOM.

Obviously, the circumstances pertaining to the promotion at issue in this case were highly unusual from a UK or Irish perspective. Nevertheless, the underlying principle has wider significance for police promotion decisions where the officer concerned has been the subject of serious criminal allegations which have not been resolved by an independent inquiry. In such cases, the body taking the promotion decision (or decision to recommend promotion) may well be under a common law duty to request the relevant independent complaints body to investigate the allegations (at least where the decision-maker is competent to make such a request). This would appear to be applicable to the police oversight bodies (and police chiefs) throughout the UK and Ireland. Where the duty applies, any person or body with sufficient standing in the matter should be able to challenge a failure to discharge it by way of a judicial review.

Oversight of Police Reform in Ireland

A relentless series of corruption, neglect and mismanagement scandals in Irish policing over the past few decades has generated a stream of reports and recommendations from external bodies and inquiries. These can be traced at least as far back as the voluminous reports of the Morris Tribunal of Inquiry in the first decade of this century, and there is still more in the pipeline. The reports and recommendations are paralleled by a history of pretence, obfuscation and incoherence in the implementation of badly needed police reform.

Arguably, the most comprehensive body of analysis and recommendations for reform in the history of the Garda Síochána is contained in the Garda Inspectorate's report *Changing Policing in Ireland* (December 2015). Its 442 pages provide detailed and pragmatic recommendations for change aimed at achieving and maintaining the highest levels of efficiency and effectiveness across all aspects of the structure, operation and deployment of the Garda. This report is widely acclaimed as an excellent blueprint for change, equipping the Garda with the capacity to deliver an efficient and effective policing

service in Ireland today and for the foreseeable future.

Most of the Inspectorate's recommendations were accepted by the government and the Garda which adopted a *Modernisation and Renewal Programme* as the vehicle for implementation. Following its establishment in 2016, the independent Policing Authority was charged by the government with the task of monitoring, assessing and reporting back on Garda progress in implementing the reform recommendations. The Authority had duly produced six progress reports when the report of the *Commission on the Future of Policing in Ireland* was published in September 2018 (see https://blogs.kent.ac.uk/criminaljusticenotes/2018/10/01/police-reform-in-ireland/). The Authority was advised by the government in December 2018 that the *Modernisation and Renewal Programme* was superseded by *A Policing Service for the Future*, a 'High Level Implementation Plan' drawn up to implement the recommendations of the Commission's report (see https://blogs.kent.ac.uk/criminaljusticenotes/2019/01/09/implementing-police-reform-in-ireland/). *A Policing Service for the Future* is now the plan for reform of the Garda and policing generally over the next four years. Accordingly, the Policing Authority's seventh report, published in February 2019, was its final report on Garda progress on implementing the *Modernisation and Renewal Programme*. This little potted summary conveys at least part of the reason why real Garda reform has been such a perplexing and frustrating subject for so long.

The Policing Authority's final implementation report makes sobering reading. It finds that, more than three years later, the majority of the reform recommendations in the Inspectorate's *Changing Policing in Ireland* report are still outstanding and relevant. This does not instill confidence in the capacity of Garda management or the government to drive the breadth and depth of reform that is so urgently needed.

Although the Authority found commendable examples of personal commitment and drive within the Garda to secure change through implementation of the recommendations, these are disparate and isolated. Reform progress is being hampered by the tendency to hide behind the monitoring of individual project milestones at the expense of a substantive focus on evidencing and assessing Garda outputs and activities.

The absence of a strategic vision for the organisation in key areas is a particular obstacle in the implementation of change. There is still no settled view articulated as to what the expanded Garda workforce will look like, how it will be recruited, trained and organised, and how best it can be effective for the community. There is no strategic framework to guide a demand analysis, an assessment of the skills gaps or the business needs of the organisation.

The significant increase in the size and composition of the force (800 new members approved in 2016) has not been accompanied by articulation of a vision as to how those new resources will be used to deliver a more effective policing service. Insufficient attention has been given to the demands and opportunities of recruitment, diversity, training and supervision in respect of the large intake of new personnel. Equally, there has been no re-imagining of how the several categories of Garda personnel might best perform their respective roles in order to realise the potential for complementarity envisaged in the decision to grant the extra resources.

The Policing Authority found systemic weaknesses in the Garda approach to implementing reform. Too frequently, recommendations for change from external sources are accepted quickly with little assessment as to the feasibility of their achievement. This has led to the Garda repeatedly over-promising and under-delivering. Planning for change has proceeded without sufficient consideration of organisational capacity. Similarly, insufficient attention has been, and

continues to be, given to key enablers of change; most notably: human resources, ICT, accommodation, training and finance. In the Authority's view, they are not being placed at the centre of the change effort. A continued failure to tackle capacity in these areas will inhibit the success of any planned change.

Planning, itself, has been "siloed", and this has resulted in an inability to assess the overall resource demand, identify interdependencies and prioritise within the Garda. There is too much focus on the outcomes of individual projects, and the resource demands of individuals who shout the loudest, at the expense of a coherent view and delivery of overall priorities and outcomes. A costed annual policing plan expressing the organisation's priorities and development commitments is needed. This would give reassurance that the full resource requirements have been assessed, understood and secured, or at least that choices have been made.

The Authority found that frontline policing has not felt the benefits or effects of the change agenda articulated in the *Modernisation and Renewal Programme*. There is a disconnect between the centre and the frontline on the rollout of that agenda. Gardaí on the ground feel that key concerns, expressed repeatedly, around fleet, accommodation, equipment and uniforms have gone unheeded. Despite the completion of a culture audit within the organisation, it seems that little tangible attention has been given to the articulation of the optimum culture for the Garda, including identification of the desired behaviours that would support such a culture and those that would not.

It must also be appreciated that (for very good reason) policing in Ireland has been deluged in recent years with copious and extensive recommendations for reform emanating from a range of sources. A perception that the recommendations are externally driven can undermine the sense of organisational ownership and endorsement which, in turn, can sap motivation for rigorous implementation. Moreover, as noted by the Policing Authority, many of the source reports and recommendations are considered without reference to each other, with the result that some can overrule or even conflict with prior recommendations. While the Authority does not expressly say so, it would seem that churning out recommendations for change has become an end in itself; a substitute for actual reform, or an exercise in conveying the pretence of change.

Overall, the Policing Authority's final progress report on the implementation of the reform recommendations in the Inspectorate's *Changing Policing in Ireland* conveys a familiar picture of a Garda organisation that has yet to find the imagination and capacity to reform. The problems confronting the force have been charted in comprehensive detail by a seemingly endless series of inquiries and reports. Recommendations for addressing those problems run into the hundreds. Government and Garda management have accepted most of those recommendations and supposedly have implemented (or are implementing) them. Extensive legislative reforms to Garda structures have been effected. Substantial new resources in terms of personnel, finance, equipment and powers have been provided. And yet, the more things change, the more they stay the same.

It remains to be seen whether the switchover to the implementation of the reforms emanating from the report of the *Commission on the Future of Policing in Ireland* will make any difference. The mere fact that the whole reform process has been subject to such arbitrary and irrational decision-making does not give much cause for confidence. Perhaps the real problem is that, despite the optics, there is still a lack of political and institutional will to deliver meaningful change. The experience of the past two decades suggests that too much energy and resources are being invested in conveying the appearance of action and change, and not enough into its substantive

delivery. Meanwhile, real control over policing in Ireland remains comfortably in the hands of narrow established interests.