

# Statutory Report

Public statement by the Police Ombudsman pursuant to

Section 62 of the Police (Northern Ireland) Act 1988.

Relating to a public complaint:

COMPLAINTS ABOUT THE ARRESTS AND  
DETENTIONS OF MICHAEL TONER, STEPHEN  
CRUMLISH, GERALD McGOWAN, AND GERARD  
KELLY AT STRAND ROAD POLICE STATION  
BETWEEN 26 FEBRUARY 1979 AND 1 MARCH  
1979.

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# Executive Summary

On 14 February 1979, Lieutenant Stephen Kirby was murdered at Carlisle Terrace, Derry/Londonderry. The Provisional Irish Republican Army (PIRA) later claimed responsibility for his murder. Lieutenant Kirby was 22 years old and an officer in the 1<sup>st</sup> Royal Welch Fusiliers.

During January and February 1979, there were also a number of punishment shootings in the city.

On 26 February 1979, police arrested Michael Toner and Stephen Crumlish after receiving anonymous information regarding a punishment attack which occurred on 18 February 1979. Mr Toner and Mr Crumlish were interviewed about this attack and three other punishment shootings. Both were later questioned about the murder of Lieutenant Kirby.

Mr Toner and Mr Crumlish were interviewed 11 and 12 times respectively between 26 February and 28 February 1979 when they were detained at Strand Road Royal Ulster Constabulary (RUC) Station, Derry/Londonderry.

Information obtained from the interviews of Mr Toner and Mr Crumlish led to police arresting Gerald McGowan and Gerard Kelly on 28 February 1979.

Mr McGowan and Mr Kelly were each interviewed seven times between 28 February and 1 March 1979 during their detention at Strand Road RUC Station. They were interviewed about the four punishment shootings and the murder of Lieutenant Kirby.

When in police custody, Messrs Toner, Crumlish, McGowan and Kelly made a number of '*confessional*' statements<sup>1</sup> admitting their involvement in some, or all, of the punishment shootings, and the murder of Lieutenant Kirby.

All four were charged with the murder of Lieutenant Kirby and remanded in custody to Crumlin Road Gaol, Belfast, on 1 and 2 March 1979. Each of the four were also charged with some, or all, of the punishment shootings, conspiracy to murder, unlawful possession of a firearm, and possession of information likely to be useful to terrorists. Messrs Toner and Crumlish were also charged with membership of a proscribed organisation, Fianna na h'Éireann.

Mr McGowan and Mr Kelly successfully applied for bail on 25 April 1979. Mr Toner and Mr Crumlish were initially refused bail on 7 March 1979 but were successful with further applications on 27 April and 2 May 1979 respectively.

The trial of Messrs Toner, Crumlish, McGowan, and Kelly started on 13 October 1980. On the third day of the trial, all four defendants failed to attend, having absconded to the Republic of Ireland.

A police report, dated 24 October 1980, stated that bail was granted to all four individuals because '*of the grave concern expressed by many people*' about the prosecution of the four young men, given the '*extensive alibi evidence*' indicating that they had not been involved in either the murder of Lieutenant Kirby or the punishment shootings.

Mr Toner and Mr Crumlish were arrested in Donegal shortly after absconding. Mr McGowan and Mr Kelly were later detained in Dublin. All

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<sup>1</sup> For the purposes of this public statement, the term '*confessional*' statements, is to be interpreted objectively as the four complainants having made statements which were adverse to themselves, and which do not connote the Police Ombudsman having accepted that those statements are accurate or reliable.

four were later released by An Garda Síochána (AGS) who advised them that they had not received any extradition papers from the RUC.

In 1998, the Director of Public Prosecutions (DPP) decided that any attempt to mount a successful prosecution of the four men would be unlikely to succeed. This was due to the RUC stating that they were unable to locate both the original interview notes and bench warrants. Also, a number of police witnesses had retired and others could not be located.

The DPP offered no evidence against the four men and they were found not guilty and acquitted of all charges in December 1998.

In 2003, Messrs Toner, Crumlish, McGowan, and Kelly made a number of complaints and related allegations to the former Police Ombudsman, Nuala O'Loan, in respect of police actions during their detention at Strand Road RUC Station.

The four men alleged:

- I. That they were subjected to ill treatment, including physical and mental abuse, during their time in police custody;
- II. That they were threatened and told that members of their family would come to harm if they did not make statements admitting their guilt;
- III. That they were not allowed access to a solicitor or family member;
- IV. That their statements were fabricated and obtained by oppressive and coercive means;
- V. That the only evidence against them was fabricated statements;
- VI. That they only agreed to make statements as they were frightened and wanted to be released from custody;

- VII. That their arrests and detentions were unlawful;
- VIII. That the actions of police forced them to flee Northern Ireland, depriving them of a family life; and
- IX. There were also concerns about how police dealt with alibi witnesses.

Their complaints were accepted by the former Police Ombudsman and an investigation commenced in 2003.

### **The Police Ombudsman Investigation**

The original RUC investigation papers, where available, were secured and reviewed. As part of the Police Ombudsman investigation additional material was obtained from the complainants, Forensic Science Northern Ireland (FSNI), the Northern Ireland Courts and Tribunals Service (NICTS), and open sources.

The Police Ombudsman investigation considered the relevant law and administrative rules applicable to the interrogation and detention of suspects by police at the time of the arrests and detentions. The applicable standards and rules are contained in case law, Home Office guidance, and Judges' Rules and Administrative Directions which were adopted in Northern Ireland in 1976. These Rules and Directions provided guidance for police on how suspects should be treated during their detention and questioning.

The Police Ombudsman investigation commissioned an independent forensic linguistics expert, Expert 1, to examine all the '*confessional*' statements made by the four complainants during their time in police custody.

The analysis of Expert 1 suggested that '*confession statements attributed to Mr McGowan and Mr Kelly which implicate them in the death of a British*

*soldier, are too similar to have been produced independently.*' Expert 1 concluded that the available evidence supported the allegations of Mr McGowan and Mr Kelly that police officers told them what to put in their statements.

The findings of Expert 1 were forwarded to the Public Prosecution Service (PPS) who directed that a second opinion be obtained.

A second independent forensic linguistics expert, Expert 2, supported the findings of Expert 1, stating that the latter's conclusions were '*entirely appropriate.*' Expert 2 added that the linguistic evidence was '*strong.*'

In September 2006, the original statements of the four complainants, in addition to maps used during their relevant interviews, were submitted to FSNi by Police Ombudsman investigators for testing. This examination was necessary to establish if there was any evidence that may cast doubt on the authenticity of the documentation.

A Forensic Scientist identified no irregularities in the body of the statements. No additions or alterations were detected and no indentations were found on any of the maps.

The Police Ombudsman investigation interviewed ten former police officers under criminal caution for the offence of Perverting the Course of Public Justice. In line with the Ombudsman's statutory duty, as set out in section 58(2) of the Police (Northern Ireland) Act 1998, a file was sent to the PPS who issued a direction to prosecute Police Officers 5 and 6 for the offence of Perverting the Course of Public Justice. None of the other former police officers subject to investigation were to be prosecuted.

Issues of discrepancies in disclosure, which are addressed in this public statement, resulted in the PPS deciding not to proceed with the prosecution, and Police Officers 5 and 6 were acquitted. This decision led

to the former Police Ombudsman, Dr Michael Maguire, commissioning an independent review of the Police Ombudsman's procedures. This review was conducted by the former Chief Operating Officer of the Independent Police Complaints Commission (IPCC).<sup>2</sup>

## **Conclusions**

Regulation 6 of the RUC (Complaints etc) Regulations 2001 provides that complaints received under section 52 of the Police (Northern Ireland) Act 1998 can be investigated by the Police Ombudsman if *'the complaint has not otherwise been investigated by the police.'*

Therefore, the Police Ombudsman was not permitted to investigate the allegations of physical ill-treatment/assault made by Messrs Toner, Crumlish, McGowan, and Kelly, which allegedly occurred in March 1979. That is because these allegations were investigated at that time by the RUC's Complaints and Discipline Branch.

## **Complaints that they were not allowed access to a solicitor or family member**

Michael Toner stated that police allowed him access to a solicitor only after he was charged. He was allowed a brief visit from his father after he had signed *'confessional'* statements.

Stephen Crumlish also stated that he was denied the right to legal representation and advice, but was permitted to see his parents.

Gerald McGowan stated that he asked to see a solicitor but this was not allowed until he signed a statement.

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<sup>2</sup> The report was compiled by the IPCC at the request of the Police Ombudsman and is referred to at Chapter 5 of the Public Statement. The IPCC is now named the Independent Office of Police Conduct (IOPC).

Gerard Kelly stated that he was not informed of his rights or told that he could see a solicitor.

Police Ombudsman investigators reviewed all the available custody documentation. This indicated that none of the four complainants received a visit from a solicitor until after they had been charged with the murder of Lieutenant Kirby and the punishment shootings.

Police Ombudsman investigators reviewed the available documentation and have been unable to find any reason why allowing Messrs Toner, Crumlish, McGowan, and Kelly access to legal advice and/or representation would have delayed or hindered the police investigation.

Police Ombudsman investigators have been unable to locate any recorded rationale as to why legal representation was not offered to the young men at the time.

The Judges' Rules and Administrative Directions were part of Home Office guidance that applied at the time to the actions of RUC officers.

There was no statutory right for suspects to have access to legal representation at the time. Today this is provided for in PACE<sup>3</sup> legislation.

However, the Police Ombudsman is of the view that police failed to comply with Home Office guidance in this respect, in that legal representation to protect the interests of Messrs Toner, Crumlish, McGowan, and Kelly was not offered to them during their lengthy periods of detention.

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<sup>3</sup> Article 59 of Police and Criminal Evidence (Northern Ireland) Order 1989.

## **Complaints that ‘confessional’ statements were fabricated and obtained by oppressive means**

Police Ombudsman investigators interviewed ten police officers under criminal caution who all denied that they were involved in fabricating ‘confessional’ statements from Messrs Toner, Crumlish, McGowan, and Kelly.

There were no CCTV cameras or witness evidence to support or refute the complainants’ allegations. Electrostatic Detection Analysis (ESDA)<sup>4</sup> of relevant police documentation found nothing to suggest irregularities regarding the manner in which the 21 statements were obtained.

However, two linguistics experts identified issues with four ‘confessional’ statements made by Gerald McGowan (Statements B and D) and Gerard Kelly (Statements A and C).

The linguistics experts concluded that Messrs McGowan and Kelly could not have made their statements independently of one another.

Based on this evidence, the PPS directed that Police Officers 5 and 6 be prosecuted for the offence of Perverting the Course of Public Justice. The PPS later offered no evidence and Police Officers 5 and 6 were acquitted. The reasons for this are detailed in this public statement.

Based on all the available evidence and information the Police Ombudsman is of the view, that the statements from Messrs Toner, Crumlish, McGowan, and Kelly were not voluntary and were obtained unfairly and in a coercive atmosphere because of the following:

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<sup>4</sup> Electrostatic Detection Analysis (ESDA) is a technique used by investigators where an electrostatic charge is applied to a document containing suspected indented writing. Indented writing can be seen via the application of charge sensitive toner. This technique can assist when seeking to establish the chronology and credibility of a document.

- I. The length of time that they were detained;
- II. The timing of two of the four problematic statements in that they were recorded in the early hours of the morning after protracted interviews, contrary to standards at the time;
- III. During detention, arrangements were made by police for some of the suspects to speak to their co-accused, which is not provided for in the Judges' Rules;
- IV. The *'immature age'* of the complainants; and
- V. The failure to provide support to the complainants by providing access to a solicitor during their detentions; and
- VI. The statements were made by the complainants in order to secure their release from custody.

### **Complaints that their arrests and detentions were unlawful**

Messrs Toner, Crumlish, McGowan, and Kelly all alleged that their arrests and subsequent detentions were unlawful.

The Police Ombudsman investigation has established that Mr Toner and Mr Crumlish were arrested on the basis of an anonymous telephone call received by police. Both were arrested under section 11 of the Northern Ireland (Emergency Provisions) Act 1978 (the 1978 Act). I am unable to determine if these arrests were unlawful as that is a matter for a Court.

The information obtained during the interviews of Mr Toner and Mr Crumlish provided the basis for the suspicion to arrest Mr Kelly and Mr McGowan under section 11 of the 1978 Act.

In respect of the detention of the complainants, the Police Ombudsman is unable to determine whether their initial and continued detentions were lawful as this ultimately is a matter for a Court.

However, the Police Ombudsman is critical of the duration of the detentions of these individuals given their *'immature age.'*

Police also failed to provide the young men with an opportunity to request a solicitor in order to protect their interests.

### **Overall Conclusions**

The Police Ombudsman is of the view that Messrs Toner, Crumlish, McGowan, and Kelly's complaints about their mental ill-treatment, detention, and interviewing by police at Strand Road RUC Station are legitimate and justified. The interviews were, in her view, conducted in a coercive atmosphere and in breach of Home Office guidance at the time. She has concluded that their *'confessional'* statements were obtained unfairly and not voluntarily in the sense described in the Judges' Rules.

The Police Ombudsman is critical of the manner in which *'confessional'* statements were obtained from them by police, the sharing of these statements, the duration of the detentions, the timing of two of the interviews (after midnight), and the actions of police in allowing the young men to talk to each other, which was not provided for in the Home Office guidance.

This investigation has concluded that all four complainants ought to have been given an opportunity to access legal representation when detained at Strand Road RUC Station.

The Police Ombudsman is mindful of the vulnerability of the complainants by virtue of their *'immature age'* and the seriousness of the charges.

The Judges' Rules and Administrative Directions required that *'interrogating officers should always try to be fair to the person who is being questioned, and scrupulously avoid any method which could be regarded in any way as unfair or oppressive.'* However, the Police

Ombudsman is of the view that the circumstances, including their young age, the lack of access to support by way of legal advice, and the coercive atmosphere surrounding their detention, are indicative of unfair treatment of the complainants in this case.

The Judges' Rules added:

*'That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.'*

I am of the view that the irregularities and coercive atmosphere in which the *'confessional'* statements were obtained were indicative of the statements having been obtained unfairly and not freely given as required by the Judges' Rules. I am of the view that their complaints in this respect are legitimate and justified.

# 1.0

## Introduction

- 1.1. On 14 February 1979, Lieutenant Stephen Kirby was murdered at Carlisle Terrace, Derry/Londonderry. Lieutenant Kirby, an officer in the 1<sup>st</sup> Royal Welch Fusiliers, was 22 years old. PIRA later claimed responsibility for his murder. During January and February 1979, there were also a number of punishment shootings in the city. Police arrested four local young men, Michael Toner, Stephen Crumlish, Gerald McGowan, and Gerard Kelly on suspicion of having been involved in these attacks. They were interviewed by detectives at Strand Road RUC Station over a number of days, where they made statements confessing<sup>5</sup> to their roles in the punishment shootings and the murder of Lieutenant Kirby.
  
- 1.2. Gerard Kelly was 18 years old at the time of his arrest. Messrs Toner, Crumlish, and McGowan were 17 years old. They stood trial for the murder of Lieutenant Kirby and the punishment shootings in October 1980, in addition to a number of other related charges. During these criminal proceedings all four absconded to the Republic of Ireland, where they remained until December 1998, when the then Director of Public Prosecutions offered no evidence against them and they were subsequently acquitted by the Court. All four maintained their innocence during this period and, in October 2003, made complaints to the former Police Ombudsman, Nuala O’Loan. They stated that police officers had

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<sup>5</sup> In this public statement, the terms ‘*confessions*’ and ‘*confessional statements*’ are used interchangeably. For the purposes of this public statement, the terms are to be interpreted objectively as the four complainants having made statements which were adverse to themselves. They should not be interpreted by the reader as connoting any lack of veracity or credibility on the part of the four complainants.

been guilty of the offence of Perverting the Course of Public Justice, alleging that their confessions had been obtained under duress.

- 1.3. This document is a public statement detailing my rationale for actions, decisions, and determinations in respect of their complaints. The investigation conducted by this Office into the allegations made by the above four individuals is also outlined in this public statement.
- 1.4. This investigation generated over 200 investigative actions and identified 59 potential witnesses, including 38 retired Royal Ulster Constabulary (RUC) officers who performed a variety of roles connected to the police investigation in 1979. Other witnesses included alibi witnesses provided by the four young men, a community representative, and members of the legal profession. Some witnesses are deceased while others either declined or were unable to assist. However, 25 witnesses co-operated with my investigation. I thank those who took the time to assist.
- 1.5. Ten former police officers were interviewed under criminal caution by my investigators for the offence of Perverting the Course of Public Justice. In June 2012, this Office submitted a file of evidence for direction to the PPS regarding these officers. In March 2014, the PPS directed that two of the former police officers be prosecuted for this offence.
- 1.6. On 19 December 2014, following issues identified during the relevant disclosure process carried out by this Office, the PPS offered no evidence and the Court acquitted the two former police officers as there was no longer a reasonable prospect of conviction. These issues are discussed in greater detail later in this public statement.
- 1.7. I am unable to consider the question of disciplinary proceedings relating to any potential misconduct as all of the relevant police officers are now retired. In this public statement, I have criticised the actions of a number of RUC officers serving at the time. I have provided an opportunity for all

of those, who were subject to criticism, to respond. I have considered these responses and incorporated them into the public statement, where I consider it appropriate.

- 1.8. Prior to its publication, this public statement was also forwarded in full to the Police Service of Northern Ireland (PSNI) for fact checking. A copy was also forwarded to the PPS for comment. A response was received from the PPS which I have reflected, where I consider it appropriate, in this public statement.

## 2.0

# Background to the Investigation

- 2.1. On 18 February 1979, a punishment shooting was carried out on a male in Derry/Londonderry. Police received anonymous information regarding the attack which led to the arrests of Michael Toner and Stephen Crumlish on 26 February 1979 under section 11 of the Northern Ireland (Emergency Provisions) Act 1978 (the 1978 Act). Messrs Toner and Crumlish were initially interviewed about this attack and three other punishment shootings that occurred on 8 January, 14 February, and 17 February 1979. They were later questioned about the murder of Lieutenant Kirby on 14 February 1979.
- 2.2. The interviews took place at Strand Road RUC Station between 26 February and 28 February 1979. During this period, Michael Toner and Stephen Crumlish were interviewed 11 and 12 times respectively.
- 2.3. Information obtained from the interviews of Messrs Toner and Crumlish led to police arresting Gerald McGowan and Gerard Kelly on 28 February 1979, under the 1978 Act. They were interviewed about the four punishment shootings and the murder of Lieutenant Kirby.
- 2.4. The interviews of Messrs McGowan and Kelly took place at Strand Road RUC Station, between 28 February and 1 March 1979. They were each interviewed seven times.
- 2.5. When in police custody, Messrs Toner, Crumlish, McGowan, and Kelly made a number of '*confessional*' statements admitting their involvement

in some, or all, of the punishments shootings and the murder of Lieutenant Kirby.

2.6. The four young men were subsequently charged as follows:

- I. Michael Toner was charged with the murder of Lieutenant Kirby; conspiracy to murder; the punishment shootings on 14 and 18 February 1979; unlawful possession of a firearm; possession of information likely to be useful to terrorists; and membership of a proscribed organisation.
- II. Stephen Crumlish was charged with the murder of Lieutenant Kirby; conspiracy to murder; the punishment shootings on 8 January, 14 February, 17 February, and 18 February 1979; unlawful possession of a firearm; possession of information likely to be useful to terrorists; and membership of a proscribed organisation.
- III. Gerald McGowan was charged with the murder of Lieutenant Kirby; conspiracy to murder; the punishment shooting on 18 February 1979; unlawful possession of a firearm; and possession of information likely to be useful to terrorists.
- IV. Gerard Kelly was charged with the murder of Lieutenant Kirby; conspiracy to murder; the punishment shootings on 8 January, 14 February, and 18 February 1979; unlawful possession of a firearm; and possession of information likely to be useful to terrorists.

2.7. On 1 March 1979, Michael Toner and Stephen Crumlish were remanded in custody to Crumlin Road Gaol, Belfast. On 2 March 1979, Gerald McGowan and Gerard Kelly were also remanded in custody to Crumlin Road Gaol, Belfast.

## Applications for Bail

- 2.8. All four applied for bail and Messrs McGowan and Kelly were successful in their applications on 25 April 1979. Messrs Toner and Crumlish were initially refused bail on 7 March 1979 but were successful with further applications on 27 April and 2 May 1979 respectively.
- 2.9. A police report, dated 24 October 1980, stated that bail was granted to all four individuals because '*of the grave concern expressed by many people*' about their prosecutions. Those concerned included Bishop Edward Daly, Bishop of the Diocese of Derry, and John Hume, the Member of Parliament (MP) for the Foyle constituency.<sup>6</sup> Both, now deceased, raised concerns about the prosecutions of the four young men, given the '*extensive alibi evidence*' indicating that they had not been involved in either the murder of Lieutenant Kirby or the punishment shootings.
- 2.10. Gerald McGowan was granted variations to his bail conditions on two occasions so that he could play football outside Northern Ireland. On 2 November 1979, he was allowed to play a match in County Donegal. On 13 May 1979, he was permitted to travel to Scotland to take part in a tournament.

## The Trial

- 2.11. The trial of Messrs Toner, Crumlish, McGowan, and Kelly started on 13 October 1980. On the third day of the trial, all four defendants failed to attend, having absconded to the Republic of Ireland.

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<sup>6</sup> John Hume was the then leader of the Social Democratic and Labour Party (SDLP), and Member of Parliament for the Foyle Constituency in which the city of Derry/Londonderry is situated.

## **Subsequent Arrests in the Republic of Ireland**

2.12. Messrs Toner, Crumlish, McGowan, and Kelly informed my investigators that, when in the Republic of Ireland, they were arrested by officers from An Garda Síochána (AGS). Michael Toner and Stephen Crumlish were arrested in Donegal shortly after absconding. Gerald McGowan and Gerard Kelly were later detained in Dublin. All four were later released by Gardaí who advised them that they had not received any extradition<sup>7</sup> papers from the RUC.

## **Decision by the Crown to offer no Evidence and Acquittal**

2.13. In March 1990, AGS notified police in Northern Ireland that Gerard Kelly was residing at a known address in the Republic of Ireland. The RUC shared this with the DPP who requested information relating to bench warrants and previous police efforts to trace the four men. The DPP also requested that the original police interview notes be ESDA tested.<sup>8</sup>

2.14. Police informed the DPP that the original interview notes could not be located. They also stated that bench warrants had been issued and circulated at the time that the four had absconded.

2.15. In 1992, the DPP directed that the case was not suitable for either extradition or extraterritorial application.<sup>9</sup> Further, any decision relating

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<sup>7</sup> Extradition is the formal process requesting the surrender of identified individuals from one territory to another for the following purposes: 1. to be prosecuted; 2. to be sentenced for an offence for which the person has already been convicted; or 3. to carry out a sentence that has already been imposed.

<sup>8</sup> Electrostatic Detection Analysis (ESDA) is a technique used by investigators where an electrostatic charge is applied to a document containing suspected indented writing. Indented writing can be seen via the application of charge sensitive toner. This technique can assist when seeking to establish the chronology and credibility of a document.

<sup>9</sup> Generally an offence will only be triable in the jurisdiction in which the offence takes place. However, there are some specific statutes which allow U.K. Courts to exercise their power beyond their normal territorial limits. For example, section 62 of the Terrorism Act 2000 extends the jurisdiction of the Northern Ireland Courts over someone who commits an act of terrorism outside of the United Kingdom, where the act would constitute the commission of one of the offences listed within section 62(2) of that Act.

to a prosecution of Gerard Kelly would only be considered if he was arrested in Northern Ireland.

2.16. In June 1998, the RUC stated that they were unable to locate both the original interview notes and bench warrants. They also confirmed that a number of police witnesses had retired, and others could not be located.

2.17. Given this information, the DPP decided that any attempt to mount a successful prosecution would be unlikely to succeed. No evidence was offered against the four men and they were found not guilty and acquitted of all charges on 21 December 1998 by the former Lord Chief Justice, Lord Carswell.

## 3.0

# The Complaints and Scope of the Police Ombudsman Investigation

3.1. In 2003, Messrs Toner, Crumlish, McGowan, and Kelly made a number of complaints and allegations to the former Police Ombudsman, Nuala O'Loan, in respect of police actions during their time in custody at Strand Road RUC Station. They complained that police had been guilty of Perverting the Course of Public Justice, and also made a number of specific allegations. These allegations are set out in full later in this public statement. However, in summary, the complaints concerned rose generally from the following issues:

- I. That they were subjected to ill-treatment, including physical and mental abuse, during their time in police custody;
- II. That they were threatened and told that members of their family would come to harm if they did not make statements admitting their guilt;
- III. That they were not allowed access to a solicitor or family member;
- IV. That their statements were fabricated and obtained by oppressive and coercive means;
- V. That the only evidence against them was fabricated statements;
- VI. That they only agreed to make statements as they were frightened and wanted to be released from custody;
- VII. That their arrests and detentions were unlawful;
- VIII. That the actions of police forced them to flee Northern Ireland, depriving them of a family life; and

IX. That there were also concerns about how police dealt with alibi witnesses.

3.2. Their complaints were accepted for investigation under section 52 of the Police (Northern Ireland) Act 1998 (the 1998 Act). The RUC (Complaints etc) Regulations 2001 (the 2001 Regulations) permit the Police Ombudsman to investigate public complaints which are outside the normal time, namely made within twelve months of the alleged conduct, if they *'should be investigated because of the gravity of the matter or the exceptional circumstances.'* Police Ombudsman Nuala O'Loan was of the view that the complaints made by Messrs Toner, Crumlish, McGowan, and Kelly met this *'grave or exceptional'* definition and their complaints were, therefore, accepted for investigation.

3.3. Regulation 5(3)(f) of the 2001 Regulations also states that complaints received under section 52 of the 1998 Act can only be investigated if *'the complaint has not otherwise been investigated by the police.'* The Police Ombudsman cannot, therefore, investigate the allegations of physical ill-treatment/assault made by Messrs Toner, Crumlish, McGowan, and Kelly in March 1979 as these complaints were investigated at that time by the RUC's Complaints and Discipline Branch.

### **The 1979 RUC Complaints and Discipline Investigation**

3.4. Gerald McGowan and Gerard Kelly both alleged that they were subjected to physical ill-treatment/assault during their detentions at Strand Road RUC Station. RUC Complaints and Discipline investigators secured the relevant interview rooms and seized the clothing of Messrs McGowan and Kelly. A Forensic Scientist, Scenes of Crime Officer (SOCO), and RUC Photographer attended Strand Road RUC Station on 2 March 1979 and examined the relevant scenes. A mark was identified on a wall in one of the interview rooms that could have been

a palm or fingerprint mark as it contained traces of sweat. It was not possible, however, to establish when this mark had been made as sweat can remain for months on this type of surface.

- 3.5. The RUC Complaints and Discipline investigation also reviewed relevant police documentation, including medical records, and interviewed witnesses. The police officers linked to the allegations provided written statements under criminal caution for the offence of assault. They all denied the allegations.
- 3.6. In respect of complaints made later by Michael Toner and Stephen Crumlish, similar enquiries were conducted by police. However, as these complaints were made a period of time after the alleged incidents, opportunities to conduct forensic scene examinations were more limited. The police officers linked to the allegations provided written statements under criminal caution for the offence of assault. They all denied the allegations.
- 3.7. At the conclusion of these enquiries, RUC Complaints and Discipline Branch forwarded a file of evidence to the DPP, containing all the evidence gathered during the course of the investigation. On 24 March 1982, the DPP directed 'No Prosecution' in respect of 14 police officers subject to investigation. As stated, this previous criminal investigation precludes me from investigating the complaints of physical ill-treatment/assault.
- 3.8. In 2003, my Office commenced an independent investigation to address the remaining complaints and allegations of Messrs Toner, Crumlish, McGowan, and Kelly.
- 3.9. The original RUC investigation papers, where available, were secured and reviewed as part of this investigation. This included one set of police interview notes and 21 statements of '*confession*' made by Messrs

Toner, Crumlish, McGowan, and Kelly. My investigators also obtained material from open sources and the following:

- I. The four complainants and their legal representatives;
- II. Forensic Science Northern Ireland;
- III. The Northern Ireland Courts and Tribunals Service; and
- IV. Press articles.

3.10. In June 2016 my predecessor, Dr Michael Maguire, issued a public statement about police conduct relating to the murders of six men at the Heights Bar, Loughinisland, on 18 June 1994. This public statement was challenged as being *'ultra vires'*<sup>10</sup> by the Northern Ireland Retired Police Officers Association (NIRPOA).

3.11. Following prolonged legal proceedings, on 18 June 2020 the Northern Ireland Court of Appeal gave judgment on the Police Ombudsman's role as provided for in Part VII of the 1998 Act. The Court ruled that the Ombudsman's role was investigatory and not adjudicatory in nature. Decisions as to whether a police officer's actions amounted to criminality or misconduct were for other forums such as a criminal court or disciplinary panel.

3.12. Paragraph 40 of the Court of Appeal judgment stated *'It is clear that the principal role of the Ombudsman is investigatory. The complaint defines the contours of the investigation and in this case informed the terms of reference about which no complaint has been made. There is no power or duty created by the statute for the Ombudsman to assert a conclusion in respect of criminal offences or disciplinary conduct by police officers. The Ombudsman is required to provide recommendations to the DPP if he considers that a criminal offence has been committed. Such a recommendation is a decision which could form part of a PS [Public*

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<sup>10</sup> A legal term meaning to act beyond the power or authority of the body.

*Statement]. Once he makes such a recommendation he has no role thereafter apart from supplying information on request.’<sup>11</sup>*

3.13. The Court, in explaining the legal framework of the 1998 Act, outlined at Paragraph 43 *‘That framework specifically excluded any adjudicative power for the Ombudsman in the determination of criminal matters. The confidence of the public and police force was to be secured by way of the independence, efficiency and effectiveness of the investigation coupled with an adherence to the requirements of the criminal law before any finding of a criminal offence could be made against a police officer and the conduct of a disciplinary hearing with all the protections afforded within that system before disciplinary misconduct could be established. The thrust of the appellants’ case is that the statutory case could be undermined if the Ombudsman was entitled to use section 62 as a vehicle for the making of such findings. We agree that the legislative steer is firmly away from the Ombudsman having power to make determinations of the commission of criminal offences or disciplinary misconduct but will address later how this affects the content of a PS.’*

3.14. At Paragraph 55, the Court outlined the powers of the Police Ombudsman in respect of officers, where there was a question of criminality and/or misconduct, should a police officer have resigned or retired. *‘There may well be circumstances, of which this appeal may be an example, where a police officer will have resigned as a result of which the officer would no longer be subject to any disciplinary process. By virtue of section 63(1) (e) of the 1998 Act the Ombudsman has limited powers in a PS to identify a person to whom information relates if it is necessary in the public interest. That is a strict test. We accept that a person can be identified by inference, a so-called jigsaw identification. We do not consider that the power to make a PS provides the Ombudsman with the power to make determinations in respect of retired*

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<sup>11</sup> 2020 [NICA] 33.

*officers. We accept, however, that the statutory scheme does enable the Ombudsman in respect of such officers to indicate what recommendations might have been made, what reasons there were for making such recommendations and whether disciplinary proceedings would have been appropriate.'*

- 3.15. My interpretation of this judgment is that, in the absence of determinations of criminality or misconduct by the appropriate authority, my role is limited to commenting on the matters raised in a complaint. My conclusions in respect of the complaints made by Messrs Toner, Crumlish, McGowan, and Kelly are outlined later in this public statement.

## 4.0

# Relevant Rules and Standards

- 4.1. Messrs Toner, Crumlish, McGowan, and Kelly complained that police officers who interviewed them were guilty of Perverting the Course of Public Justice. In particular, they alleged that they were forced to make false statements implicating them in the murder of Lieutenant Kirby and a number of punishment shootings. These allegations must be considered within the wider context of policing in Northern Ireland in 1979 and the law and standards applicable to police conduct at that time.
- 4.2. At the time of the arrests, there was no legislation governing the actions of police officers when detaining or interviewing suspects. Police conduct was subject to the RUC Code of Conduct, Common Law principles, and the Judges' Rules and Administrative Directions to the Police 1964 (implemented in Northern Ireland on 8 October 1976). Messrs Toner, Crumlish, McGowan, and Kelly were arrested under section 11 of the Northern Ireland (Emergency Provisions) Act 1978 (the 1978 Act).
- 4.3. In order to understand the emergency legislation introduced at the time, which is related to the arrest and detention of suspects, it is necessary to consider the conflict that took place in Northern Ireland during the 1970s.

## Policing in Northern Ireland in the 1970s

- 4.4. In 1969, violence erupted in Northern Ireland which would continue for the next 30 years. The RUC was supported in its policing of the conflict by the deployment of the military to Northern Ireland in August 1969.
- 4.5. Throughout the 1970s, there were numerous allegations of ill-treatment made by detainees in police custody. A number of Committees and Inquiries were established to examine these allegations.
- 4.6. Between 9 and 10 August 1971, 342 people were interned on suspicion of being involved with republican paramilitaries. This operation, led by the military, was known as Operation Demetrius. Allegations were made by many of those interned that they had been physically abused by the security forces. This abuse included being forced to stand for prolonged periods of time, the use of hoods, sleep and food deprivation, and the use of electronic noise.<sup>12</sup>
- 4.7. The Compton Inquiry was established in November 1971 to examine these allegations, and its findings<sup>13</sup> were published in January 1972. It concluded that the above practices amounted to ill-treatment, but fell short of being torture. A further review by the Parker Committee in 1972 stated that the practices were unlawful.<sup>14</sup> The five practices were also considered by the European Court of Human Rights (ECtHR) in the case

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<sup>12</sup> In December 2021, the UK Supreme Court ruled that a PSNI decision in 2014 not to investigate allegations made by 14 men that they had been physically abused following their internments in 1971, was unlawful. The 14 individuals, known collectively as the 'Hooded Men,' alleged that they had been interrogated using the five techniques referred to in the body of this public statement. The PSNI decision followed a Raidió Teilifís Éireann (RTE) television documentary that referred to a British Government memorandum, known as the 'Rees Memo.' This memorandum '*referred to the use of torture and its approval by UK ministers.*' In December 2021, Lord Hodge ruled that the PSNI decision not to '*investigate further the allegation in the 'Rees Memo' was based on a seriously flawed report, was therefore irrational, and falls to be quashed.*'

<sup>13</sup> Sir Edmond Compton, 'Report of the enquiry into allegations against security forces of physical brutality in Northern Ireland arising out of events on 9<sup>th</sup> August 1971' (1971).

<sup>14</sup> Lord Parker of Waddington, 'Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism' (1972).

of Ireland v UK,<sup>15</sup> which concluded that they amounted to *'inhuman and degrading treatment.'*

4.8. In 1972, the violence in Northern Ireland reached new levels. Following the events of 'Bloody Sunday' on 30 January 1972, the United Kingdom (UK) Government imposed direct rule on 28 March 1972. A Commission was set up, chaired by Lord Diplock, to examine existing legal procedures for dealing with terrorist offences in Northern Ireland. Prior to the establishment of this Commission, the main means of dealing with terrorism related offences was by internment, under the Special Powers Act 1922.<sup>16</sup>

4.9. The Diplock Commission made recommendations relating to new powers of arrest, search, and detention. It recommended a different standard of test in respect of the admissibility of *'confessional'* statements.<sup>17</sup><sup>18</sup> These recommendations formed the basis of the Northern Ireland (Emergency Provisions) Act 1973 (the 1973 Act).

4.10. The 1973 Act introduced *'scheduled offences.'* These were specific offences detailed in schedule 4 of the Act. They included common law offences such as murder and manslaughter, as well as statutory offences such as those contained in the Offences Against the Person Act 1861. The Diplock Commission recommended that scheduled offences should be heard before a judge, with no jury. The 1973 Act enacted this recommendation, stating that *'a trial on indictment of a scheduled offence shall be conducted by the Court without a jury.'* These proceedings became commonly known as *'Diplock Trials.'*

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<sup>15</sup> [1978] 2 EHRR 1.

<sup>16</sup> Civil Authorities (Special Powers) Act (Northern Ireland) 1922.

<sup>17</sup> Lord Diplock, 'Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland' (1973).

<sup>18</sup> For the purposes of this public statement, the term *'confessional statement'* is to be interpreted objectively as the four complainants having made statements which were adverse to themselves, and which do not connote the Police Ombudsman having accepted that those statements were accurate or reliable.

- 4.11. The 1973 Act also created a threshold for the grounds on which an arrest could be effected, which was much lower than the test which is applied today. Schedule 11(1) of the 1973 Act gave constables the power to arrest any person ‘*suspected of committing, having committed or being about to commit a scheduled offence*’ or any other offence under the Act. Under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) in place today, a constable must now satisfy that there are ‘*reasonable grounds for suspecting*’<sup>19</sup> that a person has committed or is about to commit an offence. This in practice is a two part test,<sup>20</sup> and sets a higher bar than the 1973 Act.
- 4.12. Prior to the 1973 Act, the admissibility of ‘*confessional*’ statements depended on the prosecution proving beyond a reasonable doubt that the statement was a free and voluntary account. The accused could not be induced to make it by a promise of favour, or by menace or threats. This rule, known as the common law test of admissibility, was the guiding one in all cases not tried under the emergency legislation.<sup>21</sup>
- 4.13. The 1973 Act introduced the Diplock Commission’s recommendation for a substantially modified test in respect of ‘*confessional*’ statements. Section 6 of the 1973 Act stated that ‘*in any criminal proceedings for a scheduled offence a statement made by the accused may be given in evidence by the prosecution.*’ Under section 6, a statement of this kind would only be excluded if ‘*prima facie*’ evidence could be established that the accused had been subjected to ‘*torture or to inhuman or degrading treatment in order to induce him to make the statement.*’<sup>22</sup>

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<sup>19</sup> Article 26(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989

<sup>20</sup> The term ‘*reasonable grounds for suspecting*’ sets a two-part test which constables must satisfy. Firstly, does the arresting officer honestly suspect that ‘A’ has committed the offence?; and would a reasonable man be of that opinion, having regard to the information that was in the mind of the arresting officer? The latter part of this test was not required by the 1973 Act.

<sup>21</sup> R v McCormick and Others [1977] NI 105.

<sup>22</sup> s.6(2) The Northern Ireland (Emergency Provisions) Act 1973, re-enacted as s.8(2) The Northern Ireland (Emergency Provisions) Act 1978.

- 4.14. Interpretation of this provision was considered in *R v McCormick and others* [1977] where the court concluded that the terms ‘*torture or inhuman or degrading treatment*’ were derived from Article 3 of the ECHR.<sup>23</sup> In adopting this wording, the emergency legislation rendered acceptable coercive interrogation by police, which would not have been acceptable under the ‘*voluntariness*’ standard at common law.<sup>24</sup> Therefore, in ‘*Diplock*’ proceedings an accused’s confession was presumed admissible in the absence of any evidence of the investigator having forced a confession.
- 4.15. The Court in *R v McCormick* stated that, for treatment to fall within Article 3 of the ECHR, it must be treatment of a gross nature. Therefore, it was the view of the Court that, if section 6 of the 1973 Act was construed in the same way as Article 3, then it was acceptable for an Interviewing Officer to ‘*use a moderate degree of physical maltreatment for the purpose of inducing a person to make a statement.*’ However, the Court of Appeal in the case of *R v O’Halloran*<sup>25</sup> stated that the Court found ‘*it difficult in practice to envisage any form of physical violence which is relevant to the interrogation of a suspect in custody and which, if it had occurred, could at the same time, leave a court satisfied beyond a reasonable doubt in relation to the issue for decision under section 6.*’
- 4.16. In such circumstances, the 1973 Act provided the court with the discretion to exclude a confession if it decided that it would be appropriate to do so in order to avoid unfairness to the accused, or otherwise, in the interests of justice. Although it is clear that this legislation deemed any violence on the part of an Interviewing Officer to be unfair, there was a difference between a ‘*moderate degree of*

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<sup>23</sup> Article 3 (ECHR) – ‘*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*’

<sup>24</sup> Professor John Jackson, ‘Many years on in Northern Ireland: the Diplock legacy’ NILQ 60(2): 213-219, at 216.

<sup>25</sup> *R v O’Halloran* [1979] 2 NIJB 45.

*physical maltreatment*' that was permitted and violence that was prohibited.<sup>26</sup>

4.17. In October 1976, Home Office Guidance, appended with the Judges' Rules and Administrative Directions to Police,<sup>27</sup> was adopted in Northern Ireland. These Rules and Directions were initially introduced in England and Wales in 1964. The Judges' Rules were '*concerned with the admissibility in evidence...of answers, oral or written,*' and the Administrative Directions provided clarity to police as to how suspects should be treated during detention and questioning. They were guidance, as opposed to legislation. The Judges' Rules were underpinned by the following five core principles:

- I. That citizens have a duty to help a police officer to discover and apprehend offenders;
- II. That police officers, otherwise than by arrest, cannot compel any person against his will to come to, or remain, in any police station;
- III. That every person at any stage of an investigation should be able to communicate and consult privately with a solicitor. This is so, even if he is in custody, provided that, in such a case, no unreasonable delay or hindrance is caused to the progress of the investigation or the administration of justice in doing so;
- IV. That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence; and
- V. That it is a fundamental condition of the admissibility in evidence against any person, equally, of any oral answer

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<sup>26</sup> Carol Daugherty Rasnic, 'Northern Ireland's Criminal Trials without a Jury: The Diplock Experiment', [1999] Annual Survey of International and Comparative Law 5(1), at Article 9.

<sup>27</sup> Judges' Rules and Administrative Directions to the Police - Home Office Circular No. 31/1964.

given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

4.18. The overriding consideration in assessing the admissibility of statements was principle V, namely that the statement must be voluntary. I am of the view that the primary purpose of the Judges' Rules and Administrative Directions was the provision of guidance to police on how evidence should be collected and presented, so as to ensure its admissibility before the Court. Judges did not have a supervisory role in respect of police conduct, but advised how proceedings should be conducted in the courtroom. Although the Rules were formally adopted in Northern Ireland, their status remained unclear with some academics commenting that the Courts did not robustly and consistently apply them.<sup>28</sup>

4.19. The Home Office Guidance, to which the Rules and Administrative Directions were appended, provided additional guidance for police and stated that:

*'In giving evidence as to the circumstances in which any statement was made or taken down in writing, officers must be absolutely frank in describing to the court exactly what occurred, and it will then be for the Judge to decide whether or not the statement tendered should be admitted in evidence...'*

*'The Rules, which have been made by the Judges as a guide to police officers conducting investigations, should constantly be borne in mind, as should the general principles which the Judges have set out before*

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<sup>28</sup> Professor John Jackson, 'Many years on in Northern Ireland: the Diplock legacy' NILQ 60(2): 213-219, at 218.

*the Rules. But in addition to complying with the Rules, interrogating officers should always try to be fair to the person who is being questioned, and scrupulously avoid any method which could be regarded as unfair or oppressive.*'<sup>29</sup>

- 4.20. The Judges' Rules provided guidance to police officers regarding how after caution written statements were to be obtained. This included ensuring that the individual making the statement either wrote it themselves or told a police officer what to put in the statement. The Rules also provided guidance on the certification of statements.
- 4.21. In addition to the Judges' Rules, Appendix B of the Home Office Circular contained the '*Administrative Directions on the Interrogation and the Taking of Statements.*' These stated that '*a person in custody should be allowed to speak on the telephone to a solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice by his doing so.*' The Administrative Directions also directed that those in custody should be informed of their right to speak with a solicitor, and that notices highlighting such rights '*should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices.*'
- 4.22. Principle V of the Judges' Rules set out the circumstances and procedure by which an officer should, if they so wished, show a co-accused's statement to a person in custody. The Rules stated that if a police officer '*wishes to bring to the notice of [a person in custody] any written statement made by another person who in respect of the same offence has also been charged or informed he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment.*'

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<sup>29</sup> Judges' Rules and Administrative Directions to the Police - Home Office Circular No. 31/1964.

- 4.23. In considering the application of this Rule to police actions in respect of the four complainants when in custody, I am mindful that the relevant police officers indicated that they permitted the young men to speak with one another while the police officers remained in the room. This pre-charge interaction was not provided for in the Rules. I consider this in light of the express permission given to officers by the Rules in post-charge circumstances only, and that no other method of communication between suspects was allowed for.
- 4.24. The Court of Appeal, in the case of *R v Brown & others*<sup>30</sup>, highlighted that the Administrative Directions on Interrogation and the Taking of Statements, published by the Home Office, also provided guidance in relation to the interrogation of children and young people. Paragraph 4 of the Administrative Directions stated that *'As far as practicable children...should only be interviewed in the presence of a parent or guardian, or in their absence, some person who is not a police officer, and who is of the same sex as the child.'* This was reflected in the RUC Code of 1974, and was supplemented by the Children and Young Persons (Northern Ireland) Act 1968 (the '1968 Act') which states that *'where a child or young person is arrested or taken to a place of safety, such steps shall be taken as may be practicable to inform at least one person whose attendance may be required under this section.'* Under the 1968 Act, a child was defined as being under the age of 14 years, and a young person was someone of 14 years and over, but under the age of 17 years.
- 4.25. It is accepted that the complainants in this case did not fall into the definition of children or young persons, as provided for in the 1968 Act and, as a matter of law, were adults at the time of their confessions.

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<sup>30</sup> In the case of *R v Michael Devine (in the matter of a Statutory Referral by the Criminal Cases Review Commission)* [2021] NICA 7 Lord Justice McCloskey delivering the judgment of the Court of the Appeal, referenced the decision of *R v Brown* with approval.

4.26. The legal principles governing the admissibility of confessions at the time of the complainants' interviews are also explained in the Court of Appeal judgment in *R v Brown*, as follows:

*'[6] A confession is only admissible at common law if it is free and voluntary. The common law position is encapsulated in the Judges' Rules which were designed to secure that only answers and statements which were voluntary were admitted in evidence against their makers. The introduction of the 1964 edition which came into force in this jurisdiction on 8 October 1976 noted that the Judges Rules did not—*

*'affect the principles...*

*(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so...*

*(e) That it is a fundamental condition to the admissibility in evidence against any person, equally of any oral answer given by the person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.*

*The principle set out in paragraph (e) above is overriding and applicable in all cases...'*

*'[7] Oppressive questioning was described by Lord MacDermott in an address to the Bentham Club in 1968 as:*

*'questioning which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that this will crumble and he speaks when otherwise he would have stayed silent.'*

4.27. The Court of Appeal in *R v Brown* explained further the role and recommendations of the Diplock Commission as follows:

*'[9] 1972 was the worst year of civil unrest in Northern Ireland. In that year there were 467 people killed, 10,628 shooting incidents and 1853 bomb explosions or devices defused. The government convened a Commission Chaired by Lord Diplock to consider what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book individuals involved in terrorist activities. The Diplock Commission reported in December 1972. It concluded that witnesses were subject to intimidation by terrorist organisations and were thereby deterred from giving evidence. That also applied to jurors although not to the same extent. The Commission also noted that the detailed, technical common law rules and practice as to the admissibility of inculpatory statements were hampering the course of justice in the case of terrorist crimes.'*

*[10] The Commission concluded that trial by judge alone should take place of trial by jury for the duration of the emergency. It also recommended a departure from the common law test for the admissibility of confession statements. It concluded that a confession made by an accused should be admissible as evidence in cases involving scheduled offences unless it was obtained by torture or inhuman or degrading treatment; if admissible it would then be for the court to determine its reliability on the basis of evidence given from either side as to the circumstances in which the confession had been obtained. It recommended that the technical rules, practice and judicial discretions as to the admissibility of confessions ought to be suspended for the duration of the emergency in respect of the scheduled offences.*

*[11] Some but not all of the Commission's recommendations were implemented in the Northern Ireland (Emergency Provisions) Act*

1973. Section 6 of the 1973 Act provided for the admissibility of statements of admission.

*'(1) In any criminal proceedings for a scheduled offence a statement made by the accused may be given in evidence by the prosecution in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of subsection (2) below.*

*(2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or inhuman or degrading treatment in order to induce him to make a statement, the court shall, unless the prosecution satisfies them that the statement was not so obtained, exclude the statement or, if it has been received in evidence, shall either continue the trial disregarding the statement or direct that the trial shall be restarted before a differently constituted court (before whom the statement shall be inadmissible).'*

- 4.28. Clearly, my role is not to assess the admissibility of the impugned confessional statements made by the complainants. However, I must determine whether the conduct of police officers in obtaining those statements may have been such as to contravene the standards and guidance applicable, at that time. The relevance of the analysis carried out by the Court of Appeal in the case of *R v Brown* to my role demonstrates to me that, at the relevant time, provision did not speak to the standards expected of police officers' conduct when obtaining statements. This was notwithstanding that statements could be admissible in a criminal prosecution, if they had been obtained as a result of maltreatment which fell short of satisfying the provisions of section 6 (2) of the 1973 Act.

4.29. I consider that those standards expected of police officers meant that statements were to be obtained in an atmosphere which was free and voluntary. Further, the statements should not have been extracted as a result of oppressive questioning, in line with the Judges' Rules, paragraph (e). My conclusion in this regard is reinforced by virtue of the decisions of *R v Corey* (December 1973), *R v McCormick* [1977] NI 105, and *R v O'Halloran* [1979], as quoted with approval by the Court of Appeal in *R v Brown*. Although obtaining a statement in breach of the Judges' Rules would not render a confession inadmissible on that ground only, the courts retained a residual discretion to exclude these statements, if deemed to be in the interests of justice and the standards of fairness which prevailed at that time.

4.30. The Court of Appeal in the case of *R v Brown & others*<sup>31</sup> highlighted that the Administrative Directions also provided guidance in relation to the interrogation of children and young people. Paragraph 4 of the Administrative Directions stated that '*As far as practicable children...should only be interviewed in the presence of a parent or guardian, or in their absence, some person who is not a police officer, and who is of the same sex as the child.*'<sup>32</sup> This was reflected in the RUC Code of 1974, and was supplemented by the Children and Young Persons (Northern Ireland) Act 1968 which states that '*where a child or young person is arrested or taken to a place of safety, such steps shall be taken as may be practicable to inform at least one person whose attendance may be required under this section.*' Under the 1968 Act, a

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<sup>31</sup> *R v Brown & others* [2012] NICA 14 – These appeals were made during a review of the cases by the Criminal Cases Review Commission. In each of the cases, the appellants had been arrested and interviewed under the relevant Northern Ireland (Emergency Provisions) Act in force at the time of their arrest (1970s). Each of the appellants were aged either 15 or 16 years old, and none had access to a solicitor during their detention, nor did they have a parent or independent person present during interview. Each of the appellants had made admissions during their interviews, and were subsequently convicted of the crimes they had been arrested for. Three of the four appellants were arrested and detained at Strand Road RUC Station in Derry/Londonderry.

<sup>32</sup> The Home Office published further guidance in 1968 which confirmed that reference within the 'Administrative Directions on Interrogation and Taking of Statements' to '*children*' also included reference to '*young people*.'

child was defined as being under the age 14 years, and a young person was someone of 14 years and over, but under the age of 17 years.

- 4.31. In 1977, Holding Centres were opened by the RUC at Castlereagh, Belfast, and Gough Barracks, Armagh, specifically for the interviewing of persons suspected of terrorist offences. The introduction of the Prevention of Terrorism (Temporary Provisions) Act in 1974 allowed police to arrest and detain, for up to seven days, with the approval of the Secretary of State.<sup>33</sup> This constituted a move away from internment, with suspects being brought to court after questioning.<sup>34</sup> However, the introduction of these Holding Centres led to many complaints of ill-treatment, similar to those made by Messrs Toner, Crumlish, McGowan, and Kelly.
- 4.32. In 1978, Amnesty International published a report on interrogation practices in Northern Ireland.<sup>35</sup> It concluded that '*maltreatment of suspected terrorists by the RUC*' had taken place, and that '*legal provisions, which have eroded the rights of suspects held in connection with terrorist offences, have helped to create the circumstances in which maltreatment of suspects has taken place.*'<sup>36</sup>
- 4.33. In June 1978, the Honourable Roy Mason MP, then Secretary of State for Northern Ireland, in response to the Amnesty International report, announced that a Committee of Inquiry, headed by Judge Harry Bennett, was to be established. The role of the Committee of Inquiry was to examine police interrogation procedures in Northern Ireland. Its findings were published in March 1979.<sup>37</sup>

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<sup>33</sup> Prevention of Terrorism (Temporary Provisions) Act 1974.

<sup>34</sup> Professor John Jackson, 'Many years on in Northern Ireland: the Diplock legacy' NILQ 60(2): 213-219, at 217.

<sup>35</sup> Amnesty International, 'Report of an Amnesty International Mission to Northern Ireland' [1978].

<sup>36</sup> Ibid.

<sup>37</sup> Judge H G Bennett QC, 'Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland' [1979].

- 4.34. The Bennett Report stated that *'Medical Officers, in 1977 and early 1978, made representations about the treatment of prisoners and in some of the cases investigated by Amnesty International there was prima facie evidence that ill-treatment had taken place. Our own examination of medical evidence reveals cases in which injuries, whatever their precise cause, were not self-inflicted and were sustained in police custody.'*<sup>38</sup>
- 4.35. The Bennett Report recommended that a number of safeguards be put in place to prevent the physical abuse of persons suspected of terrorist offences.<sup>39</sup> However, the continued use of Holding Centres and *'Diplock Trials'* in Northern Ireland still concerned Human Rights organisations.<sup>40</sup>
- 4.36. By 1979, a number of steps had been taken to address concerns about the treatment of individuals suspected of terrorist offences in Northern Ireland, while in police custody. However, it is my view that these fell short of the relevant legislation and guidance in place today regarding the detention and treatment of suspects. The matters discussed in this chapter provide the context and background within which to investigate the complaints of Messrs Toner, Crumlish, McGowan, and Kelly. For the avoidance of any doubt, it should be clearly understood that the various Committees and Inquiries, detailed in this chapter, examined allegations that were not specific to the complaints made by Messrs Toner, Crumlish, McGowan, and Kelly. However, these are relevant given that they have assisted me in understanding the context and policing standards of the time.

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<sup>38</sup> Ibid at paragraph 404(16).

<sup>39</sup> Professor John Jackson, 'Many years on in Northern Ireland: the Diplock legacy' NILQ 60(2): 213-219, at 223.

<sup>40</sup> Ibid.

## 5.0

# The Police Ombudsman Investigation

- 5.1. Messrs Toner, Crumlish, McGowan, and Kelly made a number of complaints in respect of police actions during their time in custody at Strand Road RUC Station. They alleged that they were physically ill-treated/assaulted and subjected to mental abuse. They alleged that they were threatened and told that members of their family would come to harm if they did not make statements admitting their guilt. They alleged that the only evidence against them was fabricated statements. They alleged that their arrests and detentions were unlawful and that the actions of police forced them to flee Northern Ireland. There were also concerns raised about how police dealt with alibi witnesses.
- 5.2. They alleged that they were not allowed access to a solicitor or family member. They alleged that their statements were fabricated and obtained by oppressive and coercive means, and that police officers perverted the course of justice.
- 5.3. In 1979, police officers made contemporaneous handwritten notes when interviewing suspects in custody. These formed the basis for police statements of evidence that officers produced for related criminal proceedings. The original handwritten notes would not normally be submitted in court. When giving evidence, a police officer would refer to their related statement.
- 5.4. Messrs Toner, Crumlish, McGowan, and Kelly signed 21 *'confessional'* statements. My investigators obtained 20 of the original *'confessional'*

statements and one photocopy. PSNI were unable to locate any of the original police interview notes. However, Police Officer 1, when interviewed under criminal caution by my investigators, provided his notes relating to the interviews of Michael Toner. He stated that he had retrieved these notes from a police station in Belfast, where he had previously secured them for safe-keeping.

### **The Police Interviews of Messrs Toner, Crumlish, McGowan, and Kelly**

- 5.5. This public statement focuses on the complaints made by Messrs Toner, Crumlish, McGowan, and Kelly about the conduct of police. Therefore, it includes details of these complaints and the original '*confessional*' statements. In considering these complaints, I have sought to include as complete a narrative as possible. As such, this public statement provides details of the '*admissions*' made by Messrs Toner, Crumlish, McGowan, and Kelly to police while in custody.
- 5.6. Furthermore, in respect of the arrests of Mr Kelly and Mr McGowan I am unable to comment on their legality, as this is a matter for the Court. I acknowledge that all four complainants maintain their innocence and deny any involvement in the matters for which they made '*admissions*' in 1979. In 1998, they were found not guilty and acquitted of all the charges.
- 5.7. This investigation included a review of the detentions of Messrs Toner, Crumlish, McGowan, and Kelly. This included compiling a timeline of events detailing their interviews, statements they were purported to have made, medical examinations, meals, and visits.
- 5.8. The interviews of Messrs Toner, Crumlish, McGowan, and Kelly, took place at Strand Road RUC Station. They were conducted by 12 police officers from North Region Crime Squad, a policing unit that specialised in the interviewing of persons suspected of terrorist offences. Police interview

teams normally consisted of two police officers. Five of the Interviewing Officers, Police Officers 2, 3, 11, 12, and 14 are now deceased.

### **Police Interviews of Michael Toner**

- 5.9. Michael Toner and Stephen Crumlish were arrested on 26 February 1979. During his first interview, Michael Toner admitted to being a member of Fianna na h'Éireann<sup>41</sup> and having been involved in the punishment shooting on 18 February 1979. Police documentation reflected that Mr Toner stated that Messrs Crumlish, McGowan, and Kelly were also involved in this attack, but asked that this not be included in his statement. He later made statements detailing his role in the punishment shootings on 14 and 17 February 1979.
- 5.10. On 28 February 1979, police questioned Mr Toner about the murder of Lieutenant Kirby. He initially denied being involved but then asked if Stephen Crumlish had implicated him. When the Interviewing Officers made no response, he asked to speak to Stephen Crumlish. This meeting was not facilitated by police.

### **Police Interviews of Stephen Crumlish**

- 5.11. When first interviewed by police on 26 February 1979, Stephen Crumlish denied any involvement in the punishment shootings. When interviewed again on the morning of 27 February 1979, he admitted membership of Fianna na h'Éireann.
- 5.12. In a further interview later that day, he admitted having been involved in the punishment shooting on 18 February 1979. He stated that Michael Toner and Gerard Kelly were also involved, as was an individual with the surname McGowan.

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<sup>41</sup> Fianna na h'Éireann is an Irish nationalist youth organisation that was formed in 1909. It has been a proscribed organisation in Northern Ireland since 1920.

- 5.13. On 28 February 1979, police questioned Mr Crumlish about the murder of Lieutenant Kirby. Mr Crumlish asked if Michael Toner had implicated him. When the Interviewing Officers replied that they did not know, he confessed to having been a *'lookout'* during the murder. He also admitted to having been involved in the other three punishment shootings.

#### **Police Interviews of Gerald McGowan**

- 5.14. During their respective interviews, Michael Toner and Stephen Crumlish told police that Gerald McGowan and Gerard Kelly were involved in the punishment shootings and the murder of Lieutenant Kirby. The latter two individuals were subsequently arrested on 28 February 1979. Gerald McGowan initially denied any involvement. However, on 1 March 1979, he admitted having been a *'lookout'* during the murder of Lieutenant Kirby. He made this confession after police informed him that Michael Toner and Stephen Crumlish had implicated him in the murder.
- 5.15. Gerald McGowan continued to deny being involved in the punishment shootings until shown the statement of Gerard Kelly, which implicated him in the attack on 18 February 1979. He asked to speak to Gerard Kelly, which was facilitated on the afternoon of 1 March 1979, following which he admitted his involvement.

#### **Police Interviews of Gerard Kelly**

- 5.16. Gerard Kelly also admitted to having acted as a *'lookout'* during the murder of Lieutenant Kirby, when informed by police that Michael Toner and Stephen Crumlish had named him as having been involved. He also confessed to participating in three of the punishment attacks, adding that Gerald McGowan was involved in the punishment shooting on 18 February 1979.

- 5.17. None of the four young men had legal representation during their interviews. These were not legal requirements at the time. However, the Judges' Rules state that, as a core principle, every person, at any stage of an investigation, should be able to communicate and consult privately with a solicitor. All four complainants were examined by police doctors on a number of occasions. Gerard Kelly was also visited by his own doctor on 1 March 1979, following which he made allegations that he had been mistreated during his time in police custody. Michael Toner and Stephen Crumlish were visited by family members before and after they were charged, while Gerald McGowan and Gerard Kelly were visited by family members after they were charged.

### **The '*Confessional*' Statements of Messrs Toner, Crumlish, McGowan, and Kelly**

#### **Statements of Michael Toner**

- 5.18. Michael Toner was detained at Strand Road RUC Station for a total of 74 hours, 45 minutes. He was charged approximately 61 hours and 56 minutes into his detention. During this period he was interviewed 11 times by police. The interviews lasted a total of 16 hours, the majority of them conducted by Police Officers 1 and 2. They were present when Michael Toner made four of the six '*confessional*' statements recorded during his time in custody. The first of these was made on 26 February 1979.
- 5.19. In these statements, Michael Toner detailed acting as a '*lookout*' during the murder of Lieutenant Kirby and taking part in the punishment shootings on 14, 17, and 18 February 1979. He only admitted to the 14 February attack when informed by police that they possessed information indicating his involvement. None of the statements referred to any of his co-accused but police interview notes recorded that he verbally implicated Messrs Crumlish, McGowan, and Kelly.

### **Statements of Stephen Crumlish**

- 5.20. Stephen Crumlish was detained at Strand Road RUC Station for a total of 74 hours, 40 minutes. He was charged approximately 61 hours and 35 minutes into his detention. During this period he was interviewed 12 times by police. The interviews lasted for 22 hours, 35 minutes. He made eight statements during his time in custody, the first of these on 27 February 1979. Police Officer 3 was present when seven of these statements were recorded. The statements identified Messrs Toner, McGowan, and Kelly as having been involved in the other attacks.

### **Statements of Gerald McGowan**

- 5.21. Gerald McGowan was detained at Strand Road RUC Station for a total of 53 hours, five minutes. He was charged approximately 36 hours and 35 minutes into his detention. During this period he was interviewed seven times by police. The interviews lasted for 13 hours, 50 minutes. On 1 March 1979, he admitted acting as a *'lookout'* during the murder of Lieutenant Kirby, having been told by police that Michael Toner and Stephen Crumlish had named him as being involved. This interview took place between 2:10am and 2:50am. This was one of two interviews conducted after midnight by police.
- 5.22. Later that day, Gerald McGowan made a statement detailing his role in the punishment shooting on 18 February 1979. He did so after police informed him that Gerard Kelly had implicated him in the attack. Police Officer 3 was present when Gerald McGowan admitted to his involvement in the murder of Lieutenant Kirby and the punishment shooting on 18 February 1979.

### **Statements of Gerard Kelly**

- 5.23. Gerard Kelly was detained at Strand Road RUC Station for a total of 53 hours, five minutes. He was charged approximately 36 hours and 35

minutes into his detention. During this period he was interviewed seven times by police. The interviews lasted for 12 hours, 45 minutes. On 1 March 1979, he admitted to having been involved in the murder of Lieutenant Kirby, after police informed him that Michael Toner and Stephen Crumlish had implicated him. Police Officers 3 and 5 conducted this interview.

- 5.24. Police records indicate that Gerard Kelly subsequently made a total of four statements detailing his part in the murder of Lieutenant Kirby and three of the punishment shootings. In the statements, he also described the roles played by the other suspects. During an interview on the afternoon of 1 March 1979, he changed his account as to where he had been positioned as *'lookout'* during the murder. This ensured that his statement was consistent with Stephen Crumlish, who had also altered his version of events. Police Officers 3 and 5 were present during the recording of all four of Mr Kelly's statements.

### **Comparative Analysis of the *'Confessional'* Statements of Messrs Toner, Crumlish, McGowan, and Kelly**

- 5.25. This investigation compared the statements made by Messrs Toner, Crumlish, McGowan, and Kelly against those of victims and other witnesses. This was to establish whether any patterns existed that would support their complaints that the statements were made under duress. The analysis identified both similarities and inconsistencies in the accounts of all four individuals.

### **The Murder of Lieutenant Kirby**

- 5.26. Messrs Toner, Crumlish, McGowan, and Kelly made a total of seven statements relating to the murder of Lieutenant Kirby. Stephen Crumlish made three statements relating to the murder. He stated that the four of them were picked up beforehand in a white van, and then dropped off at various locations in the Abercorn Road area, where they were to act as

*'lookouts.'* He stated that following the murder, they were collected again in the same van and driven to another location. He stated that the night before, he had accompanied another man to pick up the van used in the murder. They had then driven to another location where the man had gone into a house and returned, carrying a rifle.

- 5.27. Michael Toner stated that they were picked up in a white van and he was dropped off at the top of Abercorn Road, where he was to act as a *'lookout.'* Following the attack, they were collected in the same white van but deposited at a location different from the one that Stephen Crumlish indicated.
- 5.28. Gerard Kelly stated that the white van dropped the four of them at the top of Abercorn Road. He stated that he walked to his designated *'lookout'* position. Upon hearing a shot, he then walked to the same location mentioned by Stephen Crumlish.
- 5.29. Gerald McGowan made his initial statement after police allowed him to consult with Gerard Kelly and read the latter's statement. He stated that the white van dropped them at their *'lookout'* positions. Afterwards, he returned to the same location referred to by Messrs Kelly and Crumlish. He later made a second statement, changing the location where he stood as a *'lookout'*, stating that afterwards he went to the location referred to by Michael Toner.
- 5.30. Messrs Toner, Crumlish, McGowan, and Kelly provided consistent accounts regarding their roles during the murder and the manner in which they were taken to the Abercorn Road area. However, there are a number of inconsistencies in the statements as to their locations after the murder and how they travelled there.

### **Punishment Shooting on 8 January 1979**

- 5.31. On 28 February 1979, Stephen Crumlish made a statement detailing his role in this attack, followed by Gerard Kelly the next day. Mr. Crumlish stated that he went to the door of the victim and informed him that there was a phone call for him at a nearby shop. He stated that when the victim left the shop a short time later, he carried out the punishment shooting. Michael Toner and Gerard Kelly held the victim down, while Gerald McGowan acted as driver.
- 5.32. Gerard Kelly stated that Stephen Crumlish went to the victim's front door and spoke to him regarding the phone call at a nearby shop. He added that when the victim came out of the shop he held him down and Michael Toner watched, while Mr. Crumlish carried out the shooting. He made no reference to Gerald McGowan being present during the attack.
- 5.33. There were inconsistencies between the accounts of Messrs Crumlish and Kelly, and the victim. These related to the location of the attack and the clothing worn by the assailants. The victim stated that he was attacked by three men, consistent with the accounts provided by Messrs Crumlish and Kelly.

### **Punishment Shooting on 14 February 1979**

- 5.34. Messrs Toner, Crumlish, McGowan, and Kelly provided five statements in total regarding this attack. Stephen Crumlish was the first to admit his involvement on the evening of 27 February 1979. He stated that he shot the victim, while Michael Toner and Gerard Kelly held him down. Gerald McGowan acted as the driver. He later provided a second statement detailing how he had hijacked a car the previous night for use in the attack, assisted by Michael Toner,

- 5.35. Michael Toner also made two statements regarding the attack. He stated that he went to the victim's house with two other men. He shot the victim once, while one of the other men shot him twice. In his second statement, he clarified that the victim was placed on the ground in the hallway prior to being shot. Michael Toner detailed the roles played by his co-accused but asked that police did not include their names in his '*confessional*' statements.
- 5.36. On the morning of 1 March 1979, Gerard Kelly made a statement regarding the attack. He stated that Michael Toner and Stephen Crumlish had previously hijacked a car for use in the attack. He stated that he held the victim down, while the other two shot him.
- 5.37. The statements made by Messrs Toner, Crumlish, and Kelly were not consistent with that of the victim regarding the location of the attack, number of shots fired, and clothing worn by the assailants.

#### **Punishment Shooting on 17 February 1979**

- 5.38. Michael Toner admitted his involvement in the attack on the morning of 27 February 1979. He stated that he had waited in a previously hijacked car with another male, while two other men carried out the shooting. Stephen Crumlish made a statement the following day. He stated that the other men held the victim down, while Michael Toner shot the victim in both legs. This version of events was consistent with the account provided by the victim. However, the account provided by Michael Toner was significantly different. Michael Toner was not charged in relation to this attack despite having made a '*confessional*' statement.

#### **Punishment Shooting on 18 February 1979**

- 5.39. Michael Toner made two statements regarding his role in this attack. In the first, he stated that he acted as a '*lookout*' while two other males carried out

the shooting. In his second statement, he detailed how the guns used in the shooting were collected from a house. Police interview notes indicated that he provided a third account which included information not contained within these statements. This included that Messrs Crumlish, McGowan, and Kelly were involved in the attack, in addition to information about the weapons used. There is no record of this information having been recorded in a further statement.

- 5.40. Stephen Crumlish also made two statements regarding the attack. In his first account, he stated that he acted as a *'lookout.'* He later provided a second account, stating that he and Michael Toner carried out the shooting. Gerard Kelly held the victim down, while Gerald McGowan was the driver.
- 5.41. Gerard Kelly stated that he carried out the shooting, while Gerald McGowan held the victim down. He added that Michael Toner and Stephen Crumlish acted as *'lookouts.'* Gerald McGowan only made a statement after he was allowed to speak to Gerard Kelly and read his account. He then provided a version of events consistent with the statements provided by Michael Toner and Gerard Kelly.
- 5.42. All four statements were mainly consistent until Stephen Crumlish made a second statement. All the accounts differed from the victim as to where the attack took place.

### **Summary of Comparative Analysis**

- 5.43. Section 11(3) of the Northern Ireland (Emergency Provisions) Act 1978 (the 1978 Act) states *'A person arrested under this section shall not be detained in right of the arrest for more than seventy two hours after his arrest.'*
- 5.44. The comparative analysis undertaken by my investigators did not identify any patterns that demonstrated a co-ordinated attempt by police to fabricate consistent accounts that incriminated Messrs Toner, Crumlish,

McGowan, and Kelly. Although some of the statements were similar in content, others contained inconsistencies. The only evidence linking the four suspects to the murder of Lieutenant Kirby and the punishment shootings were their ‘*confessional*’ statements.

- 5.45. The police officers subject to this investigation were involved solely in the interview process. It was not their responsibility to obtain additional evidence that may have strengthened or undermined the accounts of the suspects. The overall police investigation was conducted by police officers from the RUC’s Criminal Investigation Department (CID). The RUC Code<sup>42</sup> stated that ‘*the investigation, the collection of clues and the seeking of evidence generally must never be dropped or even relaxed merely because a suspect has confessed. The modern means of assistance now available to the police must be fully and properly employed to enable the production of all useful evidence in every case whether a confession has been made or not.*’

### **Witnesses**

- 5.46. This investigation identified 59 potential witnesses, including 38 former police officers. They included custody staff at Strand Road RUC Station, detectives, collators, Complaints & Discipline investigators, and an extradition unit officer.
- 5.47. Ten of these former police officers were deceased. However, of the remainder, 13 co-operated with my investigation. 12 civilian witnesses also provided accounts, including Persons A and B, a community representative in Derry/Londonderry at the time, and legal staff involved in the related criminal proceedings. I am grateful to those former police officers and civilian witnesses who co-operated with the investigation into these complaints.

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<sup>42</sup> RUC Code 12/76.

- 5.48. None of the witness accounts from former police officers corroborated any of the allegations made by the four complainants. Custody staff provided useful contextual information regarding the layout of Strand Road RUC Custody Suite. They also assisted my investigators in identifying the roles and responsibilities of relevant police personnel at the time.
- 5.49. None of the custody staff interviewed by my investigators witnessed any ill-treatment of Messrs Toner, Crumlish, McGowan, and Kelly. They all stated that they would have reported any ill-treatment to their supervisor, had they witnessed it. Their accounts were consistent with those made in 1979 to RUC Complaints & Discipline investigators.
- 5.50. My investigators established that interview notes and statements obtained during the questioning of Messrs Toner, Crumlish, McGowan, and Kelly would have been submitted to the local Collators Office before being forwarded to RUC Headquarters in Belfast. These documents would have been retained there for a period of time before being returned to Strand Road RUC Station. This documentation was not routinely retained by police officers who conducted the relevant interviews.

### **Forensic Linguistics Evidence – Expert 1**

- 5.51. This investigation commissioned an independent forensic linguistics expert, Expert 1, to examine all 21 '*confessional*' statements made by Messrs Toner, Crumlish, McGowan, and Kelly during their time in police custody.
- 5.52. Statement A was made by Gerard Kelly between 1:02am and 1:50am during an interview on 1 March 1979. In their statements, Police Officers 3 and 5 stated that Mr Kelly indicated he would prefer police to write his statement.

- 5.53. Statement B was made by Gerald McGowan between 2:20am and 2:40am during an interview on 1 March 1979. Again, this was in the presence of Police Officers 3 and 5. Statements A and B both related to the murder of Lieutenant Kirby.
- 5.54. Statement C was made by Gerard Kelly between 11:06am and 11:31am during an interview on 1 March 1979. Police Officers 3 and 5 were present during the recording of this statement.
- 5.55. Statement D was made by Gerald McGowan between 2:00pm and 2:10pm during an interview on 1 March 1979. Police Officers 3 and 6 were present during this interview. Police Officer 5 was present during part of the interview. Statements C and D related to the punishment shooting on 18 February 1979.
- 5.56. Expert 1 concluded as follows:

*'1. the confession statements attributed to McGowan and Kelly, numbers 15 and 18 respectively, which implicate them in the death of a British soldier, are too similar to have been produced independently;*

*2. if the timings of the two statements are correct, and McGowan did indeed write his own statement, that statement must have been produced, at least in part, on the basis of the Kelly statement, or on the basis of another unknown document on which the Kelly statement itself had also been based.'*

- 5.57. Expert 1 also stated that *'confession statements attributed to McGowan and Kelly, which implicate them in the kneecapping of (18 February 1979), are too similar to have been produced independently.'* He stated that *'the linguistic evidence is consistent with the claims by Kelly and McGowan that their statements were dictated to them.'*

- 5.58. Expert 1 also stated that Police Officer 5's '*account of the March 1<sup>st</sup> interview with Kelly, which started at 10:30 is seen to be problematic when set against the three Kelly statements timed as having been written during the interview.*' He stated that Police Officer's 5's '*account of the March 1<sup>st</sup> statement taking [sic] from McGowan which started at 2:20am is seen to be problematic as it claims McGowan wrote his own statement unaided, but implies an interview was taking place.*'
- 5.59. The findings of Expert 1 were forwarded to the PPS who requested that a second opinion be obtained.

### **Forensic Linguistics Evidence – Expert 2**

- 5.60. Expert 2 conducted a peer review of the evidence of Expert 1, stating that the latter's conclusions were '*entirely appropriate.*' He added that the linguistic evidence was '*strong.*'
- 5.61. Expert 2 examined Statement B and concluded that there was '*clear evidence of intervention in the statement by the interviewing officer(s).*' He also identified examples of unlikely formality in the relevant statements which did not exist in other statements made by Messrs Toner, Crumlish, McGowan, and Kelly.
- 5.62. He added, however, that the conclusion reached by Expert 1 regarding Police Officer 5's statement was circumstantial and the '*least definitive*' of his findings. I accept Expert 2's analysis of this issue.
- 5.63. Expert 2 concluded that the linguistics evidence '*cast serious doubt on the independence of the statements and on irregularities in the reporting of them.*'

## **Electrostatic Detection Analysis (ESDA)**

- 5.64. In September 2006, the original '*confessional*' statements of Messrs Toner, Crumlish, McGowan, and Kelly, in addition to maps used during their relevant interviews, were submitted to FSNI by my investigators for ESDA testing.
- 5.65. This documentation was examined for evidence that may have cast doubt on its authenticity. A Forensic Scientist concluded that there were no textual anomalies in the statements which had been written in the correct time sequence.
- 5.66. The examination revealed that one of Gerald McGowan's statements appeared to have been '*abandoned due to incorrect wording*' and re-written. However, this was not deemed significant as the declaration at the beginning of the initial statement had been transcribed incorrectly, resulting in a second statement being required.
- 5.67. The Forensic Scientist identified no irregularities in the body of the statements. No additions or alterations were detected and no indentations were found on any of the maps.
- 5.68. My investigators interviewed Police Officer 1 under criminal caution in May 2011. During interview he produced his original documentation relating to the police interviews of Michael Toner between 26 February and 1 March 1979.
- 5.69. This documentation was submitted for ESDA testing and nothing irregular was identified. Indentations found on a page of the relevant interview notes indicated that a page had been discarded after five lines had been written. The Forensic Scientist, however, could not identify the nature of this text.

## **Police Ombudsman Interviews of former Police Officers**

5.70. Twelve former police officers participated in the interviews of Messrs Toner, Crumlish, McGowan, and Kelly. My investigators interviewed ten former police officers under criminal caution for the offence of Perverting the Course of Public Justice. Police Officers 2 and 3 were deceased by that time. These interviews are summarised below.

### **Police Officer 1**

5.71. Police Officer 1 was interviewed under criminal caution in May 2011. He produced interview notes relating to Michael Toner which were submitted to FSNI for ESDA testing. He stated that he removed these from a filing cabinet at Strand Road RUC Station when he became aware that it had been left unsecured. He stored the interview notes at Knocknagoney Police Station until he retired. He retrieved them when he became aware that a Police Ombudsman investigation had commenced.

5.72. He stated that, prior to the interviews of Messrs Toner, Crumlish, McGowan, and Kelly, he would have been briefed about the punishment shootings. He could not recall how the murder of Lieutenant Kirby was introduced into the interview process. He recalled that Michael Toner was friendly and open during interview and did not appear to be frightened of police or republican paramilitaries.

5.73. He was involved in some, but not all, of the interviews of Michael Toner. He stated that any information obtained during an interview would have been passed to CID officers. Where a suspect was being implicated by a co-accused the former would have been shown the relevant incriminating statement and allowed to speak to the other party to confirm that this was correct. Police Officer 1 denied all the allegations.

### **Police Officer 5**

- 5.74. Police Officer 5 was interviewed under criminal caution in January 2012. He stated that he was a Special Branch officer in early 1979, but was attached to North Region Crime Squad. Special Branch would have briefed him about Messrs Toner, Crumlish, McGowan, and Kelly prior to the interviews. However, he could not recall the details of this briefing.
- 5.75. Police Officer 5 recalled the relevant interviews, stating that he asked Police Officer 3 on the third day to question the four suspects about the murder of Lieutenant Kirby as they were now *“running with the big boys.”* He stated that Police Officer 3 later informed him that he had been right in his suspicion as *“the boys were lookouts”* during the murder.
- 5.76. Police Officer 5 stated that interview notes would have been written during the interview. They were then used by Crime Squad officers to produce their duty statements which were submitted to CID. He could not explain why one of his statements was dated 5 September 1979 as he would have written them shortly after each interview.
- 5.77. He added that suspects were given the opportunity to write their own statements. Interviewing Officers would have ensured that all the relevant points were covered in these statements but they would not have been told what to put in them. It was standard practice to show suspects the statements of their co-accused and ask them to comment. He denied all the allegations.

### **Police Officer 6**

- 5.78. Police Officer 6 was interviewed under criminal caution in December 2011. He stated that he could not recall the investigation or being involved in the

interviews. He confirmed that he was a member of North Region Crime Squad at the time and his role would have mainly involved interviewing persons suspected of terrorist offences.

- 5.79. He stated that it would not have been unusual or improper for one suspect to have been shown the statement of another. This was accepted practice at the time. He denied all the allegations.

#### **Police Officer 7**

- 5.80. Police Officer 7 was interviewed under criminal caution in November 2011. He stated that he remembered the murder of Lieutenant Kirby but could not recall being involved in the interviews of the four suspects. He denied all the allegations, adding that any interview notes would have been forwarded to the local Collator's Office for secure storage.

#### **Police Officer 8**

- 5.81. Police Officer 8 was interviewed under criminal caution in October 2011. He stated that he could not recall the police investigation or being involved in the interviews. He denied all the allegations.

#### **Police Officer 9**

- 5.82. Police Officer 9 was interviewed under criminal caution in November 2011. He recalled the murder of Lieutenant Kirby and some of the related interviews, but not in any detail. He could not recall the punishment shootings but remembered that the four suspects were young men. He denied all the allegations.

### **Police Officer 10**

- 5.83. Police Officer 10 was interviewed under criminal caution in June 2011. He stated that police interviewed four suspects but he could only remember the surnames of Messrs Toner, Crumlish, and Kelly. He was present during a briefing but believed this only related to a punishment shooting and not the murder of Lieutenant Kirby. He recalled Michael Toner later admitting his involvement in both these offences. He denied all the allegations.

### **Police Officer 11**

- 5.84. Police Officer 11 was interviewed under criminal caution in October 2011. He could not recall the murder of Lieutenant Kirby, the punishment shootings, or being involved in the relevant interviews. He denied all the allegations.

### **Police Officer 12**

- 5.85. Police Officer 12 was interviewed under criminal caution in September 2011. He could not recall the murder of Lieutenant Kirby, the punishment shootings, or being involved in the relevant interviews. He established however, from his relevant journal, that he interviewed Stephen Crumlish on 26 February 1979, prior to attending a High Court hearing. He had no further involvement in the interview process and denied all the allegations.

### **Police Officer 13**

- 5.86. Police Officer 13 was interviewed under criminal caution in November 2011. He recalled the murder of Lieutenant Kirby, the names of Stephen Crumlish and Gerald McGowan, and preparing a file for the DPP. However, he could not recall specific details and denied all the allegations.

## **Additional Enquiries Arising from Police Ombudsman Interviews**

### **CCTV Camera Footage**

- 5.87. A number of the former police officers, during their respective under caution interviews, stated that there were CCTV cameras in interview rooms at Strand Road RUC Station in 1979. This investigation established that, although cameras had been introduced in some custody suites in Northern Ireland by then, they were for monitoring purposes only and did not record footage. My investigators were unable to establish if there were CCTV cameras in interview rooms at Strand Road RUC Station in 1979. Further, there is no reference to CCTV cameras in the relevant RUC Complaints and Discipline file.

### **Interview Notes Produced by Police Officer 1**

- 5.88. My investigators conducted enquiries at Knocknagoney Police Station, where Police Officer 1 stated he had stored the police interview notes relating to Person A. They examined the station's visitor book which recorded the details of all non-police staff who entered the premises. No details relating to Police Officer 1 were found.
- 5.89. My investigators searched a number of filing cabinets at Knocknagoney Police Station but found nothing relevant to the investigation.

### **RUC Complaints & Discipline Investigation**

- 5.90. My investigators spoke to the police officer in charge of the relevant Complaints and Discipline investigation. He recalled the details of the enquiry and confirmed its findings, but could add nothing of further relevance to the investigation.

## Extradition Enquiries

- 5.91. All four complainants stated that they were arrested by AGS after absconding to the Republic of Ireland. Michael Toner and Stephen Crumlish were detained in County Donegal, Gerald McGowan and Gerard Kelly in Dublin. All four also stated that AGS officers knew of their backgrounds and circumstances prior to releasing them.
- 5.92. Michael Toner stated that he was only held for a couple of hours and then released as AGS officers had received no extradition warrant from the RUC, which they described as unusual. Stephen Crumlish stated that a Garda told him that he knew who he was and why he had left Derry/Londonderry.
- 5.93. Gerard Kelly stated in his complaint to this Office that Gardaí found it ‘*strange*’ that the RUC had not sought extradition proceedings against him. He stated that he was advised to “*keep his head down,*” avoid certain pubs, and was then released.
- 5.94. My investigators made enquiries with PSNI’s Extradition Unit, the Crown Solicitors Office, the Attorney General’s Office, and the PPS to establish what, if any attempts, were made by the authorities to have Messrs Toner, Crumlish, McGowan, and Kelly returned to Northern Ireland.
- 5.95. PSNI Extradition Unit records revealed that extradition proceedings were not initiated. The unit retained a file relating to Gerard Kelly but this contained no documentation.
- 5.96. The Crown Solicitors Office held documentation relating to Messrs Toner, Crumlish, McGowan, and Kelly initiating civil proceedings against the Chief Constable.<sup>43</sup>

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<sup>43</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-foyle-west-47028146>

- 5.97. The Attorney General's Office confirmed that it had previously held extradition files in respect of Michael Toner and Gerard Kelly. In September 1992, the Attorney General directed that extradition was no longer an appropriate course of action. When my investigators made enquiries with the Attorney General's Office it confirmed that these extradition papers had since been destroyed as part of its retention and disposal policy.
- 5.98. The PPS confirmed that it held documentation relating to Gerard Kelly's extradition. This material was provided to my investigators.
- 5.99. Further enquiries established that police issued bench warrants and made regular checks regarding the status of Messrs Toner, Crumlish, McGowan, and Kelly between 1980 and 1986. Intelligence was received about their whereabouts throughout the 1980s and police in the Republic of Ireland informed the RUC in 1990 that Gerard Kelly was living in Dublin.
- 5.100. The relevant extradition arrangements at the time, between the United Kingdom and the Republic of Ireland, were governed by the Extradition Act 1965. This provided that '*Extradition shall not be granted for an offence which is a political offence or connected with a political offence.*' Research conducted by my Office established that the courts in the Republic of Ireland rarely sanctioned the extradition of individuals accused of terrorist offences for this reason. Therefore, in my view, no inference can be drawn from the failure to pursue extradition proceedings in this case.

#### **The PPS Direction**

- 5.101. My Office submitted a file of evidence to the PPS in June 2012 in respect of the allegations of Messrs Toner, Crumlish, McGowan, and Kelly. This contained all the relevant evidence gathered during this investigation, together with a recommendation that no officer be prosecuted.

- 5.102. In May 2014, the PPS issued a direction to prosecute Police Officers 5 and 6 for the offence of Perverting the Course of Public Justice. This related to two statements purportedly made by Gerald McGowan on 1 March 1979. None of the other former police officers subject to investigation were to be prosecuted.
- 5.103. The first statement, Statement B, was made between 2:20am and 2:40 am during an interview on 1 March 1979. It related to the murder of Lieutenant Kirby. Police Officers 3 and 5 conducted this interview. Police Officer 3 was deceased at the time the PPS directed regarding this matter.
- 5.104. The second statement, Statement D, was made between 2:00pm and 2:10pm during an interview on 1 March 1979. It related to the punishment shooting on 18 February 1979. Police Officers 3 and 6 conducted this interview. Police Officer 5 was present during part of it.
- 5.105. Experts 1 and 2 concluded that the two '*confessional*' statements made by Gerald McGowan on 1 March 1979 were too similar to two statements made by Gerard Kelly at 1:50am and 11:31am on the same date to have been produced independently. They added that, if the relevant interview times were correct, the statements of Gerald McGowan must have been copied from those of Gerard Kelly, or other unknown documentation on which the statement of Gerard Kelly was based.

### **Disclosure Issues**

- 5.106. The interviews of Messrs Toner, Crumlish, McGowan, and Kelly conducted by my investigators were tape recorded in accordance with best investigative practice. My investigators then prepared written statements from these tape recorded interviews which the four complainants read and signed.

- 5.107. Following the decision by the PPS to prosecute Police Officers 5 and 6 in May 2014, my investigators commenced the process of preparing disclosure schedules in accordance with the Criminal Procedure and Investigations Act (CPIA) 1996. Initial schedules detailing documentation and other material gathered during the course of the investigation were first provided to the PPS in September 2014. Early versions of these draft schedules did not list the tape recordings of the original interviews of Messrs Toner, Crumlish, McGowan, and Kelly in 2005.
- 5.108. In late September 2014, the legal representatives of Police Officers 5 and 6 then requested all accounts provided to my Office by Messrs Toner, Crumlish, McGowan, and Kelly. My Office then made the PPS aware of the tape-recorded accounts and was requested to prepare corresponding transcripts. Updated disclosure schedules which included reference to the tape recordings were later supplied to the PPS in December 2014.
- 5.109. The transcript of Gerald McGowan's tape recorded interview was found to differ from the witness statement subsequently signed by him. In the latter, he stated that police officers told him what to put in his relevant statement of 1 March 1979. However, in his tape recorded interview he stated that he told police he was involved in the attacks so he could be released from custody.
- 5.110. Upon reviewing this discrepancy, the PPS decided that there was no longer a reasonable prospect of a conviction and, shortly afterwards, offered '*no evidence*' against Police Officers 5 and 6, who were acquitted of the charges against them.
- 5.111. As a result of the PPS decision not to proceed with the prosecution, my predecessor, Dr Michael Maguire, commissioned an independent review by the Independent Police Complaints Commission<sup>44</sup> [for England and Wales] of the Police Ombudsman's procedures for disclosure to the PPS.

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<sup>44</sup> Now the Independent Office for Police Complaints (IOPC).

5.112. The former Chief Operating Officer from the IOPC who conducted the review was also an experienced crown prosecutor. He expressed the view that there were *'significant discrepancies between the witness statement in which McGowan effectively said that the confession was dictated to him by RUC officers, and the interview in which he said he pretended to be involved (in order to gain his release from custody).'* He was in agreement with the PPS decision to withdraw the case.

5.113. The IOPC review attributed the failure to identify these discrepancies to the approach taken by my staff to the disclosure process. This included a delay in the preparation of disclosure schedules until after the PPS had directed the prosecution of Police Officers 5 and 6 which, in part, had its origins in the under-resourcing of the investigation and *'an assumption that there would be no prosecution in this case.'*

5.114. In addition to making a number of recommendations for improvements in disclosure practices, the reviewing officer concluded:

*'Taking a purist view there was no failure in disclosure. There was no attempt to conceal material from the prosecution nor the defence. No innocent defendant was unjustly convicted. However, the fact remains that former RUC officers were charged with offences that could never be proved to a criminal standard and they stood in jeopardy for eight months.'*

*'Taking a more rounded approach I conclude that whilst legal, the approach to disclosure left much to be desired. Disclosure in CPIA terms was not considered before the submission of a file to the PPS. This was compounded by changes in personnel at key times.'*

*'I see no benefit in trying to attribute blame or fault, [This] was a long running investigation which was clearly under-resourced if the aim was to complete the investigation within a reasonable timescale. The risks of a*

*disclosure failure increase almost exponentially as cases grow stale. Looking at allegations from 1979 when starting in 2004 is a significant challenge – allowing the investigation to take 8 years makes that task significantly harder as the results in this case show.'*

- 5.115. Following the identification of inconsistencies by the PPS between the tape recorded account provided by Mr McGowan to my investigators in 2005 and the statement subsequently made from that recording, Dr Maguire referred this matter to PSNI. Following a police investigation the PPS directed 'No Prosecution' of any member of Police Ombudsman staff.

## 6.0

# The Complaints of Messrs Toner, Crumlish, McGowan, and Kelly

- 6.1. Messrs Toner, Crumlish, McGowan, and Kelly made statements of complaint to my Office that police officers were guilty of Perversion of the Course of Public Justice. They also made a number of specific allegations regarding their arrests and detentions by police. These can be categorised as follows:

### **That their arrests and detentions were unlawful**

- 6.2. Messrs Toner, Crumlish, McGowan, and Kelly alleged that their arrests and subsequent detentions were unlawful. As outlined by the Court of Appeal in *Re Hawthorne and White* the role of the Police Ombudsman is investigatory and not adjudicatory. Therefore I am unable to adjudicate on the lawfulness of an arrest or detention, as this is a matter which can only be determined by a Court.
- 6.3. This investigation has established that Michael Toner and Stephen Crumlish were arrested under section 11 of the 1978 Act<sup>45</sup>. These arrests occurred after police received an anonymous telephone call naming the young men as having been involved in a punishment

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<sup>45</sup> Under section 11 (1) of the 1978 Act, a police officer could 'arrest without warrant any person whom he suspects of being a terrorist.' The 1978 Act would define a 'terrorist' as someone 'who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organising or training persons for the purpose of terrorism.' At that time, the term 'terrorism' was defined as 'the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.'

shooting on 18 February 1979. During their police interviews, they both made ‘*confessional*’ statements, implicating Gerald McGowan and Gerard Kelly in a number of the attacks. This led to Messrs McGowan and Kelly being arrested on 28 February 1979, again under section 11 of the 1978 Act.

6.4. Following his arrest, Michael Toner was detained for a period of 74 hours and 45 minutes but was charged after 61 hours and 56 minutes in detention. Stephen Crumlish was detained for a period of 74 hours and 40 minutes but was charged after 61 hours and 35 minutes in detention. Gerald McGowan and Gerard Kelly were both detained for a period of 53 hours and 5 minutes but were charged after 36 hours and 35 minutes in detention. Under section 11 (3) of the 1978 Act, an arrested person cannot be detained, without charge, for a period of more than 72 hours after their arrest.

6.5. I am mindful of the low threshold for an arrest under terrorism legislation in 1979 and am unable to comment on the legality of the arrests. Although I am unable to adjudicate on the lawfulness of the detentions which are the subject of these complaints, I am critical of the timing, scheduling, and duration of the detentions. I detail my concerns in Chapter 8 of this public statement.

**That they were subjected to ill-treatment, including physical and mental abuse, during their time in police custody**

6.6. Michael Toner provided a statement of complaint on 13 February 2006, alleging that he was physically and mentally abused during his time in police custody. He stated that during police interviews he was slapped on the face and pulled by the hair. He was punched in the stomach and dragged off his chair onto the ground, prior to being kicked. He named five police officers as being involved. Police Officer 3, in particular, ‘*put*

*the fear of God*' into him. He stated that he was placed under '*relentless pressure*' and that '*the fear factor was just unbelievable.*'

- 6.7. Stephen Crumlish provided a statement of complaint on 28 September 2005. He stated that during his first day of detention he was not subject to physical ill-treatment/assault. However, when he continued to deny being involved in the attacks he was slapped across the face on more than one occasion and patted on the back of the head. He was also pulled off a chair before being thrown back onto it.
- 6.8. He stated that police told him what to say regarding the punishment shooting. He stated that he was verbally abused and struck on the head. He stated that he had to be constantly corrected as Michael Toner and him were contradicting each other in their accounts and '*getting things wrong.*' He stated that Police Officer 3 grabbed him by the neck and pushed him up against a wall. At one point, he stated that there were nine police officers in the interview room with him.
- 6.9. Gerald McGowan provided a statement of complaint on 28 September 2005. He stated that Police Officer 5 pulled his hair and forced his head back during an interview, while Police Officer 3 kicked him in the genital area. Police Officer 3 would then twist his arm behind his back, while Police Officer 5 kicked him in the stomach. He stated that police said they could knock him around the room and not leave any physical marks.
- 6.10. Gerard Kelly provided a statement of complaint on 14 February 2006. He stated that Police Officer 3 spread-eagled him against a wall and said he would have to stand there all night until he confessed. He stated that Police Officer 5 began '*laying into the back of my knee*' when Mr Kelly told him that he was recovering from a knee operation. He was repeatedly punched and prodded in the knee, causing '*unbearable pain.*'

- 6.11. He stated that Police Officer 3 stood behind and punched him in the back, while shouting obscenities at him. Every so often his head was pulled back by the hair. He described Police Officers 3, 5, and 13 as exceptionally vicious. Police Officer 4 did not touch him but was present during a number of the instances of physical ill-treatment/assault. It was Gerard Kelly's view that Police Officer 4 was in charge.
- 6.12. The 2001 Regulations state that complaints received under section 52 of the 1998 Act can only be considered if *'the complaint has not otherwise been investigated by the police.'* My Office cannot, therefore, investigate the physical ill-treatment/assault allegations made by Messrs Toner, Crumlish, McGowan, and Kelly as they were investigated by RUC Complaints and Discipline Branch in 1979.

**That they were threatened and told that members of their family would come to harm if they did not make statements admitting their guilt**

- 6.13. Michael Toner stated that his parents, brothers, and girlfriend were threatened and he was told that he and his parents would be *"executed"* by the Ulster Volunteer Force (UVF) if he did not admit to a punishment shooting.
- 6.14. Stephen Crumlish stated that he was asked how would he like his mother to come and identify his body. He stated that police officers interviewing him made inappropriate sexual comments about his parents.
- 6.15. Gerald McGowan stated that Police Officer 3 told him he would make sure he would be put away for life. The same police officer stated that, if did not make a statement, the judge would regard him as a *'ringleader.'* Police Officer 3 stated that he would arrange for him to be shot and would rape his teenage sister.

- 6.16. Gerard Kelly stated that Police Officers 6 and 7 ripped up his first statement, calling him a *'murdering bastard.'* Police Officer 8 threatened to arrest his brothers and tell PIRA that a family member worked at a local naval base. Police threatened to have him or his family shot.
- 6.17. My investigators interviewed ten police officers, who were involved in the interviewing of the four complainants. These interviews were conducted under criminal caution. All of the officers denied the allegations put to them. This investigation has been unable to conclude whether there were CCTV cameras in Strand Road RUC Station at this time. There is no third party witness evidence to support or refute the allegations of Messrs Toner, Crumlish, McGowan, and Kelly. Custody staff interviewed by my investigators stated that they did not witness suspects being mistreated or threatened.

**That they were not allowed access to a solicitor or family member**

- 6.18. Michael Toner stated that he was allowed access to a solicitor only after he was charged. He was allowed a brief visit from his father after he had signed *'confessional'* statements. Stephen Crumlish also stated that he was denied the right to legal representation and advice, but was permitted to see his parents. Gerald McGowan stated that he asked to see a solicitor but police would not allow this until he signed a statement. Gerard Kelly stated that he was never informed of his rights of access to a solicitor.
- 6.19. My investigators reviewed all the available custody documentation. This confirmed that none of the four suspects received a visit from a solicitor until after they had been charged with the murder of Lieutenant Kirby and the punishment shootings.
- 6.20. In 1979, RUC actions were subject of Home Office guidance which included the 1964 *'Judges' Rules and Administrative Directions to the*

*Police*’ which were introduced in Northern Ireland in 1976. One of the five core principles contained within the Rules was *‘That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so, even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by him doing so.’*

6.21. *‘The Administrative Directions on Interrogations and Taking Statements’*, which were introduced in Northern Ireland in Home Office guidance alongside the Judges’ Rules in 1976, provided that *‘A person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice.’*

6.22. The Administrative Directions also directed that those in custody should be informed of their right to speak with a solicitor, and that notices highlighting such rights *‘should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices.’*

6.23. I have found no contemporaneous evidence that Messrs Toner, Crumlish, McGowan, and Kelly had access to a solicitor before they were charged.

**That their statements were fabricated and obtained by oppressive and coercive means**

**That the only evidence against them was fabricated statements**

**That they only agreed to make statements as they were frightened and wanted to be released from custody**

- 6.24. Michael Toner stated that, at times, there were four or five police officers in the interview room with him. He was placed under relentless pressure and would have done anything to get out of the police station. He stated that, on 27 February 1979, police provided him with the details of the punishment shootings and, as he was so afraid, he signed the relevant '*confessional*' statements.
- 6.25. Mr Toner stated that, the following day, police provided him with information regarding the murder of Lieutenant Kirby. He stated that he signed the statements to stop the physical and mental abuse. He recalled, at one point, being placed in a cell with Stephen Crumlish and Gerard Kelly to '*get facts right.*'
- 6.26. Stephen Crumlish stated that, despite the physical and mental abuse, he initially denied being involved in any of the attacks. He asked to speak to Michael Toner who told him that he had implicated him in one of the attacks. Stephen Crumlish stated that, upon hearing this, he felt '*hopeless.*' He decided to tell police what they wanted to hear so that they would leave him alone and it would all be over.
- 6.27. Mr Crumlish stated that police placed red and green cards in front of him, so that he could read them and '*get my story right.*' Police became annoyed when the accounts did not match, and repeatedly corrected his statements. He was subjected to constant physical and mental abuse during this process. At one point, police told Gerald McGowan that Mr Crumlish had implicated him in at least one of the attacks.
- 6.28. He stated that he was allowed to see his parents, which caused him to break down. After this, he confessed to being involved in the murder as he was at his lowest point. He stated that he was tired and wanted to go home. He asked police to write out his statements as his spelling was poor.

- 6.29. Gerald McGowan stated that police told him that Stephen Crumlish and Gerard Kelly had made statements implicating him in the attacks. They stated that he would be taken to Castlereagh RUC Holding Centre and not allowed to see a solicitor until he signed a statement.
- 6.30. Mr McGowan stated that he was '*green*', naïve, and very frightened. Police told him that Messrs Toner, Crumlish, and Kelly had all made statements and that, if he did not, the judge would view him as the '*ringleader*' and sentence him to life imprisonment. He was tired, frightened, and prepared to sign anything if police would leave him alone. He stated that police told him what to put in the statements and he wrote them. He concluded that there was not '*a shred of truth*' in them.
- 6.31. Gerard Kelly stated that he was '*petrified*' and would have signed anything to end the '*torture and suffering I was going through.*' Mr Kelly only signed the statements as he could no longer take the abuse. They were '*a tissue of lies from beginning to end.*' He stated that police told him what to put in the statements and altered and amended them as required.
- 6.32. All four complainants provided my Office with consistent accounts, stating that they were physically and mentally abused for a sustained period of time at Strand Road RUC Station. They stated that this treatment resulted in them agreeing to sign '*confessional*' statements, implicating them in the murder of Lieutenant Kirby and a number of punishment shootings. They alleged that the statements were all fabricated and obtained under duress.
- 6.33. My investigators interviewed ten former police officers, under criminal caution, in relation to the complainants' claims that those officers had perverted the course of justice. The former police officers who were interviewed all denied the allegations. Police Officers 2 and 3 were

deceased at that time and self-evidently the complainants' allegations could not be put to them. There were no CCTV cameras or witness evidence to support the allegations. The RUC Complaints and Discipline investigation into the assault allegations did not uphold their complaints.

6.34. ESDA testing of the available statements and police interview notes identified no irregularities. However, Experts 1 and 2 identified issues with four 'confessional' statements made by Gerald McGowan (Statements B and D) and Gerard Kelly (Statements A and C). Both experts concluded that they could not have made their statements independently of one another. Based on this evidence, the PPS directed that Police Officers 5 and 6 be prosecuted for the offence of Perverting the Court of Public Justice. These charges were later withdrawn for reasons detailed at Chapter 5 in this public statement.

**That the actions of police forced them to flee Northern Ireland, depriving them of a family life**

6.35. Messrs Toner, Crumlish, McGowan, and Kelly all absconded to the Republic of Ireland during their criminal trial in October 1980. They resided there until the DPP withdrew the charges against them in December 1998. All four complainants alleged that they had no choice but to do so, the actions of police having deprived them of the opportunity to have a fair trial, under Article 6 of the ECHR.<sup>46</sup> They added that the actions of police also deprived them of the right to a family life, under Article 8<sup>47</sup> of the ECHR.

6.36. Michael Toner stated that he was unable to attend the funerals of his father, sister, and brother, and he asserted that he was unable to grieve

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<sup>46</sup> Article 6 (ECHR) – '*...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*'

<sup>47</sup> Article 8 (ECHR) – '*Everyone has the right to respect for his private and family life, his home and his correspondence.*'

for them properly. He stated that the actions of police destroyed him as a human being, removing all of his Human Rights in the process.

6.37. Stephen Crumlish stated that he returned to live in Northern Ireland a year before his acquittal. His sister died during his time in the Republic of Ireland. He stated that he was forced to live in exile which prevented him from attending family baptisms, weddings, and funerals. He was forced to live under *'a cloud of suspicion, rumour, and innuendo.'*

6.38. Gerald McGowan stated that his life was changed forever because of the actions of the RUC. He stated that he now suffers from Post-Traumatic Stress Disorder, has panic attacks, and has been left emotionally scarred and fragile. He contended that he had been denied access to his home, his family, and a possible career as a professional footballer.

6.39. Gerard Kelly stated that his basic Human Rights had been fundamentally violated. He asserted that the actions of RUC officers had a *'devastating'* effect on his physical and mental health. His knee remains painful and tender and he suffers from Post-Traumatic Stress Disorder. He stated that he was forced to live in exile and was unable to attend his father's funeral.

**That there were also concerns about how police dealt with alibi witnesses**

6.40. Michael Toner and Gerald McGowan raised concerns with my Office regarding the manner in which police dealt with alibi witnesses provided by them. They alleged that police intimidated witnesses by accusing them of lying and threatened to prosecute them for perjury.

6.41. My investigators identified eight alibi witnesses who provided statements to police. Seven of these assisted my investigation. Five of

them provided accounts which did not support the complaints and concerns raised by Michael Toner and Gerald McGowan.

6.42. Michael Toner stated that an alibi witness provided by him, Person A, was threatened by Police Officer 4. He allegedly threatened to '*send Michael Toner away for 30 years,*' as well as Person A for '*telling lies.*' Person A informed my investigators that Police Officer 4 was hostile towards him but did not recall being threatened with perjury.

6.43. A second alibi witness, Person B, informed my investigators that Police Officer 4 was '*aggressive and domineering*', ripping up three versions of her witness statement. She made no complaint at the time, but stated it was a traumatic experience that had '*instilled fear*' in her.

# 7.0

## Procedural Fairness

### Introduction

- 7.1. In concluding this public statement, I am mindful of the need to ensure procedural fairness to those who may be affected by its content. Mr Justice McCloskey (as then) in the High Court in *Re Hawthorne & White* provided guidance to this Office as to what was generally required. In particular, I have considered relevant passages from that judgment which I outline here for ease of reference, highlighting the requirements of procedural fairness in this context:

*[113] In my judgment, it matters not that the police officers thus condemned are not identified. There is no suggestion that they would be incapable of being identified. Further, and in any event, as a matter of law it suffices that the officers condemned by the Police Ombudsman have identified themselves as the subjects of the various condemnations. Procedural fairness, in this kind of context, cannot in my view depend upon, or vary according to, the size of the readership audience. If there is any defect in this analysis it is of no consequence given that the overarching purpose of the conjoined challenge of the second Applicant, Mr White, belongs to the broader panorama of establishing that reports of the Police Ombudsman couched in the terms considered exhaustively in this judgment are unlawful as they lie outwith the Ombudsman’s statutory powers.*

*[114] The somewhat different challenge brought by Mr White, imbued by corporate and broader ingredients, gives rise to the following conclusion, declaratory in nature. Where the Police Ombudsman, acting within the confines of his statutory powers, proposes to promulgate a “public statement” which is critical of or otherwise adverse to certain persons our fundamental requirements, rooted in common law fairness, must be*

*observed. First, all passages of the draft report impinging directly or indirectly on the affected individuals must be disclosed to them, accompanied by an invitation to make representations. Second, a reasonable period for making such representations must be permitted. Third, any representations received must be the product of conscientious consideration on the part of the Police Ombudsman, entailing an open mind and a genuine willingness to alter and/or augment the draft report. Finally, the response of the individual concerned must be fairly and accurately portrayed in the report which enters the public domain.'*

7.2. This process, sometimes called 'Maxwellisation', involves four fundamental requirements as outlined by Mr Justice McCloskey:

- I. That all passages of the draft public statement impinging directly or indirectly on the affected individuals must be disclosed to them, accompanied by an invitation to make representations;
- II. A reasonable period for making such representations must be permitted;
- III. Any representations received must be conscientiously considered, entailing an open mind and a genuine willingness to alter and/or augment the draft report; and
- IV. The response of the individual concerned must be fairly and accurately portrayed in the statement that is published.

## **The 'Maxwellisation' Process**

- 7.3. In order to give the officers concerned a fair opportunity to respond to any proposed criticisms in this public statement, correspondence was forwarded on 11 October 2021 from this Office to Police Officers 1, 4, 5, 6, 7, 8, 9, and 12 along with extracts from the draft public statement that impinged directly or indirectly on them, seeking their comments. A period of 30 days, from receipt of that correspondence, was provided in order for the individuals to respond.
- 7.4. Police Officers 1, 4, 5, and 6 forwarded written responses to my Office, raising a number of issues and concerns. The contents of their correspondence was the subject of careful and conscientious consideration by me. Following their responses, my Office responded in writing to their issues and concerns. No responses were received from the other former police officers referred to in this public statement.

### **Police Officer 1**

- 7.5. Police Officer 1 stated that Mr Toner was neither physically nor mentally abused by him or any of his colleagues during his period of detention at Strand Road RUC Station. He stated that he did not take advantage of Mr Toner's age or vulnerability. Police Officer 1 stated that the statements made by Mr Toner were not fabricated and were not obtained by oppressive or coercive means.
- 7.6. Police Officer 1 stated that Mr Toner did not ask for a solicitor and explained the process if Mr Toner had requested one. This would have involved Police Officer 1 recording the request in writing and notifying the Custody Sergeant who, in turn, would have informed the Duty Superintendent. After consulting with the SIO leading the investigation, the Duty Superintendent would then have decided whether or not the

detained person was allowed legal representation. Police Officer 1 stated that he would have played no role in this decision-making process.

7.7. Police Officer 1 believed that allowing Mr Toner legal representation, had he requested it, would have impeded or unreasonably delayed the RUC investigation and the administration of justice. Police were still seeking to arrest other individuals involved in the murder and to recover the weapon used in the attack.

7.8. Police Officer 1 stated that he was not involved in the arrest of Mr Toner and the detention process was not his responsibility. He added that Home Office guidelines and Judges' Rules were adhered to at all times. He stated that the allegations against him and his colleagues had been '*made up.*' He contended that the views and criticisms contained within the draft public statement were mistaken, inaccurate, and unjust.

#### **Police Officer 4**

7.9. Police Officer 4 stated that the Police Ombudsman was not entitled to make '*evaluative judgments*' concerning his conduct. The Police Ombudsman's authority was limited to evaluating the evidence which her investigation had uncovered. This allowed her to arrive at a decision as to whether or not to recommend criminal proceedings to the PPS or, in the case of a serving police officer, to recommend disciplinary proceedings to the Chief Constable. The views of the Police Ombudsman had no legal status outside of her Office.

7.10. He stated that my Office intended to publish defamatory material concerning him, adding that he had been provided with insufficient evidence/material to allow him to respond to criticism. He stated that the information supplied to him by my Office was partial, lacked context, and contained no evidence/material of his alleged involvement in the matters subject to this public statement. He stated that the public statement

appeared unbalanced, unjust, and *'ultra vires.'* The *'evaluative judgments'* levelled against him by the Police Ombudsman were vexatious, disproportionate, and hurtful.

- 7.11. Police Officer 4 stated that my Office had presented him with extracts from a draft public statement relating to serious matters that took place 42 years ago, yet expected him to commit his reputation to a response within 30 days without having viewed the evidence. This conduct represented an extraordinary and unacceptable breach of his rights under Articles 6 (Right to a Fair Trial) and 8 (Right to Privacy) of the ECHR.
- 7.12. Police Officer 4 stated that he was not present during the interviews of Messrs Crumlish, Toner, McGowan, and Kelly. He stated that it was *'physically impossible'* for him to have supervised the interview process as he had been attending a trial in Belfast on the dates in question. At its conclusion, he returned to Strand Road RUC Station where he received a telephone call from Father Denis Faul, asking him to speak to relatives of the four detained individuals. He agreed to meet with these relatives.
- 7.13. Police Officer 4 stated that he became involved in the investigation only after Messrs Crumlish, Toner, McGowan, and Kelly had already been charged and remanded in custody. He stated that he supervised the interviews of alibi witnesses, and recorded many of their statements himself. He denied threatening or being hostile to any of these witnesses, adding that he always acted with integrity and in a professional manner. He stated that it would have been *'bizarre'* for a senior police officer involved in the interviews of suspects to have then supervised the recording of alibi witness statements.
- 7.14. Police Officer 4 stated that the public statement implied that he oversaw a course of conduct designed to produce charges and convictions by improper means, which cannot be interpreted as anything other than attempting to pervert the course of justice. He challenged my Office to

produce any evidence of such conduct on his part and forward it to the PPS. Any other course of conduct on the part of the Police Ombudsman would be, in his opinion, *'ultra vires.'*

7.15. Police Officer 4 concluded that the allegation that he had supervised the interview process left him bewildered, anxious, and experiencing disturbed sleep patterns. He valued his *'good character'* and felt hurt that a public body, *'without a shred of evidence,'* would suggest otherwise.

7.16. Mr Kelly alleged that Police Officer 4 was present during the interview process at Strand Road RUC Station. He stated that Police Officer 4 was not directly involved in the physical and mental abuse but *'knew what was going on.'* My investigators have reviewed the available police documentation, including Custody Records and statements of other police officers involved in the interview process. My investigators also reviewed the relevant RUC Complaints and Discipline file of evidence. None of the above documentation made any reference to Police Officer 4 having been involved in the interview process.

7.17. I have carefully considered the above concerns raised by Police Officer 4 and have responded in writing to these, prior to the release of this public statement. My Senior Director of Investigations also met with Police Officer 4 to discuss the issues he had raised in his correspondence.

7.18. My Senior Director of Investigations engaged directly with Police Officer 4 in relation to matters raised by him during the *'Maxwellisation'* process. Specifically, Police Officer 4 explained that during the period of detention and interviews of Messrs Toner, Crumlish, McGowan, and Kelly at Strand Road RUC Station he had been occupied attending court proceedings and was not involved, in any way, in the planning, arrests, detention, or supervision of the complainants.

- 7.19. Police Officer 4 stated that he attended a Preliminary Enquiry at Londonderry Magistrates Court on 26 February 1979 and Belfast City Commission in relation to the trial of six men charged with terrorism offences between 27 February and 1 March 1979.
- 7.20. In researching the criminal proceedings signposted by Police Officer 4, my investigators engaged with the PPS, PRONI, and NICTS. They viewed archived records which supported Police Officer 4's recollection of attending the relevant court proceedings. Therefore, I am of the view that Police Officer 4 was occupied at Londonderry Magistrates Court on 26 February 1979 and Belfast City Commission between 27 February and 1 March 1979.
- 7.21. I am of the view, given the available evidence, that Police Officer 4 was not involved in the RUC investigation prior to the charging and remand of Messrs Toner, Crumlish, McGowan, and Kelly. As such, any references to him having been involved in this initial stage of the investigation, with the exception of the allegation of Mr Kelly, have been removed from this public statement. Allegations relating to Police Officer 4 made by the complainants and other witnesses have been retained, in order to ensure that the complaints made to my Office are fully reflected in this public statement.

### **Police Officer 5**

- 7.22. Police Officer 5 stated that my Office had no power to issue a public statement in relation to conduct which had already been the subject of criminal and/or disciplinary proceedings, referring to Regulation 6(5) of the RUC (Complaints etc.) Regulations 2001.
- 7.23. Police Officer 5 stated that it was not the role of the Police Ombudsman at any point, but particularly after criminal proceedings had concluded, to make broad findings that '*confessional*' statements had been obtained

involuntarily and within a *'coercive atmosphere.'* He stated that this constituted a finding of criminal or disciplinary wrongdoing which was *'ultra vires.'*

- 7.24. Police Officer 5 stated that there was no requirement, under the Judges' Rules, for the complainants to have been accompanied by a solicitor during their time in police custody. He stated that none of the complainants ever asked him could they speak to a solicitor. Police Officer 5 stated that the four complainants were not entitled to special measures under the Judges' Rules as they were all aged over 17 years of age.
- 7.25. Police Officer 5 stated that the complainants were medically examined on a number of occasions, but no physical injuries were identified. Police Officer 5 asserted that the complainants made no allegations of ill-treatment during their detention periods. Police Officer 5 referred to a medical examination of Mr Toner on 1 March 1979, during which Mr Toner informed a police doctor that he was being treated well. Subsequent allegations made by the four complainants had been subject to an extensive RUC Complaints and Discipline investigation.
- 7.26. Police Officer 5 stated that Linguistics Experts 1 and 2 only made adverse findings in relation to four of the 21 *'confessional'* statements. Police Officer 5 stated that Expert 1 prefixed his concluding comments as *'suggestions'* as opposed to findings. He stated that Expert 1 had concluded that there was no evidence to support claims that Statements A and C were not authentic records. He stated that ESDA testing had confirmed that the statements were written in the correct time sequence.
- 7.27. Police Officer 5 stated that linguistics evidence, which suggested statements were not produced independently of one another, did not indicate that they had not been obtained voluntarily or that they were not true accounts.

- 7.28. He stated that he was interviewed by my investigators 33 years after the interviews of Messrs Toner, Crumlish, McGowan, and Kelly. He stated that my investigators could not locate all the relevant RUC interview records. He denied that police officers told Messrs McGowan and Kelly what to put in their statements, adding that they were written in their own hand. He referred to his interview with my investigators where he stated *that 'it has to be their words but at the same time you do confer.'* He stated that Interviewing Officers would have sought clarification from the individual writing the statement.
- 7.29. Police Officer 5 stated that RUC records evidenced that Mr McGowan asked to speak to Mr Kelly and also read his relevant statement regarding a punishment shooting. He stated that it would not have been a breach of the Judges' Rules for statements of co-accused to have been shown, or put to each other, or for them to speak to each other. Expert 1 had stated that this could explain the similarities in the two statements.
- 7.30. Police Officer 5 stated that concerns regarding the recording of three statements from Mr Kelly during an interview on 1 March 1979 were not put to him, when he was interviewed by my investigators. Police Officer 5 stated that my Office should have in its possession a statement from him referring to the recording of these statements from Mr Kelly during the relevant interview. He stated that any conclusions reached by Experts 1 and 2, that did not relate specifically to linguistics, were *'opinion'* and not evidence.
- 7.31. Police Officer 5 stated that Expert 2, in his relevant report, raised concerns about the language used in Statement B. Expert 2 stated that it was written in the third-person narrative, as opposed to first-person. Expert 2 stated that this indicated *'clear evidence of intervention in the statement by the interviewing officer.'*

- 7.32. Police Officer 5 stated that this was a *'major factual error'* by Expert 2. He stated that Statement B contained no third-person narrative, but was written in the first-person. He stated that Expert 2 appeared to have been erroneously referring to Police Officer 5's statement, as opposed to the statement of Mr McGowan. He stated that this finding of Expert 2 was mistaken and could not be included in the public statement. Police Officer 5 added that observations made by Expert 2 in his report regarding the *'unlikely formality'* of the language in this statement were suppositions, incomplete, and beyond what had been asked of him.
- 7.33. Police Officer 5 stated that he could be identified from one section of the public statement through a process of *'jigsaw identification.'* Police Officer 5 stated that the recommendations made in the file of evidence submitted by my Office to the PPS should be included in the public statement. He asked why the PPS prosecution did not proceed and whether it was correct that Mr McGowan was recorded as saying that the alleged abuse had not been physical. I have carefully considered the representations made by Police Officer 5 through his solicitor and have responded in detail in respect of the issues of vires and alleged reputational damage. Where appropriate, I have addressed his comments on evidential issues in the relevant chapters of the public statement. I can confirm that my Office recommended to the PPS that no police officer be prosecuted in respect of the allegations made by Messrs Toner, Crumlish, McGowan, and Kelly.

#### **Police Officer 6**

- 7.34. Police Officer 6 stated that the extracts of the public statement forwarded for his consideration were *'full of innuendo and totally void of any evidence.'* He stated that none of the complainants asked to speak to a solicitor and, if they had, this request would have been facilitated.

- 7.35. He stated that the *'opinion'* of the linguistics experts was not evidence. Police Officer 6 contended that the experts' reports had not been challenged in a court and should, therefore, not have been accepted by my Office. Police Officer 6 stated that the public statement suggested that he and his colleagues were guilty of criminal offences. He asserted that the complainants only made allegations in 1979 after they had spoken to their solicitors, and he believed that there was no evidence to support their allegations of ill-treatment.
- 7.36. Police Officer 6 stated that Mr McGowan had allegedly informed a member of the PPS that he was not physically harmed during his relevant RUC interviews, but was subjected to mental abuse. Police Officer 6 asked how Mr McGowan could be believed, in light of previous allegations of physical ill-treatment/assault he had made.

### **Summary**

- 7.37. I have carefully considered the issues and concerns of Police Officers 1, 4, 5, and 6 and responded to them in writing. I have incorporated them, where I believe it appropriate, within the body of this public statement as procedural justice requires. I believe that the contents of this public statement accurately reflect the Police Ombudsman investigation of the complaints of Messrs Toner, Crumlish, McGowan, and Kelly. The views I have expressed in relation to the conduct of police officers within this public statement are based on evidence and other information, gathered during the course of this investigation. I am satisfied that I have the power to publish this statement on the investigation into these complaints pursuant to section 62 of the 1998 Act.
- 7.38. In broad terms, my responses to Police Officers 1, 4, 5, and 6 addressed the issues of whether or not the Police Ombudsman's process had been conducted in accordance with the 1998 Act, the ECHR, and the *Hawthorne and White* Court of Appeal judgment. I do not concede that

by publishing this statement I am acting beyond my legal authority. Neither do I concede any procedural unfairness, given the steps taken to provide both PSNI and the relevant retired police officers with an opportunity to comment on my draft public statement.

7.39. I would like to thank Police Officers 1, 4, 5, and 6 for bringing these matters to my attention. At every stage my investigators have sought to engage with former police officers in order to understand the environment within which they investigated serious crime. I accept that former RUC officers faced significant challenges and pressures. I have also sought to obtain and review the relevant legislation, standards, and guidance that existed in order to understand policing procedures and policies at the time. I believe that this has resulted in a fair and impartial investigation, underpinned by evidence-based conclusions.

## 8.0

# Conclusions

- 8.1. My role as Police Ombudsman is set out clearly in Part VII of the 1998 Act. In the Court of Appeal judgment in *Re Hawthorne and White's application*<sup>48</sup> the Court ruled that the Police Ombudsman has no role in adjudicating on a complaint of criminality or misconduct of a police officer. The Court held that the decisions and determinations of these issues are a matter for the PPS and criminal courts in relation to allegations of criminality.
- 8.2. In this instance my predecessor, Dr Maguire, forwarded a file of evidence to the PPS. This related to ten former police officers identified as having been involved in the interviews of Messrs Toner, Crumlish, McGowan, and Kelly at Strand Road RUC Station between 26 February 1979 and 1 March 1979. The PPS, having considered the evidence contained within the file, directed that Police Officers 5 and 6 be prosecuted for the offence of Perverting the Course of Public Justice. These charges were later withdrawn for reasons outlined in Chapter 5 of this public statement. The main purpose of this public statement, therefore, is to address those complaints made by Messrs Toner, Crumlish, McGowan, and Kelly which I am permitted to investigate under the 1998 Act and related regulations.
- 8.3. In accordance with my statutory functions under the 1998 Act, I am also obliged to consider the question of disciplinary proceedings. However, due to relevant police officers being retired, a misconduct investigation is not possible. This would normally include a misconduct interview where the relevant police officers would be asked to account for their decisions

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<sup>48</sup> *Re Hawthorne and White's Application for Judicial Review*. NICA [2020] 33.

and actions after a misconduct caution. As stated by the Court of Appeal, it is not my role to determine whether or not police officers are guilty of misconduct. That is a matter for PSNI's Professional Standards Department (PSD) and the relevant police disciplinary panel in respect of serving police officers.

- 8.4. The investigation of complaints about historical matters is challenging due to the passage of time and unavailability of relevant witnesses and documentation. However, in this investigation, considerable evidence was gathered. This included original police documentation, witness statements, and other material within the public domain. Independent expert evidence was also obtained. I am unable to compel former police officers to assist investigations in a witness capacity. However, a number of former police officers co-operated with my investigation. I am grateful for their assistance.
- 8.5. I am mindful of the context within which the original investigation was conducted and the law and standards that existed in 1979, particularly relating to the arrest, detention, and interviewing of suspects. These differed greatly from what is in place today. The Home Office Guidance, Judges' Rules, and Administrative Directions were superseded in 1989 by the introduction of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) and related Codes of Practice. These set out clearly the current rights of detained individuals and the standards expected of police officers involved in the detention and interviewing process.
- 8.6. Messrs Toner, Crumlish, McGowan, and Kelly complained that police officers who interviewed them were guilty of Perversion of the Course of Public Justice. They each made a number of specific allegations relating to their arrests and detentions at Strand Road RUC Station between 26 February and 1 March 1979. These can be summarised as follows:

- I. That they were subjected to ill-treatment, including physical and mental abuse, during their time in police custody;
- II. That they were threatened and told that members of their family would come to harm if they did not make statements admitting their guilt;
- III. That they were not allowed access to a solicitor or family member;
- IV. That their statements were fabricated and obtained by oppressive and coercive means;
- V. That the only evidence against them were the fabricated statements;
- VI. That they only agreed to make statements as they were frightened and wanted to be released from custody;
- VII. That their arrests and detentions were unlawful;
- VIII. That the actions of police forced them to flee Northern Ireland and deprived them of a family life; and
- IX. That there were also concerns about how police treated alibi witnesses.

**That they were subjected to ill-treatment, including physical and mental abuse, during their time in police custody**

- 8.7. All four complaints were accepted for investigation under section 52 of the 1998 Act. The RUC (Complaints etc) Regulations 2001 (the 2001 Regulations) permit the Police Ombudsman to investigate public complaints which are outside the 12 month time limit after the alleged conduct, if they *'should be investigated because of the gravity of the matter or the exceptional circumstances.'* The former Police Ombudsman, Nuala O'Loan, determined that the complaints made by Messrs Toner, Crumlish, McGowan, and Kelly met this *'grave or exceptional'* definition, given the serious nature of the allegations being made.

- 8.8. Regulation 6 of the 2001 Regulations also provides that complaints received under section 52 of the 1998 Act can only be considered if *'the complaint has not otherwise been investigated by the police.'* This Office cannot, therefore, investigate the physical ill-treatment/assault allegations made by Messrs Toner, Crumlish, McGowan, and Kelly in March 1979 as they were investigated at that time by the RUC's Complaints and Discipline Branch. A file of evidence was forwarded to the then DPP who directed 'No Prosecution' against any police officer subject to investigation. No disciplinary action was taken against any police officer subject to investigation.
- 8.9. Gerard Kelly alleged that Police Officer 4 was present in an interview room when some of the ill-treatment/assaults were taking place, although he was not personally involved. Mr Kelly stated that Police Officer 4 appeared to be in charge.
- 8.10 During the course of this investigation, my investigators engaged with Police Officer 4. He denied being involved in the interview process and stated that he only became involved in the RUC investigation after the four complainants had been charged and remanded in Crumlin Road Gaol.
- 8.11. My investigators reviewed the available police documentation and could find no reference to Police Officer 4 having been involved in the relevant interview process at Strand Road RUC Station. Further, there was no record of him having been subject to the RUC Complaints and Discipline investigation into allegations of physical ill-treatment/assault.
- 8.12. In response to the 'Maxwellisation' process, Police Officer 4 robustly denied any involvement in the relevant interviews and offered evidence to support his assertion that he was not present during them.

- 8.13. My Senior Director of Investigations engaged directly with Police Officer 4 in relation to matters raised by him during the *'Maxwellisation'* process. Specifically, Police Officer 4 explained that during the period of detention and interviews of Messrs Toner, Crumlish, McGowan, and Kelly at Strand Road RUC Station he had been occupied attending court proceedings and was not involved, in any way, in the planning, arrests, detention, or supervision of the complainants.
- 8.14. Police Officer 4 stated that he attended a Preliminary Enquiry at Londonderry Magistrates Court on 26 February 1979. He then attended Belfast City Commission in relation to the trial of six men charged with terrorism offences between 27 February and 1 March 1979.
- 8.15. In researching the criminal proceedings highlighted by Police Officer 4, my investigators engaged with the PPS, PRONI, and NICTS. They viewed archived records which supported Police Officer 4's recollection of attending the relevant court proceedings. Therefore, I am of the view that Police Officer 4 was occupied at Londonderry Magistrates Court on 26 February 1979 and Belfast City Commission between 27 February and 1 March 1979.
- 8.16. I am of the view, given the available evidence, that Police Officer 4 was not involved in the RUC investigation prior to the charging and remand of Messrs Toner, Crumlish, McGowan, and Kelly.

**That they were threatened and told that members of their family would come to harm if they did not make statements admitting their guilt**

- 8.17. My investigators interviewed ten police officers under criminal caution, who all denied these allegations. There were no CCTV cameras or witness evidence to support or refute the allegations of Messrs Toner, Crumlish, McGowan, and Kelly. This investigation established that,

although cameras had been introduced in some custody suites in Northern Ireland by then, they were for monitoring purposes only and did not record footage. My investigators were unable to establish if there were CCTV cameras in interview rooms at Strand Road RUC Station in 1979. Custody staff interviewed by my investigators stated that they did not witness the complainants being mistreated. Given the conflicting evidence, I am unable to conclude on these specific allegations.

### **That they were not allowed access to a solicitor or family member**

- 8.18. Michael Toner stated that he was permitted access to a solicitor only after he was charged. He was allowed a brief visit from his father after he had signed ‘*confessional*’ statements. Stephen Crumlish also stated that he was denied the right to legal representation and advice, but was permitted to see his parents. Gerald McGowan stated that he asked to see a solicitor but was told this would not be allowed until he signed a statement. In fact, he was not permitted access to a solicitor until after he was charged. Gerard Kelly stated that he was not informed of his rights or told that he could see a solicitor.
- 8.19. My investigators reviewed all the available custody documentation. This indicated that none of the four complainants received a visit from a solicitor until after they had been charged with the murder of Lieutenant Kirby and the punishment shootings.
- 8.20. In 1979, the conduct of RUC officers was guided by the 1964 ‘*Judges’ Rules and Administrative Directions to the Police*’ contained in Home Office Guidance introduced in Northern Ireland in October 1976. One of the five core principles contained within the Rules was ‘*That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so, even if he is in custody provided that in such a case no unreasonable delay or hindrance is*

*caused to the processes of investigation or the administration of justice by him doing so.'*

8.21. Appendix B of the Rules, titled '*Administrative Directions on Interrogation and the Taking of Statements*' continued that '*A person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice.*' The Administrative Directions also directed that those in custody should be informed of their right to speak with a solicitor, and that notices highlighting such rights '*should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices.*'

8.22. My investigators reviewed the available police documentation regarding this matter and there was no recorded rationale for Messrs Toner, Crumlish, McGowan, and Kelly being denied access to legal advice. In particular, there was no record of any consideration given to whether access to a solicitor would have delayed or hindered the police investigation. The Judges' Rules and Administrative Directions were part of Home Office guidance. There was no legal obligation imposed on police to allow arrested persons legal representation. However, I am of the view that police failed to comply with Home Office guidance in this respect, in that legal representation to protect the interests of Messrs Toner, Crumlish, McGowan, and Kelly was not offered to them during their lengthy periods of detention. There is no evidence of any consideration by police that allowing access to legal representation would have delayed or hindered the police investigation. Therefore, is my view that the failure to provide the four young men with legal representation was in breach of Home Office guidance.

**That their statements were fabricated and obtained by oppressive and coercive means**

**That the only evidence against them was fabricated statements**

**That they only agreed to make statements as they were frightened and wanted to be released from custody**

- 8.23. My investigators interviewed ten former police officers under criminal caution who all denied that they were involved in fabricating '*confessional*' statements from Messrs Toner, Crumlish, McGowan, and Kelly. ESDA testing of relevant police documentation found nothing to suggest irregularities regarding the manner in which the statements were obtained.
- 8.24. However two linguistics experts, Experts 1 and 2, identified issues with four '*confessional*' statements made by Gerald McGowan (Statements B and D) and Gerard Kelly (Statements A and C). They concluded that Messrs McGowan and Kelly could not have made their statements independently of one another. Based on this evidence, the PPS directed that Police Officers 5 and 6 be prosecuted for the offence of Perverting the Course of Public Justice. These charges were later withdrawn for reasons detailed in Chapter 5 of this public statement.
- 8.25. It is not my role to determine if Messrs Toner, Crumlish, McGowan, and Kelly were involved in the murder of Lieutenant Kirby or the relevant punishment shootings. However, I accept the expert evidence that two statements signed by Mr Kelly and Mr McGowan in respect of the murder of Lieutenant Kirby were too similar to have been produced independently. Also, I accept that the expert evidence supports the allegation of Mr McGowan that police told him what to put in his statement.

8.26. Further, I accept the expert evidence that two statements signed by Mr Kelly and Mr McGowan, confessing their role in the punishment shooting on 18 February 1979, were also too similar to have been produced independently. I also accept that the expert evidence supports the allegations of Mr Kelly and Mr McGowan that they were told by police officers what to put in their statements. Expert 2 concluded that there was '*clear evidence of intervention*' which '*cast serious doubt on the independence of the statements and on irregularities in the reporting of them.*'

8.27. I have accepted the evidence of Expert 1 and Expert 2 for the following reasons:

- I. The experts are independent;
- II. They possess expertise in the relevant area of linguistics;
- III. Their evidence was to be used by the PPS in the failed criminal proceedings against Police Officers 5 and 6; and
- IV. The error made by Expert 2 in his report did not undermine the other conclusions he reached.

8.28. The forensic linguistic experts did not reach similar conclusions in relation to the other 17 '*confessional statements.*'

8.29. It is my view, given the available evidence, that the statements from Messrs Toner, Crumlish, McGowan, and Kelly were obtained unfairly and were not '*voluntary*' in the sense described in the Judges' Rules because of the following:

- I. The length of time that they were detained;
- II. The timing of two of the four problematic statements, in that they were recorded in the early hours of the morning after protracted interviews, contrary to standards of the time;

- III. During detention, police arranged for Mr McGowan to speak with Mr Kelly. As a consequence of this, Mr Kelly made an admission. This interrogation method is not provided for in the Judges' Rules;
- IV. The '*immature age*'<sup>49</sup> of the complainants;
- V. The failure to provide support to the complainants by providing access to a solicitor during their detentions; and
- VI. The statements were made by the complainants in order to secure their release from custody.

### **That their arrests and detentions were unlawful**

8.30. Messrs Toner, Crumlish, McGowan, and Kelly all alleged that their arrests and subsequent detentions were unlawful. Although I cannot reach a finding on the legality of arrests and detentions that is akin to a criminal adjudication, this investigation has established that Michael Toner and Stephen Crumlish were arrested on the basis of an anonymous telephone call received by police. Both were arrested under section 11 of the 1978 Act. I am unable to determine if these arrests were unlawful as that is a matter for a Court.

8.31. The information obtained during the interviews of Mr Toner and Mr Crumlish provided the basis for the suspicion to ground the arrests of Mr Kelly and Mr McGowan under section 11 of the 1978 Act. Again, I am unable to determine if these arrests were unlawful as that is a matter for a Court.

8.32. In respect of the detention of the complainants, I am unable to determine whether their initial and continued detentions were lawful as this

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<sup>49</sup> As previously referred to in this public statement, the Judges' Rules dealt with particular aspects of police conduct which would have the power to render answers and statements inadmissible. In particular these included affording '*special procedures in the case of persons unfamiliar with the English language or of an immature age or feeble understanding.*' Whilst Messrs Toner, Crumlish, McGowan, and Kelly were not 'young people' as defined by the Children and Young Persons (Northern Ireland) Act 1964, they were aged 17 and 18 years old.

ultimately is a matter for a Court. However, I am critical of the scheduling, timing, and duration of the detentions of these individuals given their *'immature age.'* Police also failed to provide them with an opportunity to request a solicitor in order to protect their interests.

**That the actions of police forced them to flee Northern Ireland, depriving them of a family life**

- 8.33. Messrs Crumlish, Toner, McGowan, and Kelly stated that they had no option but to abscond to the Republic of Ireland in October 1980. They stated that they could not be guaranteed a fair trial, given police had obtained fabricated *'confessional'* statements from them. The decision to bring a prosecution, based solely on *'confessional'* statements, in circumstances when all four had complained about physical ill-treatment/assault at Strand Road RUC Station was not made by police. It was the DPP's decision to proceed with the prosecution of the young men. I acknowledge that the police actions complained of set in train the prosecution process. However, I am unable to comment on the reasons why the DPP decided to prosecute, as this is outwith my statutory remit.

**That there were also concerns about how police dealt with alibi witnesses**

- 8.34. The extensive nature of the alibi evidence has been referred to earlier in this public statement. Michael Toner and Gerald McGowan raised concerns with my Office regarding the manner in which police dealt with alibi witnesses provided by them. They alleged that police intimidated witnesses by accusing them of lying and threatened to prosecute them for perjury.
- 8.35. Michael Toner stated that an alibi witness provided by him, Person A, was threatened by Police Officer 4. He allegedly threatened to *'send Michael Toner away for 30 years,'* as well as Person A for *'telling lies.'* Person A

informed my investigators that Police Officer 4 was hostile towards him but did not recall being threatened with perjury.

- 8.36. A second alibi witness, Person B, informed my investigators that Police Officer 4 was '*aggressive and domineering*', ripping up three versions of her witness statement. She made no complaint at the time, but stated that it was a traumatic experience that had '*instilled fear*' in her.
- 8.37. My investigators met with Police Officer 4 in a witness capacity and put to him the complainants' allegations relating to the other police officers subject to investigation. He denied the allegations, adding that he was always professional and acted with integrity towards the alibi witnesses that he interviewed. In his response during the '*Maxwellisation*' process, Police Officer 4 stated that the allegations about his treatment of the alibi witnesses were untrue and made up by the complainants. I note that five other alibi witnesses interviewed by my investigators did not support the allegations made by Messrs Toner and McGowan. In light of the conflict between the accounts of alibi witnesses, the concerns of Messrs Toner and McGowan, and Police Officer 4's assertions, I am unable to conclude on this element of the complaints.

### **The Police Ombudsman's Powers**

- 8.38. I must act lawfully and fairly in the exercise of my functions as provided for under Part VII of the 1998 Act. The Court of Appeal in *Re Hawthorne and White* has unanimously ruled on the powers of the Police Ombudsman under that legislation. This includes how the Ombudsman will address complaints generally and, more particularly, in relation to complaints about the actions of RUC officers.
- 8.39. In that context, I have considered the complaints and allegations raised by Messrs Toner, Crumlish, McGowan, and Kelly. I have carefully considered the evidence and information gathered during this

investigation. After very careful consideration of the relevant facts, I have concluded that the evidence obtained during this investigation supports their complaints that the '*confessional*' statements were obtained in a '*coercive atmosphere*,' and in circumstances which did not comply with Home Office guidance. This investigation has also established that the statements were obtained unfairly as they had no access to legal representation and were provided in order to secure their release from custody.

8.40. There were also a number of other irregularities in respect of the application of the Judges' Rules and Administrative Directions, which lead me to the view that the statements were obtained unfairly and in a coercive atmosphere. The overarching complaint by all four men is that police were guilty of Perversion of the Course of Public Justice. Determination of a criminal offence is clearly outwith the scope of my powers, but I note that a file of evidence was submitted by my Office to the PPS in 2014, which resulted in prosecutions being brought against Police Officers 5 and 6. The detail of the outcome of those proceedings is outlined earlier in this public statement.

8.41. The complainants also made a number of specific allegations. My conclusions in respect of these are detailed below.

8.42. The solicitor acting for the four complainants wrote to me on 1 June 2022 in relation to the following issues:

- I. Objection to use of the term '*confessional*' statements in the public statement as '*this could be interpreted as attributing some veracity or credibility to the contents of the statements if not prefixed by the word 'false'*';
- II. The low threshold for arrests under terrorist legislation in 1979; and

- III. The Police Ombudsman's conclusions on the question of the complainants' innocence.

The solicitor wrote again on 6 June 2022 providing further details relating to the acquittal of the four complainants. I have carefully considered the matters raised by the complainants' solicitor and responded fully to the issues raised. In particular, I am of the view that the phrase '*confessional*' statements does not connote a lack of veracity or credibility in the content of the relevant statements. I note and acknowledge the low threshold at which arrests could be made under terrorist legislation in 1979. I am unable to make a determination on the legality of the relevant arrests or detentions because my role is investigatory and not adjudicatory. Finally, the guilt or innocence of the complainants in this case is not a matter which falls within the statutory scope of my powers, and so it would be inappropriate for me to comment on such issues, which were matters for the trial judge.

### **Overall Conclusion**

**That the statements of Persons Messrs Toner, Crumlish, McGowan, and Kelly were fabricated and obtained by oppressive and coercive means**

- 8.43. An anonymous telephone caller stated that Michael Toner and Stephen Crumlish, both 17 years of age, had been involved in a '*kneecapping*' on 18 February 1979. They were both arrested under section 11 of the 1978 Act, at approximately 8:00am on 26 February 1979.
- 8.44. They were taken to Strand Road RUC Station where they were detained for three days. During this time they were interviewed by police officers attached to the RUC's North Region Crime Squad. Having been charged in connection with a number of punishment shootings and the murder of Lieutenant Kirby, Messrs Toner and Crumlish were permitted brief visits

by their parents. Although Gerald McGowan asked to speak with a solicitor, he was denied access to legal representation until after he was charged. Gerard Kelly stated that he was not informed of his rights of access to a solicitor. All four young men were then brought before a court and subsequently remanded to Crumlin Road Gaol.

- 8.45. During their detentions, Messrs Toner and Crumlish were interviewed for 16 and over 22 hours respectively. Neither of them had access to a solicitor until they had appeared at Court. However, they were permitted short visits by family members after they had made '*confessional*' statements.
- 8.46. During interviews between 10:30am and 3:25pm on 26 February 1979, Michael Toner made a number of statements admitting that he had participated in the punishment shooting on 18 February 1979 as a '*lookout*.' Police continued to interview him, with breaks, until 10:30pm that night. Stephen Crumlish was interviewed, with breaks, for six hours between 10:35am and 10:35pm and continued to deny having been involved in any attack.
- 8.47. The following morning, Mr Toner made a further statement stating that he had participated in a second punishment shooting. Other than confessing to membership of Fianna na h'Éireann, Mr Crumlish continued to deny having been involved in any of the attacks.
- 8.48. Police records indicate that, shortly before 5:00pm on 27 February 1979, police allowed a brief meeting between Messrs Toner and Crumlish, at the request of Stephen Crumlish.
- 8.49. My investigators were unable to recover statement(s) that may have been made by the police officer(s) who facilitated this meeting. Mr Toner did not recall the meeting. Mr Crumlish informed my investigators that police had told him that Mr Toner had implicated him in a '*kneecapping*,' as a

result of which Mr Crumlish had asked to meet with Mr Toner. During the confrontation that followed, Mr Crumlish asked Mr Toner if he was involved in the *'kneecapping'* and if so, whether he had also implicated Mr Crumlish. Mr Toner, who was in a distressed state, replied that he had.

- 8.50. Police records indicate that interviews of Mr Crumlish resumed after this meeting. He immediately made a *'confessional'* statement to having been a *'lookout'* during the first punishment shooting. In this statement, he also implicated Michael Toner, Gerard Kelly, and Gerald McGowan in the attack.
- 8.51. Police records indicate that on 27 February 1979 between 8:04pm and 8:55pm, Mr Crumlish made a *'confessional'* statement in which he described being a *'lookout'* in the *'kneecapping'* of a third victim. He stated that Michael Toner and Gerard Kelly entered the victim's house, while Gerald McGowan was the driver. During an interview between 9:55pm and 10:30pm, police obtained a *'confessional'* statement from Michael Toner where he described shooting the victim once, while Stephen Crumlish shot him twice.
- 8.52. Stephen Crumlish made a further *'confessional'* statement between 10:17pm and 11:45pm, where he admitted shooting the third victim while Messrs Toner and Kelly restrained him. He also confessed to the *'kneecapping'* of the second victim, stating that Messrs Toner, Kelly, and McGowan were present. Mr Crumlish further clarified his role in the shooting of the first victim, stating that he and Mr Toner had shot him, while Gerard Kelly held him down. Gerald McGowan again acted as driver.
- 8.53. At approximately 7:00am on 28 February 1979, Gerard Kelly and Gerald McGowan, then 17 and 18 years old, were arrested under section 11 of the 1978 Act. The arrests were on the basis that Messrs Toner and Crumlish had implicated them as having been involved in a number of the

punishment shootings. Messrs Kelly and Mr McGowan were detained at Strand Road RUC Station for two days, again without access to a solicitor. Following this they were charged, brought before a special court, and remanded into custody at Crumlin Road Gaol.

- 8.54. On the morning of 28 February 1979, Stephen Crumlish made a statement between 10:57am and 11:41am, where he admitted having been a *'lookout'* during the murder of Lieutenant Kirby. He stated that Messrs Toner, Kelly, and McGowan were also involved. Mr Toner made a similar *'confessional'* statement between 12:10pm and 12:50pm on the same date.
- 8.55. On 28 February 1979, Mr Kelly and Mr McGowan were interviewed for eight hours and made no *'confessional'* statements. During an interview of Gerard Kelly between 00:30am and 2:00am on 1 March 1979, he made a statement confessing to his role as a *'lookout'* during the murder of Lieutenant Kirby. In this statement he named Messrs Toner, Crumlish and McGowan as also having been involved. During an interview between 2:10am and 2:50am on the same morning, Gerald McGowan made a *'confessional'* statement that he had performed a similar role during the murder.
- 8.56. Later that same morning, between 10:42am and 12:11pm, Mr Kelly made a statement where he described restraining the third *'kneecapping'* victim while Messrs Toner and Crumlish shot him. He stated that Mr McGowan was the driver. Between 11:06am and 11:31am he made a further statement, confessing to having shot the first *'kneecapping'* victim, adding that Mr McGowan had restrained the victim. Finally, between 11:53am and 12:11pm, he made a statement where he described restraining the fourth victim while Mr Crumlish shot him, adding that Mr Toner was also involved.

- 8.57. Complaints that the four young men had been physically ill-treated while in police custody at Strand Road RUC Station were investigated by RUC Complaints and Discipline Branch. Files of evidence were forwarded to the DPP who subsequently directed no prosecution against any police officer subject to investigation.
- 8.58. As previously discussed in Chapter 4 of this public statement, in 1979 courts retained a residual discretion to exclude ‘*confessional*’ statements from criminal proceedings if they were shown to have been involuntary and/or did not conform to the Judges’ Rules. The Rules, and their underlying principles, provided relevant guidance to police officers conducting investigations. The framework required that a statement or answer to question(s) put by police officers, oral or written, from members of the public must be ‘voluntary in the sense that it has not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.’ It was for a judge to decide on whether or not to admit such evidence at a subsequent trial. The question as to whether or not the statements of the complainants in this case would have been admissible at trial is not a matter that I can determine, and I do not seek to do so. The question of admissibility is a discretionary judgment which was properly a matter for the trial judge.
- 8.59. Such was their importance when considering the admissibility of statements to criminal proceedings, and consequently the investigative process, that the RUC required compliance with the Judges’ Rules, as reflected in its Code of Conduct. Police officers were told that ‘*in addition to complying with the rules, interrogating officers should always try to be fair to the person who is being questioned and scrupulously avoid any method which could be regarded as in any way unfair or oppressive.*’ Flagrant breaches of the Judges’ Rules, falling short of criminal conduct, could constitute misconduct.

- 8.60. A confession is only admissible at common law if it is free and voluntary. This principle is encapsulated in the Judges' Rules. In light of the complainants' belief that by providing the '*confessional*' statements they would be released from custody; I am of the view that the confessions were not 'freely given' because they were obtained in the hope of this advantage. Therefore, I am of the view that the complainants' '*confessional*' statements were not 'voluntary' in the sense described in the Judges' Rules. However, I am unable to conclude on the question of admissibility of '*confessional*' statements in all the circumstances, as that would have been a matter for the trial judge.
- 8.61. The detention periods of Messrs Toner, Crumlish, McGowan, and Kelly were consistent with the prevailing legislation of that time. Similarly, in 1979 there was no statutory requirement to provide suspects in police custody access to legal advice.
- 8.62. However, the Administrative Directions accompanying the Judges' Rules required that '*a person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice by his doing so.*' It was the practice of the RUC to deny such access during interviews relating to the investigation of terrorism offences. During the late 1970s, concerns were being expressed about the duration of suspect interviews and access to legal representation. These were the subject of qualified recommendations in the Bennett Report, published in March 1979:

*'(24) Interviews should not last longer than the interval between normal meal-times, or extend over meal-breaks, or continue after midnight except for urgent operational reasons. Not more than two officers at a time, or six in all, should interview one prisoner (paragraph 181). Officers should identify themselves by name or number (paragraph 182).*

*(45) The consistent refusal to allow access to a solicitor throughout the whole period of detention is unjustifiable (paragraph 276). Without prejudice to their existing rights, prisoners in Northern Ireland should be given an unconditional right of access to a solicitor after 48 hours and every 48 hours thereafter (paragraphs 277 and 278). But solicitors should not be permitted to be present at interviews (paragraph 278).'*

- 8.63. Messrs Toner, Crumlish, McGowan, and Kelly complained that they were coerced into making statements which were untrue and contained information about the attacks that had been supplied by police. It is not my role to make a determination as to the guilt or innocence of any individual.
- 8.64. The four young men were subject to repeated interviews, some of which commenced or continued into the early hours of the morning. Analysis of the sequence of the interviews revealed how frequently the complainants made '*confessional*' statements one after the other. This is best illustrated in the sequencing of the '*confessional*' statements made relating to the murder of Lieutenant Kirby. The unexplained loss of most of the contemporaneous police interview records, which was the main factor in the DPP's decision to offer no evidence against the four young men, is a matter of considerable concern. Examination of this material would have assisted my investigators in their assessment of the interview processes, and may also have identified further lines of enquiry.
- 8.65. Of particular significance to me was the meeting between Messrs Toner and Crumlish on 27 February 1979. This was before Mr Crumlish confessed to being having been involved in any of the attacks and before either he or Mr Toner confessed to their role in the murder of Lieutenant Kirby. Such meetings between suspects in custody was common investigative practice at that time. Mr Crumlish informed my investigators

that he requested the meeting. This was because he could not understand why Mr Toner had implicated him in criminal activity. Whether by design or not, I am of the view that this meeting, which was supervised by police, had a profound effect on the coercive atmosphere generated during the interviews and the subsequent securing of '*confessional*' statements.

8.66. In addition, the prolonged and repeated nature of the interviewing, the immature ages of the four young men, their inexperience with law enforcement, and the absence of access to legal advice or other support made them susceptible to compliance with those in authority. I am of the view that these factors had the cumulative effect of creating an oppressive and fearful environment in which they made '*confessional*' statements. It is my view that the '*confessional*' statements made by Messrs Toner, Crumlish, McGowan, and Kelly were not obtained fairly, but by coercion and/or oppression. I conclude also that the statements were made in order to secure their release from custody and were not made freely and voluntarily in the sense described in the Judges' Rules.

8.67. My predecessor, Dr Maguire, forwarded a file of evidence to the PPS regarding the complainants' allegations that their statements had been fabricated. After considering this file of evidence, the PPS directed that Police Officers 5 and 6 be prosecuted for the offence of Misconduct in a Public Office. Both were subsequently acquitted of this offence for reasons set out in Chapter 5 of this public statement.

**That the arrests and detentions of Messrs Toner, Crumlish, McGowan, and Kelly were unlawful**

8.68. This investigation has established that Michael Toner and Stephen Crumlish were arrested on the basis of an anonymous telephone call received by police. Both were arrested pursuant to section 11 of the 1978 Act.

8.69. Information obtained during the interviews of Messrs Toner and Crumlish provided the basis for the suspicion to arrest Mr Kelly and Mr McGowan under section 11 of the 1978 Act. There was information to ground these arrests and I have commented on the low threshold for arrest under terrorism legislation at the time.

**That Messrs Toner, Crumlish, McGowan, and Kelly were not allowed access to a solicitor or family member**

8.70. My investigators reviewed all the available custody documentation. This established that none of the four suspects received a visit from a solicitor until after they had been charged with the murder of Lieutenant Kirby and various punishment shootings.

8.71. In 1979, there was no relevant legislation governing the detention and questioning of suspects. RUC officers were guided by the 1964 *'Judges' Rules and Administrative Directions to the Police'* which were introduced in Northern Ireland in October 1976. One of the five core principles contained within the Rules was *'That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so, even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by him doing so.'*

8.72. Messrs Toner, Crumlish, McGowan, and Kelly had no statutory right to a solicitor during their respective police interviews. However, Paragraph 38 of the RUC Code of Conduct stipulated that all police officers adhere to the Judges' Rules. The accompanying *'Administrative Directions on Interrogation and the Taking of Statements'* continued that *'A person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice.'*

- 8.73. My investigators reviewed the available police documentation relating to this matter and have been unable to establish why allowing Messrs Toner, Crumlish, McGowan, and Kelly access to legal advice and/or representation would have delayed or hindered the police investigation. There is no recorded rationale as to why this was not allowed. The 1976 Judges' Rules were intended as guidance. The suspects had no statutory right to a solicitor but the Judges' Rules recommended that *'every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor.'*
- 8.74. I am of the view, given the *'immature age'* and vulnerability of these young men, added to the serious nature of the offences, that an opportunity to access legal advice ought to have been afforded to Messrs Toner, Crumlish, McGowan, and Kelly during their detention at Strand Road RUC Station. I have been unable to establish a rationale as to how this may have delayed or hindered the police investigation.
- 8.75. I have taken into account that the complainants' allegations were denied by all the police officers subject to investigation. There were no CCTV cameras to support or disprove the complaints of ill-treatment/abuse. The physical ill-treatment/assault allegations were investigated by RUC Complaints and Discipline Branch at the time and the DPP directed 'No Prosecution' against all the police officers subject to investigation. I am mindful, however, that these complaints were made in 1979 and then again to my predecessor in 2003. I am also aware that these allegations were the subject of civil claims brought by Messrs Toner, Crumlish, McGowan, and Kelly. These were settled by PSNI for undisclosed sums in 2019. At that time, Assistant Chief Constable (ACC) George Clark stated that there had been *"significant shortcomings"* in the treatment of the four men. He added that:

*“We recognize the stress that this has caused them. This is reflected in the settlement provisions. Policing has developed greatly since these incidents took place, as have our policies and procedures for dealing with detained persons. Detainees have a range of protections afforded by the Police and Criminal Evidence (N.I.) Order and Human Rights legislation. The PSNI has strict human rights compliant policies and procedures in place to ensure that its custody facilities and investigative processes comply with the highest possible standards.”*

- 8.76. In light of the above, I find that that the complaints of Messrs Toner, Crumlish, McGowan, and Kelly are legitimate and justified regarding their mental ill- treatment, detention, and interviewing by police at Strand Road RUC Station. This includes the manner in which ‘*confessional*’ statements were obtained from them by police. This investigation has established that all four complainants ought to have been given an opportunity to access legal representation while detained at Strand Road RUC Station.
- 8.77. I am also mindful of the complainants’ vulnerability by virtue of their ‘immature age’ and the seriousness of the charges. The Judges’ Rules required police officers to ‘try to be fair.’ It is my view, given the young age of the four complainants, their lack of access to legal advice, and the oppressive atmosphere surrounding their detentions that this was indicative of an unfair process. I am of the view that the irregularities and coercive atmosphere in which the ‘*confessional*’ statements were obtained were indicative of the statements having been obtained unfairly, and not freely and voluntarily in the sense described in the Judges’ Rules. I am of the view that their complaints in this respect are legitimate and justified.

8.78. This has been a protracted and complex investigation requiring my consideration of the law and standards that applied to the conduct of police officers in 1979. I thank those who took the time to assist this investigation. Finally, I apologise to Messrs Toner, Crumlish, McGowan, and Kelly for the delay in the publication of this statement.

**Marie Anderson**  
***POLICE OMBUDSMAN FOR NORTHERN IRELAND***  
**10 June 2022**

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