The Impact of the Human Rights Act 1998 on Policing in England and Wales

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This article explores the impact of the Human Rights Act (HRA) 1998 on the police service of England and Wales. It draws upon qualitative data produced during interviews with police personnel to provide the first empirical study of the influence of the HRA on the police service at an organizational level and on the day-to-day working practices of police officers. Whilst the fundamental aim of the HRA is to protect and enhance citizens’ rights and freedoms, we argue that there is little evidence to suggest that it has promoted a greater awareness of, and respect for, human rights amongst police officers. Rather, the HRA has become institutionalized by the police service into a series of bureaucratic processes that, although requiring conformity by officers, do not encourage active consideration of human rights issues. Instead of shaping police work to make it more responsive to human rights, bureaucratic processes are used by officers to legitimize and justify their existing practices. Focusing on ‘risks’ rather than ‘rights’, officers satisfy the ‘tests’ introduced by the HRA through an assessment of the dangers posed by particular individuals and crime types and the resource implications of effectively managing them. An important result of this is that the HRA is not used to achieve a balance between individual rights and community interests, but becomes a framework for mandating police decision making and protecting officers from criticism and blame.

Introduction

This article explores the impact of the Human Rights Act (HRA) 1998 on the police service of England and Wales. The HRA is significant for policing because, incorporating the European Convention on Human Rights (ECHR) into English law, it places a legal requirement on the police service, as a public authority, to respect the human rights of individuals. Whilst the United Kingdom has a long association with the ECHR—it signed the Convention at its inception in 1950, was the first Council of Europe state to ratify it in 1951 and granted the right of individual petition to the European Court of Human Rights (ECtHR) in 1966—the HRA gives the rights contained in the Convention significantly new and important domestic legal effect. Public authorities must not only conform to the requirements of the HRA but, if they do not, individuals can seek direct redress for violations of their rights in the domestic courts rather than through application to the ECtHR. In light of this, public authorities, including the police, are subject to intense scrutiny in respect of their compliance with the HRA from a range of statutory bodies, including the Office of the Information Commissioner and the Equality and Human Rights Committee.

The introduction of the HRA provoked significant public and political debate that has continued in respect of a range of criminal justice issues (from the voting rights of those sentenced and imprisoned, to police uses of samples and prints). The HRA has frequently been derided in the popular press as a mechanism that affords the guilty too much protection by constraining the activities of criminal justice agencies. It is not surprising, given the pivotal role that the police service occupies in the criminal justice system, that policing has often been at the centre of claims that the HRA hinders or prevents the successful social control of criminals. Senior police officers have themselves made public statements about the ways in which the HRA
interferes with the policing of serious offenders.¹ Yet, whilst there has been some academic commentary on the impact of the HRA in policing (e.g. Harfield 2009; Neyroud and Beckley 2001) and policy documents and guidelines have discussed the implications of the act (e.g. APA 2008), there has, to our knowledge, been no empirical research on the influence of the HRA on the organizational structures and processes of the police service and the day-to-day routines and practices of police officers.

In seeking to make an initial contribution in this empirical vacuum, this article draws on data produced during qualitative interviews with police service personnel. We conducted 20 individual interviews with warranted officers and civilian staff in one county police service in March 2011. The interviews focused on officers’ experiences and perceptions of policing in relation to the HRA. The sample of participants comprised officers from a broad range of ranks—from police constables through to the ACPO ranks—who were engaged in diverse roles ranging from (detective) constables through to specialist surveillance officers. The officers we spoke to were, on the whole, long-serving and many had experienced the implementation of the HRA. Our initial focus in the interviews was on the impact of Art. 8 (which guarantees the right to respect for private and family life), but most interviews widened to incorporate discussion of a range of articles contained in the HRA (particularly the qualified rights set out in Arts. 8–11²).

A clear finding of our research is that police officers perceive the HRA to have had a very significant impact upon policing. Officers told us that the HRA had ‘absolutely and unquestionably’ had an impact ‘in lots of ways’ (Officer 2), had forced the police service to ‘stop and think’ about the outcomes of their practices on individuals and the wider community in ways that they did not do before (Officer 3) and had led to the development of a ‘new framework’ (Officer 3) through which police officers carry out their work. Throughout this article, we focus on this new framework and consider how it impacts upon Anglo-Welsh policing. In contrast to findings recently reported by the Joint Committee on Human Rights (2009)—which contained statements by police officers about the significant impact of the HRA on policing—we do not take officers’ statements at face value. Rather, we show that, whilst the HRA has had a considerable effect in creating a set of bureaucratic processes to which police officers must adhere, officers do not regard such processes to have significantly changed police practices. An important finding from our research, therefore, is that, whilst the HRA has bureaucratized police practice in a number of ways—institutionalizing processes through which officers justify, document and make auditable their decision making—there is no evidence to suggest that operational police work has fundamentally changed in response to the legislation.

Throughout the article, we argue that a key consequence of the bureaucratization of the HRA in policing is that officers rarely regard the act as an instrument designed to drive a concern with human rights. This finding is in sympathy with Harfield’s observation that ‘legislated rights, whilst generating increased activity for government officials and lawyers, do not necessarily nourish a culture that provides enhanced rights protection for the community whilst simultaneously stimulating dialogue between community and professionals’ (Harfield 2009: 104). Indeed, far from ‘stimulating dialogue’ about human rights, our research shows that the HRA has enabled officers to engender new strategies and tactics to make their existing practices work within the requirements of the legislation. We show that, far

¹See, e.g. The Sun (2008), ‘Chief blasts the “Rights” Act’, 14 May.
²The qualified rights—Arts. 8–11—guarantee, respectively, the right to private and family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression; and freedom of peaceful assembly and association.
from constraining police work, the HRA is regarded as a development that enables
and facilitates policing, allowing officers to justify their decision making and, in
doing so, providing them with a safety net in the event that they are asked to account
for their actions.

Our findings tend to concur with much of the extant literature that examines
the impact and effect of legal rules within policing. Commentators have long argued,
in respect of a wide range of jurisdictions and contexts, that, when police officers
translate black-letter law into operational police actions, they rely upon high levels of
discretion and, as a result, law is enforced in selective, uneven, discriminatory and
sometimes corrupt ways (see, e.g. Skolnick 1966; McBarnett 1978; Punch 2009;
Young 1971). Criminologists have consistently argued that the relationship between
law and policing (and, in particular, any attempt to use law as a top-down method for
achieving change in police practice) must be understood within the context of
organizational cultures in which the majority of police officers are ‘characteristically
ambivalent’ to law (Dixon 2007: 24) and regard knowledge of law as less important
than an ‘appreciation of local community norms’ (Fielding 1988: 52). As Ericson
argues, the imposition of legal rules, as a method of administrative control, rarely
changes police decision making: ‘. . . rules are literally dead letters, dying as the ink
dries on the paper on which they are published’ (Ericson 2007: 379). This is because,
as commentators have argued, the effect of legal rules is significantly determined by
the ‘police cultures’ in which they operate and the ‘working personalities’ of the
police officers who interpret and enforce them (Reiner 2000; Waddington 1999).
Academics have more recently focused on the impact of law on police habits (Chan
1996; Johnson 2010) in order to show its limitations in shaping the behaviours
and attitudes of police officers.

Given the recognized limitations of using law to refashion operational policing,
the HRA poses particularly significant challenges. This is because the HRA does not
comprise a series of rules in the same way as other statutory law but, rather, outlines a
set of principles that public authorities must respect. This distinction is important, as
Phillipson notes:

‘Rules’ denote norms which, if applied, determine the relevant issue conclusively.
They thus apply in an all or nothing way. ‘Principles’, by contrast, have a
dimension of weight and the application of one principle to an issue does not
necessarily determine it: principles merely argue for a particular outcome; more
than one may well be relevant to a given issue, and in such a case these competing
principles must be weighed against each other. (Phillipson 1999: 831)

As we argue below, the competing principles contained in the HRA (particularly in
respect of the qualified rights) allow police officers significant discretion to mandate
interference with individual rights. This is not necessary problematic, provided that
police officers have both a good comprehension of how the principles of the HRA
inform law enforcement and a systematic method for ensuring that police work
continuously maximizes the respect for rights wherever possible. What is a problem,
as we show below, is when existing bureaucratic mechanisms in policing do not
encourage an adequate reflection on the principles contained in the HRA and, as a
result, fail to make human rights a weighty principle of police work.

Institutionalizing the HRA
In this section, we outline key organizational changes implemented by the police service in general, and the force that is the subject of this study in particular, in response to the HRA. We begin by outlining the bureaucratic audits instigated by the police service in light of the requirements of the HRA and then go on to discuss the frameworks developed to ensure that operational decision making is human rights compliant. Our overall aim in this section is to demonstrate some of the ways in which the HRA has become institutionalized within the police service through the introduction of new bureaucratic procedures. Such procedures have to be seen as techniques designed to introduce new forms of governance into policing that promote an awareness of, and respect for, human rights among police officers (Leman-Langlois and Shearing, no date).

**Internal auditing**

As noted above, the HRA does not contain ‘hard’ rules that police officers must follow, but outlines a set of broad principles to which policing must conform. An initial response of the police service to the HRA was to audit existing policies to establish the extent to which they were already compliant with the principles of the HRA. In the force we researched, this took the form of tasking an inspector with the job of assessing every aspect of force policy in respect of the legal requirements of the Act. Such auditing was driven, in large part, by an early ‘suspicion’ (Officer 15) of the HRA and its potentially negative impact on operational policing. Neyroud and Beckley (2001: 206) have noted that such audits, which followed legal and professional advice, were a ‘key consequence’ of the HRA within the police service, since they were designed to identify areas of police work that would require additional training and enable the introduction of new ethical standards and codes of practice. The aim of this auditing was that it would result in a ‘secure ethical and HR compliant foundation underpinning the management and delivery of public services’ (Neyroud and Beckley 2001: 211). We return later in the article to discuss the extent to which this ethical underpinning has been achieved.

One outcome of these audits was that police forces amended certain procedures to demonstrate that the HRA was being considered by police officers when making decisions about both policy and operational practice. For example, one of the most fundamental changes that was identified by the officers we interviewed was an amendment made to the processes through which operational orders are written and police officers are briefed. The police service use a nationally recognized standard briefing format for policing operations that is commonly referred to as IIMARCH (information, intention, method, administration, risk assessment, communication, human rights compliance). The H—for human rights compliance—was added after the introduction of the HRA. Officers drew attention to how a box is now checked on the IIMARCH form to demonstrate that the ‘H’ had been considered when operational orders are issued. However, as we explore in more detail below, understanding of the principles represented by the ‘H’ is variable among officers.

**Legislative regulation of covert practices**

For the officers we interviewed, one area of policing that was viewed to have been subject to considerable change following the introduction of the HRA was covert investigation. Covert investigation, whilst covering a broad range of practices, can be defined as the investigation of a suspect who is assumed to be unaware of any police scrutiny (Harfield and Harfield 2008). By its very nature, covert policing interferes with the human rights of suspects, most notably in relation to Art. 8 of the HRA, but
Some commentators have questioned whether the objective of RIPA—to ensure that certain surveillance activities conducted by the police service comply with the HRA—has been achieved (Ferguson and Wadham 2003). Certainly, the Office of the Surveillance Commissioner, which has responsibility for oversight of aspects of the covert surveillance regime, has noted problems. These have included: lack of understanding of the legislation by officers; errors in documentation; late notifications, renewal and cancellation of authorities; commencement of operations before authorization has been granted; failure to document reasoning in urgent oral authorizations; authorizations given by staff who are not empowered to do so; authorizing more than was requested on the application; and codes of practice not being readily available to officers (Harfield and Harfield 2008).

Demonstrating that covert investigations conform with the qualified rights contained in the HRA requires the police to show that any interference with an individual’s rights is in accordance with the law, pursues one or more of a series of legitimate aims and is necessary in a democratic society to meet those aims. These requirements do not therefore, as O’Brien (2010: 128) notes, provide a ‘get out’ clause for the police but compel officers to justify any interference with rights in relation to specific criteria. At the point at which the HRA was introduced, the police service faced the problem that, although covert policing was established as ‘part and parcel of modern police work’, actions were not regulated by statute (Cheney et al. 2001: 87). Police authority for covert investigations ‘was based on the common law principle that whatever is not expressly forbidden by law is permissible’ (Cheney et al. 2001: 87), or, put more prosaically, the police could ‘do what they wanted as long as there was not a law forbidding it or regulating it in some other way’ (O’Brien 2010: 126). The insufficient regulation of covert investigations, and of the intelligence it generated, had led to a series of ‘embarrassing’ judgments against the UK government in the ECtHR (Clark 2007: 429). As Maguire (2000: 321) notes, the United Kingdom had lagged behind other European states in institutionalizing the principles of the ECHR at a domestic level and any changes in policy tended to be the result of ‘reluctant British governments’ being forced to adapt to adverse decisions from Strasbourg. There is no doubt, therefore, that momentum for changes in policing was gathering well before the commencement of the HRA—during the late 1980s and 1990s, for instance, piecemeal legislation was introduced to regulate certain aspects of covert investigation and official guidance and voluntary codes of practice from the Home Office and ACPO were disseminated (Harfield and Harfield 2008)—but it was ultimately the HRA that provided stimulus for major reform.

At the point at which the HRA was enacted, the UK government introduced the Regulation of Investigatory Powers Act (RIPA) 2000 in order to regulate:

... the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and the acquisition of the means by which electronic data protected by encryption or passwords may be decrypted or accessed. (RIPA 2000)

RIPA provides a statutory mechanism for the oversight, inspection and review of covert investigations along with a complaints procedure.³ The purpose of RIPA is ‘to seek to provide legality within a framework of accountability’ in order that any

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interference with human rights is properly justified in terms of legality, legitimacy and necessity (Clark 2007: 429). RIPA can be seen to give statutory expression to the HRA in order to restrict the discretion of police officers and change a situation in which officers could ‘interpret the boundaries of practice as much by relying on the spirit of the law as its detailed substance’ (Neyroud and Beckley 2001: 65). As such, a key part of the police service’s organizational adaption to the HRA was its accommodation of RIPA.

The officers we interviewed viewed RIPA and the HRA as essentially the same legislative instrument. RIPA was described as ‘the operating procedures for the HRA’ (Officer 3) and was viewed as having had a significant impact on the processes and practice of various aspects of policing. Officers described at length the RIPA requirement that any policing action that infringes a right must be legally proscribed, pursue a legitimate aim and be necessary in a democratic society. To ensure that officers conform to this, police forces have introduced a process of (usually) internal authorizations that are issued following a written application made by investigating officers. In requesting authorization to engage covert operational tactics, officers fill in forms to justify their decision making, document their reasoning and explain why the tactics they propose are necessary. Officers are expected to: describe the purpose of the investigation or operation; explain what the information is expected to obtain; set out the grounds on which action is necessary; identify the potential for collateral intrusion; and establish why the form of action is proportionate. This process is an important way in which the HRA has been institutionalized within the police service. We explore below, in a discussion of how officers justify their decisions and interpret the terms necessity and proportionality, the extent to which this bureaucratic process produces any meaningful reflection on human rights.

Satisfying the Requirements of the HRA: How Police Officers Understand Necessary Policing

As we argued above, an impact of the HRA on police practice has been the introduction of a series of bureaucratic procedures designed to ensure compliance with the Act. A key aspect of these procedures is that they require officers to demonstrate awareness and respect of the range of human rights embedded in the HRA. In respect of the qualified rights (Arts. 8–11), officers are required to demonstrate that any policing action that interferes with a right meets the tests of being proscribed by law, pursues a legitimate aim and is necessary in a democratic society. In this section, we explore how officers understand, interpret and satisfy these tests.

Awareness and understanding of the tests

Officer 8 told us that the requirements of the HRA are:

... drummed in from day one in police college. Policing automatically leads to interference [with human rights] but needs to be legal, necessary and proportionate or you are in trouble in court. Being able to justify this is important. This is at the front of your mind from day one—from notebooks, to statements and especially when arresting someone: is it legal, necessary and proportionate?

In fact, all of the officers we spoke to were well aware of the need to justify their actions and decision making in this way. This is unsurprising, since RIPA, for example, requires officers to provide an Authorizing Officer with a justification that
satisfies the tests of legality, legitimacy and necessity. There was difference in opinion among officers about the extent to which this requirement created difficulties for operational policing. To illustrate, some officers drew attention to the ‘art’ of ‘constructing the answers to the questions’ on RIPA applications (Officer 4) in order to anticipate what would ‘get past’ Authorizing Officers and ‘sell’ their operational decisions (Officer 7). Officers told us that they have learned to anticipate what Authorizing Officers require and ‘copy and paste’ from Authorizations that have previously been successful. In certain cases, officers consult Authorizing Officers in advance of submitting an application in order to maximize its chance of success. In this sense, officers did not view RIPA Authorities as problematic. However, there was a sense of frustration that Authorizing Officers differ in respect of the justifications that they require and that submitting officers cannot assume that an application that has been successful with one Authorizing Officer will be successful with another. As a result, participants drew attention to how some officers ‘moan’ about the ‘goal posts changing’ and complain that new justifications for actions have to be established (Officer 9). Furthermore, officers feel that Authorizing Officers are not always consistent in their decision making and that a previously ‘sold’ application may not be successful in the future.

Whilst all of the investigating officers that we interviewed were well aware of the tests introduced by the HRA, the extent to which the key principles of legality, legitimacy and necessity became confused and mangled in officers’ accounts was striking. In Strasbourg jurisprudence—the cornerstone of interpretation of the rights contained in the HRA—legality, legitimacy and necessity are separate aspects of a methodological framework designed to establish a fair balance between the rights of individuals and the public authorities that may wish to restrict them. The necessity test requires a consideration of three interrelated factors: whether any interference with a right addresses a pressing social need, whether in meeting that need any interference is proportionate and whether such interference is reasonable and sufficient. Proportionality is often taken to be the most important factor in determining whether a particular practice is necessary in a democratic society, since it is seen as a way to ‘search for fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s human rights’ (Soering v. The United Kingdom, 11 EHRR 439, at para. 89). We found that, in policing, however, the concepts of necessity and proportionality are used in distinctly different ways from that found in Strasbourg jurisprudence. Not only are they used as if they were wholly separable from each other—largely because (as we explore below) necessity is misunderstood as legitimacy—but they are rarely used to address the fair balance between community and individual interests that the HRA demands.

Consider this account of the process of making a RIPA application:

I ask: is the proposed tactic necessary and proportionate. Necessity is similar to RIPA. You tick a box—normally the prevention of crime—to say why this action is necessary. I have to determine whether it does meet that aim and is necessary to policing and law. Then I check evidence or intelligence that supports it. You go through a framework. Proportionality is defined by do you need a sledgehammer to crack a nut? Have we tried everything else and, if not, why? (Officer 12)

In this account, the concept of necessity is being used to describe what is actually the legitimacy of any policing action (the prevention of crime). Indeed, in the interviews we conducted, officers consistently conflated necessity with legitimacy, using
necessity to justify any policing tactic that pursued the aim of preventing and detecting crime. In this sense, officers viewed a policing action to be necessary (rather than legitimate) if it was perceived to facilitate the prevention or detection of crime. The concept of necessity was not used, therefore, as a framework for considering the balance between individual rights and community interests, but focused on whether a particular action was required to meet a particular policing aim.

In describing how they approached the question of necessity, officers often said that they asked themselves: ‘Am I pursuing the greater good?’ Although this question seems to suggest that officers are considering how a policing action may meet a ‘pressing social need’, their focus is actually on the legitimacy of their actions rather than on their necessity. The officers we interviewed argued that policing actions aimed at the prevention and detection of crime always pursue a greater good and are therefore necessary. This is problematic, since not all practices deemed appropriate and desirable by the police to meet the legitimate aim of crime prevention will satisfy the necessity test of the HRA. A recent example of this is the judgment by the ECtHR that the blanket retention of samples and prints by police forces in England and Wales was, despite pursuing a legitimate aim, not necessary in a democratic society (S. and Marper v. The United Kingdom, 2008, ECHR 1581).

Proportionality: sledgehammers and nuts

As demonstrated by the quote from Officer 12 above, the concept of proportionality is now a significant part of policing discourse. Officers regard proportionality as a ‘watchword’ in policing and a way of introducing checks and balances into police decision making (Officer 14). Proportionality was commonly described by officers as posing a very specific question: ‘Am I using a sledgehammer to crack a nut?’ Officer 17, for example, explains that:

Prior to the HRA we used sledgehammers to crack very small nuts. For example, in respect of search warrants, maybe ones relating to drugs, we may have at one time have gone in to a private property in a very heaving handed way. Now we ask: is this a proportionate response? It is a cultural change in the way that we police. We question what we are doing in terms of customers.

This was a common understanding among officers who view proportionality as a method of matching particular policing actions with particular types of crime. Similarly, Officer 2 argued that whether a policing action was proportionate was ultimately determined by a consideration of crime type: ‘. . . you wouldn’t want to use a sledgehammer to crack a nut—so a surveillance team is too much for shop-lifting—but for crimes like terrorism, break out the sledgehammer.’

Or, as Officer 18 put it: ‘To smash doors in, we have to act in a balanced way. If it is a murderer, then it is proportionate. The safety of the public overrides an individual’s right to private life.’

It is unsurprising that officers believe that interfering with human rights in general, and Art. 8 rights in particular, can be justified as proportionate when investigating those suspected of committing the most serious crimes. Officers were quite clear that there are certain crimes in which interference with, for instance, Art. 8 rights would automatically be considered proportionate—terrorism being an obvious example—and other crime types in which it would not be considered proportionate—shoplifting being an example frequently given. However, officers did draw attention to crimes that they described as falling within the ‘shades of grey’ (Officer 7).
Officers suggested that there is a wide variety of crime types that fall somewhere between terrorism and shoplifting, where making decisions about proportionality is much less clear-cut. They also drew attention to seemingly low-level issues, such as anti-social behaviour, that can have a significant effect on people’s lives, and necessitate policing strategies that interfere with Art. 8 rights. As a result of this, officers stressed that decisions about proportionality must be made on a case-by-case basis.

As well as focusing on the seriousness of offences when deciding which policing practices (which ‘hammers’) best respond to particular crime types (‘nuts’), officers said they frequently asked a range of questions about the economy, effectiveness and efficiency of operational policing. Questions about proportionality can therefore be seen to reflect, at least in part, a concern with the cost of deploying officers. As Officer 16 argues:

[It] is about alternative methods for getting information. Balancing up financial/resource with ability to get information without intrusions. There are tensions between resources and rights. Don’t smash a walnut with a bulldozer. Don’t do weeks of surveillance on someone for spitting. [Avoid] disproportionate use of resources.

These examples of how officers understand and apply the concept of proportionality raises questions about the extent to which it is used as a framework to achieve the fair balance of individual rights and community interests required by the HRA. The tendency among many of the officers that we interviewed, to reduce considerations of proportionality to assessments of the seriousness of offences and of resourcing, has been noted and criticized by the Office of the Surveillance Commissioner in relation to the completion of RIPA applications:

Greater precision in articulating why the activity is proportionate is still required in many authorisations. A failure to detail other less intrusive means considered suggests that minds are either not applied rigorously or that some tactics are considered routine. Nor should there be over-reliance on the seriousness of the crime as an automatic justification of proportionate covert surveillance. A wise Authorising Officer will ensure that details of his consideration are recorded; he may find them helpful if cross-examined some time later. Similarly, force strategic priorities and cost-effectiveness, of themselves, provide insufficient basis for authorization. (OSC 2010: 12)

Whilst the Office of the Information Commissioner does not regard considerations of either the seriousness of an offence or the cost-effectiveness of policing as sufficient for satisfying questions of proportionality, police decision making is very much focused on these areas.

Risk not rights
A further way in which police officers approach the question of whether their actions are necessary is through a consideration of the risks posed by individuals and the strategies needed to manage them. Officers repeatedly drew attention to how the police service has become increasingly concerned with managing risks and threats since the turn of the century (one aspect of a more general tendency in contemporary criminal justice policy and practice as noted by many criminologists, e.g. Hope and
Sparks 2000; O’Malley 2010; Stenson and Sullivan 2001). The result has been, officers argued, a proliferation of ‘risk technologies’ throughout police practice. Officers are expected to make assessments—sometimes using standardized management tools—of the risk posed by dangerous offenders and to vulnerable victims. Officers working in particular specialist areas—for instance, in the field of child protection, the management of sex offenders, domestic violence, and data and information management—all argued that structured decision making and the generation of risk assessments was now an important component of their day-to-day routines. To illustrate this, officers drew attention to how attending officers present at scenes of domestic violence are expected to fill in standardized risk assessment forms in order to quantify the level of risk posed to women and children. The score recorded on the form should then be used to shape the nature of the police (and other agencies’) response to that incident. Whilst it should be stressed that the extent to which such technologies have become embedded in police practice, or effectively measure and minimize risk in the ways that they purport, is questionable (Chan 1999), the focus on risk is now ubiquitous in policing and officers have increasingly become ‘information brokers’ who utilize a range of information and intelligence to assess and mitigate dangers in contemporary societies (Ericson and Haggerty 1997).

Whilst our focus is not explicitly on the issue of risk and we did not seek to examine in detail how policing is implicated in the management of ‘risk society’, a concern with assessing and documenting risks was present in officers’ accounts of the impact of the HRA on the police service:

It’s about risk, I don’t think its human rights. If I am going to arrest someone human rights and the impact on their private life isn’t in my mind, to be honest. (Officer 13)

The only thing I can think about how the HRA has effected policing is in risk because it has become important that we document everything. (Officer 19)

As these officers explain, risk overrides rights. Although interference with rights requires justification (the documentation of everything), the HRA is seen to provide a framework that facilitates an assessment of the dangers posed by individuals and the level of response required to contain this risk. As Officer 5 explains:

Necessity and proportionality . . . this is about the crime type and how dangerous a person might be viewed to be. So a dangerous individual known for domestic violence would be watched more closely than a drunk driver. Whilst the drunk driver is a risk the nature of the risk is different . . . . But seriousness of the case will affect the decision as well. Seriousness of risk and offending is considered, what you know about the person using the intelligence systems. Everything is taken into account . . . . The amount of resources are also considered in thinking through risk.

Police officers view themselves, as Officer 11 puts it, as ‘managing risk’. Risk is central to decision making about necessity and proportionality because, as Officer 13 explains, it is the basis on which assessments are made about the potential impact of an offender upon the public and police officers themselves:
We have more freedoms now than ever before in some respects. But we have to be proportionate. Again, if I arrest someone do I need to handcuff them? If they are compliant then handcuffing could be disproportionate. It’s about not going over the top. But proportionality is down to perception of risk, of what someone is doing. It is down to the individual and how they perceive the situation. To decide proportionality in my job I would look at the history, context and victim in the situation to determine the risk and how to manage it.

Many of the officers we spoke to conveyed the same understanding of the centrality of risk to questions of necessity. The principle factor being considered by officers, therefore, is not the impact of police actions upon the rights of the individual, but the risk that an individual may pose. That is not to suggest that police officers do not consider the impact of their actions upon human rights—they do consider the collateral intrusion of their actions and attempt to mitigate these—but their considerations rarely focus on the target of their activities. In other words, any explicit concern with human rights relates to either those individuals who may get caught in the net of an investigation or the general public who are at risk from offending. In respect of suspects, questions of necessity are overwhelmingly focused on how to apply the most efficient and effective means of addressing any dangers they pose.

It is clear that officers’ understanding of rights is significantly influenced by their concern to manage risks and the interaction of these two, sometimes competing, discourses has been the subject of academic debate. In response to Hudson’s argument, that the best way to avoid ‘no-holds-barred risk control’ in the criminal justice system is to encourage ‘a whole-hearted embrace of the ideas of human rights’ (Hudson 2001: 110) and Zedner’s view that adherence to ‘legal strictures enshrining basic values such as equality, fairness, and the preservation of basic human rights’ is a way of regulating risk control strategies (Zedner 2006: 425), Murphy and Whitty (2007) contend that the twin discourses of risk and rights work in subtle, and often unpredictable, ways in criminal justice practice. As Murphy and Whitty argue, there has been little empirical research on how rights discourse impacts upon ideas about risk in the criminal justice system. They argue that what is needed is ‘a new strand of academic enquiry focused on the co-existence of risk and rights’ and for ‘scholarship which recognizes the social construction of both risks and rights, investigates public sector regulatory models, and pays close attention to the apparent mobility and hybrid quality of legal knowledges’ (Murphy and Whitty 2007: 811). The data presented above empirically demonstrate that, whilst a rights discourse has become established in policing, the dominant discourse among officers is one of risk. Whilst this is unsurprising, given the nature of police work, what is salient is the way that the language of risk can be used to trump rights and, as a result, provide a way for police officers to easily justify interference with rights as necessary.

It is no criticism to point out that police officers use high levels of authorized discretion in determining which course of action to take in respect of the risk posed by individuals or groups in society. Whilst such decision making may, at times, create controversy in relation to particular policing actions—for instance, in recent debates about public order policing in London—an assessment of risk is an inherent and vital aspect of police work. What is clear, however, is that the prevalence of any risk tends to override, in very fundamental ways, a concern for individual human rights. The focus in policing on the rights and freedoms of the public elevates the status of the collective over the individuals who are subject to police actions. In an interview with Officer 15, who provided an unusually explicit reflection on the importance of
balancing individual rights with community interests, the importance of risk is nevertheless made clear:

Proportionality is subjective. It is trying to weight up all the factors of a situation. Take [the disclosure of information about an individual]. What I have to weigh up is . . . what the risk is, and should [others] have access to certain material. This is tricky because I am impacting upon a person’s private life if I disclose information about them. But I tend to err on the side of caution.

To ‘err on the side of caution’ is to view the potential for risk to the community as a more fundamental concern than the rights of the individual. This is contrary to the requirements of the HRA that, although affording public authorities the ability to interfere with an individual’s rights in order to meet the aim of preventing and detecting crime, demands that an overriding concern be on justifying the necessity of the interference. Considerations of necessity should, as well as addressing social needs, focus on the individual and raise questions about what impact any policing action will have on them. Yet, whilst there is a tacit acknowledgment of the impact of policing on individual rights, considerations of necessity are fixed on an assessment of risks to the community and the effectiveness of actions designed to address these.

A commonsense approach
In the quote above, Officer 15 states that decision making in respect of proportionality is subjective. When officers used this term, they were pointing to the individual nature of police decision making and how questions of proportionality are heavily dependent on officers’ own judgments. Again, this is hardly surprising in policing, where, confronted with a range of different situations involving multiple parties, officers weigh up and balance competing interests. However, in other public services in which coercion and force are used to address risky behaviour—for example, in health and social care (see, e.g. Commission for Social Care Inspection 2007)—frameworks have been developed to ensure a respect for individual rights. The officers we spoke to did not identify any specific framework to achieve a balance between the need to mitigate risks and the responsibility to respect rights. Officers regard decision making in relation to risk to be grounded, not in a formal human rights framework, but in a subjective and commonsense understanding of the needs of the communities they serve. As Officer 15 stated:

You run through the human rights aspects but you can’t get bogged down by them. You can over-complicate it, but with experience you know what is the right thing to do. I ask: what would the average man or woman on the street want? What would my mum and dad want?

Many of the officers we spoke to said that an overriding consideration in respect of their decision making involved asking the question ‘would an average person think it was ok to do this?’ and assessing what ‘the community would expect’ (Officer 3). This involved, they said, ‘subjective judgment’ that ‘comes down to information and whether the information is sufficient’ (Officer 4). In the next section, we explore how the ‘subjective judgments’ required by the HRA have not meant that policing has become ‘bogged down’ by human rights or experienced a ‘rights-enmeshed halt’ (Dixon 2007: 33). Rather, as we demonstrate, the HRA is regarded by police officers as enabling for, and beneficial to, their work.
The Impact and Consequences of the HRA on Operational Policing

Whilst the HRA has required police officers to demonstrate that their actions are legal, legitimate and necessary, an important finding from our research is that officers regard the bureaucratic processes created by the HRA to be a largely positive and useful development for the police service. Far from expressing the negative attitudes towards the HRA that are symptomatic of popular debate about policing, officers’ accounts regard the force-level procedures designed to satisfy the HRA as useful to, and affirmative of, police work. Officers gave three main reasons for this: first, they saw the principles derived from the HRA as enabling, rather than constraining, of police work; second, they viewed the processes designed to ensure conformity with the HRA as providing a robust framework through which to justify policing actions; and, third, they regarded the processes to provide an important level of accountability to police decision making. Whilst officers noted some problems with the bureaucratic processes created by the HRA—particularly with regard to covert policing—their overall attitude to the Act was positive. The following sections consider this in more detail.

Enabling policing

As noted above, it is common to find claims in the popular press that the HRA is a straightjacket that prohibits effective policing. The same claims are sometimes made in policy and academic contexts. For instance, at a conference held by Justice in 2007 on the theme of Human Rights and Policing, Richard Perks (and others) made speeches about how police officers were being deterred from using their full powers because of ‘unfounded fears that their actions may be deemed unlawful’ under the HRA and the director of Justice called for ‘education, education, education’ among police officers to dispel these myths. Yet, despite these claims, we found no evidence among police officers that the HRA was viewed as constraining or negative. On the contrary (and perhaps surprisingly), we found that most officers believed that the HRA enabled and facilitated their work.

The notion that the HRA has strengthened and underwritten police powers was present in officers’ accounts of the impact of the Act on their day-to-day work. Officers told us that the qualifications written into Arts. 8–11 provide them with considerable scope in which to act. For example, one officer drew attention to the ‘exceptions’ in the HRA (by which he meant the qualifications) as ‘sufficient to give the police the powers that they need to do their job’ (Officer 1). Officers also drew attention to how the legislative and bureaucratic procedures introduced by RIPA to meet the requirements of the HRA enable police officers to more effectively use their powers because of ‘unfounded fears that their actions may be deemed unlawful’ under the HRA and the director of Justice called for ‘education, education, education’ among police officers to dispel these myths. Yet, despite these claims, we found no evidence among police officers that the HRA was viewed as constraining or negative. On the contrary (and perhaps surprisingly), we found that most officers believed that the HRA enabled and facilitated their work.

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in a way that can be justified later’ (Officer 3). At the most extreme, some officers even believed that the HRA was responsible for facilitating certain police actions, such as the taking of non-intimate samples or the use of CCTV.

**Justifying existing police practice**

Officers view the bureaucratic frameworks through which they justify their actions and decisions as beneficial to operational policing because they provide a mechanism to structure and facilitate both advanced and post-hoc rationalization of a wide range of decision making. To illustrate this, one officer stated that, although ‘everything’ in policing has ‘to be considered in relation to proportionality, necessity, and legality’, this now provides a ‘template for justification’ (Officer 14). The ‘template for justification’ has come to be viewed by officers as a framework through which the police service can defend, explain and ultimately validate any policing actions. As Officer 1 noted, ‘you can’t go wrong if you have, at the back of your mind, a common sense answer for your boss if asked to explain yourself’. This officer went on to argue that ‘you could usually come up with a policing aim/justification’ for any action or decision.

Officers use compliance with the tests of the HRA to justify the decisions that they make. However, contrary to Neyroud and Beckley’s (2001) view—that compliance with the HRA produces ethical policing more attuned to human rights—the officers we interviewed suggested that compliance with the principles of the HRA had engendered little (if any) reflection on human rights. Instead, their overriding concern was to make their practices bureaucratically justifiable. As Officer 19 explained: ‘I complete RIPA forms and it didn’t occur to me that it had anything to do with human rights . . .. The HRA . . . is not in my mind. But we do have to justify everything we do.’

Because the practice of satisfying the bureaucratic requirements introduced by the HRA is on justifying police practice, rather than reflecting on it in terms of its impact on human rights, it is not surprising that many of the officers stated that the HRA had produced no impact on their day-to-day work: ‘Honest answer is: I don’t think anything has changed. It hasn’t made us question the way we operate. I haven’t seen any impact. I can’t think of any obvious difference in what we have done’ (Officer 11).

Even when officers said that they do explicitly consider human rights, they suggested that they were unsure how this linked to the bureaucratic compliance built into RIPA authorizations:

A lot of my job involves impinging on people’s private lives and I have to be justifying this all of the time in terms of legality, necessity and proportionality. I am always signing forms saying ‘I have considered human rights’ but I’m not sure we understand what we are signing off. (Officer 16)

The institutionalization of the HRA into bureaucratic processes has led to a perception amongst officers that they are simply justifying their actions ‘for someone else’s benefit’ (Officer 4). This corresponds to Ericson’s description of how police officers use administrative frameworks: ‘Accounts are routinized through the use of formulaic phrases that not only justify the decisions taken but also serve as a form of rhetoric to persuade police audiences—in particular, prosecutors, defense lawyers and judges—to ratify these decisions’ (Ericson 2007: 377). The result is that the bureaucratic
processes established by the HRA do not encourage reflection of how police work impacts upon the human rights of suspects and those in wider society.

**Accountability**

The HRA is one of many mechanisms through which policing aims and officer practices have been rendered publically accountable. It has been viewed to be especially important because ‘personal and organizational responsibility for human-rights compliance and the emphasis on independent oversight provide significant additional dimensions to the framework of police accountability’ (Neyroud and Beckley 2001: 70). Indeed, many commentaries on the impact of the HRA on police accountability regard the HRA as ‘a powerful legal framework making the police accountable for their actions’ (Mawby and Wright 2005: 3, emphasis added). In this sense, the HRA has come to be understood as legislation that significantly acts upon officer attitudes and practices by installing new forms of accountability into police practice.

The issue of accountability was strongly embedded in officers’ accounts of the HRA. However, rather than focusing on the HRA as a mechanism through which the police service can be held to account, they focused almost exclusively on accountability as a form of self-protection. For officers, accountability was conceptualized in terms of the outcome of the processes through which their decision making is documented. Documentation of their compliance with the HRA was viewed by officers to allow for an audit of their decision making that ultimately protected them from criticism, liability or blame. One officer argued that the processes designed to ensure compliance with the HRA ‘gives structure to decision making . . . and gives you an audit trail and a mechanism to remind you of the decisions you have made’ (Officer 5). Another officer, whilst critical of the ‘form filling’, noted that ‘I document everything to protect myself’ (Officer 8). Similarly, another officer argued that whilst ‘officers moan about the paper work’—and that ‘forms are just a way of trying to please our masters’—the ‘forms are a good thing as they provide accountability’ (Officer 9). Indeed, when officers talked about the relationship between the HRA and accountability, they frequently described compliance with the HRA as a framework for ‘covering their arses’. One officer stressed that compliance with the HRA was important so that officers were ‘covered in the event that mistakes are made’ (Officer 5). Showing a consideration of human rights was said to be a way of ‘covering our backs’ (Officer 13) and provided a ‘get out of jail card’ (Officer 2).

*The problem of bureaucracy*

Whilst the HRA is not generally perceived by officers to have had a negative impact upon operational policing, officers did consistently tell us that the bureaucratic procedures and processes—especially those institutionalized through RIPA—could potentially slow down operational activities in certain areas of policing. The issue of the bureaucracy created through RIPA has been noted in official publications, including Flanagan’s review of policing (Flanagan 2008), a Home Office consultation on RIPA (2009) and in reports of the Office of Surveillance Commissioners (OSC 2009). One of the areas identified by officers as most problematic was the effect of the bureaucracy created by RIPA, designed to satisfy the requirements of the HRA, in respect of gaining authorization to deploy surveillance teams and to extract information from mobile phones and computers. As we have seen, it is certainly not the case that RIPA prevents the use of covert surveillance techniques but, instead, requires officers to justify and document their decision making in particular ways.
Whilst, as we noted above, officers saw many benefits in RIPA, they also identified the problems associated with ‘form filling’. One officer (Officer 2) said that, prior to the HRA, officers could seek permission to deploy covert surveillance by simply asking their supervisor and decisions about whether to grant this permission would be shaped largely by a consideration of resource implications. By contrast, this and other officers stated that the new processes for documenting decisions and for gaining authorizations were onerous. One officer noted that ‘life must have been a lot easier’ before the HRA, RIPA and the assorted processes that must now be followed (Officer 20).

A key problem identified by officers in respect of RIPA was the amount of time spent gaining authorization in the pre-investigative stages of an inquiry. Whilst officers saw the benefit of the HRA in making them ‘stop and think’ about their actions, they complained that it sometimes slowed them down in problematic ways. A frequently used example was the delays they experienced in gaining access to data on suspects’ mobile phones. Many officers viewed such data as increasingly useful, since they may provide far-reaching insight into suspects’ activities, networks and, in some cases, will be the scene of the crime itself. However, lawfully seizing mobile phones does not permit officers to covertly examine the information contained on them. Such examinations are regulated by the Police Act 1997, as well as RIPA, and the appropriate authority will depend on where the data are actually held (Harfield and Harfield 2008). Many officers noted that the process of gaining authorization to extract information from mobile phones was slow. Officers raised similar issues for extracting information from computers. However, whilst the HRA was sometimes blamed for creating such delays, it was clear from officers’ accounts that delays were as much about the resources available and backlogs in forensic examination. Officers therefore blamed the HRA for significantly slowing down police activity when wider organizational factors were also playing a role.

Official reports have also identified slowness to be the outcome of officers’ mishandling of authorization procedures. Flanagan, for instance, raises concern that ‘in some instances excessive bureaucracy is created by a combination of misunderstanding and sometimes over-interpretation of the relevant rules’ (Flanagan 2008: 61). Similarly, the Home Office (2009) has stated that any . . . potential invasion of privacy caused by using techniques regulated by RIPA should be properly justified in a clear, concise paper trail. We do not accept that short-cutting this trail would produce a better outcome, but we do accept that clearer guidance is needed to assist some public authorities to get the balance right. (Home Office 2009: 8)

And the Surveillance Commissioner has argued:

I have repeatedly commented that the bureaucracy some complain about is often self-inflicted and due to police officers’ failure to construct their documents concisely and with clarity . . . producing this trail is essential to proper observance of the legislation and is not meaningless bureaucracy. (Office of Surveillance Commissioner 2009: 19)

Some of the problems raised by officers about bureaucracy may therefore be overstated. In urgent situations, authorization can in fact be gained orally from an

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5Overt examination of mobile telephones (e.g. with a suspect’s knowledge and permission) is facilitated by the Police and Criminal Evidence Act 1984, whereas covert examination (e.g. where a suspect is unaware) requires authorization under RIPA.
Figures provided by the Office of Surveillance Commissioners suggest they are relatively rare.

In this sense, RIPA affords the police service significant room to manoeuvre in respect to covert surveillance.

**Conclusion**

This article has drawn on the accounts of police officers in order to consider the impact of the HRA on police practice in England and Wales. The incorporation of the ECHR into English law, through the HRA, was, in part, driven by a desire to generate a greater rights culture in all public authorities. We have shown that the HRA has failed to embed a culture of human rights awareness in policing. The effect of the HRA, whilst profound in the capacity it grants to individuals to complain of violations to their rights in the domestic courts, has not been to promote a vocabulary of rights among police officers. On the contrary, whilst most officers were highly competent at talking about the bureaucratic requirements of the HRA, they had little substantive knowledge of the rights and freedoms guaranteed by the HRA. Many of the officers we interviewed were candid about this lack of knowledge, showing us copies of a pocket sized book that, having been issued soon after the HRA came into force, they had retrieved from their office drawers and bookshelves in order to ‘revise’ for their interview with us. In short, the HRA has not acted as a mechanism through which awareness of human rights has trickled down from Strasbourg to local policing.

The limited impact of the HRA on understandings of human rights among police officers does not, in itself, lead to the conclusion that police officers act contrary to the spirit of the rights contained in the Act. However, it does suggest that the HRA has been unsuccessful in creating new forms of reflection on human rights among officers. This is unsurprising, since previous research on solicitors and courts suggests that the HRA is hardly used in the criminal justice process and has had very little influence on English due process in the lower courts (Costigan and Thomas 2005). Research has also demonstrated that, more broadly, public service workers have limited awareness of the HRA or how human rights principles relate to their day-to-day activities (Donald et al. 2008). This is, therefore, not a problem that is unique to policing. But it is a problem that police forces must address if they wish to claim—as many of them would—that policing is driven by a concern to respect human rights. A culture of human rights in policing requires more from officers than compliance with bureaucratic procedures in order to satisfy force policy and protect them from criticism. It requires, as Lamb (2008) argues, the development of new ‘cultural capacities’ based on the ideas of respect, equality, toleration, dignity, fairness, transparency and democratic accountability from which police officers can draw inspiration in carrying out their work. It demands an appreciation among police officers of how police work might contribute to greater respect for, and protection of, human rights in society. At the very least, it necessitates an understanding of the fundamental objectives of the HRA and the framework that it provides for achieving a fair balance between the demands of the community and the protection of human rights.

Our overall conclusion, therefore, is that the HRA has, without question, been important for the police service. It has bureaucratized aspects of decision making, forcing officers to justify and document the rationale for breaching human rights in ways that render their actions visible and open to audit and inspection. However, whilst these processes of justification may slow down police decision making in certain sets of circumstances, they have not fundamentally changed police practice. The HRA is understood by officers to enhance police powers, mandate police

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6Figures provided by the Office of Surveillance Commissioners suggest they are relatively rare.
decision making and ultimately protect officers from potential criticism and blame. In contrast to much of the public comment on the HRA, our research shows that officers regard the HRA to have had a positive impact on the police service. However, given that the aim of the HRA is to promote and enhance a fair balance between the rights of individuals and the public authorities that may wish to restrict them, the institutionalization of the HRA by the police service cannot be seen to have succeeded. New bureaucratic processes designed to satisfy the requirements of the HRA do not currently encourage officers to focus on the balance between individual human rights and community interests but, instead, emphasize the importance of risk, effectiveness and resources. We argue that, whilst the HRA has had a significant impact on police service procedure, it has not created police practices more attuned to the fundamental questions of human rights.

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