

CAJ's submission no. S386

**CAJ's submission to the
Department of Justice's consultation on the
Future Operation of the Office of the
Police Ombudsman for Northern Ireland**

June 2012

Submission to the Department of Justice’s Consultation on the Future Operation of the Office of the Police Ombudsman for Northern Ireland, June 2012

The Committee on the Administration of Justice (‘CAJ’) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its obligations in international human rights law.

Summary of Key Points:

- **The focus of the consultation should be on how to ensure the independence of the Office, not on governance issues.** The focus on whether the office should be changed away from a single Ombudsman (Corporation Sole) risks distracting from the core nature of the problem having been weak leadership and interference in the Office. It is worth remembering that during the tenure of the first police Ombudsman, the Office was generally held up as a model of good practice and that the Department’s own McCusker report concluded that ‘governance was not the key issue.’ CAJ supports the retention of the present model.
- **Scope of consultation: relationship with Five Year Review of Powers:** the Ombudsman’s Five Year Review of Powers (previous recommendations from which were not implemented in irregular circumstances) is referenced in passing but not dealt with substantively by the consultation document. *CAJ understands that the Department of Justice is yet to take a position on whether to take forward the recommendations.* CAJ is concerned that focusing primarily on the format of the Office does not deal with many substantive and significant issues in relation to ensuring the effectiveness and independence of the Office. CAJ calls for clarity on how the Five Year Review and broader reforms not referenced in the consultation will be taken forward.
- **The Police Ombudsman dealing with historical cases is not an insurmountable problem:** CAJ is open to the discussion of transitional justice mechanisms to deal with the past but concurs with the consultation that at present it is the Ombudsman’s obligation to conduct criminal justice investigations into deaths in which police officers are implicated. CAJ’s research concluded that resourcing issues did not explain the Office having developed a seeming unwillingness to effectively investigate past cases; proposals suggesting a separate body to deal with historic cases should not be premised on the suggestion that it is not possible for the Police Ombudsman to deal with such cases.

References to human rights framework welcome: CAJ welcomes the attention paid in the consultation document to international human rights standards.

- **Police/Civilian balance:** CAJ argues it would be beneficial to examine the current imbalance in the police/civilian composition at other levels in the organisation (beyond the Ombudsman per se).
- **Previous CAJ recommendations and concerns:** CAJ highlights recommendations from previous research reports; draws attention to recent correspondence with the NIO containing further evidence of irregularities in the appointment of the second Police Ombudsman and our concerns regarding the recent decision of the Ombudsman to reinterpret legislation in a restrictive manner in relation to investigating nearly 50 cases where RUC officers were responsible for deaths.

Appendices:

- A: the Executive Summary of our 2011 research into the Police Ombudsman and historic cases;
- B: CAJ's 2005 'Commentary on the Office of the Police Ombudsman for Northern Ireland';
- C: CAJ correspondence to the NIO over irregularities in the appointment of the second ombudsman;
- D: DoJ Comparative Table: OPONI 5 Year Review Reports;

Introduction:

CAJ welcomes the opportunity to comment on the Department of Justice's (DOJ) March 2012 consultation on the future operation of the Police Ombudsman's Office, a critical component in our new policing architecture and therefore vital to human rights compliance – as well as a critical conflict resolution mechanism. CAJ welcomes the attention paid in the consultation document to international human rights standards and the duties there are on the Office to undertake investigations in relation to Article 2 (the right to life) of the European Convention on Human Rights.

In July 2011, CAJ published 'Human Rights and Dealing with Historic Cases - A Review of the Office of the Police Ombudsman for Northern Ireland' which raised serious concerns about political and police interference in the workings of the Office. This report, along with an Investigation Report commissioned by the Department (McCusker Report) and the subsequent September 2011 Criminal Justice Inspection report into the independence of the Office, have been the catalyst for the current reform process.

CAJ issues this response to highlight a number of key issues but, in addition to reaffirming our intention to engage further in the reform process, CAJ wishes to again draw the Department's attention to the range of recommendations in our report as a contribution to the present consultation. To this end the Executive Summary of our report is included as Appendix A to this submission. CAJ also draws attention to our 2005 'Commentary on the Office of the Police Ombudsman for Northern Ireland' report which contains analysis and recommendations relevant to the present consultation which are included as Appendix B to this submission along with the Executive Summary of the publication.

As well dealing with issues of weak leadership, the CAJ research highlighted incidents of political interference in the office by the NIO, including in relation to irregularities in the recruitment of the second Police Ombudsman, Al Hutchinson, which the NIO publicly denied. Appendix C to this submission is a copy of recent correspondence from CAJ to the NIO on this matter. This, on the back of a significant legal victory for CAJ under freedom of information legislation, provides further evidence as to the irregularities surrounding the appointment of the second Ombudsman set out in our research. CAJ includes this, not only to set the record straight, but to highlight the problems the Office faced in the hope and expectation that such practices will not be repeated.

At a public meeting on the consultation, the Department of Justice supplied a helpful comparison table which sets out the matters dealt with by the present consultation and the full list of recommendations from the 2011 Five Year Review, alongside the original recommendations of the 2007 Five Year review. For completeness, this document is included as Appendix D.

Focus on securing independence not governance issues

The Department of Justice's consultation paper should be viewed in light of one critical fact. When the first Ombudsman Nuala O'Loan, left the Office in 2007 it was regarded internationally as an instance of exemplary police oversight. A review conducted by the Criminal Justice Inspection in 2005 noted the Office was, "an efficient and hard-working organization" that was "tightly managed" and "delivering value for money.. The report further noted the Office was, "delivering on its stated aims and objectives with public confidence in the system increasing."

The fact that the Office was fit for purpose and working as intended was evidenced in the quality of its reports including the investigation into Operation Ballast.¹ This landmark report highlighted what many who work on issues of state accountability regard as the tip of the iceberg in terms of security force collusion with loyalist paramilitaries. CAJ has voiced concerns to the international community that since this report there appears to have been concerted attempts to 'rollback' the independence and effectiveness of institutions set up to investigate conflict related deaths.² The events of the subsequent past five years since Operation Ballast, including what then happened in the Ombudsman's Office, must be viewed firmly through this lens.

By extension, the question in the current consultation document as to whether or not the corporation sole model is appropriate risks overlooking the issue that lies at the heart of the Office's current crisis: political and police interference in the Office. This question seems doubly anomalous given that in the DoJ's own investigative report into the Office, Tony McCusker concludes whilst emphasising the need for clarity of roles, that he is, "not however persuaded that governance per se is the key issue."³ In fact, the three investigative reports into the Office, from three distinctly different institutions, including the report from the Department of Justice (June 2011), CAJ's report (June 2011), as well as the Criminal Justice Inspection Northern Ireland (September 2011), all concluded that the Office of the Police Ombudsman was severely undermined due to political and police interference as well as 'weak leadership.' In other words the corporate sole model is appropriate if a Police Ombudsman is appointed with the political will and expertise to do the job. However, appoint an individual without these qualities and the Office becomes weak and ineffective. CAJ sees no compelling reason to change the present model of a sole Ombudsman.

¹ 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters', Nuala O'Loan (Mrs) Police Ombudsman for Northern Ireland, 22nd January 2007.

² For further detail, in particular in relation to the PSNI Historical Enquiries Team, see CAJ Submission no. S376 'Joint submission by Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) in relation to the supervision of Cases concerning the action of the security forces in Northern Ireland' (February 2012).

³ Department of Justice, Police Ombudsman's Investigation Report, June 2011, (conclusions, p26).

In fact, there are cogent arguments against a collective body, some of which are made in the consultation document itself. The post of Director of Public Prosecutions is a useful comparator. The Ombudsman must also come to conclusions and make decisions based on evidence presented to him or her acting in a quasi-judicial manner. Like the Director, the Ombudsman must satisfy him or herself that the investigation into the relevant matter has been robust and all evidential opportunities have been followed up. Of course, in the case of the Ombudsman, s/he is managerially responsible for the investigative process also. It is right that this kind of function is exercised by an individual who is publicly accountable for it. It would be quite wrong for such conclusions and decisions to be subject to a process of debate and compromise within a collective body. In investigating complaints against the police, the issue is not reflecting the different interests, currents and attitudes within Northern Ireland society but of exposing wrongdoing without fear or favour and of vindicating proper actions equally robustly when appropriate.

In his report produced in 1997 which examined police complaints mechanisms in many different countries and proposed a model for the Office in this country, Dr. Maurice Hayes considered the question of governance extensively. His recommendations were specifically geared toward ensuring independence and Dr. Hayes noted in the course of his international research, “The overwhelming message I got from nearly all sides and from all political parties was the need for the investigation to be independent and to be seen to be independent.” The Patten Report further emphasised the importance of a fully independent Police Ombudsman to operate as “a most effective mechanism for holding the police accountable to the law.” This report also aligned itself fully with Dr Hayes’ recommendations on the police complaints system. This criterion remains critical today and continues to be emphasised in police complaints systems internationally as a fundamental requirement for compliance with human rights.

Therefore it is not surprising that the requirement for independence is a statutory duty of the Office of the Police Ombudsman and a key requirement for compliance with Article 2 of the European Convention on Human Rights. CAJ contends that institutions should be in a perpetual state of critical reflection to enhance effectiveness and efficiency and this includes questions of governance, particularly given that it is still subject to supervision by the Committee of Ministers (who oversee the implementation of the judgements of the European Court of Human Rights). However, questions which consider whether a single individual can act as Police Ombudsman (a corporation sole model) misconstrue the crucial issue which lies at the heart of the Office’s current crisis.

Police Ombudsman: policing and civilian backgrounds

The Police Ombudsman’s Office is a civilian oversight mechanism that holds the police to account. As the police are law enforcement officials, it follows that the Police Ombudsman should have significant expertise in the law. Among the conclusions within CAJ’s recent report into the Ombudsman was a recommendation to: Examine the current imbalance in the police/civilian composition at senior levels in the organisation in an effort to address perceptions of bias.

The consultation makes reference to the 1997 Hayes Report envisaging the recommendation that the post of Police Ombudsman be filled by a person of the quality and experience of a senior judicial figure, thus indicating a high level of candidature that importantly did not reference a policing background. The document includes some comparative information on such approaches in New Zealand and Australia on which CAJ has further information.⁴

Whilst the consultation document focuses on the Police Ombudsman per se, what is also clear from international parallels is that the balance between (former) police and civilian personnel is considered crucial to both the reality and perception of independence. Under the second Police Ombudsman, the Executive Board of the Office was composed of three members, the Police Ombudsman and the Senior Director of Investigations both of whom come from a policing background, and the Chief Executive who is from a ‘civilian’ background. In addition, the Director of Current Investigations and the Director of Historic Investigations both had a policing background. If anything has been learned over the past five years, it is that the balance in police-civilian composition is crucial as the Office cannot fulfil its statutory remit or domestic and international human rights obligations without impartiality and a balance in perspective. CAJ would therefore urge the broader question of police-civilian imbalance be examined.

Broader Reform of the Police Ombudsman’s Office

Northern Ireland is a post-conflict society that remains deeply divided. It is also a society with a policing service that faces the grave challenges created by those who continue to use physical force against the state and its agents. CAJ maintains that prior policing methods, including those that were unlawful coupled with coercive legislation, contributed substantially toward an escalation of the conflict. As outlined in the Patten report, the Office is not only a vital part of our new policing architecture and therefore vital to human rights compliance, it is also a critical conflict resolution mechanism. In light of the current political context it remains vital that Northern Ireland maintains an effective and independent Police Ombudsman’s office. At present we see the priority as returning the Office to being fit-for-purpose for this job and do not see any case for merging the office with other investigatory bodies, such as the Prisoner Ombudsman, which in any case has a distinct role.

⁴ For example, in the Police Integrity Commission (PIC) in New South Wales the Commissioner must have special legal qualification defined as: (a) is or is qualified to be appointed as a Judge of the Supreme Court of the State or of any other State or Territory, a Judge of the Federal Court of Australia or a Justice of the High Court of Australia, or (b) is a former judge of any court of the State or elsewhere in Australia or a former Justice of the High Court. This emphasis on legal qualifications is echoed in Queensland where the executive board of the Crime and Misconduct Commission (CMC) consists of the chairperson and 4 part-time commissioners. To be considered for appointment as the chairperson the person must be a civilian and have a judicial background which would qualify them for appointment as, a Judge of – (a) the Supreme Court of Queensland; or (b) the Supreme Court of another state; or (c) the High Court of Australia; or (d) the Federal Court of Australia. Interestingly, in Canada the review or investigative unit which examines police complaints is also heavily weighted toward individuals with legal backgrounds and none of the current staff, including the director, are former police officers.

CAJ is open to the discussion of transitional justice mechanisms to deal with the past but concurs with the consultation that at present it is the Ombudsman's obligation to conduct criminal justice investigations into deaths in which police officers are implicated. CAJ's research concluded that resourcing issues did not explain the Office having developed a seeming unwillingness to effectively investigate past cases. Our report noted:

- The investigative process is agonisingly slow and it is often difficult to ascertain why the research requires such an extensive period to conduct. The length of time it takes for historic cases to be investigated and once opened, completed, is particularly stark given that many families have already waited decades to uncover the truth of their loved ones death.
- Publicly, the Police Ombudsman has consistently referred to a lack of resources as prohibitive and warned that historic investigations are an unnecessary drain on resources required to deal with present-day complaints. Even if inadequate resourcing is accepted, questions nonetheless arise in relation to efficiency and the use of existing resources. This is most salient when the length of time of the investigation is considered and compared to the eventual output, in particular the brevity of some of the reports. Additionally, there are concerns about the level, quality, and depth of research and investigation they entailed.
- This needs to be addressed in the context of the necessity of promptness in "...maintaining public confidence in [the Office's] adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts" as required by Article 2.

CAJ would therefore like to emphasise that the Police Ombudsman's Office dealing with historical cases should not be presented as an insurmountable problem requiring a separate entity to carry the work forward.

Five Year Review and the scope of the present consultation

The present consultation was issued alongside a recent Five Year Review Report produced by the Ombudsman's Office. This report makes reference to the original review by the first Police Ombudsman published in 2007 and appears to concede that following submission to the NIO, the review "appears to have lost focus and agreed statutory amendments were not progressed through the legislature."⁵ The consultation document also makes reference to the concerns expressed in the McCusker Review that "an agreement appeared to have been concluded on the previous five year review between the Senior Director of Investigations and a middle ranking official of the NIO without either the imprimatur of the Ombudsman or the knowledge of the Chief Executive."⁶ The result has been that very few of the 2007 recommendations were implemented.

Although the introduction of the present consultation document indicates the specific issues covered by the consultation paper include "Whether the proposals for adjustments to the role and powers of the Ombudsman emerging from the five year review are appropriate."

⁵ Police Ombudsman 'Statutory Report: REVIEW under SECTION 61(4) of the POLICE (Northern Ireland) ACT 1998' Paragraph 3.3.

⁶ Paragraph 2.15 of consultation document.

However, the rest of the paper does not make more of a passing reference to the Five Year Review, and CAJ has been informed– at a meeting on the present consultation- that the Department is yet to take a position in relation to the recommendations but would welcome views on the same.

CAJ draws attention to our original submission to the 2007 review (CAJ s226) available on our website, and our earlier 2005 *‘Commentary on the Office of the Police Ombudsman for Northern Ireland’* research publication. This 2005 publication highlights other areas whereby there are gaps in the powers of the Police Ombudsman’s office which could be addressed by the current reform process.

The 2007 Five Year Review contains a range of recommendations about the role and powers of the Ombudsman covering matters such as the Police Ombudsman being able to compel the co-operation of retired police officers with investigations. The present consultation document however focuses primarily on three main issues, namely whether the Police Ombudsman should not be permitted to come from a Policing background; whether the single Ombudsman model (corporation sole) should be maintained and whether the Office should be merged with others. Again CAJ reiterates the concern raised at the beginning of this submission that the consultation does not appear to deal with many substantive and significant issues in relation to ensuring the effectiveness and independence of the Police Ombudsman’s Office which have become apparent in recent times. CAJ therefore asks the Department to clarify as soon as is possible its position on taking forward the recommendations in the Five Year Review.

A further area which CAJ would like to highlight is the decision of the Office in late November 2011 to re-interpret legislation in a manner which means the Office argues it can no longer conduct investigations into nearly 50 cases where RUC officers were responsible for deaths. CAJ regards this as an overly narrow interpretation of the relevant legislation – the RUC (Complaints etc) Regulations 2001 – and despite Freedom of Information requests we are yet to receive a satisfactory response as to when and why the Office chose to seek fresh legal advice on this matter, and on what basis the interpretation has been made.

CAJ notes that whilst the legislation places restrictions on Ombudsman investigations into complaints already investigated by the police, previously the Ombudsman’s office did not regard this as a bar on investigations. It is notable that fresh investigations are unlikely to cover exactly the same ground as previous police investigations.

We note recommendation 20 in the 2011 Review to review and where necessary amend the RUC (Complaints etc) Regulations 2001 to enable the Ombudsman ‘to investigate deaths occurring either directly as a result of police action or indirectly due to police operations despite the fact that the death might otherwise have been previously investigated by police.’ Whilst legislative amendment would be welcome to provide clarity and prevent misinterpretation of the legislation, we do not believe the impediment is such that such

investigations cannot take place in the interim but rather is caused by the Office's decision to narrowly re-interpret the legislation.⁷

Given the inadequacies and limitations that surrounded the original RUC and subsequent ICPC investigations into these historical cases, we submit that the Office should adopt a policy of widely interpreting its powers under 6 (1) and (2) (as exercised by the first Ombudsman). This is particularly important given the determination reached by the ECtHR in the 'Cases concerning the action of security forces in Northern Ireland'⁸ that the UK had violated its procedural obligations under Article 2. In finding that there had been no prompt or effective investigation into allegations of collusion in the death of Patrick Shanaghan and a lack of independence of those officers investigating it from those implicated in the murder, the ECtHR stated:

104. Insofar as the investigations were conducted by RUC officers, they were part of the police force which was suspected by the applicant and other members of the community of harassing and issuing threats against Patrick Shanaghan. They were all under the responsibility of the RUC Chief Constable, who played a role in the process of instituting any disciplinary or criminal proceedings (see paragraphs 59-61 above). The power of the ICPC to require the RUC Chief Constable to refer an investigating report to the DPP for a decision on prosecution or to require disciplinary proceedings to be brought is not, however, a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those potentially under investigation.⁹

It is incumbent on the Office to invoke its powers to carry out effective investigations in retrospective cases given the flaws that surrounded the original investigations.

⁷ The Ombudsman's position is set out by the UK government in February 2012 to the Council of Europe Committee of Ministers as follows:

'13. The Police Ombudsman has now determined, however, that he is restrained from investigating the circumstances of these deaths, and many other similar historical matters, by limitations set out in the Royal Ulster Constabulary (Complaints etc) Regulations 2001.

14. An expert legal opinion provided to the Police Ombudsman in late 2011 confirms that in the absence of new evidence, not reasonably available at the time the matter originally occurred, he cannot investigate any matter that has previously been investigated by police.

15. The legal opinion confirmed that the Police Ombudsman must proceed on the basis of the domestic law as it is enacted. At this stage, therefore neither of these matters will be investigated by the Police Ombudsman.

16. Specifically, the opinion advised that if the Police Ombudsman sought to investigate an historic incident where lethal force was used by police he would be prevented from doing so if it had already been investigated by police in the absence of new evidence. The opinion continued that there was no scope within the legislation for a qualitative analysis of the previous police investigation.

United Kingdom Response to the CAJ/PFC and RFJ submissions made to the Committee of Ministers – February 2012,

http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Info_cases/UK/McKerr16022012.pdf

⁸ Jordan v the United Kingdom [2001] ECHR 327, Kelly and others v the United Kingdom [2001] ECHR 328, McKerr v the United Kingdom [2001] ECHR 329, Shanaghan v the United Kingdom [2001] ECHR 330, McShane v the United Kingdom [2002] ECHR 469 Finucane v the United Kingdom [2003] ECHR 328

⁹ Ibid

Appendix A:

July 2011 CAJ report 'Human Rights and Dealing with Historic Cases - A Review of the Office of the Police Ombudsman for Northern Ireland'

Executive Summary

In recent years, a number of concerns have been raised about the capacity of the Office of the Police Ombudsman for Northern Ireland (OPONI) to investigate historic cases due to the length of time taken, the quality of the reports it has published, and the conclusions reached. The most recent reports into historic cases published by the Office of the Police Ombudsman have contributed towards a questioning of the Office's ability and commitment to undertake robust and impartial analysis. A growing lack of confidence in the Office is further exacerbated by the experiences and perceptions of some of those who have referred complaints to OPONI, in particular, those families involved in historic cases due to the death of a loved one.

Under Article 2 of the European Convention on Human Rights, where complaints against the police relate to violations of the right to life, the UK government is obliged to conduct independent, effective, prompt, and transparent investigations. The UK government has argued during examinations before the Committee of Ministers of the Council of Europe (the body empowered to monitor compliance with judgments of the European Court of Human Rights) that OPONI fulfils its obligations under Article 2 of the European Convention on Human Rights.

This report therefore reviews the Office of the Police Ombudsman on how well it discharges its duties in accordance with the requirements of Article 2 of the European Convention on Human Rights: effectiveness, efficiency (promptness), transparency and independence.

Effectiveness

In recent years, investigations into 'grave and exceptional' (historic) matters by OPONI have resulted in serious questions about the effectiveness of investigations by the Police Ombudsman's Office, and thus its ability to meet Article 2 obligations. In particular a number of issues cause concern:

- CAJ is concerned about the lack of any clear definition or consistent application of the term collusion in a number of recent historic investigations involving allegations of collusion. Furthermore, there is no explanation as to why different aspects of collusion are engaged with in different investigations. This discrepancy leaves the Office open to allegations that a different standard of 'collusion test' is utilised given the specific circumstances of the investigation, which could in turn raise questions about the real and/or perceived impartiality of the Office.
- Of further concern in relation to recent reports on historic cases is the application and interpretation of 'police criminality and misconduct.' In a number of recent reports, the Police Ombudsman states that "collusion may or may not involve a criminal act" followed by

the assertion that “the Police Ombudsman may only investigate and report on matters of alleged police criminality or misconduct.” However, a criminal act is criminality and therefore if a collusive act is criminal it would constitute criminality and should be found as such. Likewise, a collusive act that may not be criminal may constitute misconduct. The absence of a definition of collusion and the subsequent excessively narrow interpretation of criminality or misconduct therein, therefore becomes problematic and contradictory. An unduly restrictive approach such as that adopted in the most recent reports also ignores the cumulative impact of a range of activities which regarded individually may appear relatively minor, but which, when taken in combination, are much more serious.

- A review of recent investigations into historic cases highlights a tendency towards finding ‘failings’ but stopping short of more detailed recommendations which might secure accountability for those failings as is required from an Article 2 compliant investigation. By comparison, a more prescriptive set of recommendations such as those contained in previous reports from the Police Ombudsman’s Office has led to fuller responses from the PSNI regarding acceptance and implementation.

Efficiency

CAJ is concerned that the current levels of efficiency or ‘promptness’ offered by the Police Ombudsman’s Office are not Article 2 compliant:

- The investigative process is agonisingly slow and it is often difficult to ascertain why the research requires such an extensive period to conduct. The length of time it takes for historic cases to be investigated and once opened, completed, is particularly stark given that many families have already waited decades to uncover the truth of their loved ones death.
- Publicly the Police Ombudsman has consistently referred to a lack of resources as prohibitive and warned that historic investigations are an unnecessary drain on resources required to deal with present-day complaints. Even if inadequate resourcing is accepted, questions nonetheless arise in relation to efficiency and the use of existing resources. This is most salient when the length of time of the investigation is considered and compared to the eventual output, in particular the brevity of some of the reports. Additionally there are concerns about the level, quality, and depth of research and investigation they entailed.
- This needs to be addressed in the context of the necessity of promptness in “...maintaining public confidence in [the Office’s] adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts” as required by Article 2.

Transparency

Transparency was regarded as fundamental to accountability and the building of public confidence by the Patten Commission. It also forms part of the core legislative responsibility of the Police Ombudsman’s Office to exercise his or her powers in such manner and to such extent as appear best calculated to secure public confidence. Thus, while the role of the Office is to investigate complaints against police, in doing so it needs to be accessible and to provide information to families:

- In addition to unacceptable delays, the treatment of families by the Police Ombudsman's Office has often been painful and distressing for family members. In particular, concerns exist around the frequency and nature of communication, willingness to consider views of relatives, and inequality of treatment in relation to prior access to reports.
- It is not only the formal statements, reports and media presence of the Police Ombudsman, but the nature of interaction with the public - individually and collectively – that is a critical determinant of the degree of public support for and confidence in the Office, and by extension the credibility extended to the Office. However, recent years have witnessed a perceived shift from proactive community-based outreach initiatives spearheaded by the Police Ombudsman to an emphasis on meeting with international delegations.
- As regards historic cases, the requirements for transparency and openness to public scrutiny form a core part of the Article 2 obligations, and have particular relevance in the context of building confidence in policing and accountability in a post-conflict society.

Independence

The requirement for independence is a statutory duty of the Office of the Police Ombudsman and a key requirement for compliance with Article 2 of the ECHR. This report identifies a number of issues that impact upon the independence of the Office:

1. Irregularities in the appointment process of the current Police Ombudsman.

- CAJ has become aware that the criterion of prior Northern Ireland experience appears to have been added at a very late stage in the recruitment for the current Police Ombudsman. It is difficult to determine precisely by whom, and how, these important decisions appear to have been made; however the evidence points to the changes being introduced by the appointing body (the Northern Ireland Office), which raises serious questions as to why, and when, the NIO would choose to add an additional criterion. It is difficult to avoid the conclusion that certain candidates would be privileged or disadvantaged by the additional criterion and that this was the primary motivation for the change. It is clear that an important appointment procedure is now mired in doubt because of serious questions about the independence and transparency of the process and its potential susceptibility to political interference.
- It has emerged that there were irregularities in the manner in which security vetting procedures were conducted with respect to the current Police Ombudsman. The way in which the process appears to have been conducted raises questions as to whether normal procedures were applied, suspended or circumvented. The approach taken to high-level security clearance for the current Police Ombudsman was at best irregular and at worst unacceptable for an Office which deals with highly classified materials. It further raises questions about the propriety with which the Police Ombudsman's Office was treated by the Northern Ireland Office in this regard.

- CAJ's analysis has raised a number of concerns about both the use of public monies and equality with respect to the remuneration extended to the current Police Ombudsman. The salary of the current Ombudsman at the end of the financial year of 09/10 was in the region of £20,000 greater than when the former Police Ombudsman finished her term in office only two years previously. As the marked increase in remuneration correlates with a transition from a female to male incumbent, questions arise around gender equality, and in particular equal pay for work of equal value. Concerns have also emerged regarding the role of the Northern Ireland Office in relation to the remuneration and terms and conditions of the current Police Ombudsman.

These financial irregularities, taken together with the irregularities in the recruitment process, and the discrepancies relating to the process of security clearance, raise serious questions and concerns as to the independence of and political interference in the Office of the Police Ombudsman.

2. Concerns surrounding intelligence and independence from the PSNI.

An overview of the process of accessing intelligence illustrates that there are a number of steps in the process where 'gatekeepers' can significantly limit and control OPONI's access to intelligence without detection:

- The fact that most, if not all, historic intelligence material is provided by the PSNI Intelligence Branch (C3) is of concern. It is unclear how many former Special Branch officers are located throughout the specialist branches of Crime Operations and what percentage of total officers they constitute. Given that former Special Branch officers would have substantial years of service and intelligence experience, it is likely these officers occupy pivotal positions with respect to intelligence and security policing.
- All of this is relevant to the work of OPONI on historic cases, since it means that the Ombudsman's Office is reliant on intelligence efforts undertaken by former RUC (and Special Branch) officers, despite the fact that many of the most serious allegations of human rights abuses may involve allegations of improper RUC/Special Branch behaviour.
- In light of the legal and human rights obligations of the Office of the Police Ombudsman, it would seem appropriate for the Office to adopt a robust position, and ensure that 'gatekeepers' are not limiting access to intelligence. Our attempts to establish how independence around intelligence was ensured in theory and in practice in this regard were inconclusive. However, it is the responsibility of the Police Ombudsman's Office to develop safeguards to ensure independence around intelligence, to be transparent about what these safeguards are, and to subject them to independent scrutiny.

3. Concerns and perceptions of bias arising from historic cases

The police-civilian composition of the Office of Police Ombudsman is crucial as the Office cannot fulfil its statutory remit or domestic and international human rights obligations without impartiality and a balance in perspective:

- Currently the Executive Board of the Police Ombudsman’s Office is composed of three members, the Police Ombudsman and the Senior Director of Investigations both of whom come from a policing background, and the Chief Executive who is from a ‘civilian’ background. In addition, the Director of Current Investigations and the Director of Historic Investigations both have a policing background. It is clear from international parallels that the balance between (former) police and civilian personnel is considered crucial to both the reality and perception of independence.
- To meet the standards required under Article 2, it is “necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events...This means not only a lack of hierarchical or institutional connection but also a practical independence.” In this regard, perceptions of bias are as important as actual bias when it comes to levels of public confidence in, and the accountability and effectiveness of, the Office.

Conclusion and recommendations

This report has identified concerns and raised questions in relation to the actual and perceived effectiveness, efficiency, transparency and independence of the Office of the Police Ombudsman. If the Office is to discharge obligations arising under Article 2 of the European Convention on Human Rights to provide an independent and effective investigation into deaths where complaints have been made against the police, then CAJ recommends that the Office must:

1. Define, operationalise and consistently apply the term collusion in all of its investigations.
2. In this context, clarify what is criminal behaviour and what is misconduct, and ensure that events and activities are considered in their totality rather than in isolation.
3. Move beyond the practice of simply finding failings to articulating conclusions and more detailed recommendations that enable responsibility and accountability to be attributed.
4. Examine how resources are allocated to and spent on historic investigations relative to the methodology adopted and outputs produced and in particular address perceptions and concerns related to promptness and efficiency.
5. Ensure transparency, openness and accessibility to both next of kin and the wider community in order to build confidence in the Office.
6. Ensure there is institutional, hierarchical and practical independence at all levels and in all the work of the organisation.
7. Put in place robust and transparent mechanisms in relation to the policies and practices of intelligence-handling.

8. Examine the current imbalance in the police/civilian composition at senior levels in the organisation in an effort to address perceptions of bias.

CAJ maintains that an independent and effective mechanism for investigating complaints against the police is essential to ensure public accountability of and thus confidence in policing in Northern Ireland. Importantly, while this report focuses on the work of the Police Ombudsman in relation to historic cases, the concerns raised have a broader resonance for the general workload of the Office. Therefore the recommendations made – while located in the context of meeting obligations under Article 2 – are essential to ensuring public confidence in the independence and effectiveness of the Office of Police Ombudsman in holding the police to account.

Appendix B:

2005 'Commentary on the Office of the Police Ombudsman for Northern Ireland' by CAJ

Appendix C:

Correspondence to the NIO over irregularities in the appointment of the second Ombudsman

Appendix D:

A DoJ Comparative Table: OPONI 5 Year Review Reports

Committee on the Administration of Justice Ltd
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