

CAJ's Submission no. S415

**CAJ's submission to the Department of Justice's Consultation
on the 'New Powers Package Policy Paper' for Office of the Police
Ombudsman for Northern Ireland (OPONI), July 2013**

July 2013

About CAJ

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights in Northern Ireland.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

CAJ's Submission to the Department of Justice's Consultation on the 'New Powers Package Policy Paper' for Office of the Police Ombudsman for Northern Ireland (OPONI), July 2013

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:

- **Whilst the reforms are welcome the process has been delayed and protracted:** CAJ welcomes the internal reforms which have taken place over the last year to re-establish the credibility of OPONI. Whilst it is also welcome that the Department is now taking forward some of the matters in its remit resulting from the Ombudsman's Five Year Review of Powers, implementation of which has been delayed since 2007, the protracted and slow nature of the current process is a matter of concern.
- **The reforms which the Department intends to implement contain positive measures which would remedy gaps in OPONI's remit:** The consultation document outlines a Package of Reforms the Department intends to implement which includes eleven recommendations from the Five Year Review, seven of which will require legislation. Among these are important matters such as extending OPONI's remit to include oversight of civilian staff operating with the PSNI in a policing capacity.
- **Eleven recommendations from the Five Year Review are however being parked by the Department, these engage international obligations:** the consultation indicates there is not cross party support for eleven recommendations including powers to compel retired/former RUC officers to cooperate with the Ombudsman and amendments to RUC complaints regulations. CAJ urges the Department to assess which of these require implementation to ensure compliance with the UK's international obligations (in particular Article 2 ECHR requirements for effective independent investigations) and, should it not be possible to progress them through the devolved institutions, refer them to the UK government for implementation in accordance with the Northern Ireland Act 1998.

Whilst noting the drawn out nature of the process CAJ welcomes that a number of review recommendations, which have remained unimplemented since 2007, are now being taken forward. CAJ however urges the Department to also find a mechanism to ensure other recommendations, which engage matters of compliance with human rights obligations, will also be dealt with.

The time span of the process to take reform forward

CAJ welcomes the opportunity to comment on the Department of Justice's (DOJ) July 2013 consultation on the future operation of the Police Ombudsman's Office. The Office is a critical component in our new policing architecture and therefore vital to human rights compliance.

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 then workings of the Office during the tenure of the Second Police Ombudsman. 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, were the catalysts for the current reform process following the resignation of the Second Police Ombudsman. It is welcome that under the third Police Ombudsman internal reforms have been undertaken. Following a positive appraisal by the Criminal Justice Inspector early in the year the office has again been deemed fit-for-purpose to undertake historic investigations.

In relation to legislative and other changes within the remit of the Department it is worth drawing attention to how this process has suffered considerable delay. This present June 2013 consultation has been issued over a year on from the previous consultation. The March 2012 consultation document was published alongside the Police Ombudsman's Five Year Review of Powers, previous recommendations from which had not been implemented in irregular circumstances. However in the 2012 consultation the Five Year Review was only referenced in passing but not dealt with substantively. It became clear the Department of Justice was yet to take a position on how to take forward its recommendations.

Consequently the 2012 consultation document focused primarily on other far reaching yet seemingly extraneous issues, including whether the single Ombudsman model (corporation sole) should be maintained and whether the Office should be merged with others like the Prisoner Ombudsman. CAJ expressed concern that the consultation did not appear to deal with many substantive and significant issues in relation to ensuring the effectiveness and independence of the Police Ombudsman's Office. It is notable in the present consultation that the above suggestions now appear to have been rightly taken off the table and a focus is back on the Five Year Review.¹ Protracted consideration of consultation on them however has had the effect of delaying the reform process by around a year.

The 2012 consultation did make reference to the original Five Year Review by the first Police Ombudsman published in 2007 and appears to concede that following its submission to the Northern Ireland Office (NIO), the review "appears to have lost focus and agreed statutory amendments were not progressed through the

¹ See paragraph 1.7 of present consultation.

legislature.”² The 2012 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.”³ The result has been that very few of the 2007 recommendations were actually implemented.

In response to the 2012 consultation CAJ called on the Department to make clear its position on the Five Year Review, which had been further revised in 2011. In October 2012 the Department produced a 'summary of responses to OPONI consultation' and presented it to the Justice Committee summing up who was in favour and who was not on particular measures. There was still no indication if the Minister had taken a position on the Five Year Review of Powers' recommendations. The Department then announced a long process in relation to reform with further work between the Minister, Committee and OPONI and “detailed policy and legislative proposals” to follow for another consultation “probably in the first half of 2013.”

Whilst it is welcome that in June 2013 this consultation, setting out the present position on the Five Year Review, has finally come it is worth reflecting on the protracted nature of this present process. As further referenced later in this response the matters under discussion do engage the UK's human rights obligations to ensure adequate procedures are in place to ensure effective independent investigations, and hence should be dealt with expeditiously.

CAJ would urge the Department that the reform process is taken forward as expeditiously as possible.

The reforms now being taken forward by the Department of Justice:

The consultation document sets out seven measures the Department intends to take forward through legislative change, in summary:

- Power to appoint an interim Ombudsman (2011 five year review recommendation (hereafter 'rec') 3);
- Reducing Ombudsman term from seven to five years (rec 2.);
- Extending OPONI remit to deal with 'all civilians operating with police in a policing capacity' (rec 4);
- Extending power to recommend disciplinary sanctions to civilian staff (rec 5);
- Repealing requirement to serve a notice on officers subject to a complaint when not substantiated and no investigation (rec 9);

² Police Ombudsman 'Statutory Report: REVIEW under SECTION 61(4) of the POLICE (Northern Ireland) ACT 1998' Paragraph 3.3.

³ Paragraph 2.15 of consultation document.

- Revising OPONI local resolution and mediation procedures to more localised and quicker system (rec 11-14);
- Amendment for Ombudsman not to submit files to prosecution service when complaint involving criminal offence has been received after it becomes statute barred (recommendation 19);

Further to this the Department sets out a further four ‘administrative’ changes which do not require legislation and relate to four Five Year Review recommendations (10, 24, 25 and 26 respectively). These cover tracking and trending multiple complaints; DoJ engaging the Ombudsman in discussions on statutory change effecting OPONI; reviewing and revising statutory guidance on police complaints to align with OPONI legal framework; and a 12 month time limit for misadministration complaints.

Given the use of PSNI of civilian staff the recommendation to extend the OPONI remit to cover them is an important one. Paragraph 1.5 of the consultation paper states that the remit will be extended to “all civilians operating with police in a policing capacity.” The Appendix to the consultation sets out further detail and links the matter to the programme of civilianisation. It states that whilst OPONI does have powers over civilian detention officers, escort officers and investigators it does not currently have power over “civilian receptionists in police stations or other civilian staff operating directly in conjunction with police officers”. CAJ supports the extension of OPONI's remit to civilian staff. In due course the Department should provide further certainty as to who this would cover. In particular this should address inclusion of any remaining rehired police officers in civilian roles and any private security contractors carrying out work for the PSNI.

PSNI ‘rehiring’ led to former officers being rehired in a civilian capacity to undertake what were essentially policing roles, beyond reception type functions. The Northern Ireland Audit Office Report into the practice found for example that C3 Intelligence Branch had the second highest number of rehired officers and of those persons rehired to work as ‘Intelligence Officers’ 97% were former retired officers rehired as civilians.⁴ The Audit Office report also found that the PSNI had ‘employed’ 64 staff through limited companies – 63 in the Historical Enquiries Team.⁵ The Audit Office indicates this may be primarily related to tax avoidance. However employing persons in this capacity may also have implications for whether they are covered under OPONI's current or future remit. The Department should provide clarity as to the scope of roles which will be brought into the OPONI remit.

The consultation also states that OPONI will be maintained as a single Ombudsman Office (Corporation Sole, rec 1). CAJ supported and provided commentary on this in our previous submission.⁶

⁴ NIAO ‘The Police Service of Northern Ireland: Use of Agency Staff’ Report by the Comptroller and Auditor General, 3 October 2012 figure 7; p 23 and figure 14; p35.

⁵ As above, paragraph 2.24.

⁶ CAJ s386, June 2012, page 5.

Recommendations not currently being taken forward by the Department:

Annex C of the consultation document then sets out a total of eleven recommendations from the Five Year Review not being presently taken forward by the Department of Justice. In summary these are:

- Amending the law to ensure protection of information disclosed by the Police Ombudsman to other agencies (rec 6);
- Empowering other statutory agencies to make referrals to OPONI (rec 7);
- Empowering PSNI officers to draw matters to the attention of OPONI (rec 8);
- Amending RUC conduct regulations for matters relating to PACE and disciplinary caution questioning (rec 15);
- OPONI empowered to compel attendance at interview of both witnesses and suspect officers (rec 16);
- OPONI empowered to compel former or retired officers to submit to witness interview and provide documentation, in grave or exceptional matters (rec 17);
- Amending s5(1) 'Criminal Law 1967' to include OPONI when matters relate to police conduct (rec 18);
- Review and amendment of RUC conduct regulations to enable investigation of deaths directly or indirectly attributable to police, regardless if there was a previous police investigation (rec 20);
- Statutory provision for a conciliation process (rec 21)
- Empower withdrawal of complaints by alternative formats to writing (rec 22);
- Amend RUC conduct regulations to allow Ombudsman to attend all hearings which take place following an OPONI investigation (rec 23);

Among the most serious matters not currently being reformed are the gaps in the Police Ombudsman's powers in relation to compelling former or retired officers to cooperate with the Office (rec 18). At the time of writing the current PSNI Deputy Chief Constable Judith Gillespie has just expressed regret that a number of retired officers had declined to cooperate with a Police Ombudsman investigation. This related to the RUC role in not warning residents of an IRA bomb which then killed three people in 1998, and the subsequent flawed RUC investigation which followed.⁷ A further long running matter is the review and amendment of RUC conduct regulations to ensure they cannot be interpreted in a manner which prevents OPONI investigations in deaths attributable to police (rec 23).

The cover letter to the consultation cites two reasons why these recommendations have not been including in the package of reforms for implementation. These are namely "*due to the lack of consultees or political support.*" In relation to the first reason the cover letter elaborates "*Many respondents did not respond to all of the*

⁷ See 'RUC 'failed to warn' over 1988 bomb' UTV News Online, 10 July 2013.

*questions and recommendations set out in the consultation documentation*⁸ It seems a rather unlikely scenario that the reforms have been delayed as insufficient commentary had been received from consultees, and certainly sets an interesting precedent for Departmental consultations. In this instance we would draw attention to there likely being considerable information in relation to many of the above recommendations both in process of the Five Year Review and in much of the commentary that has accompanied matters such as the difficulties caused by not being able to compel retired/former officers to cooperate with OPONI.

The second reason relates the realities of a potential lack of political consensus on some of the recommendations. If the Department has already sought to take forward recommendations and they have been blocked at the Executive, or indications were given they could not progress through the Assembly one of the matters the Department should ensure it has considered is the extent to which implementation of some of the recommendations is required to give effect to the UK's international obligations. This in particular would include the duties to ensure effective independent investigations under Article 2 of the European Convention on Human Rights and would have particular relevance to the above matters relating to gaps in OPONI's powers relating to former/retired officers and the RUC conduct regulations. When the implementation of recommendations is required to fulfil international obligations, but the Department has been unable to progress them through the devolved institutions, the Department should draw them to the attention of the Secretary of State who, further to the Belfast/Good Friday Agreement, has powers under the Northern Ireland Act 1998 to direct action (including legislation) be taken when required to fulfil international obligations.⁹

CAJ July 2013

⁸ Letter to consultees re OPONI targeted consultation, Head of Legacy Branch, DoJ, 17 June 2013.

⁹ The Belfast/Good Friday Agreement provided that Westminster ("whose power to make legislation for Northern Ireland would remain unaffected") "will... legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland". s26-27 of Northern Act 1998 provides a power for the Secretary of State to direct action (including legislation) should or should not be taken in order to fulfil international obligations (defined as 'any international obligation of UK' other than EU law or ECHR rights, which are provided for separately in the Act).