

Human Rights and Dealing  
with Historic Cases -  
A Review of the  
Office of the Police Ombudsman  
for Northern Ireland

Committee on the Administration of Justice (CAJ)

June 2011

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## **What is CAJ?**

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation that works to promote justice and protect rights in Northern Ireland by seeking to ensure that the government complies with its responsibilities in international human rights law.

CAJ's areas of work are extensive and include policing, criminal justice, equality and the protection of rights. Its activities include publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, making submissions to various UN and European human rights bodies, individual casework and providing legal advice.

CAJ is affiliated with the International Federation of Human Rights and works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First and Human Rights Watch. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence. Its membership is drawn from across the community in Northern Ireland and beyond.

In 1998 the organisation was presented with the Council of Europe's Human Rights Prize for its successful efforts to mainstream human rights and equality considerations into the peace negotiations.

## Acknowledgements

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## 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.



## 1. Introduction

The Committee on the Administration of Justice (CAJ) has advocated for an independent police complaints mechanism since 1982 and continues to advocate that such a mechanism is essential to ensure public accountability of and thus confidence in policing in Northern Ireland. The current complaints mechanism – the Office of the Police Ombudsman for Northern Ireland (OPONI) – which was established by the Police (Northern Ireland) Act 1998 began operating eleven years ago in November 2000. Five years into its existence in 2005, CAJ produced a commentary on the operation of the Office.<sup>1</sup> That commentary was comprehensive and looked at a wide range of the Police Ombudsman’s powers and activities and made a number of detailed recommendations for change. A further six years on, this report does not seek to provide a similarly broad assessment and so does not repeat the ground covered in that commentary; instead this report focuses specifically on the Office’s fitness for purpose in relation to historic cases arising from the conflict.

There are a number of catalysts for this approach. For many years now, there has been a debate about how to deal with Northern Ireland’s past. This debate has engaged many thousands of people and an expectation has been created among them that the legacy of the conflict in Northern Ireland would be substantially and comprehensively addressed. However to date this has not happened, and many victims and survivors continue to have unanswered questions.

Engaging in these longstanding debates on dealing with the past, CAJ continues to advocate that a mechanism is required to deal with the past in a comprehensive and human rights-compliant way.<sup>2</sup> In the absence of such a mechanism, it has fallen to a number of institutions to conduct investigations into individual cases; including the Historical Enquiries Team (HET) set up by the Police Service of Northern Ireland (PSNI) to investigate all deaths that occurred during the conflict, and the Office of the Police Ombudsman to investigate those involving complaints against the police. Thus the Police Ombudsman has a ‘dual mandate’: investigating both ‘normative’ day-to-day complaints and acting as a surrogate truth recovery vehicle by investigating historic cases involving complaints against the police.<sup>3</sup>

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<sup>1</sup>Commentary on the Office of the Police Ombudsman for Northern Ireland, CAJ, 2005, see <http://www.caj.org.uk/contents/545>

<sup>2</sup>See [http://www.caj.org.uk/files/2000/01/03/S210\\_Response\\_to\\_the\\_Consultative\\_Group\\_on\\_the\\_Past\\_-\\_Dealing\\_with\\_the\\_Legacy\\_-\\_a\\_human\\_rights\\_perspective\\_September\\_2008.pdf](http://www.caj.org.uk/files/2000/01/03/S210_Response_to_the_Consultative_Group_on_the_Past_-_Dealing_with_the_Legacy_-_a_human_rights_perspective_September_2008.pdf) and [http://www.caj.org.uk/files/2000/01/03/S240\\_Response\\_to\\_the\\_consultation\\_on\\_The\\_Report\\_on\\_the\\_Consultative\\_Group\\_on\\_the\\_Past\\_September\\_2009.pdf](http://www.caj.org.uk/files/2000/01/03/S240_Response_to_the_consultation_on_The_Report_on_the_Consultative_Group_on_the_Past_September_2009.pdf) in particular the appendices setting out CAJ’s Basic Principles for a truth process in Northern Ireland.

<sup>3</sup>See Graham Ellison, A Blueprint for Democratic Policing Anywhere in the World?: Police Reform, Political Transition, and Conflict Resolution in Northern Ireland in *Police Quarterly* 10: 243-269 (2007).

Under Article 2 of the European Convention on Human Rights, where these complaints relate to violations of the right to life, the UK government is obliged to conduct effective and independent 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 the HET and OPONI fulfil its obligations under Article 2 of the European Convention on Human Rights.

However, as a result of concerns arising from recent cases related to the past handled by OPONI, together with the ongoing absence of any broader mechanism to deal with the past, CAJ believes it is vital to examine the extent to which OPONI meets the standards required of Article 2 compliant mechanisms. This report raises a number of concerns in that regard.

## 1.1 Background to the establishment of OPONI

The Office of the Police Ombudsman for Northern Ireland replaced the former Northern Ireland complaints body, the Independent Commission for Police Complaints (ICPC). The ICPC was flawed on many levels, with the main problem being that the police themselves investigated the complaints made against them. Even when police investigations were supervised by the ICPC, which only took place in a very small percentage of cases, the primary responsibility for investigation remained with members of the RUC. CAJ began arguing for the need for an independent and effective investigation of complaints against the police as early as 1982 and detailed reports in 1982, 1983, 1990, 1991, 1993 and 1997 addressed this need.<sup>4</sup>

In 1995, the Secretary of State for Northern Ireland appointed Dr Maurice Hayes to conduct a review of the police complaints system in Northern Ireland.<sup>5</sup> His report published in January 1997 recommended the establishment of a Police Ombudsman for Northern Ireland.<sup>6</sup>

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<sup>4</sup>See [www.caj.org.uk](http://www.caj.org.uk) for all our previous publications in relation to policing.

<sup>5</sup>Dr. Maurice Hayes went on to become a member of the Patten Commission. He is a former Northern Ireland Ombudsman and Boundary Commissioner, and was Permanent Secretary of the Department of Health and Social Services (NI). He is a former chairman of the Community Relations Council (NI) and the Acute Hospitals Review Group. Dr. Hayes also wrote the pivotal report which led to the setting up of the Police Ombudsman. He was a member of the Irish Senate 1997-2007. He also served, at the Taoiseach's request, as Chairman of the National Forum on Europe in Ireland. The approach he devised to educate the population on the arguments around European issues was so successful that many other European countries adopted similar methods. He is a former chairman of both the Community Relations Council (NI) and the Ireland Funds, a major charitable group which has made significant grants to groups dealing with social and business problems in Ireland. He has also received honorary doctorates from his alma mater, Queen's University Belfast; Trinity College, University of Dublin; University of Ulster; National University of Ireland. Maurice was voted European Person of the Year in 2003.

<sup>6</sup>A Police Ombudsman for Northern Ireland? A review of the police complaints system in Northern Ireland by Dr. Maurice Hayes, 1997.

Subsequently, political negotiations took place that in due course led to a multi-party peace agreement that was approved by referendum. In accordance with the Belfast/Good Friday Agreement, the Independent Commission on Policing was established (the 'Patten Commission') and began work in June 1998. It was tasked with considering the future policing arrangements for Northern Ireland, and the Agreement specifically stated that its proposals should ensure "there are open, accessible and independent means of investigating and adjudicating upon complaints against the police."<sup>7</sup>

The Office of the Police Ombudsman was established under Part VII of the Police (Northern Ireland) Act in July 1998. The legislation was therefore enacted before the Patten Commission could report and did not fully implement Dr Hayes' recommendations. While OPONI was still in the process of being established, in September 1999 the Patten report "A New Beginning: Policing in Northern Ireland" emphasised the importance of a fully independent Police Ombudsman to operate as "a most effective mechanism for holding the police accountable to the law."<sup>8</sup> This report also aligned itself fully with Dr Hayes' recommendations on the police complaints system. The authorities seemed reluctant to provide the Ombudsman's office with the appropriate level of independence urged by Dr Hayes, and also the Patten Commission, and it required extensive lobbying (by CAJ and many others) to secure firstly the Police (Northern Ireland) Act 2000 and then the Police (Northern Ireland) Act 2003 to bring all the earlier promised reforms to legislative fruition.

Thus, the Office of the Police Ombudsman is, and must be seen to be, an accountability mechanism designed to play a critical and central role in ensuring this 'new beginning' to policing in Northern Ireland.

## 1.2 Human rights obligations

In the midst of these attempts to transform policing in Northern Ireland, a number of cases were progressing through the European Court of Human Rights challenging *inter alia* the failure of the UK government to investigate violations of Article 2 (right to life) of the European Convention on Human Rights.<sup>9</sup> The judgements that were delivered by the European Court in 2001 established the standards that need to be met to ensure that deaths are investigated in an Article 2 compliant manner. These 'procedural obligations' require states to show that an investigation is independent, effective, prompt and transparent (including involving the next of kin to the extent necessary to protect their interests). Subsequent case-law of the Court has re-emphasised these standards.

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<sup>7</sup><http://www.nio.gov.uk/agreement.pdf> Annex A Commission on Policing for Northern Ireland Terms of Reference

<sup>8</sup>[http://www.nio.gov.uk/a\\_new\\_beginning\\_in\\_policing\\_in\\_northern\\_ireland.pdf](http://www.nio.gov.uk/a_new_beginning_in_policing_in_northern_ireland.pdf)

<sup>9</sup>Jordan v. UK [2001] ECHR 327, Kelly & Ors v. UK [2001] ECHR 328, McKerr v. UK [2001] ECHR 329, Shanaghan v. UK [2001] ECHR 330 and subsequently McShane v. UK [2002] ECHR 469 and Finucane v. UK [2003] ECHR 328, CAJ represented the applicants in Kelly & Ors, Shanaghan and McShane before the ECtHR.

Supervision of the implementation of judgments of the European Court of Human Rights is undertaken by the Committee of Ministers of the Council of Europe which, following findings of state violations of the Convention, requires the states in question to develop packages of remedial measures, both individual and general (the latter if systemic failings have been identified, so as to prevent similar violations occurring in the future).<sup>10</sup> In response to the 2001 decisions and a number of additional Northern Ireland cases, the UK government has contended that the existence and operation of the Office of the Police Ombudsman provides a remedial measure to ensure independent and effective investigations and thus discharge its Article 2 obligations in relation to deaths where complaints have been made against the police. It follows therefore that OPONI is required to meet these standards in its work, and the Committee of Ministers continues to monitor the extent to which it does so.<sup>11</sup>

### 1.3 Dealing with historic cases

Against the backdrop of a post-conflict society that is still deeply divided, independence and impartiality remain crucial to the credibility and legitimacy of policing generally and specifically to the Police Ombudsman's Office. Not only does independence have particular relevance toward ensuring Article 2 compliant investigations as outlined above, but it is also critical to ensure impartial and objective investigations which enhance public confidence. From a human rights perspective, the nature and extent of historic policing controversies including allegations of collusion and human rights violations, must be critically investigated, with those involved held fully to account, in order to secure a 'new beginning to policing.'

Complaints involving historic cases are accepted by the Police Ombudsman in accordance with Regulation 6(1) RUC (Complaints etc) Regulations 2001, as being a complaint that is investigated because of the gravity of the matter or the exceptional circumstances.<sup>12</sup>

In recent years, a number of concerns have been raised about OPONI's capacity 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.

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<sup>10</sup>See [http://www.coe.int/t/cm/humanrights\\_en.asp](http://www.coe.int/t/cm/humanrights_en.asp)

<sup>11</sup>Although this report focuses on obligations arising from Article 2 of the European Convention of Human Rights as a very specific and applicable set of requirements given the supervision by the Committee of Ministers, it is important to note that there are a range of other applicable international human rights standards – see [www.ohchr.org](http://www.ohchr.org). It is also important to note the extent to which human rights were seen as fundamental to a 'new beginning to policing' in the work of and report of the Patten Commission, and subsequently by the PSNI themselves – see for example [http://www.psni.police.uk/index/about-us/human\\_rights.htm](http://www.psni.police.uk/index/about-us/human_rights.htm). Therefore the human rights context of the policing framework should be seen as more than just compliance with obligations as a mechanistic exercise but as part of a stated desire to deliver a policing service that observes and promotes human rights.

<sup>12</sup>Such complaints are investigated under Section 56 Police (Northern Ireland) Act 1998.

This has been brought into sharp relief by concerns arising from the most recent investigations involving allegations of police criminality, misconduct and collusion by officers of the Royal Ulster Constabulary (RUC).<sup>13</sup> 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. The treatment and experiences of those families is another catalyst for this report.

In this report, the Office of the Police Ombudsman will be reviewed on how well it discharges its duties in accordance with domestic and international human rights standards. The forthcoming sections of this report analyse the Office in line with human rights standards which are particularly salient to the operation of the Office of the Police Ombudsman generally, and which are required under Article 2 of the European Convention on Human Rights: effectiveness, efficiency (promptness), transparency, and independence.

## 2. Effectiveness

As highlighted in the introduction, in response to a number of judgments from the European Court of Human Rights (ECtHR) in relation to the protection offered to the right to life in Northern Ireland, the UK government was required through the Council of Europe to present a series of general remedial measures which the government claimed would ensure future Article 2 compliant investigations. These measures included the establishment and Article 2 compliant operation of the Police Ombudsman's Office in addition to other mechanisms through which the state can ensure effective official investigations when individuals have been killed as a result of the use of force by the state. The ECtHR described these as procedural obligations noting that their purpose is to make sure that domestic laws protecting right to life are correctly implemented and with respect to cases involving state agencies such as the police, those responsible for deaths are made properly accountable:

“105. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”<sup>14</sup>

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<sup>13</sup>Important to consider in this context are the conclusions of the recent report of the Inquiry into the death of solicitor Rosemary Nelson, which found that the Inquiry could not “exclude the possibility of a rogue member or members of the RUC or the Army in some way assisting the murderers to target Rosemary Nelson” and found inter alia that leakage of intelligence outside the RUC increased the danger to Rosemary's life; and that the actions of members of the RUC in publicly abusing and assaulting her and in making abusive and/or threatening remarks about her to her clients both had the effect of legitimising her as a target. See <http://www.official-documents.gov.uk/document/hc1012/hc09/0947/0947.pdf>

<sup>14</sup>Jordan v UK, see [http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/ECHR/2001/327.html&query=title+\(+jordan+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/ECHR/2001/327.html&query=title+(+jordan+)&method=boolean)

In terms of effectiveness, the Court has specified that:

“107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances...and to the identification and punishment of those responsible... This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.”<sup>15</sup>

Police complaints mechanisms demonstrate their independence and commitment to these human rights obligations through an impartial and robust approach to investigations. In recent years, investigations into ‘grave and exceptional’ (historic) matters by OPONI has resulted in several NGOs and legal representatives, who are to the fore in supporting and representing families throughout the investigative process, raising 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:

1. The lack of definition and consistent application of the concept of and practices associated with collusion
2. The interpretation of ‘police criminality and misconduct’
3. Findings, failings, and the lack of accountability

## **2.1 The lack of definition and consistent application of the concept of and practices associated with collusion**

In his enquiries into allegations of collusion between the security forces and loyalist paramilitaries in Northern Ireland, former Metropolitan Police Commissioner Lord Stevens QPM DL stated that collusion is evidenced in many ways, ranging from “wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extremes of agents being involved in murder.”<sup>16</sup>

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<sup>15</sup>Ibid

<sup>16</sup>See [http://www.madden-finucane.com/patfinucane/archive/pat\\_finucane/2003-04\\_17\\_stevens\\_report.pdf](http://www.madden-finucane.com/patfinucane/archive/pat_finucane/2003-04_17_stevens_report.pdf) at para 4.7

A retired Canadian Supreme Court judge, Judge Peter Cory was appointed by the UK and Irish governments in 2002 to investigate a number of cases involving allegations of collusion. Having looked at the issue of collusion independently and thoroughly and framing his analysis in the context of confidence building, Cory's definition of collusion merits serious consideration. Judge Cory noted that the verb 'to collude' is synonymous with the verbs: to conspire; to connive; to collaborate; to plot, and to scheme. He further stated:

"The verb connive is defined as to deliberately ignore; to overlook; to disregard; to pass over; to take no notice of; to turn a blind eye; to wink; to excuse; to condone; to look the other way; to let something ride..."

Judge Cory also noted that the verb to collude means, "...to connive with another: conspire, plot," with the definition of the verb connive being, "to pretend ignorance or unawareness of something one ought morally, or officially or legally to oppose; to fail to take action against a known wrongdoing or misbehaviour – usually used with connive at the violation of a law."<sup>17</sup>

Significantly, Judge Cory advocated a "reasonably broad" definition specifically because of the negative impact of collusion on public confidence:

"At the outset it should be recognised that members of the public must have confidence in the actions of governmental agencies, particularly those of the police force. There cannot be public confidence in government agencies that are guilty of collusion or connivance in serious crimes. Because of the necessity for public confidence in the police, the definition of collusion must be reasonably broad when it is applied to actions of these agencies. This is to say that police forces must not act collusively by ignoring or turning a blind eye to the wrongful acts of their servants or agents or by supplying information to assist others in committing their wrongful acts or by encouraging them to commit wrongful acts. *Any lesser definition would have the effect of condoning, or even encouraging, state involvement in crimes, thereby shattering all public confidence in these important agencies.*"<sup>18</sup>  
(Emphasis added)

The Cory definition of collusion has particular relevance for the Police Ombudsman's Office given the primary statutory responsibility of the Police Ombudsman to exercise his powers in such a manner and to such an extent as appears to him to be best calculated to secure the confidence of the public and members of the police service in that system.<sup>19</sup>

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<sup>17</sup>See Judge Peter Cory, Cory Collusion Inquiry Report: Rosemary Nelson, London: The Stationary Office (2004) and, <http://cain.ulst.ac.uk/issues/collusion/cory/cory03nelson.pdf> paras 4.27 - 4.30

<sup>18</sup>See Judge Peter Cory, Cory Collusion Inquiry Report: Chief Superintendent Breen and Superintendent Buchanan, London: The Stationary Office (2003) and, <http://www.patfinucanecentre.org/cory/breenbuchanan.pdf> at para 2.59

<sup>19</sup>Section 51, Police (Northern Ireland) Act 1998, see <http://www.legislation.gov.uk/ukpga/1998/32/contents>

Given the importance of historic investigations by the Police Ombudsman in building public confidence, the embodiment of this definition by the Office would act as a safeguard against investigations that give rise to speculations of partiality. However, CAJ is concerned about the lack of any clear definition or consistent application of the term collusion in a number of recent historic investigations which involved allegations of collusion.

- **John Larmour**

In the case of John Larmour, an RUC officer who was killed by the IRA in 1988, the Police Ombudsman's statement found that the initial investigation was not thorough, and importantly that information was not passed on to detectives investigating the killing.<sup>20</sup> Family members have alleged that RUC officers knew the identity of the killer and contend that members of Special Branch and other senior police officers withheld information to protect an IRA gunman who was possibly an informer working for Special Branch. However, the Police Ombudsman's statement at the conclusion of the investigation does not indicate whether this line of inquiry was pursued, nor does it appear to engage with the question of whether the withholding of information constitutes an act of collusion. According to Lord Stevens the withholding of intelligence and evidence does constitute collusion.<sup>21</sup>

- **The Claudy Report**

The Claudy Report investigated the circumstances that led to the deaths of nine people when three car bombs exploded in the village of Claudy in 1972.<sup>22</sup> The Police Ombudsman's Office set itself the remit of establishing whether there was any evidence of police criminality or misconduct and whether police had any information which might have enabled them to prevent the attack.

Following almost eight years of investigation, the Police Ombudsman published a 26 page report in 2010 which appeared to conclude on the basis of intelligence only that a local Catholic priest (now deceased) may have been involved in the bombings. The report also revealed that senior police officers, the Catholic hierarchy and government ministers had engaged in a subsequent cover-up of Fr. Chesney's alleged involvement. The Ombudsman found that the RUC could have done more to investigate and that obstruction occurred among senior PSNI officers, senior NIO civil servants, and amongst hierarchy in the Catholic Church.

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<sup>20</sup> "Investigation of Police Officer's murder not thorough: Police Ombudsman" 15 April 2008; see: [http://www.policeombudsman.org/modules/press/press.cfm/action/detail/Press\\_ID/174/Archive/2008/year/2008/level/page](http://www.policeombudsman.org/modules/press/press.cfm/action/detail/Press_ID/174/Archive/2008/year/2008/level/page)

<sup>21</sup>The report of the investigation has yet to be made publicly available but the statement from the Ombudsman indicates that the PSNI's Historical Enquiries Team (HET) which is looking into the Larmour case "have been made aware of all relevant information which is available in this case." Given that recent research has raised a number of concerns regarding the extent to which HET can be considered to be Article 2 compliant, and the extent to which they can secure independence around intelligence, there is a risk that the case of John Larmour is vulnerable to possible attempts to withhold information - see Patricia Lundy, *Can the Past be Policed?: Lessons from the Historical Enquiries Team Northern Ireland*, 11 *Journal of Law & Social Challenges*, 109-171 (2009). The OPONI statement also indicates that the report has been forwarded to the Chief Constable and "it is now up to the PSNI to make a decision on any new lines of enquiry."

<sup>22</sup>See <http://www.policeombudsman.org/Publicationsuploads/Claudy.pdf>

The report states that the term collusion has yet to be defined (despite the existence of the Stevens and Cory definitions) and does not itself offer a working definition of collusion. Rather it considers aspects of Judge Cory's definition and focuses in on one particular aspect relating to conniving. The report notes that in the absence of explanation, senior RUC officers, "...in seeking and accepting the Government's assistance in dealing with the problem of Father Chesney..." engaged in what "...was by definition a collusive act."<sup>23</sup> While CAJ does not in any way query the existence of collusion in this case, we do question the methodological basis for finding that something was 'by definition a collusive act' without a definition of collusion.

#### • The McGurk's report

The McGurk's report investigated the bombing that occurred at McGurk's Bar, Belfast in 1971 and resulted in the deaths of 15 people and injuries to 16 others.<sup>24</sup> The ability of the Office to conduct impartial investigations was called into question when the Police Ombudsman was forced in July 2010 to postpone publication of the initial report, which failed to properly address the role played by the RUC. The Police Ombudsman stated in relation to this initial report that:

"There is no doubt that there was a desire to plant in the minds of the public the idea that the bombing was by the IRA. The documentation we have seen, which not only discusses this aim but considers how it may be achieved, was documentation between the Army and the Government. We have found no evidence that police had discussed promoting such an idea. What is clear, however, is that police let this belief go unchallenged."<sup>25</sup>

By letting the belief "go unchallenged" senior RUC officers were involved in the dissemination of misinformation. However in the original report the Police Ombudsman minimised this behaviour and concluded there was no evidence of "police criminality or misconduct." According to Judge Cory's definition, this would constitute collusion.

Furthermore, the Pat Finucane Centre and a relative of one of those killed in the McGurk's bombing uncovered documentation in the National Archives at Kew which records that two days after the bombing then Stormont Prime Minister Brian Faulkner, who would have been briefed daily by senior police and officials about the security situation, stated to the UK Home Secretary that intelligence indicated the "strong likelihood that the bomb was carried out by the IRA rather than Protestant extremists."<sup>26</sup>

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<sup>23</sup>Ibid at para 6.17

<sup>24</sup>See <http://www.policeombudsman.org/publicationsuploads/McGurk%27s---Final-Report.pdf>

<sup>25</sup>Belfast Telegraph, 'No collusion in McGurk's bombing, says report', 09 July 2010

<http://www.belfasttelegraph.co.uk/news/local-national/no-collusion-in-mcgurks-bombing-says-report-14871013.html>

<sup>26</sup>See [http://www.themcgurksbarmassacre.com/images/faulkner\\_irishnews4.12.10.jpg](http://www.themcgurksbarmassacre.com/images/faulkner_irishnews4.12.10.jpg)

It is concerning that given the extensive resources at the disposal of the Police Ombudsman in terms of highly trained investigative staff, financial resources, and access to intelligence files, the Office was unable to uncover in its original investigation the documentation the Pat Finucane Centre and a relative found at Kew, particularly in light of Article 2 requirements expressed by the European Court to the effect that, “the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident” and “they cannot leave it to the initiative of the next of kin...to take responsibility for the conduct of any investigative procedures.”<sup>27</sup>

In contrast to the initial report, the revised report released by the Ombudsman in February 2011 found, *inter alia*, that:<sup>28</sup>

- The police interpreted the available intelligence and evidence as indicating that the IRA had been responsible for the bombing and failed to give adequate consideration to involvement by loyalist paramilitaries;
- The focus of the RUC investigation became unduly influenced by information which suggested that the bombing was the responsibility of republican paramilitaries, which had the effect of undermining the police investigation;
- Police were communicating with Northern Ireland’s government about the bombing and records indicate the continuing focus by police on their belief that the IRA was responsible and that this view was shared with government;
- Observations and commentary by the Minister of State for Home Affairs at Stormont was informed by police briefings to government;
- The RUC assessment presented to the Prime Minister was selective and consequently misleading;
- The police predisposition precluded an effective investigation into the bombing;
- The RUC were perpetuating the hypothesis that the bombing was the responsibility of republican paramilitaries;
- Following the arrest of Robert Campbell, the RUC failed to investigate effectively the information that other members of the UVF had also been responsible for the bombing.

The failure by the Police Ombudsman to identify and highlight the role played by the police in the initial report gave rise to serious concerns on the part of NGOs, families and others in relation to bias on the part of the Office.

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<sup>27</sup>Jordan v UK, *ibid*

<sup>28</sup>*Ibid*

More importantly in relation to effectiveness, however, the revised report finds that while there was “investigative bias” there was “insufficient evidence to establish that the investigative bias was collusion on the part of the police” and that “failings in the police investigation fell short of collusion in this instance.” However, the report does not define what collusion is, which raises questions as to how it is possible to ‘find’ something that has not been defined. Instead, the report again states – as did the Claudy report – that the term collusion has yet to be defined and there is no single accepted all-encompassing definition.<sup>29</sup>

It then goes on to note that “the essence of collusion requires that a number of elements be present. Usually, *but not always*, it involves an agreement between two or more parties.” (emphasis added). The report further states that, “there is no evidence which indicates that any of the investigative failures... resulted from agreements entered into with others.” This raises a number of questions: is the existence of agreement the basis on which the Ombudsman defines the presence or otherwise of collusion? If so, how is this reconciled with the preceding observation that collusion does not always involve such agreement?

In the foreword to the report the Police Ombudsman states, “Although each situation is different, I have discussed the issue of collusion in the context of Justice Cory’s analyses and investigation.”<sup>30</sup> Although situational differences exist this should not be used as an excuse to refrain from robustly defining the term and applying it without bias across the board: in fact this complexity makes the need to define the term even more acute.

More pointedly, there is no explanation as to why different aspects of collusion are engaged with in respect of the McGurk’s investigation and the Claudy investigation. 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 give rise to questions about the real and/or perceived impartiality of the Office.

This is in contrast to the approach of the former Police Ombudsman in her report on the investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters.<sup>31</sup> Known as Operation Ballast, the investigation revealed collusion between loyalist paramilitary informers and RUC Special Branch officers in both the McCord Jr case and a number of other instances. The concerns raised included the protection given to a number of informants which kept them from being held fully accountable to the law although it was known by Special Branch officers that these individuals were involved in serious crime including murder. The report noted “grave concerns about the practices” (by the RUC Special Branch) which included *inter alia* the creation of false statements, the blocking of searches for evidence, the use of “lengthy sham interviews at which they [informers] were not challenged”, and withholding intelligence from police colleagues which could have prevented or detected crime.<sup>32</sup>

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<sup>29</sup>Despite the definitions offered by Judge Cory and prior to that by Lord Stevens in his Stevens 3 report.

<sup>30</sup>But without explanation as to why Cory’s definition itself was not being utilised.

<sup>31</sup>See <http://www.policeombudsman.org/publicationsuploads/BALLAST%20PUBLIC%20STATEMENT%202022-01-07%20FINAL%20VERSION.pdf>, Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters. Belfast: OPONI (2007).

<sup>32</sup>Ibid, p 11.

The report highlights the definition of collusion offered by Lord Stevens and Judge Cory and importantly states that the Police Ombudsman has used these definitions for the purposes of examining whether collusion has been identified in the course of the investigation. The report then points to 32 areas where collusion has been identified.<sup>33</sup>

The failure of the current Police Ombudsman's Office to define, operationalise and consistently apply the term collusion in recent reports on historic cases has raised concerns about the level of transparency of the Office around historic cases and particularly the Office's ability to conduct effective investigations which hold the police robustly to account. As noted by one legal representative:

"The definition of 'collusion' as applied in McGurk's has caused concern not only among families but from a legal perspective in that the definition is inconsistent when you compare the Claudy, Ballast and McGurk's investigations. Actually, the evidential basis for the finding of 'collusion' in Claudy and Ballast is weaker than in McGurk's. In other words, if there was a finding of 'collusion' in Claudy and Ballast investigations there should be a similar finding in McGurk's. We are currently giving serious consideration to challenging the Office's failure to discharge its obligations to carry out an effective investigation given its re-defining of the test as set out by Judge Cory."<sup>34</sup>

The lack of definitional clarity has also led families to question the approach taken by the Police Ombudsman. Another legal representative stated that:

"Clients fear that the Police Ombudsman's Office is restricted, perhaps on a policy level, from making a pro-active conclusion that the police have colluded with loyalist murder gangs, even in circumstances where the evidence points to that inevitable conclusion."<sup>35</sup>

The Police Ombudsman notes in the McGurks' report that, "I believe that there needs to be a broader dialogue about what collusion is and what it is not."<sup>36</sup> In terms of Article 2 compliance and given the statutory responsibilities of OPONI, whether the Police Ombudsman believes there should be a 'broader dialogue' about collusion is a separate issue from OPONI adopting and consistently applying a definition of collusion, and thus enhancing the transparency, accountability and effectiveness of the Office and its investigations.

➔ **CAJ recommends that the Office of the Police Ombudsman define, operationalise and consistently apply the term collusion in all of its investigations.**

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<sup>33</sup>Ibid, p.132

<sup>35</sup> Interview with Kevin Winters, Solicitor.

<sup>35</sup>Interview with Niall Murphy, Solicitor.

<sup>36</sup>Ibid

## 2.2 The interpretation of ‘police criminality and misconduct’

Of further concern in relation to recent reports on historic cases is the application and interpretation of ‘police criminality and misconduct.’ Section 3 of the Claudy report states that “the objective of the Police Ombudsman’s investigation was to establish whether there was any evidence of criminality or misconduct by RUC officers;” whilst section 5 of the McGurk’s report states that “the scope of the Police Ombudsman’s investigation is to determine if there is any evidence of police misconduct or criminality in relation to the matters raised.”

This interpretation becomes particularly problematic in the subsequent sections of those reports that consider collusion. In both the Claudy and McGurk’s 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” (Claudy) and “the Police Ombudsman’s responsibility in this matter is to reach a determination on the actions of police. He may only investigate and report on matters of alleged criminality or misconduct” (McGurk’s).

The argument appears to be that collusion may or may not be a criminal act, and the Police Ombudsman may only investigate allegations of 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.

In contrast, the former Police Ombudsman’s report on Operation Ballast in 2007 does not comment on the criminality or misconduct of the activities identified. More importantly, it does not focus on the individuality of activities but considers their cumulative effect to have amounted to collusion. An unduly restrictive approach such as that adopted in the most recent reports ignores the cumulative impact of a range of activities which regarded individually may appear relatively minor, but which in combination are much more serious. The need to consider this cumulative effect was highlighted by Judge Cory:

“evidence may reveal a pattern of behaviour by a government agency that comes within the definition of collusion. This evidence may add to and form part of the cumulative effect which emerges from a reading of the documents.”<sup>37</sup>

The importance of not taking an unduly restrictive approach was also highlighted in the case of *R v Secretary of State for Home Department ex parte Amin*, where the House of Lords cited the Court of Appeal judgment that:

“the procedural obligation promotes ... interlocking aims: to minimise the risk of future deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. *The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts...*”<sup>38</sup> [emphasis added]

<sup>37</sup>Ibid, para 4.33

<sup>38</sup>[2003] UKHL 51, para 27

The absence of a definition of collusion, and the subsequent excessively narrow interpretation of criminality or misconduct therein, therefore becomes problematic and contradictory. Significantly, it also appears to lead to a propensity to isolate and consider individual actions or activities in the context of criminality or misconduct rather than their broader and total effect that could amount to collusion.

➔ **CAJ recommends that in the context of collusion, the Office of the Police Ombudsman should clarify what is criminal behaviour and what is misconduct, and ensure that events and activities are considered in their totality rather than in isolation.**

### 2.3 Findings, failings and the lack of accountability

To comply with Article 2, investigations must be effective in order to secure accountability:

“105. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”<sup>39</sup>

International human rights law also places obligations on states to take effective action to combat impunity:

“Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.”<sup>40</sup>

The Police Ombudsman’s Office has indicated that since November 2007, the findings of six historic investigations have been released into the public domain. While some of these cases do not concern conflict-related deaths, they have nonetheless been categorised as “historic” by OPONI.<sup>41</sup> As well as the three outlined above, there have been investigations into how police handled the disappearance of Arlene Arkinson, allegations that police refused to investigate suspicion of fraud in relation to a charity football match in Omagh, and alleged false police evidence during the Omagh trial.

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<sup>39</sup>Jordan v UK, *ibid.* Accountability does not always mean prosecution, particularly in relation to misconduct rather than criminality. However, even in the case of criminality prosecutions are desirable but not required – see for example Brecknell v UK - <http://www.bailii.org/eu/cases/ECHR/2007/989.html>

<sup>40</sup>United Nations set of principles for the protection and promotion of human rights through action to combat impunity, 2005 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

<sup>41</sup>Response to CAJ FOI request no. 22

A review of these investigations 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:

- **Charity Football Match:** The Police Ombudsman submitted a report to the Chief Constable containing recommendations for the PSNI to review how allegations of crime are assessed and dealt with.<sup>42</sup>
- **Arlene Arkinson:** The Police Ombudsman’s report notes that changes to policing policy should ensure there will be no repeat of the failings identified.<sup>43</sup>
- **Police Evidence during Omagh trial:** The Police Ombudsman identified a number of issues and failings that require further consideration. These relate to the case preparation, documentation and disclosure which will be subject to a further report and recommendations to the Chief Constable.<sup>44</sup>
- **John Larmour:** The Police Ombudsman’s report on the findings and recommendations (not currently available to the public) was submitted to the Chief Constable; the PSNI’s HET have been made aware of all relevant information; and, the decision of whether or not to pursue new lines of enquiry has been left to the PSNI.<sup>45</sup>
- **Claudy bombing:** The Police Ombudsman made the findings known to the families, the PSNI, the NIO, and the Catholic Church and also made a public statement. No recommendations were made.<sup>46</sup>
- **McGurk’s Bar bombing:** Despite a number of findings, the Police Ombudsman made two recommendations to the Chief Constable: that he satisfy himself that all investigative opportunities have been exhausted; and, that he acknowledge the “enduring pain” caused to the families by the actions of the police.<sup>47</sup>

Within hours of publication of the Police Ombudsman’s report on McGurk’s, the Chief Constable dismissed the first recommendation by stating that “there appear to be no further investigative opportunities available,” which caused considerable distress to the victims and their families.<sup>48</sup> The response by the Chief Constable shows the ease with which responsibility and accountability can be avoided with such a general approach. 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.<sup>49</sup>

<sup>42</sup>[http://www.policeombudsman.org/modules/investigation\\_reports/index.cfm/reportId/153](http://www.policeombudsman.org/modules/investigation_reports/index.cfm/reportId/153)

<sup>43</sup>[http://www.policeombudsman.org/modules/investigation\\_reports/index.cfm/reportId/151](http://www.policeombudsman.org/modules/investigation_reports/index.cfm/reportId/151)

<sup>44</sup>[http://www.policeombudsman.org/modules/press/press.cfm/action/detail/Press\\_ID/189/Archive/2009/year/2009/level/page](http://www.policeombudsman.org/modules/press/press.cfm/action/detail/Press_ID/189/Archive/2009/year/2009/level/page)

<sup>45</sup>Ibid

<sup>46</sup>Ibid

<sup>47</sup>Ibid

<sup>48</sup>PSNI press statement issued 21 February 2011

<sup>49</sup>See for example the response of the PSNI to the recommendations made in the Operation Ballast report, *ibid*. Likewise, reports of the Prisoner Ombudsman for Northern Ireland make detailed recommendations that have led the relevant authorities to respond as to whether they were accepted and if so how they would be implemented – see <http://www.niprisonombudsman.gov.uk/publications.html> and <http://www.niprisonerservice.gov.uk/module.cfm/opt/5/area/Publications/page/publications/archive/false/cid/42>

Failures to deliver effective investigations may give rise to concerns relating to impunity in that the approach potentially creates:

“...the impossibility, de jure or de facto, of bringing the perpetrators of violations to account [...] since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties...”<sup>50</sup>

In accordance with ECHR jurisprudence, failures to identify those implicated in violations of the right to life and hold them accountable do not meet the standards required of effective investigations under Article 2:

“107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.”<sup>51</sup>

➔ **CAJ recommends that the Office of the Police Ombudsman move beyond the practice of simply finding failings to articulating conclusions and more detailed recommendations that enable responsibility and accountability to be attributed.**

### 3. Efficiency

CAJ is concerned that the current levels of efficiency or ‘promptness’ offered by the Police Ombudsman’s Office are not Article 2 compliant. As articulated by the European Court of Human Rights in *Jordan v UK*:

“108. A requirement of promptness and reasonable expedition is implicit... It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities [...] may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”<sup>52</sup>

In recent years the Office of the Police Ombudsman has averaged about one historic case per annum in 2007, 2009, 2010 and 2011, with two cases concluded in 2008. The investigative process is agonisingly slow and it is often difficult to ascertain why the research requires such an extensive period to conduct. The investigation into the bombing of Claudy, for example, took almost eight years to complete (initiated in December 2002, the final report was published in August 2010) with the resulting PDF document an arid 26 pages based on an investigative methodology that focused primarily on a desk-based review of intelligence files, documents from the government, and RUC materials.

<sup>50</sup>United Nations set of principles for the protection and promotion of human rights through action to combat impunity, 2005 *ibid*

<sup>51</sup>*Jordan v UK*, *ibid*

<sup>52</sup>*Jordan v UK*, *ibid*

A review of the length of time taken to conduct historic investigations and the resulting output for the six historic cases raises concerns about efficiency:

- **Charity Football Match Fraud:**

Complaint received by Ombudsman: 2005  
Date of report: 6 December 2007

Output: A statement on OPONI's website represents the public report in addition to a press release.

- **John Larmour:**

Complaint received by Ombudsman: August 2006  
Date of statement: 15 April 2008

Output: A statement on OPONI's website represents the public report as well as a press release. The Office cannot release the actual investigation report as the case has been referred to PSNI and HET.

- **Arlene Arkinson:**

Complaint received by Ombudsman: October 2005  
Date of report: 5 August 2008

Output: PDF document of 15 pages

- **Police Evidence during Omagh trial:**

Matter referred by Chief Constable: November 2006  
Date of report: 19 February 2009

Output: PDF document of 30 pages

- **Claudy bombing:**

Ombudsman initiated investigation: December 2002  
Date of report: 24 August 2010

Output: PDF document of 26 pages

- **McGurk's Bar bombing:**

Complaint received by Ombudsman: 2006  
Date of report: 21 February 2011

Output: PDF document of 79 pages

In response to a Freedom of Information request, the Police Ombudsman's Office has indicated that a further six investigations into historic cases have been completed and that these cases are now the subject of public statements that the Office is preparing. It indicated that there is no release date for five of them.<sup>53</sup>

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<sup>53</sup>Response to CAJ FOI request no. 22, received April 11 2011

The remaining report relates to the attack on The Heights Bar in Loughinisland, into which the investigation began five years ago, the publication of which has been repeatedly delayed and postponed, and has recently been postponed again until the end of June 2011.

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.<sup>54</sup> One NGO noted “longstanding” concerns about delay: “it takes forever to investigate even simple complaints.”<sup>55</sup>

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.<sup>56</sup>

In its consultation on the draft budget for 2011-2015 in December 2010, the Department of Justice NI announced that the Police Ombudsman “will receive additional funding of over £5m in Budget 2010 for Historic Enquiry costs. £4m of this relates to staff costs.”<sup>57</sup> This figure represents an increase of approximately 25% over prior years, where net operating expenditure for historic investigations was reflected as £876,417 (2008/09) and £783,263 (2009/10). While these figures and the new allocation of £5m may appear substantial it is worth noting by comparison that over the past two years net operating expenditure for core investigations amounted to £7,741,699 (2008/09) and £8,113,315 (2009/10).<sup>58</sup> These figures indicate that allocation for historic investigations has amounted to approximately one-eighth of expenditure for core investigations. How the resourcing of each investigative division (historic and current) at OPONI is determined is difficult to ascertain but it has not been a topic of public consultation since the formation of the Office.

The Police Ombudsman has indicated that even with the new funding it will still take at least another 25 years to complete these investigations, “With existing resources we estimate that we can do two serious cases per year so that would be in the neighbourhood of 50 years. But with the additional (£4.8m) resources arguably that could be cut in half or perhaps even better as we get more effective in dealing with these cases.”<sup>59</sup>

While acknowledging that “...you’re still looking at a lifetime, a generation in many ways and that’s unacceptable” the Police Ombudsman has argued that “...regrettably all I can do is work with the resources we have.”<sup>60</sup> One NGO has noted the propensity and inappropriateness of the Police Ombudsman’s Office to refer to a lack of resources with respect to historic cases particularly in front of families:

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<sup>54</sup>At the point of writing CAJ is aware that the Office is considering a prioritisation matrix. This would ensure that the way cases are selected and prioritized is transparent and objective in the sense that clear criteria exist. It would also be helpful for families to understand where their case sits in the ‘cue’ of pending cases.

<sup>55</sup>Interview with Jane Winter, British Irish RIGHTS WATCH

<sup>56</sup>See for example <http://www.thedetail.tv/issues/5/ombudsman-story/ombudsman-itll-take-25-years-to-finish-troubles-reports> and <http://www.thedetail.tv/issues/5/ombudsman-story/has-ombudsman-led-to-greater-accountability-in-policing>

<sup>57</sup>[http://www.dojni.gov.uk/index/public-consultations/archive-consultations/doj\\_draft\\_budget\\_2010\\_consultation.pdf](http://www.dojni.gov.uk/index/public-consultations/archive-consultations/doj_draft_budget_2010_consultation.pdf)

<sup>58</sup>See OPONI’s Annual Report and Accounts for 2009/10 at:

<http://www.policeombudsman.org/Publicationsuploads/9473S%20PONI%20Annual%20Report%2010-Web.pdf>

<sup>59</sup><http://www.thedetail.tv/issues/5/ombudsman-story/ombudsman-itll-take-25-years-to-finish-troubles-reports>

<sup>60</sup>ibid

“The lack of resources is referred to in front of the families as an explanation for the considerable delays they experience. This is simply not appropriate and it occurs at the majority of meetings.”<sup>61</sup>

Legal representatives have also expressed concern. One interviewee noted that many families are considering withdrawing support for the Police Ombudsman:

“Families come to solicitors on sensitive legacy issues and they want justice. Over the years we have engaged with the Police Ombudsman’s Office on behalf of families in pursuit of justice. However, this relationship comes under severe strain when: families experience huge dissatisfaction with the findings of investigations; and, families face huge delays in obtaining these findings. This situation in turn creates a professional difficulty for us to refer families to the Police Ombudsman with any kind of confidence.”<sup>62</sup>

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, as illustrated in the McGurk’s case where an NGO and family member were able to research and identify documents in the national archives that had apparently not been found by OPONI.

A legal representative warned that some families now believe there may be other reasons behind the delay in investigating the killing of their loved ones:

“I don’t agree with current cases being relegated to a higher status at the expense of historic cases. There should be a parity of resourcing to all cases, historic or current. This is akin to a second-class status with historic cases being downsized and downgraded, and you have to ask, ‘Why?’ Some families now take the view that this is political and that theme has been touched upon by the resignation of the Chief Executive and the reasons he articulated for his resignation.”<sup>63</sup>

This perception needs to be considered and addressed in the context of the necessity of promptness in “...maintaining public confidence in their 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 recommends that the Office of the Police Ombudsman examines how resources are allocated to and spent on historic investigations relative to the methodology adopted and outputs produced, and in particular addresses perceptions and concerns related to promptness and efficiency.**

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<sup>61</sup>Interview with Paul O’Connor of the Pat Finucane Centre

<sup>62</sup>Interview with Kevin Winters, Solicitor

<sup>63</sup>Interview with Kevin Winters, Solicitor Ibid. This is a view that was shared by others who were interviewed.

## 4. Transparency

Transparency was viewed as fundamental to accountability and the building of public confidence by the Patten Commission.<sup>64</sup> In that respect it 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.<sup>65</sup> 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. This has also been made explicit by the courts in relation to cases engaging Article 2 obligations. As articulated in *Jordan v UK*:

"109. ...there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."<sup>66</sup>

Two key requirements are thereby identified: involvement of next of kin and openness to public scrutiny.

### 4.1 Involvement of next of kin

In addition to unacceptable delays (as highlighted in section 3 above) 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.

The stated policy of the Police Ombudsman's Office in relation to dealing with complaints is:

"We will give you as much information as we can at every stage of the complaints process.

We will contact you every six weeks...

We will normally reply to your letters within four working days."<sup>67</sup>

As regards the frequency and nature of communication, the lack of information in relation to the progress on investigations was raised by a number of NGOs and legal representatives interviewed by CAJ. One NGO commented on the "frustrations" of the families they are supporting:

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<sup>64</sup>"A new beginning: policing in Northern Ireland" Report of the Independent Commission on Policing for Northern Ireland, *ibid.* See para 5.14 in particular; in addition the need for and importance of transparency was highlighted throughout the report.

<sup>65</sup>Section 51, Police (Northern Ireland) Act 1998, *ibid.*

<sup>66</sup>*Jordan v UK*, *ibid.*

<sup>67</sup>Leaflet on "Dealing with Complaints Against the Police" May 2007, steps 3 and 4, page 8; see <http://www.policeombudsman.org/Publicationsuploads/Complaints%20Leaflet%20May%202007.pdf>

“They don’t hear anything; communications are very poor and they are not kept up to date. This is very disappointing for them. Families are unhappy about not hearing anything, or hearing that there has been no progress.”<sup>68</sup>

In their comments on a submission made by CAJ and the Pat Finucane Centre to the most recent examination of the UK government by the Committee of Ministers in March 2011, the government stated that the Police Ombudsman:

“recognizes the distress and trauma being caused to families because of the lack of progress in some cases. He makes every reasonable attempt to maintain open and transparent processes and provide information to the families of victims or their representatives *when asked*.”<sup>69</sup> (emphasis added)

It is worth noting that the Article 2 requirement is that families “must be involved” and not simply when they ask to be. This also seems to be out of step with the stated policy of the Police Ombudsman’s Office to proactively and regularly communicate with complainants as outlined above.

In one particular case that CAJ is involved in supporting - which was successful in the European Court of Human Rights and which the Committee of Ministers is therefore monitoring - in addition to having waited five years, the experience of the family is not one of openness, transparency and the provision of information as articulated above. Having written on 12 March 2011 to inquire about progress, a reply was received from the Ombudsman on 11 April 2011 acknowledging that the family had last been updated in October 2010 and saying it was “regrettable” that the Office had not corresponded since that date. Of further frustration to the family was the revelation that circumstances had not changed in the six months that had elapsed, and there was still no clear date for the release of the report. Similar experiences and concerns were referenced in interviews with other NGOs, legal representatives, and families.

Also of concern is the seeming unwillingness to involve and consider the views of families. The Police Ombudsman is perceived to have an internal culture of not sharing information with families, not even the original statement of the complainant. By extension the Office interprets which part of the complaint it will look at which may not address the actual concerns of the family. By comparison, the Historical Enquiries Team (HET) indicates to families what aspects their investigation will examine and families have an opportunity to comment and provide information that may prove helpful in shaping the investigation.

These concerns are compounded by the approach taken by the Police Ombudsman’s office to prior access to reports, and the inequality of treatment accorded to families vis-a-vis other stakeholders, and in particular the police.

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<sup>68</sup>Interview with Alan McBride, WAVE Trauma Centre

<sup>69</sup><https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1801942&SecMode=1&DocId=1708536&Usage=2>

Historically the Police Ombudsman has only granted prior access to the PSNI and other institutional stakeholders, with the exception of similar access being extended to the relatives of the McGurk's bombing apparently in light of the controversy surrounding the withdrawal of the initial report.

In a meeting with NGOs arising from concerns related to the initial McGurk's report, the Ombudsman appeared to commit to ensuring families would be treated the same as other stakeholders in terms of sight of draft reports, which was noted in a follow-up letter from the NGOs to the Ombudsman. However in response to this letter the Ombudsman appeared to backtrack on this:

“The principle of appropriate family engagement identified in your summary reflects my commitment. You will appreciate however that each situation is different... I cannot guarantee two weeks in all cases but do believe it has to be an appropriate time with proper family engagement. Parity of time with institutional stakeholders and their fact-checking is a good principle, but as a matter of practice I would prefer to have the fact-checking completed before going to the families.”<sup>70</sup>

This means that families will not get a copy of the draft report until after it has been checked by others, and will have it for a shorter period of time. While understanding the need for fact-checking, there is a wider perception and concern that this process goes beyond fact-checking to influencing the substance and findings of reports. It is important that such perceptions and concerns are addressed in order to ensure public confidence, and one obvious way of doing this would be to ensure equality of prior access.

CAJ is also aware of cases where legal or other representatives have been given copies of a draft report on the condition that they not make copies, meaning that while they may discuss the content with families they may not give them a copy. This raises concerns around compromising the duty of care owed by a legal representative to their client, as noted by one legal representative:

“The embargoed basis upon which the statements are disclosed to the solicitor makes it difficult to perfect instructions and give advice thereon.”<sup>71</sup>

It also begs a larger question around further inequality of treatment for families who do not have legal representation or NGO support, who presumably would not even be made aware of the content of a report nor given an opportunity to consider it. It certainly would not meet the standard required by Article 2.

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<sup>70</sup>Correspondence on file with CAJ.

<sup>71</sup>Interview with Niall Murphy, Solicitor. See also in this context the UN Declaration on Human Rights Defenders and in particular the right to lawful exercise of occupation or profession – <http://www2.ohchr.org/english/issues/defenders/declaration.htm>

As one NGO noted, “With respect to historic cases what families need is the maximum permissible disclosure in the least traumatic of circumstances.”<sup>72</sup> Instead of a human rights compliant and sensitive response, it appears from recent cases that families left traumatised and bereft by the loss of a loved one have often been further traumatised by their interaction with the Police Ombudsman’s Office.<sup>73</sup>

## 4.2 Openness to public scrutiny

Accessibility and openness to public scrutiny is critical to police complaints mechanisms because such offices cannot effectively hold the police to account if they are not used, and seen to be used, by all sections of the community. This is particularly important in post-conflict societies, where they play a fundamental role in building public confidence in police accountability. Accessibility is also directly related to the issue of transparency, and to be credible the Office must be, and be seen to be, open and accessible to all. Accessibility and openness are not simply reducible to awareness but rather the attitudes, opinions, perceptions and level of trust that comprise the relationship between the public as a whole and the Office. Securing the confidence of the public, as well as members of the police service, in the Office is also a core element of the legislative remit of the Police Ombudsman.

In its first five years the Office of the Police Ombudsman gained significant public confidence as encapsulated succinctly in a report by the Northern Ireland Affairs Committee, citing the view of the Independent Police Complaints Commission for England and Wales:

“...the Office, led by Mrs O’Loan, had won the respect of both communities by actively visiting the communities, explaining the role of the Office to them, and making itself accessible.”<sup>74</sup>

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. So for example, in her final year as Police Ombudsman, Mrs O’Loan recorded 21 engagements where she personally attended and engaged in discussion with community members. She met with people in a variety of locations and affiliations including Rathcoole Heritage Committee, Sion Mills, Crumlin Community Centre, St Malachy’s Church and the Dunclug Partnership, Ballymena.<sup>75</sup> The development of a police complaints system that is “...fully accessible and responsive to the community” was a core component of her Office’s mission statement.<sup>76</sup>

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<sup>72</sup>Interview with Mark Thompson, Relatives for Justice

<sup>73</sup>For example, the initial draft of the McGurk’s report which had to be withdrawn inaccurately listed one of the family members as having died.

<sup>74</sup>Northern Ireland Affairs Committee (NIAC) (2005), *The Functions of the Office of the Police Ombudsman for Northern Ireland*. London: Stationery Office, see <http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmniaf/344/344.pdf> at paragraph 38.

<sup>75</sup>Response to CAJ FOI request no. 25

<sup>76</sup>OPONI, Annual Business Plan 2006 – 2007.

This emphasis was reflected not simply in the use of media to inform the public but in a proactive approach which involved public outreach to inform communities of the role of the Office and the outcomes of complaints and investigations. This not only enhanced public understanding and scrutiny of the Office but actively championed the benefits of a police complaints mechanism in marginalised communities.

Subsequent 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. For example, in 2009/10 the current Police Ombudsman recorded nine engagements. Of these engagements, four involved international representatives that included visiting delegations from Vietnam, Turkey, Jamaica and New Zealand. A further two involved presentations to Iraqi visitors and Bosnian visitors at the Police Ombudsman's Office. Of the nine speaking engagements there is one presentation recorded to a 'community group' in West Belfast. The remaining two were to a District Policing Partnership and the British Council.<sup>77</sup>

A recent report on survey findings published by the Department of Justice which measure the level of public confidence in the police and police accountability arrangements in Northern Ireland indicate significantly lower levels of confidence as compared to England and Wales. At 40%, overall confidence in community engagement by the police and accountability measures is almost a fifth lower than the equivalent rate in England and Wales. The report highlights that the results of the survey should play "an important role in informing and monitoring government policies and targets, such as, strategies relating to public confidence."<sup>78</sup> Furthermore, a quarterly update in March 2011 notes a "statistical significance of change at the 5% level" in the confidence rating that OPONI is independent of the police, which while high, had dropped from 90% in 2007/2008 to 86.1% in 2010.<sup>79</sup>

The broader issue of accessibility is worthy of further exploration and comment regarding the overall work of the Office. 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.

➔ **CAJ recommends that the Office of the Police Ombudsman ensures transparency, openness, and accessibility to both next of kin and the wider community in order to build confidence in the Office.**

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<sup>77</sup>Response to CAJ FOI request no. 25

<sup>78</sup>Statistics and Research Branch, Department of Justice (2010), Perceptions of Policing, Justice and Organized Crime: Findings from the 2009/10 Northern Ireland Crime Survey.

<sup>79</sup>Department of Justice Statistics and Research branch: Perceptions of Policing, Justice and Organised Crime; Quarterly Update to December 2010, Published March 2011

## 5. Independence

The report produced in 1997 by Dr Maurice Hayes recommending the establishment of a Police Ombudsman noted that, “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.”<sup>80</sup> This criterion remains critical today and continues to be emphasised in police complaints systems internationally as a fundamental requirement for compliance with human rights.

The requirement for independence is a statutory duty of the Office of the Police Ombudsman. Section 51 of the Police (Northern Ireland) Act 1998 which established the Office states that:

“(4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure—

- (a) the efficiency, effectiveness and *independence* of the police complaints system; and
- (b) the confidence of the public and of members of the police force in that system.”<sup>81</sup> [emphasis added]

Furthermore, independence is a key requirement for compliance with Article 2 of the European Convention on Human Rights. As expressed by the European Court of Human Rights in the case of *Jordan v UK*:

“106. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as 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.”<sup>82</sup>

In the course of researching the issues highlighted in the sections above, questions and concerns emerged as to the levels of real and perceived independence of the Office both from political interference and the PSNI. In exploring these, CAJ has become aware of a number of issues that impact upon the independence of the Office.<sup>83</sup>

<sup>80</sup>A Police Ombudsman for Northern Ireland? A review of the police complaints system in Northern Ireland by Dr. Maurice Hayes, 1997.

<sup>81</sup>See section 51 of the Police (Northern Ireland) Act 1998 at <http://www.legislation.gov.uk/ukpga/1998/32/section/51>

<sup>82</sup>*Jordan v UK*, *ibid*

<sup>83</sup>These concerns were deepened by media reporting in April 2011 of the resignation of the Chief Executive of the Office of the Police Ombudsman, citing very serious allegations of undue influence and systematic and sustained meddling in the Office of the Ombudsman by senior officials in the Department of Justice (formerly the Northern Ireland Office) that he believed undermines the independence of the Office. We await the outcome of the investigations subsequently announced – by a retired civil servant into the allegations of political interference and by the Criminal Justice Inspectorate into the independence of the Ombudsman’s office. However, on the basis of information that CAJ has uncovered in the course of this research, we believe that significant questions and concerns exist about the current independence of, and interference in, the Office.

These include:

1. Irregularities in the appointment process of the current Police Ombudsman.
2. Concerns surrounding intelligence and independence from the PSNI.
3. Concerns and perceptions of bias arising from historic cases.

Each of these issues will be reviewed below.

## **5.1 Irregularities in the appointment process of the current Police Ombudsman**

On 26 June 2007 the then Secretary of State for Northern Ireland Rt Hon Peter Hain MP announced that Al Hutchinson would replace Nuala O’Loan as Police Ombudsman on 6 November 2007. The Secretary of State noted that, “This appointment was made after a rigorous selection process which adhered to public appointment guidelines.”<sup>84</sup> Ministerial appointments to public bodies are bound by the Code of Practice in that, “Public appointments should be made in accordance with the requirements of the law and, where appropriate, the Code of Practice issued by the Commissioner for Public Appointments.”<sup>85</sup> Additionally, recruitment processes must adhere not only to public appointment guidelines but to employment laws and guidance. The recruitment process and appointment of the Police Ombudsman should be conducted in a manner that exemplifies the propriety with which a public official should be appointed in a democratic society. This consistency with the recognised principles of open governance is particularly significant for societies transitioning from conflict and is crucially important to an Office that is a vital component in building public support for and confidence in the police service. CAJ has become concerned about apparent irregularities in the 2007 recruitment process that raise questions about political interference in, and thus the independence of, the Office and believes that these issues should be addressed transparently and urgently if the Police Ombudsman’s Office is to retain public confidence.

### **5.1.1 Recruitment procedure**

CAJ has a number of concerns as to whether the recruitment process for the current Police Ombudsman fully adhered to employment and public appointment laws and guidelines. In 2007, the appointment of the second Police Ombudsman fell under the remit of the Commissioner for Public Appointments England and Wales.

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<sup>84</sup>See <http://www.nio.gov.uk/announcement-of-new-police-ombudsman-for-northern-ireland/media-detail.htm?newsID=14490> Al Hutchinson is a Canadian national and a graduate of Carleton University, Ottawa and Queen’s University, Belfast. He is a former Royal Canadian Mounted Police Assistant Commissioner with 34 years of service. From its inception in 2001, Mr. Hutchinson was Chief of Staff for the Office of the Oversight Commissioner in Northern Ireland which was charged with overseeing the implementation of the Patten recommendations on policing. In 2004, Mr. Hutchinson became Oversight Commissioner until the completion of the Commission’s work in 2007.

<sup>85</sup>The Code of Practice for Ministerial Appointments to Public Bodies in England and Wales’, cited in ‘Code of Practice for Ministerial Public Appointments in Northern Ireland’, 2010. p.2. [http://www.publicappointmentsni.org/feb\\_2010\\_code\\_of\\_practice-9.pdf](http://www.publicappointmentsni.org/feb_2010_code_of_practice-9.pdf)

The Code of Practice for Ministerial Appointments states that, “Ministers have a duty to ensure that influence over public appointments is not abused for partisan purposes.”<sup>86</sup> Indeed, the Commissioner’s key concern is, “to ensure that these appointments are made in ways which are open, transparent and merit-based.”<sup>87</sup> The Code of Practice directly links these principles to public confidence, stating that, “To gain public confidence the workings of the appointments system must be clearly visible.”<sup>88</sup> Applicable Northern Ireland employment law, guidance and good practice also set standards to avoid discrimination and to show that discrimination has not taken place.<sup>89</sup>

The competition for a new Police Ombudsman for Northern Ireland was launched on 19 April 2007.<sup>90</sup> The recruitment process was conducted on behalf of the appointing body, the Northern Ireland Office (NIO), by Odgers, Ray and Berndtson (currently Odgers Berndtson), a London-based firm which specialises in executive recruitment internationally.<sup>91</sup> In a freedom of information request to Odger Berndtson, CAJ requested “any and all versions of the job description, essential and desirable criteria, and personnel specifications” for the post. This resulted in CAJ obtaining access to the recruitment materials that were provided to potential applicants as part of the recruitment process. The person specification contained a list of the requirements relevant to the post. Critically, the criterion of ‘prior Northern Ireland experience’ was not included in the requirements outlined in the application documents.<sup>92</sup> CAJ has however become aware that this criterion appears to have been added at a subsequent stage in the process. This raises concerns regarding the fairness of the process for candidates who may be considered to have been advantaged or disadvantaged by the change.

It is clear in our research that at least some applicants were alerted to an additional criterion verbally by the recruitment agency (Odgers Berndtson) after they had submitted an application. CAJ has conducted interviews with two such applicants. Both candidates can be considered to be of a very high calibre, with national and international standing. Both expressed concern about how the recruitment process was conducted and both noted they were made aware of the additional criterion of ‘prior Northern Ireland experience’ only after applying for the post.

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<sup>86</sup>Ibid, p. 2.

<sup>87</sup>Ibid, p.1.

<sup>88</sup>The Commissioner for Public Appointments (England and Wales) Code for Ministerial Appointments to Public Bodies, 2005, p. 14.

<sup>89</sup>For example, the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) and its associated Code of Practice.

<sup>90</sup>See <http://www.nio.gov.uk/competition-for-new-police-ombudsman-for-northern-ireland/media-detail.htm?newsID=14325>

<sup>91</sup>“Odgers Berndtson is the UK’s pre-eminent executive search firm, helping private and public sector organisations find the highest calibre people for permanent and interim management appointments in the UK and internationally” - see <http://www.odgersberndtson.co.uk/gb/home/>

<sup>92</sup>CAJ FOI request no. 7

Peter Tinsley<sup>93</sup>, barrister and former chair of Canada's Military Police Complaints Commission, recounted during an interview with CAJ how he was actively headhunted by the recruitment agency. The firm were so keen to secure his application that the closing date was extended from Friday (18 May 2007) until the following Monday (21 May 2007) for his application.<sup>94</sup> Mr. Tinsley noted that in his first discussion with the recruitment firm, he himself had expressed surprise that the firm was looking for candidates outside of Northern Ireland, but was reassured that the search was not to be restricted to Northern Ireland.<sup>95</sup> However, when Mr. Tinsley phoned Odgers Berndtson a week and a half after the application was submitted to inquire about the process, he told CAJ that he was informed of what was referred to as a 'new' requirement of 'prior Northern Ireland experience.'

Nicholas Long,<sup>96</sup> a Commissioner for the Independent Police Complaints Commission in England, stated in an interview with CAJ that he too was actively approached by Odgers Berndtson, and that he specifically raised the issue of prior experience in Northern Ireland and was told by them that it was not necessary.<sup>97</sup>

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<sup>93</sup>Mr. Tinsley had a 28-year career in the Canadian Armed Forces serving overseas and in Canada as a military police officer and then in the Office of the Judge Advocate General. In the latter capacity he was best known as the senior prosecutor and appellate counsel in the prosecution of Canadian Forces members stationed in Somalia for murder and torture. Following retirement from the military Mr. Tinsley entered the private practice of law as a criminal defence counsel. In 1999, he was appointed as the Director of Ontario's Special Investigations Unit. Following that appointment Mr. Tinsley served as an international prosecutor first with the United Nations Interim Administration in Kosovo and then in the Special War Crimes Department of the State Court of Bosnia and Herzegovina. In 2005 he returned to Canada to accept an appointment by the Government of Canada to a four year term as the Chairperson of the Military Police Complaints Commission. During this period he also served as the President of the Canadian Association of Civilian Oversight of Law Enforcement. Mr. Tinsley is now the Executive Director of the Institute for Justice Sector Development, a non government organization created to assist nations whose justice systems are in transition. Mr. Tinsley speaks frequently on matters relating to civilian oversight of security forces and the rule of law including presentations in such diverse locales as Nicaragua, Guatemala, El Salvador, Cuba, Romania, Northern Ireland, Kosovo, Portugal and, most recently for the United Nations Development Program Iraq and the State Government of Minas Gerais, Brazil.

<sup>94</sup>Interview conducted by CAJ, 12 August 2010. It is worth noting in passing that the inconsistent approach to deadlines would not meet the requirement that all candidates must be given the same chance to demonstrate their abilities and that differential standards should not be applied [ref 5.3.1 FETO Code of Practice].

<sup>95</sup>The appointment of a recruiting agency with international reach, rather than any of their local competitors, might also be thought to reflect a decision to recruit the best candidate, wherever they happened to be based or whatever their previous exposure to Northern Ireland.

<sup>96</sup>Nicholas Long joined the IPCC in 2003 and has responsibility for IPCC oversight of Cleveland, Durham, Humberside, Northumbria, North Yorkshire, South Yorkshire and West Yorkshire Police together with United Kingdom Borders Agency (UKBA). Additionally he leads for the Commission on Policing and Public Order (with Sarah Green) and International work. Mr. Long has a longstanding interest in human rights and criminal justice issues. He also has an active interest in civil oversight of the police, which he has developed over the last 25 years, with roles including trustee of NACRO and chair for a number of organisations including the Community-Police Consultative Group for Lambeth and the panel of lay visitors to police stations in Lambeth. Mr. Long was a founding member and Chair of the Metropolitan Police Operation Trident Independent Advisory Group and was a member of the London Crimestoppers Board. He was an independent member of the Metropolitan Police Authority until 2004 and has contributed to a number of published reports pertaining to policing methods. For his services to the community and the police in Lambeth, he was appointed MBE in 2001.

<sup>97</sup>Interview conducted by CAJ, 04 February 2011.

However approximately two weeks after Mr. Long applied he was told Northern Ireland experience was a requirement. Since this information ran counter to earlier assurances, Mr. Long pursued the matter further with the recruitment agency who told him that ‘the rules have changed’ and that it was ‘up to the appointing body to do what they wanted.’ Given that the appointment was the responsibility of the NIO, it is assumed that the appointing body was the NIO. This seems to be confirmed by the fact that it was chaired by Nick Perry, who at the time was the Director General of Criminal Justice & Policing in the Northern Ireland Office.<sup>98</sup> During the interview with CAJ, Mr. Long noted the recruitment process was “disgraceful in terms of public administration” and stated he had considered making a complaint but was advised that to do so would be “career damaging.”<sup>99</sup>

In an effort to further research this information, on 14 October 2010 CAJ submitted FOI requests to the Ombudsman’s Office requesting *inter alia* any and all documentation between OPONI and the NIO relating to the shortlisting of candidates for the post of the second Police Ombudsman. In a letter dated 28 November OPONI refused the request noting:

“The Office takes the view that to release all the relevant supporting material between it and the NIO is not in the public interest. It accepts that to release such information would add to the openness and transparency about the processes involved [...] If [sic] fears, however, that if we were to publish all the supporting documentation, and those involved in such deliberations in the future knew their correspondence would be made public, this would inhibit a frank exchange of discussion, inhibit the processes and would not be in the public interest. In taking this view the Office has noted that Section 36, 2 (b) and 5 (l) of the Freedom of Information exempts such material from disclosure.”<sup>100</sup>

On 30 November 2010, CAJ submitted a formal request for OPONI to conduct an internal review of the initial decision. We received a response on 21 January 2011 indicating that additional time would be necessary “as in light of legal advice received, additional steps are now required to be taken by this Office prior to the finalisation of a decision on your request for the release of the specified information.” On 14 February, eleven weeks after the submission of our appeal and in the absence of any formal response, CAJ submitted a complaint to the Information Commissioner’s Office. On 5 March, the Information Commissioner’s Office wrote to OPONI asking them to respond to our request for review within 20 working days, which they did not do. CAJ pursued this with the Information Commissioner’s Office at the end of April 2011 who informed us they had sent a second letter dated 20 April giving OPONI a further 20 days to respond. At the time of this report, CAJ has received no response from the Police Ombudsman’s Office, and is continuing to pursue the matter with the Information Commissioner’s Office.

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<sup>98</sup>Since 12 April 2010 Nick Perry has been the Permanent Secretary of the devolved Department of Justice for Northern Ireland (DOJ).

<sup>99</sup>Both Mr Long and Mr Tinsley noted they had no disagreement or personal issues with the current post holder but rather a concern with respect to how the recruitment process was conducted.

<sup>100</sup>CAJ FOI request no. 17

Following the recent media reporting of the resignation of and concerns expressed by the Chief Executive of the Office of the Police Ombudsman, CAJ asked him whether he would be interviewed by us in relation to this matter. He agreed but emphasised that he could only comment on his particular role.

The situation has been verified in that interview with the Chief Executive, in which he indicated that just days before the closing date for receipt of applications for the post, he had two telephone calls with the lead consultant in the recruitment agency regarding the appointment process and in one of the calls he was asked specifically about using the additional criterion of ‘having worked in Northern Ireland’ in the short-listing of candidates. The Chief Executive stated that he was very concerned about this and advised very strongly against doing so.

The addition of a late criterion – or even the suggestion of same – might be seen to reflect a preference (or dislike) for some of the candidates who had applied for the post. Any discussion of adding an additional criterion after the launch and advertisement of the post would fly in the face of all proper procedures.<sup>101</sup> Any senior OPONI staff made aware of this proposal would have been entirely justified (and indeed under a duty) to raise this concern with more senior authorities.

CAJ understands the matter was deemed serious at the time and raised by the Chief Executive in correspondence with the Permanent Secretary of the Northern Ireland Office and the Comptroller and Auditor General:

“I was very concerned that the competition was already in the public domain and was seeking to identify the highest calibre of candidates. It was clear to me that any additional criterion that was going to be used in the shortlisting process should have been indicated clearly at the outset. In the letters I expressed these concerns and highlighted that I felt the matter could be very damaging to the integrity of both the appointment process and the Office of the Police Ombudsman, and that given the legal challenges to previous selection processes by the NIO, outlined my belief that they would have observed the highest levels of transparency in this regard.”<sup>102</sup>

The Chief Executive informed us that he received a written response from the Permanent Secretary at the NIO stating that no additional criteria were added, no changes were made to the criteria after the advertisement and candidates were assessed against the advertised criteria. However, this response from the NIO appears to run contrary to the evidence. After reviewing the apparent irregularities in the appointment process, several questions can be raised.

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<sup>101</sup>As above, the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) framework stipulates that all candidates must be given the same chance to demonstrate their abilities and that differential standards should not be applied [ref 5.3.1 FETO Code of Practice]. A change to advertised specifications clearly does not follow this approach.

<sup>102</sup>Interview with Sam Pollock, Chief Executive of OPONI, 18th May 2011.

Firstly, it is unclear why at the outset the services of an executive recruitment firm would be contracted by the Northern Ireland Office to conduct an international search for individuals, if it had always been intended to require potential candidates to have prior experience in Northern Ireland. In that scenario, surely most possible candidates could have been identified and contacted at the local level. Even if the criterion had been present from the beginning, but it was nevertheless decided to contract an internationally experienced agency to conduct the work, it would seem unlikely that the agency was not particularly alert to this limitation and the need for candidates from outside Northern Ireland to be informed about it. This, together with the evidence presented in the testimonies of two applicants, and the actual job description and person specification,<sup>103</sup> indicates that the need for prior Northern Ireland experience was a later addition.

In that case, questions arise as to why and under what circumstance an executive recruitment firm that conducts business internationally would decide to enforce an addition to existing criteria at such a late stage in the process. 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 NIO), and merely implemented by the agency.<sup>104</sup> This in turn raises serious questions as to why, and when, the appointing body (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 also difficult to ascertain how many of the twenty-seven individuals who applied for the post of second Police Ombudsman were similarly treated.<sup>105</sup> It is more difficult still for outsiders to gauge the extent to which any or all of those candidates were negatively or positively impacted by the late addition of this criterion. It is clear however 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.

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<sup>103</sup>See footnote 20

<sup>104</sup>As per the interview with Nicholas Long, where he was told by the recruitment agency that it was “up to the appointing body to do what it wanted.”

<sup>105</sup>CAJ FOI request no. 2 to the NIO

## 5.1.2 Security Vetting Procedures

The Office of the Police Ombudsman would handle significant amounts of material which is designated “secret” and “top secret.”<sup>106</sup> As a result, procedures are applied whereby only those who are ‘vetted’ and achieve security clearance can handle such materials. Therefore, in common with equivalent appointments of personnel with such access, the individual appointed as Police Ombudsman must undergo two rounds of security checks: the Baseline Personnel Security Standard (BPSS)<sup>107</sup> and Developed Vetting (DV).<sup>108</sup> According to government policy, the DV process is the highest standard form of national security vetting and must be undertaken for several reasons:

- to ensure that individuals are not susceptible to pressure from foreign intelligence agencies, ‘terrorist’ groups or other organisations wishing to undermine Parliamentary democracy;
- to confirm an individual’s suitability to access and handle very sensitive information and material;
- to satisfy requirements for access to material originating from other countries and internationally.<sup>109</sup>

The Defence Vetting Agency (DVA) is an executive agency of the UK government which conducts security checks for the Police Ombudsman’s Office, and other government departments and bodies including the British Armed Forces, the Ministry of Defence, and the civil service. As stated above, Developed Vetting (DV) is the highest level of security clearance and “the most thorough way of security vetting. The DV process includes a check of your identity documents and employment and education references.”<sup>110</sup> The criteria for requiring DV clearance are “long term, frequent and uncontrolled access to top secret information or assets [...] or in order to satisfy requirements for access to material originating from other countries and international organisations.”<sup>111</sup>

<sup>106</sup>For operational definitions of secret and top secret see:

[http://interim.cabinetoffice.gov.uk/media/207318/hmg\\_security\\_policy.pdf](http://interim.cabinetoffice.gov.uk/media/207318/hmg_security_policy.pdf) As a human rights organisation, CAJ campaigns for as much transparency and openness as possible on the part of public authorities. However, we are of course aware that an office like OPONI has access to particularly sensitive information that could affect people’s lives. The Office would have material relating to victims of crime, police officers, informants, and intelligence data that might put individuals at serious risk. As part of their wider duty to uphold the right to life as enshrined by Article 2 of the European Convention on Human Rights, they must ensure that all information which should be treated as private and confidential is treated accordingly.

<sup>107</sup>“The HMG Baseline Personnel Security Standard (BPSS) describes the pre-employment controls for all civil servants, members of the Armed Forces, temporary staff and government contractors generally.” BPSS is not a security clearance. See Cabinet Office, HMG Baseline Personnel Security Standard: Guidance on the Pre-Employment Screening of Civil Servants, Members of The Armed Forces, Temporary Staff and Government Contractors (February 2011) available online at

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/baseline-personnel-security-standard.pdf>

<sup>108</sup>Developed Vetting (DV) is carried out “for people with substantial unsupervised access to TOP-SECRET assets.” See Ministry of Defence, Defence Vetting Agency, ‘What we do - National Security checks’ available online at

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/SecurityandIntelligence/DVA/WhatWeDoNationalSecurityChecks.htm>

<sup>109</sup>See the Defence Vetting Agency website

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/SecurityandIntelligence/DVA/>

<sup>110</sup>See

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/SecurityandIntelligence/DVA?TheVettingProcess.h>

<sup>111</sup>Ibid

The timescale for a 'routine' DV clearance request which utilises normal procedures takes 95 days to complete. Although there is a process for an 'immediate' request, which takes precedence over all other requests, the DVA notes it is restricted to a 'critical operational requirement.' Significantly an 'immediate' request does not involve an alternative process. In other words, while it is conceivable that the process could be expedited, it would still be necessary to complete a thorough and formal security clearance involving all the normal background checks and procedures.

It would clearly be a cause for concern if the process were circumvented in any way, or if security clearance was conducted in a manner that would give the appearance of circumvention. However, it has emerged that there were irregularities in the manner in which security vetting procedures were conducted with respect to the second Police Ombudsman in that there are questions as to whether normal procedures were applied.

In relation to the appointment of the current Police Ombudsman, concern that security clearance would not be completed before the new appointment was due to begin work was so serious that it was raised by the Chief Executive of the Police Ombudsman's Office in correspondence with the Secretary of State:

"I wrote to the Secretary of State a couple of weeks before the new Ombudsman was due to take office, and expressed my concern to him that clearance would not be in place before he began work, as my experience was that it takes many weeks to obtain, and particularly for a foreign national. Given the sensitive material the Office carries, I did not find it acceptable to permit anyone to work on these matters unless they had been cleared at DV level. It was not a question of trust or otherwise of Mr Hutchinson, who I had known in his previous capacity as Oversight Commissioner, but I felt that I – and the Office - were being left vulnerable."<sup>112</sup>

Although the second Police Ombudsman was appointed in June 2007, it was not until two weeks before he began work in November 2007 that some process of security clearance was initiated:

"Approximately one week before the Police Ombudsman was due to begin work, the Northern Ireland Office wrote to me to inform me that the vetting clearance was being pursued and they expected that it would be in place in time. I got another letter from the NIO just a number of days before the new Police Ombudsman started indicating that on the basis of consultations, they were content that access be given. I was then given verbal clearance from the DVA."<sup>113</sup>

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<sup>112</sup>Interview with Sam Pollock, 9th May 2011. This issue was also the subject of an FOI request from CAJ to OPONI on which no response has been received, and which is now subject to an investigation by the Information Commissioner as outlined above.

<sup>113</sup>Ibid.

The way in which this process appears to have been conducted raises questions as to whether normal procedures were applied, suspended or circumvented. The seemingly ad hoc approach to high-level security clearance was at best irregular and at worst unacceptable for an Office which deals with highly classified materials. It demonstrates a complete disregard for a security regime that the Secretary of State would seemingly argue is fundamental to national security. From a human rights perspective, both the Police Ombudsman’s Office and the Northern Ireland Office have a duty of care to ensure the safety of personnel, as well as police officers and the general public. Viewed in light of government policy, the security aspects of the transition from first to second Police Ombudsman raise very serious concerns in that the apparent handling of the vetting process could set a precedent at the highest level which potentially leaves the Police Ombudsman’s Office, and others, open to enormous risk. It further raises questions about the propriety with which the Police Ombudsman’s Office is treated by the Northern Ireland Office.

### 5.1.3 Financial arrangements and oversight

Given the importance of financial probity in all public appointment processes, CAJ analysed the financial arrangements attached to the post of Police Ombudsman through examination of publicly available annual reports and information received through Freedom of Information requests. The financial arrangements of public bodies must be transparent and open to scrutiny to ensure financial accountability in order to protect the public against the misuse of public monies and to ensure good governance. However, our analysis has raised a number of concerns about both the use of public monies and equality with respect to the remuneration extended to the second Police Ombudsman.

The following table highlights the salary bands for the former Police Ombudsman:

	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08
<b>Salary</b>	75-80k	80-85k	90-95k	90-95k	90-95k	115-120k	115-120k	120-125k

The following table shows the salary bands for the current Police Ombudsman to the end of the financial year 09/10:<sup>114</sup>

	2007/08	2008/09	2009/10
<b>Salary</b>	120-125k	135-140k	140-145k

<sup>114</sup>The last set of publicly available and verified annual accounts.

An analysis of the salary of the first seven years of the Police Ombudsman’s Office shows that as is normal practice, the Police Ombudsman received an annual increment in a £5,000 band in the first year of service; after two years service, pay increased by £10,000 - presumably incorporating another increment in the band of £5,000 - thus constituting an actual pay increase in the region of £5,000. Salary then remained constant for three years. It was not until five years into her term that Ms. O’Loan received another pay increase, which in real terms amounted to a normative increase of £5,000 when backdated annual increments are incorporated.<sup>115</sup> It remained as such for another year before another increment in the £5,000 band was seemingly awarded.

In contrast, the current Police Ombudsman received an increase of £15,000 in the first financial year of being in post. Presumably this increase included a £5,000 increment, but this indicates an actual pay increase of £10,000 in the first year of service. His salary 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 also arise around gender equality, and in particular equal pay for work of equal value.<sup>116</sup>

Some of this discrepancy may be explained by the fact that the current Ombudsman’s salary is supplemented by a series of “benefits in kind” reflecting the fact that he is not from Northern Ireland. The total cost of additional payments and benefits in kind to the current Police Ombudsman are as follows:

	2007/08 <sup>117</sup>	2008/09	2009/10
<b>Business class flights (3 return flights x 2 people - Ombudsman and spouse)</b>	3,254	15,609	14,997
<b>Tax &amp; National Insurance paid on these flights<sup>118</sup></b>	2,863	13,736	13,197
<b>Housing allowance<sup>119</sup></b>	5,000	12,000	12,000
<b>Payments in Lieu of Pension</b>	5,023	32,232	31,176
<b>Additional cost to public purse of benefits in kind (on top of salary)</b>	16,140	73,577	71,370

<sup>115</sup>First Ombudsman’s salary scale if increments had been awarded annually, pay increases reflected (in bold):

	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08
<b>Salary</b>	75-80k	80-85k	<b>90-95k</b>	95-100k	100-105k	<b>110-115k</b>	115-120k	120-125k

<sup>116</sup>See Equal Pay Act (Northern Ireland) 1970, as amended and Equal Pay Directive (75/117/EEC)

<sup>117</sup>As the Police Ombudsman did not take office until 6th November, these figures cover 5 months of the financial year

<sup>118</sup>The costs of which are borne by the Police Ombudsman’s Office – CAJ FOI response no. 1

<sup>119</sup>The terms and conditions of the current Police Ombudsman (obtained by CAJ in response to FOI no. 17) state that: “where the post holder was permanently resident before appointment in a country outside the United Kingdom or Ireland, the post holder will be provided with an allowance to cover the rental cost of a two bedroom, furnished apartment during period of employment. This will be paid at the rate of £1,000 per month from the date of appointment. It will be reviewed after 3 months in post and annually thereafter.”

CAJ appreciates that measures – financial or practical – are often required and are best practice when facilitating a foreign national taking up a post in Northern Ireland, and is not opposed to these. However, we would expect them to be of a fair and reasonable amount, and to not differentiate significantly from what would have been paid to any other suitable candidate who could have been recruited from inside the jurisdiction. We leave to others to judge whether that is the case in this situation. However, questions arise as to whether an average cost of £10,000 per trip for a return business class flight (including the taxation related costs which are borne by the Office) for the Police Ombudsman and his spouse is fair and reasonable, particularly in the current financial climate.<sup>120</sup> The terms of the housing allowance, paid at a rate of £1,000 per month from the date of appointment, was intended for review after 3 months in post and annually thereafter. In an FOI request CAJ was able to ascertain that the housing allowance remains in place over three years into the appointment and it has never been subject to a review of any kind.<sup>121</sup>

CAJ has also requested through FOI all documentation between OPONI and the NIO pertaining to the terms and conditions of employment of the current Police Ombudsman. While the actual terms and conditions were provided, no further information or documentation was provided on the negotiations around these since:

“The Office takes the view that to release all the relevant supporting material between it and the NIO is not in the public interest. It accepts that to release such information would add to the openness and transparency about the processes involved: indeed details about Mr Hutchinson’s salary and pension are published in the Police Ombudsman’s Annual Report. If [sic] fears, however, that if we were to publish all the supporting documentation, and those involved in such deliberations in the future knew their correspondence would be made public, this would inhibit a frank exchange of discussion, inhibit the processes and would not be in the public interest. In taking this view the Office has noted that Section 36, 2 (b) and 5 (l) of the Freedom of Information exempts such material from disclosure.”<sup>122</sup>

This is again the subject of an investigation by the Information Commissioner. However, the Chief Executive has expressed his concerns to us:

“The NIO wrote to me clarifying that the primary legislation should be interpreted ‘widely’ in terms of the provisions made for the salary, allowances, pension, accommodation support, and removal costs of the newly appointed Police Ombudsman. However, the same legislation was being interpreted narrowly in relation to the outgoing Police Ombudsman, to her financial detriment. I wrote to the NIO expressing concern as I believed it was in

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<sup>120</sup>CAJ understands from recent media coverage (see <http://www.thedetail.tv/issues/5/ombudsman-story/ombudsman-ill-take-25-years-to-finish-troubles-reports>) that the Ombudsman has now taken a voluntary 10% reduction in salary, and will take a further cut of 5% along with the reduction of the budget of the Office. It is not clear, however, whether this will also apply to other payments and benefits in kind or only to salary.

<sup>121</sup>CAJ FOI request no. 23

<sup>122</sup>CAJ FOI request no. 17

danger of leaving itself open to a suggestion that it would treat a man, of a particular background from outside the jurisdiction in one way but treat a woman, with a particular background from Northern Ireland in a different way. It was my view that this might not withstand independent scrutiny.”<sup>123</sup>

Clearly it is a matter of public interest to learn whether gender or other considerations explain why one incumbent should be treated less favourably than another. The Chief Executive, as Chief Accounting Officer for OPONI, has confirmed to CAJ that he was so concerned about the propriety of the arrangements, and the difficulty he would face in justifying his actions, that he formally renounced responsibility for these matters in a letter to the Comptroller and Auditor General:

“As Accounting Officer, I am responsible for public monies voted by Parliament through the Department and for the seven years previous to that I had full responsibility for all authorisations and controls in relation to all expenditure regarding all staff in the Office, including the Ombudsman. However, on 29 October the Minister wrote to me indicating that I had ‘*no particular locus*’ in the arrangements for the new Ombudsman. I obviously had to observe that policy decision, but I then felt under a duty to inform the Auditor General that I could not carry any accountability in the Statement of Accounts for expenditure in relation to those arrangements. I therefore formally referred the financial activity back to the Accounting Officer for the NIO.”<sup>124</sup>

Given that the arrangements could lead to an expenditure of well over £1m over the term of the Police Ombudsman’s mandate, it is clearly a matter of public interest. Certainly, any situation in which the Chief Accounting Officer feels unable to render satisfactory financial account because of the action of a sponsoring Department is unacceptable.

The situation has very clear and serious ramifications for the independence and integrity of the Police Ombudsman’s Office. The Chief Executive indicated in the interview that he was particularly disturbed by the statement from the Minister’s (Rt Hon Shaun Woodward MP) Office that he had ‘*no particular locus*’:

“I knew at this point I was dealing with a very different regime within the NIO, and that while the Office had been allowed to operate with a high level of independence in the first seven years, those days were now over. It was actually stated in writing that the Permanent Secretary of the NIO and the new Ombudsman would discuss how best to ensure effective working relationships between the Department and the Office. I felt it was a complete admonishment and a warning to me to keep my nose out and mind my own business.”<sup>125</sup>

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<sup>123</sup>Interview with Sam Pollock, *ibid*.

<sup>124</sup>Interview with Sam Pollock, *ibid*.

<sup>125</sup>*Ibid*.

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. In the context of the responsibility of the Police Ombudsman's Office for historic investigations that engage Article 2 obligations, this needs to be considered in light of the Article 2 requirement for hierarchical independence. As made clear by the House of Lords, this should be done "without casting any aspersions on the integrity of the investigator" (in this case the person who was eventually appointed as Ombudsman).<sup>126</sup> CAJ is not doing this, but believes it is important to consider the ramifications of these apparent irregularities for the actual or perceived independence of the Office.

→ **CAJ recommends that the Office of the Police Ombudsman ensures there is institutional, hierarchical and practical independence at all levels and in all the work of the organisation.**

## **5.2 Concerns surrounding intelligence and independence from the PSNI**

Of particular concern with respect to independence from the police is access to intelligence materials and the raw data that is critical to ensuring the Police Ombudsman's Office can fulfil its Article 2 obligations. OPONI's Intelligence Unit plays a critical role in that it is the portal for intelligence in a variety of forms pertinent to each investigation. The Unit is comprised of five individuals - two intelligence analysts, two intelligence researchers, and a manager. The following account of how intelligence is requested and managed by the Police Ombudsman's Office comes from an interview with the Director of Current Investigations conducted by CAJ on 11 November 2010.

The process of accessing intelligence begins when OPONI's Intelligence Unit receives a request from OPONI investigators (whose requests have already been reviewed by a Deputy Senior Investigation Officer). The Unit reviews the request which is then forwarded to a 'single point of contact' in the Crime Operations Department of the PSNI.<sup>127</sup> Through an FOI request CAJ was able to establish that this 'single point' is a Detective Superintendent at PSNI Headquarters, Brooklyn. 'Raw' intelligence is then sent from the PSNI to the Ombudsman's Intelligence Unit where an 'intelligence assessment' is conducted. This assessment involves the Unit making a determination about how best to present the intelligence to the investigators so they can use it. The fact that the data is then provided in this format means that the investigator is not privy to raw intelligence but rather to data that has been redacted and presumably somewhat 'sanitised.'

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<sup>126</sup>SP v Secretary of State for Justice [2009] EWHC 13 (Admin)

<sup>127</sup>The Crime Operations Department is further broken down into 5 specialist branches namely Organized Crime (C1); Serious Crime (C2); Intelligence (C3); Special Operations (formerly Crime Operations Support) (C4); and, Scientific Support (C5).

This 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.<sup>128</sup> In 2004 Special Branch and the Criminal Investigation Department (now the Crime Operations Department) were amalgamated under a unified command within the PSNI, but how this affects the autonomy of C3, the Intelligence Branch of Crime Operations, in practical terms is undetermined.

It is also 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. It has been suggested that critical elements relating to both intelligence and operations would be overseen by personnel who have been handpicked and consist overwhelmingly, if not exclusively, of former RUC detectives and former Special Branch officers.<sup>129</sup>

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. Also of relevance is the perception as well as the practice of independence, as to comply with Article 2, investigations need to be seen to be, as well as actually be, independent.

Insight into the utility of intelligence as a gate-keeping mechanism is provided through existing research into the Historical Enquiries Team (HET). This research is particularly relevant because the HET is another one of the mechanisms designed to deal with historic cases and which it is argued ensures Article 2 compliance, making it a 'sister' organisation to the Police Ombudsman's Office. Through exhaustive research Dr Patricia Lundy established that, "all aspects of intelligence are managed by former RUC and Special Branch officers."<sup>130</sup> Pivotal among her findings was that, "intelligence is more often available for incidents carried out by paramilitary groups than for incidents attributed to the Security Forces."<sup>131</sup>

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.<sup>132</sup>

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<sup>128</sup>It is thought that while C3 retains its operational intelligence lead and function, C2 maintains a substantial brief in this area, although perhaps with more relevance to current issues.

<sup>129</sup>CAJ interview with confidential source, February 2011.

<sup>130</sup>See Patricia Lundy, *Can the Past be Policed?: Lessons from the Historical Enquiries Team Northern Ireland*, 11 *Journal of Law & Social Challenges*, 109-171 (2009), p. 142.

<sup>131</sup>*Ibid*, p. 142.

<sup>132</sup>A Freedom of information request on this issue was refused on the grounds of public interest.

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. This is particularly important in relation to historic cases where to comply with Article 2 the European Court has made it clear that 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."<sup>133</sup>

➔ **CAJ recommends that the Office of the Police Ombudsman puts in place robust and transparent mechanisms in relation to the policies and practices of intelligence-handling.**

### 5.3 Concerns and perceptions of bias arising from historic cases

Pursuant to concerns arising from the Police Ombudsman's initial report into the McGurk's bar atrocity (discussed above), CAJ, British Irish RIGHTS WATCH and the Pat Finucane Centre met with the Police Ombudsman on 31 August 2010. To ensure an accurate record of the meeting was taken, the three organisations wrote to the Police Ombudsman after the meeting on 3 September 2010 to record some of the things that were said. Amongst other things, this letter noted:

"PONI recognises that the pendulum has swung too far away from independence and too close to the police perspective. From now on, PONI will strive for total impartiality and independence, as behoves a watchdog."

Invited to correct the record of the meeting as contained in the letter, the Police Ombudsman responded by stating in a letter to the NGOs on 27<sup>th</sup> October 2010:

"The allusion is that because I have a police background from another jurisdiction, I am automatically biased. I of course reject that. I agree with your perspective of the absolute need for impartiality and independence... What I said was that I would accept that, in the minds of some, the pendulum has swung too far. I do not accept that as fact and I believe all the evidence is to the contrary. Part of the problem with your statement is that the police perception was that the office was biased and anti-police. I believe what I have done is bring the issue back into the middle ground, where we should be."

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<sup>133</sup>Jordan v UK, ibid

This prompted the three NGOs to reply on 3<sup>rd</sup> November 2010:

“On the pendulum point, we have never said that your policing background makes you automatically biased, just as we never considered your predecessor to be anti-police. What is important here is the independence of PONI as an institution, which is paramount. That being the case, any post-holder must also be wholly impartial, otherwise the institution is undermined, and should be concerned to ensure that all policies, procedures, and protocols are designed to eliminate the possibility of bias and also the perception of bias. The challenge for you is to ask yourself how so patently biased a report as the McGurk’s [initial] report could have emanated from your office, and to identify what steps are necessary to ensure that it is impossible for the police to have undue influence over its own watchdog.”<sup>134</sup>

The police-civilian composition of the mechanism 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.<sup>135</sup> In addition, the Director of Current Investigations and the Director of Historic Investigations both have a policing background.

In other jurisdictions appointment as chair, commissioner or police ombudsman is predicated on the applicant possessing a significant judicial background.<sup>136</sup> For example, in the Police Integrity Commission (PIC) in New South Wales the Commissioner must have special legal qualification.<sup>137</sup> 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. It is clear from these international parallels that the balance between (former) police and civilian personnel is considered crucial to both the reality and perception of independence.

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<sup>134</sup>All correspondence on file with CAJ.

<sup>135</sup>The current Chief Executive has tendered his resignation.

<sup>136</sup>It is worth noting that Dr Maurice Hayes in his 1997 report had recommended that the post of Ombudsman should be filled by a judge or 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.

<sup>137</sup>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. See Police Integrity Commission Act 1996, Schedule 1, clause 1.

As regards compliance with Article 2, in the case of *SP v Secretary of State for Justice*, the House of Lords held that a person engaged to conduct an investigation under Article 2 into the treatment of a young offender, who had acted as a consultant to the prison service on policy initiatives, was not sufficiently independent:

“The risk would be that his past experience might cause him uncritically to accept an institutional view which would not be accepted, except after thorough analysis and testing, by an investigator appointed from a discipline outside that of the Prison Service.”

and

“Mr Payling had been closely concerned with the very policy areas upon which he was being asked to formulate recommendations as an investigator. The advantage that Mr Payling enjoys of familiarity with and expertise in safer custody issues carries the concomitant disadvantage that he cannot be said to be independent of the policy issues he would be investigating. For these reasons it seems to me that an investigation carried out by Mr Payling in SP’s case would not be sufficiently independent for compliance with Article 2.”<sup>138</sup>

As stated at the outset, independence is key to the discharge of Article 2 obligations and to confidence levels in the office of the Police Ombudsman. 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.”<sup>139</sup> This notion of practical independence indicates that the European Court is prepared to look behind the appearance of 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.

➔ ***CAJ recommends that the Office of the Police Ombudsman examines the current imbalance in the police/civilian composition at senior levels in the organisation in an effort to address perceptions of bias.***

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<sup>138</sup>*SP v Secretary of State for Justice* [2009] EWHC 13 (Admin) at para 84. See further: [http://regulatorylaw.co.uk/Independence\\_of\\_investigator.html](http://regulatorylaw.co.uk/Independence_of_investigator.html) - “In this case an individual having spent his working life applying prison service policy and procedure was now expected to apply an independent critical analysis to it and the learned judge held that such conflict was necessarily bound to impinge on his independence.”

<sup>139</sup>*Jordan v UK*, *Ibid*

## 6. Conclusion and recommendations

The devolution of responsibility for policing and justice to the Northern Ireland Assembly in April 2010 provides a unique opportunity to ensure accountability and place a renewed emphasis on the rule of the law by integrating human rights compliance and promotion into all aspects of the policing and justice framework. In a democratic society the police must not – in any circumstances - be above the law. In contrast a police service must be subject to the rule of law, intervene in the life of individuals only under limited and carefully controlled circumstances, embody practices and values respectful of the inherent dignity and worth of every individual, and be publicly accountable. The Office of the Police Ombudsman has an important role to play as an accountability mechanism in ensuring that the police service is a major support of democratic society. Conversely, concerns regarding the independence and effectiveness of the Office which remain unaddressed will call the credibility of the Office into question, and this will ultimately be reflected in public confidence levels in the police and the administration of justice.

This report has identified concerns and raised questions in relation to the actual and perceived effectiveness, efficiency, transparency and independence of the Office. If, as the UK government has presented to the Committee of Ministers of the Council of Europe, the Office of the Police Ombudsman 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 it 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.

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