



CVSNI RESPONSE TO THE FUTURE OPERATION OF THE OFFICE OF THE POLICE OMBUDSMAN (OPONI) AND OPONI FIVE YEAR STATUTORY REVIEW REPORT

The Commission for Victims and Survivors for Northern Ireland (the Commission) was established in June 2008 under the *Victims and Survivors (Northern Ireland) Order 2006*, as amended by the *Commissioner for Victims and Survivors Act (2008)*.

The Commission is a Non-Departmental Public Body (NDPB) of the Office of the First Minister and deputy First Minister (OFMDFM). The principle aim of the Commission is to promote awareness of the interests of victims and survivors of the conflict. It has a number of statutory duties that include:

- Promoting an awareness of matters relating to the interests of victims and survivors and of the need to safeguard those interests;
- Keeping under review the adequacy and effectiveness of law and practice affecting the interests of victims and survivors;
- Keeping under review the adequacy and effectiveness of services provided for the victims and survivors by bodies or persons;
- Advising the Secretary of State, the Executive Committee of the Assembly and any Body or person providing services for victims and survivors on matters concerning the interests of victims and survivors;
- Ensuring that the views of victims and survivors are sought concerning the exercise of the Commission's functions; and
- Making arrangements for a forum for consultation and discussion with victims and survivors.¹

The Commission welcomes this opportunity to provide its response to the consultation on the Future Operation of the Office of the Police Ombudsman for Northern Ireland as conducted by the Department of Justice.

¹ The functions of the Commission relate to those set out in the *Victims and Survivors (Northern Ireland) Order 2006* as amended by the *Commission for Victims and Survivors Act (Northern Ireland) 2008*.

We have set out our general thinking on the matter and have additionally addressed each of the specific questions of the Department's paper and the recommendations in the Police Ombudsman Statutory Report: Review under Section 61(4) of the Police (Northern Ireland) Act 1998.

The Commission for Victims and Survivors believes that there is a need to agree structures to deal with the past, beyond the current arrangements of the Historical Enquiries Team and the Office of the Police Ombudsman. Over the past four years since the Commission was established, Commissioners and staff have had almost daily contact with individuals and families who carry deep hurts and suffer debilitating conditions as a consequence of the violent conflict that dominated our society for so long. Most of these people are suffering in relative silence. Many feel hopeless about their situation and a significant number carry the additional hurt of believing that their suffering is pointless because, at its heart, our society has not changed and is incapable of change.

The Commission firmly believes that we must deal urgently with the legacy of the conflict. Many victims and survivors have waited for many years for answers and assistance, many have died without having their needs met and for many more, their needs have been exacerbated as they age. We believe Government and society has a duty of care to these individuals, families and communities.

Questions from the Department of Justice Consultation Paper March 2012

Q: Do you believe an alternative mechanism for investigating historic cases should be put in place? If so what form should that take?

In our Advice to Government on Dealing with the Past² in June 2010, the Commission for Victims and survivors said that it was our belief that the British Government needed to work in partnership with the Irish Government in developing an approach to the past. The history of the Peace Process illustrates the importance of the two Governments acting together with the political parties at key stages - most recently to help resolve the question of the devolution of policing and justice. Dealing with the Past is of such significance.

We further advised that sections of our society view both Governments as having a conflict of interest because of their involvement or perceived involvement in controversial aspects of the past. Therefore, there is a need to address such a potential difficulty so that the respective future contributions of the two Governments are viewed as credible by all concerned.

² "Dealing with the Past" Advice to Government, Commission for Victims and Survivors, June 2010

Our advice stated: “a government-led cross party Design Process needs to explore options for structures and mechanisms for dealing with the past and reach agreement. The Commission would seek to facilitate a victim perspective to that process. The Commission believes that the Design Process should include among its options the creation of a new agency for investigation, the recovery of information for families and the examination of events or issues from the past which have had a critical impact on society. Such an agency would need to be independent and capable of withstanding political or civic pressures.”

Whilst HET has set a deadline for concluding its work and OPONI has secured additional resources to investigate historic cases, we regret that nothing has been done in political or civic society to develop a more cohesive approach to the past.

In consultation with victims and survivors as part of developing this response, a number of contributors advocated an independent mechanism for dealing with the past that had the powers to compel witnesses and seek information and that would draw on the experiences of NGOs and the community.

Q: Do you agree that there should be a provision to authorise a person to act as interim Ombudsman whilst a permanent appointment is made by the First and deputy First Minister?

The Commission supports the provision for the appointment of an interim Ombudsman.

Q: Do you believe there needs to be a mechanism to appeal decisions of the Ombudsman? If so what form should it take?

The procedures, policies and operation of the Police Ombudsman’s office should fall under the remit of the Northern Ireland Ombudsman in respect of complaints regarding its operations.

We believe that a review board for serious cases where the decision of the Ombudsman is questioned could provide a useful and independent review mechanism.

In addition, in respect of decisions made as a result of complaints to the Ombudsman, there currently exists the right to judicial review in the Courts to challenge decisions which it is believed have not been correctly arrived at.

Q: Do you believe it would be right to restrict the applicants for the post of Police Ombudsman by precluding a policing background? If so, should that apply to Northern Ireland, to here and neighbouring jurisdictions or on a generic basis?

Q: Should applicants be required to have certain previous experience relevant to adjudicating on complaints?

Q: Are there specific skills/competences/experiences an applicant for the post should have? If so, what are they?

Q: Should applicants be a senior judicial figure or person of the quality and experience of a senior judicial figure?

The Commission believes that the background of the individual appointed as Ombudsman should be less important than the skills and competences they have. Essential criteria could include well developed analytical skills, a working knowledge of the law, an ability to direct investigations, a demonstrable concern for justice and human rights and a character that inspires trust and confidence.

Q: Do you believe corporation sole model is appropriate? If not, what change do you believe is needed?

This is addressed in our response to Recommendation 1 of the Five Year Review below.

Q: Do you favour retaining a separate Police Ombudsman or creating a Justice Ombudsman?

The Commission favours the retention of a separate Police Ombudsman so as to maintain confidence in the transparency and independence of the police complaints process and to ensure public understanding of the role and function of the office. The creation of the Office of a Justice Ombudsman should be reviewed in five years when succession planning for the fourth appointment of Police Ombudsman should commence.

Q: Is there merit, both in terms of efficiency and case progression, to having an Office of Justice Ombudsmen, where there is a separate Police and Prisoner Ombudsman, but there is co-location, shared services, and/or a pool of investigators?

The Commission does not believe that co-location, shared services or the sharing of a pool of investigators is dependent on the creation of the new office of Justice Ombudsman. Such possibilities can be scoped and costed at any time by the Department of Justice in terms of prudent management of its arms length bodies. We recommend this scoping exercise should take place in the 2012-13 financial year.

REVIEW RECOMMENDATIONS PREPARED PURSUANT TO S. 61(4) POLICE (NORTHERN IRELAND) ACT 1998

Recommendation 1

That the Minister of Justice review the legal structure of the Police Ombudsman for Northern Ireland and consider whether the 'Corporate Sole' model established under S.51(2) of the Police (Northern Ireland) Act 1998 remains the viable model for the future.

RESPONSE: The Commission for Victims and Survivors supports the maintenance of the structure of Corporation Sole in respect of the office of the Police Ombudsman. We address the arrangements in respect of historical investigations elsewhere in this document.

Recommendation 2

That the initial term of the Police Ombudsman should be reduced to a term of five years, and that the Police Ombudsman should be eligible for reappointment for a further term of up to five years.

RESPONSE: The Commission supports this recommendation.

Recommendation 3

That the legislation be amended to provide for the appointment of an interim Police Ombudsman.

RESPONSE: The Commission supports this recommendation.

Recommendation 4

In the public interest, any civilian staff operating directly in conjunction with Police Officers in the course of their policing functions should be brought within the remit of the Police Ombudsman for Northern Ireland for the purposes of complaints against those personnel.

RESPONSE: In our discussions with victims and survivors in preparing this response to the consultation, concerns were raised that there is currently no oversight mechanism of civilian staff. This was particularly referred to in relation to the Historical Enquiries Team, as many victims and survivors will have had contact with that branch of the PSNI. The Commission agrees with the unanimous views of

those we met that the remit of the Ombudsman's office should be extended to include civilian staff. We would stress that any arrangements made in respect of civilian staff must include those employed on short-term contracts or in a consultancy role otherwise it will not be an effective remedy for those individuals who may have grounds for complaint.

Recommendation 5

The Police Ombudsman should be given statutory power to recommend comparable disciplinary sanctions for designated civilians to those permitted for police officers.

RESPONSE: The Commission supports this recommendation, as it follows from our views on Recommendation 4 above.

Recommendation 6

That section 63(2) of the Police (Northern Ireland) Act should be amended accordingly to ensure protection of information disclosed by the Police Ombudsman to other Agencies or individuals.

RESPONSE: We understand that Section 63 of the Police (Northern Ireland) Act 1998 provides for protection of information held by OPONI, which regularly shares information with other agencies, for example the PPS. At that point the Police Ombudsman arguably loses control of the material. We support this recommendation in respect of external agencies as it is appropriate to maintain the protection of information afforded by Section 63 wherever it is held. We are concerned, however, that there may be a potential impact on the human rights of individuals and as such this recommendation needs further examination in respect of individuals.

Recommendation 7

That consideration should be given to include any other statutory body or agency who may have cause to refer matters to the Police Ombudsman under s. 52 of the Police Act.

RESPONSE: In consultation with victims and survivors, a view was expressed that widening the base of who could bring a complaint to the Ombudsman could possibly have the impact of delaying investigations resulting from complaints by private citizens. There was a fear that complaints/referrals by public bodies may be given precedence over "private" complaints, given that those bodies may have additional resources and may lobby on behalf of their complaint.

On balance, however, as it is the duty of all citizens – whether private or in public life – to uphold the rule of law, the Commission supports this change.

Recommendation 8

That police officers should be empowered to bring to the attention of the Police Ombudsman for investigation matters which appear to indicate that there are concerns about the conduct of colleagues in the delivery of policing services to the public.

RESPONSE: The Commission supports this recommendation that police officers should be permitted to bring to the attention of the Police Ombudsman matters of concern involving both the way in which services are delivered to the public and the conduct of police officers in that process. This is in line with recommendations of the Northern Ireland Human Rights Commission, the Northern Ireland Affairs Committee at Westminster and has the support of the Police Federation.

Recommendation 9

That the requirement to serve a notice under Regulation 6 of the RUC (Conduct) Regulations 2000, on officers, is repealed but that the Regulation 6 notices continue to be served on the PSNI to notify them of the existence of the complaint, so that all complaints are captured for statistical analysis.

RESPONSE: The serving of a Regulation 6 Notice on an individual officer merely indicates that they are identified in a complaint received, not that they are under investigation. Since the Police Ombudsman is required to serve notice under Regulation 9 advising an officer if/when they are subject of a complaint and what their rights are, it would seem that Regulation 6 notices are unnecessary duplication and we therefore support this recommendation.

We further support, however, that Regulation 6 Notices be served on the PSNI for purposes of tracking complaints received, whether they are pursued and whether they are informally resolved.

Recommendation 10

That tracking and trending of officers the subject of multiple complaints should be triggered by the service of Regulation 9 Notices. No legislative amendment is required for this purpose.

RESPONSE: Following on from our response to Recommendation 9 above, we support this recommendation.

Recommendation 11

That the title of the process currently referred to as “informal resolution” in section 53 of the Police (NI) Act should be changed to “Local Resolution.”

RESPONSE: The Commission is content with this recommendation in order to make the name of the process consistent with the term used in England and Wales.

Recommendation 12

To allow certain classes of less serious complaints to be subject of Local Resolution procedures without reference to the Police Ombudsman in the first instance but with a guardianship function preserved to ensure public confidence in the complaints system.

RESPONSE: The Commission is content to support this recommendation, subject to an appropriate explanation of the guardianship function foreseen.

Recommendation 13

That section 54 of the Police (NI) Act should be amended to give the Police Ombudsman discretion to decide whether a complaint which has been the subject of a failed Local Resolution should be investigated, and that in such cases a new closure category "Failed Local Resolution, further investigation not necessary" be introduced. The necessity of further investigation should be determined by the Police Ombudsman.

RESPONSE: The Commission supports this recommendation.

Recommendation 14

That the Police (NI) Act 1998 be amended to enable the Police Ombudsman to conduct mediation in appropriate circumstances, and that there be no requirement to investigate first.

RESPONSE: The Commission supports this recommendation.

Recommendation 15

That the RUC (Conduct) Regulations 2000, and the RUC (Senior Officer) (Conduct) Regulations 2000 should be amended to provide that matters the subject of questioning under PACE caution, do not require to be the subject of further questioning under a discipline caution; and that any matters relating to the discharge of a police officer's obligations under the PSNI Code of Ethics, which have not previously been addressed during a PACE interview, should be the subject of a second interview conducted following the administration of a disciplinary caution.

RESPONSE: The Commission understands that the current regulations allow that an officer may be interviewed following caution under PACE and may then be re-interviewed as part of a conduct investigation regarding the same matters and following a disciplinary caution. We would recommend that any information received during a PACE-related interview would also be available in respect of the conduct investigation and that only matters not previously addressed should be the subject of a second Code of Ethics based interview. Accordingly, we support this recommendation.

Recommendation 16

That the Police Ombudsman should be specifically empowered by statute to compel the attendance for interview of both witness and suspect officers.

RESPONSE: The Commission supports the implementation of this recommendation in respect of future PSNI investigations by the Police Ombudsman.

Recommendation 17

That the Police Ombudsman be given a power to compel retired or former police officers to submit to witness interview, and provide all relevant documentation to him, which is within their possession, custody, power or control, when he is conducting investigations involving grave or exceptional matters.

RESPONSE: The Commission believes that here is a civic duty on anyone who can assist in an investigation by the Ombudsman to provide that assistance and this applies equally to serving or retired officers and to members of the public. We believe that there is a procedural difficulty in altering the terms and conditions of service of retired/former officers in respect of compellability and that this recommendation requires further explanation and development.

Recommendation 18

That Section 5(1) of the Criminal Law 1967 be amended to include after “constable”; “or where the information relates to police conduct, the Police Ombudsman for Northern Ireland”

RESPONSE: Section 5 of the Criminal Law Act creates a duty for citizens to report information relating to criminality to the police. The appropriate authority for receiving and investigating information, from members of the public, relating to criminality by police officers is, however, the Police Ombudsman. This recommendation seeks to address the existing anomaly by requiring that members of the public report information relating to police criminality to the Police Ombudsman rather than the police themselves. The Commission therefore supports this recommendation.

Recommendation 19

That the requirement, under Section 58, to submit files for the consideration, by the Director of Public Prosecutions, of criminal prosecution only applies when the complaint has been received before the alleged criminal offence became statute barred.

RESPONSE: The Commission considers that in the first instance, the Ombudsman has a duty to “fast track” any complaints which allege that a serious offence has occurred. If a complaint alleging an offence such as assault which may become statute barred after six months is received, the Ombudsman must in the first instance

assess that and determine if a potential statute bar may apply. Furthermore, the Ombudsman must ensure that the duration of the investigation itself is not the cause of a complaint/offence becoming statute barred. No information is provided in the consultation papers regarding whether complaints received in contemporaneous case are subject to the application of a prioritisation matrix, as is the case with historical investigations. Such a process of prioritisation may assist with identification of issues in cases where serious offences are alleged.

Bearing in mind the caveats above, the Commission supports the recommendation.

Recommendation 20

The Police Ombudsman considers that the RUC (Complaints etc) Regulations 2001 should be reviewed and where necessary amended to enable him to investigate deaths occurring either directly as a result of police action or indirectly due to police operations despite the fact that the death might otherwise have been previously been investigated by police.

RESPONSE: In respect of historical cases, the Historical Enquiries Team will review all of the conflict-related deaths occurring in Northern Ireland as a result of the conflict, save for those in which there is alleged police involvement. It is of grave concern to the Commission for Victims and Survivors that there currently exists a legislative anomaly which means that in the region of 50 families have no recourse to review or investigation of the deaths of their loved ones. This concern has been raised in correspondence with the Ombudsman's office and with the Minister for Justice.

The views of victims and survivors we spoke to were unanimous in this regard that all those who have been bereaved should be able to access information regarding the deaths of their loved ones, regardless of who was responsible for that death. The Commission supports this recommendation.

Recommendation 21

That there be statutory provision for the use of a conciliation process in appropriate cases in which there is clear evidence that the conduct alleged occurred, but an individual officer cannot be identified.

RESPONSE: The Commission supports this recommendation.

Recommendation 22

That, given the number of people who have difficulties in communicating in writing for various reasons, not least disability, complainants should no longer have to withdraw complaints in writing, but that they should be able to do so verbally, or through other means, provided that the withdrawal is accompanied by a formal

written statement by the member of the Police Ombudsman's staff who receives the withdrawal.

RESPONSE: The Commission supports this recommendation.

Recommendation 23

That Regulation 26 of the RUC (Conduct) Regulations 2000 and the RUC (Conduct) (Senior Officers) Regulations 2000 be amended to provide a right to the Police Ombudsman to attend all hearings which take place following a Police Ombudsman investigation.

RESPONSE: The effect of the regulation as it currently stands is that the Police Ombudsman, having conducted an investigation giving rise to a hearing under these conduct regulations is then excluded from the hearing unless all parties consent to his attendance. The Commission supports this recommendation because we believe it will enhance the integrity and the openness of the process if the Ombudsman has a right to attend.

Recommendation 24

That the Police Ombudsman should be involved as early as possible in discussions in relation to matters of relevant and necessary statutory change affecting the Office.

RESPONSE: Given that there are proposals to give the Police Ombudsman powers to investigate complaints in relation to HMRC, the UK Border Agency and National Crime Agency in respect of the exercise of police powers by those bodies, it is right and proper that the Office of the Police Ombudsman be involved as early as possible in discussions regarding relevant and required statutory changes. The Commission supports the recommendation.

Recommendation 25

That the statutory guidance on police complaints, issued in accordance with Section 65 of the Police (Northern Ireland) Act 1998 should be reviewed and where necessary revised by the Department of Justice.

RESPONSE: Following the devolution of policing and justice, the Commission believes it is timely for the Department of Justice to review and, where necessary, revise the statutory guidance on police complaints and therefore support this recommendation.

Recommendation 26

That a time limit for the making of complaints of mal-administration against the Police Ombudsman should be introduced and that that time limit should be twelve months.

RESPONSE: The Commission supports this recommendation in order to bring provision for complaints regarding maladministration against the Police Ombudsman in line with the time limits applicable to other public bodies.