

CAJ's Submission no. S423

**CAJ's submission to supplementary proposals from the Dept
of Justice, on New Powers Package Policy Paper for OPONI**

October 2013

About CAJ

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

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

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

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

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

CAJ's Submission (S423) to the supplementary proposals from the Department of Justice's Consultation on their 'New Powers Package Policy Paper' for Office of the Police Ombudsman for Northern Ireland (OPONI), October 2013

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

CAJ responded to the Department of Justice Targeted Consultation on the new powers package for the Police Ombudsman in July 2013.¹ CAJ welcomed the reforms, from the Police Ombudsman's Five Year Review of Powers, that the Department intended to implement, which would remedy gaps in OPONI's remit. CAJ also noted that other recommendations from the Five Year Review, some of which engaged international obligations, were being parked by the Department – this included powers to compel retired/former RUC officers to cooperate with the Ombudsman and amendments to RUC complaints regulations.

On the 18 October 2013 the Department wrote again to CAJ seeking views on four further proposals presented to the Department in relation to the Police Ombudsman. The four proposals are as follows:

- i) "Recommendations and findings by the Police Ombudsman should be binding on the PSNI Chief Constable;
- ii) The PSNI should not interview or debrief serving or retired officers who are known to be witnesses or suspects in an existing or impending investigation by the Office of the Police Ombudsman;
- iii) The Police Ombudsman must be empowered to arrest and interview agents and informers [sic] of the PSNI (or any other agency) if it may assist an investigation by the Police Ombudsman; and
- iv) All protocols or memoranda of understanding (MoU) governing the release of information from the PSNI and other agencies to the Office of the Police Ombudsman to assist an investigation should be available for scrutiny by the Policing Board / Justice Committee."²

In essence CAJ believes all four of the proposals would assist with furthering human rights compliance and remedy gaps in the Police Ombudsman's powers and overall accountability framework:

¹ S415 CAJ's response to DoJ's consultation on New Powers Package Policy Paper for OPONI, [Available at <http://www.caj.org.uk/contents/1196>] accessed October 2013].

² Department of Justice Policing Policy and Strategy Division Letter to consultees, 18 October 2013.

Recommendation i: that Police Ombudsman’s Recommendations are binding on the Chief Constable. This recommendation would remedy the situation of the McGurk’s Bar bombing when the Chief Constable rejected the Police Ombudsman’s report and would not implement its recommendations.³

Recommendation ii: the PSNI should not interview/debrief officers who are witnesses/suspects in a Police Ombudsman investigation. This recommendation would merit further clarity as to its detail, to ensure the rights of accused persons and victims are given due regard. It would appear to be designed, however, to prevent the scenario whereby state actors are given undue cover for their alleged actions. This type of situation was found in the recent HM Inspector of Constabulary (HMIC) report into the PSNI Historical Enquiries Team (HET) in relation to the issue of what was commonly referred to as pre-interview disclosure. This involved preferential treatment of state actors who were given “all existing evidential documentation and other material” relevant to the case by the HET prior to interview. This approach went well beyond the right to be informed of the nature of the offence in which a person is a suspect and be furnished with sufficient information about the case against them. There is no obligation to reveal the entire prosecution case against a suspect before questioning begins and the HMIC held that the HET process for state actors was ‘illegal and untenable.’⁴

Recommendation iii: the Ombudsman be empowered to arrest and interview informants and agents as part of an investigation. This recommendation would remedy a key gap in current powers and accountability arrangements. At present if the Police Ombudsman is investigating alleged misconduct or criminality by PSNI handlers of informants it appears it would be the PSNI themselves, despite the issue of conflict of interest, who would have to interview relevant persons who are informants to the PSNI or other agencies. The recommendation would remedy this problem and, as well as avoiding the need for a multi-agency investigation, assist in ensuring investigations meet independence requirements.

Furthermore in relation to historic cases CAJ, in recent evidence to the Policing Board Working Group on the HET, noted the contradictory official position that the PSNI HET is not deemed sufficiently independent to investigate police officers but *is* permitted to investigate Informants/agents who were operating for the police and other state agencies.⁵ At present HET refers cases to the Police Ombudsman for a ‘parallel investigation’ where there is suspected police and external collusion alleged.⁶ Whilst the above recommendation would not fully remedy this position it would allow the Ombudsman to investigate the actions of handlers more effectively.

³ See ‘Chief Constable again rejects Mc Gurk’s Report’ Press Release from the Mc Gurk’s Bar Bombing Relatives, British Irish Rights Watch & Pat Finucane Centre — September 1, 2011
[Available at: <http://www.patfinucanecentre.org/cases/mcgurk04.html> accessed October 2013].

⁴ HMIC ‘*Inspection of the Police Service of Northern Ireland Historical Enquiries Team*’ 2013 Section 4.48.

⁵ CAJ S420 Submission to Historical Enquiries Team (Het) Working Group Ni Policing Board (September 2013)

⁶ UK Position to Committee of Ministers, Interim Resolution CM/ResDH(2007)73. It appears only a small number of parallel investigations have resulted from HET referrals, although the PSNI is declining to give specific statistics (see PSNI FOI reference F-2013-03386).

Recommendation iv: protocols and MoUs on disclosure by the PSNI and other agencies to be scrutinised by the Justice Committee or Policing Board. Whilst further information on the process and respective powers would be of assistance, CAJ believes that implementing this recommendation could assist in tackling the recurring problem of informal restrictions on disclosure of information to investigators and other processes.

During the course of research into covert policing, CAJ obtained under the Freedom of Information Act a MoU from the Northern Ireland Office entitled “*National Security and the Policing Board*”.⁷ CAJ was seriously concerned that the MoU seeks to heavily restrict the oversight role of the Policing Board, even beyond the changes put forward under the St Andrews Agreement 2006 in relation to the role of MI5 having primacy over ‘national security’ covert policing. This includes the MoU stipulating that the Policing Board has no oversight role in executive policing operations which engage national security and directs (even within the confines of the Board’s confidential special purposes committee) the Chief Constable not to answer Policing Board questions which ‘indirectly touch upon’ National Security matters if there is a ‘risk’ of damage to the interests of this undefined concept.

CAJ subsequently gave evidence to the Human Rights and Professional Standards Committee of the Policing Board in March 2013 and the Committee informed us that the Policing Board had now been advised that the MoU had no legal standing and that the Board was not bound to operate under its provisions. CAJ was also informed that it was not clear if the MoU been circulated to the full Policing Board and the ‘MoU’ was not formally approved or ratified by the Board but rather appears to have been the product of an informal ‘Gentleman’s Agreement’. In effect an agreement which sought to seriously limit the Policing Board’s oversight powers appears to have been concluded without its formal approval. This recommendation could prevent recurrence of such an arrangement.

In general it is well known that delays and restrictions on disclosure, particularly of intelligence based documents, have been a perennial problem in relation to ensuring effective investigations; public scrutiny of arrangements may provide some level of remedy for this.

Whilst supporting these four new recommendations, CAJ urges the department not to lose sight of the other unimplemented recommendations from Ombudsman’s Five Year Review and again urges the Department to also find a mechanism to ensure that other recommendations, which engage matters of compliance with human rights obligations, are also dealt with.

**Committee on the Administration of Justice, Ltd
October 2013**

⁷ CAJ ‘The Policing You Don’t See’ November 2012.