

Submission to Five Year Review of the Police Ombudsman March 2022

1. 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.
2. This is a response to the NI Department of Justice (DoJ) consultation on the Five Year Review of Powers of the Office of the Police Ombudsman for Northern Ireland (OPONI), and its accompanying Equality Screening exercise.¹
3. As set out in the Departmental consultation documents in the two decades since the establishment of the office there have been three previous reviews of the OPONI powers "but the recommendations have not been acted upon due to a lack of political consensus for the package put forward."² This has left significant gaps in powers and as noted by the current Ombudsman her legislation has 'fallen behind' as "Our powers have not been updated at any stage over those two decades."³
4. CAJ has engaged heavily and issued responses to previous reviews and has been disappointed recommendations have not been implemented, at times in irregular circumstances.⁴
5. In this context, we consider the approach the Ombudsman and Department should set out in the consultation documents the full range of powers desired to achieve best practice in the operation of the office and specify those areas where amendments are required to meet international human rights obligations.
6. Should measures required to meet ECHR and other human rights obligations not be progressed through the devolved institutions due to a 'lack of political consensus' the matter should not be parked but the Department should refer the matter for implementation by the UK authorities ultimately are the duty bearers to ensure the implementation of international obligations should the devolved institutions not be able to deliver. This is consistent with the framework set out in the Belfast/Good Friday Agreement regarding the role of the UK Parliament.⁵
7. Summary of key issues in this submission:

¹ <https://www.justice-ni.gov.uk/consultations/consultation-oversight-stocktake-and-oponi-review>

² DoJ Review of Police Ombudsman's Powers Consultation Paper [DoJ Consultation Paper], December 2021, Paragraph 59.

³ Police Ombudsman for Northern Ireland '5 Year Review' 2021, Foreword.

⁴ See CAJ's submission no. S386 'CAJ's submission to the Department of Justice's consultation on the Future Operation of the Office of the Police Ombudsman for Northern Ireland' June 2012, p8.

⁵ See Paragraph 33(b) of Strand 1 GFA which sets out that the UK Parliament 'will': "legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland."

- *General powers:* We welcome the accessible nature of the OPONI Five Year Review document, and largely concur recommendations made to remedy gaps in powers, including the issues of compellability of information and statements and the extension of the remit to cover recommended civilian staff working on behalf of the PSNI.
- *Complaints previously investigated by the RUC:* we would urge a further change, recommended in previous reviews, to ensure the Ombudsman is not statute barred from investigating matters previously investigated by police. This issue arose recently in the Operation Greenwich report.
- *Immigration Officers:* we would urge further consideration of the scope of the OPONI remit relating to the exercise of functions by immigration officers beyond formal enforcement powers, in particular in the context of use of ‘informal’ controls that have led to racial discrimination.
- *OPONI as a body of the NI Assembly rather than DoJ:* we would concur with the goal of bringing OPONI in line with relevant provisions of the Venice Principles, but would caution at present if there are sufficient safeguards underpinning the functioning of the Assembly to prevent the undermining of OPONI’s remit.
- *Equality Screening:* in this submission we trigger the formal process to seek a review of the equality screening provided with the consultation, which we do not consider has been completed correctly.

General Powers of OPONI

8. The Review makes a number of recommendations in relation to strengthening the powers of OPONI to conduct investigations, including remedies for gaps in the investigation remit of the Office.
9. This includes a recommendation to bring OPONI in line with other similar bodies by augmenting its powers to compel the supply of “information, evidence or documents which the Police Ombudsman believes would be relevant to her investigations.”⁶ At present OPONI powers to this end are limited to such compulsion from the PSNI and Policing Board and not any other agency or person holding information relevant to an investigation. OPONI states “It is very unusual for an investigative body not to have the power to compel evidence and the absence of this power can have a significant impact on investigations.”⁷ The Department proposes this recommendation is taken forward.⁸
10. We concur this recommendation should be implemented, and in cases where an investigation engages duties under Articles 2 or 3 ECHR, would consider this extended power an element required to ensure effective investigations.
11. A second recommendation from OPONI is that the present power to compel statements of evidence from serving Police Officers be extended to any person

⁶ Five Year Review, 2022, page 13.

⁷ Five Year Review, 2022, page 13.

⁸ DoJ Consultation Paper, recommendation 14, page 43.

suspected of committing an offence in relation to a complaint of police conduct.⁹ This, OPONI notes, is a power available to comparable bodies.

12. Recommendation 15 has been formulated in relation to this matter “*That the Police Ombudsman legislation is amended to provide power to compel witnesses and suspects to attend for interview and to do so within a reasonable time. The interviewees must be required to bring all documentation and records in their possession and control including retired police officers.*” The Department does not propose to take this recommendation forward citing lack of political consensus.¹⁰
13. We concur with the need for OPONI powers to be strengthened in this area to increase compellability of cooperation with an Ombudsman investigation. Where the subject matter of an investigation engages Articles 2 & 3 ECHR we also consider this as a necessary step to ensure requirements for effective investigations are met.
14. This includes where an investigation into the actions of Police Officers would engage the actions of other agencies or informants (‘CHIS’).¹¹ Previous consultations have sought to address the present issues of conflict regarding CHIS and OPONI investigations.¹² 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. There has also been a long running issue whereby some retired officers decline to cooperate with OPONI investigations. We would support suitable changes in powers to empower the Ombudsman to compel cooperation with suitable procedural safeguards.
15. The references to duties under Articles 2 & 3 ECHR above relate to investigations concerning the right to life or torture and inhuman or degrading treatment. They are relevant to current investigations as well as those concerning legacy matters.
16. We also concur that amendments to powers should be made to make clear the ability of the Ombudsman to publish reports and make findings.
17. We also concur that the OPONI role be further extended beyond Police Officers to other police staff engaging in policing functions. The Review states “*The Police Ombudsman believes that she should be able to investigate a complaint about any non-police officer or individual acting on behalf of the Chief Constable in a role which involves contact with the public.*”¹³ The Department proposes taking forward recommendations in this area.¹⁴

Complaints Previously Investigated by the RUC

18. There has long been a gap in OPONI powers due to provisions in the RUC (Complaints etc) Regulations 2001 that preclude Ombudsman investigations into

⁹ Five Year Review, page 14.

¹⁰ DoJ Consultation document recommendation 15.

¹¹ Covert Human Intelligence Sources.

¹² In October 2013 the Department sought views on a recommendation that “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;”

¹³ Five Year Review, page 11.

¹⁴ DoJ Consultation Document, recommendations 7 & 8.

matters previously investigated by the police themselves. This also engages the investigations of the OPONI predecessor body the ICPC. This issue has led to a situation where complaints into fatal shootings by the RUC and other matters have not been reinvestigated.

19. The restrictions would cover other complaints relating to the right to life or torture/ inhuman or degrading treatment that engage the requirements of Articles 2 & 3 ECHR. The ECHR requirements include that investigations must meet certain thresholds of independence, a standard not met by past RUC or ICPC investigations.
20. We consider that the relevant provisions in the RUC (Complaints etc) Regulations should therefore be amended to remove this statute bar on OPONI investigations in such circumstances, and that this engages ECHR requirements.
21. This issue has arisen recently in relation to the OPONI investigation into complaints of collusion in the loyalist killing of Patrick Shanahan. CAJ has represented the Shanahan family including proceedings both to the European Court of Human Rights (ECtHR), and in a complaint to the Ombudsman.
22. The *Shanahan v UK* ECtHR case found the UK had breached the procedural obligations of Article 2 ECHR in failing to secure an independent, effective investigation into his death. In relation to the RUC / ICPC investigations the Court stated:

104. Insofar as the investigations were conducted by RUC officers, they were part of the police force which was suspected by the applicant and other members of the community of harassing and issuing threats against Patrick Shanahan. They were all under the responsibility of the RUC Chief Constable, who played a role in the process of instituting any disciplinary or criminal proceedings.... The power of the ICPC to require the RUC Chief Constable to refer an investigating report to the DPP for a decision on prosecution or to require disciplinary proceedings to be brought is not, however, a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those potentially under investigation....¹⁵
23. In January 2022, the Police Ombudsman released her Operation Greenwich investigation report covering 19 murders and multiple attempted murders committed across several counties around the north west of Northern Ireland between 1989 and 1993 by the Ulster Defence Association (UDA), a legal organisation until 1992.¹⁶ This included the death of Mr Shanahan.
24. Notwithstanding other findings the Police Ombudsman cited gaps in her powers as the reason for being unable to investigate the family's complaints that prior to Patrick's murder there were beatings in custody and death threats against Patrick from RUC officers.¹⁷

¹⁵ *Shanahan v UK*, paragraph (Application no. 37715/97) May 2001, [104].

¹⁶ <https://www.policeombudsman.org/Media-Releases/2022/Collusive-behaviours-but-no-prior-knowledge-of-att>

¹⁷ Operation Greenwich report paragraphs 11.60 & 11.62.

25. In relation to the allegations of assaults in custody, the Ombudsman stated (with reference to the RUC (Complaints etc.) Regulations 2001):

The 2001 Regulations state that complaints received under Section 52 of the 1998 Act can only be considered if ‘the complaint has not otherwise been investigated by the police.’ My Office cannot, therefore, investigate the assault allegations made by Mr Shanaghan as they were investigated by RUC Complaints and Discipline Branch at the time.¹⁸

26. The Ombudsman cited the same reason as precluding her from investigating the allegations that police officers threatened to kill Mr Shanaghan. Both complaints directly relate to matters occurring in the run up to Mr Shanahan’s death at the hands of loyalist paramilitaries, that the family consider are linked to his death.

27. We consider this a limitation in the Ombudsman’s powers to conduct effective investigations into deaths and hence the gap in powers should be remedied in order to ensure full compliance with Article 2 ECHR. It is worth noting that the Committee of Ministers continues to supervise OPONI, as a general measure, in response to Article 2 ECHR breaches until it is satisfied that it is fully Article 2 ECHR compliant.¹⁹

28. Whilst a recommendation has been included in previous reviews to remedy this gap in powers, there is presently no proposal to do so in the present review.

29. The Departmental consultation document states that recommendations should be considered in the context of the UK’s intention for a legacy bill following its July 2021 Command Paper, which proposes instantly ending OPONI legacy investigations.²⁰

30. It is notable there have been proposals to transfer OPONI legacy investigations to another body from the 2014 Stormont House Agreement (SHA), (albeit with an orderly transition of cases and OPONI retaining cases that were substantively competed). Over seven years on, implementation of the SHA is still awaited, and the UK has announced an intention to unilaterally depart from it in March 2020. The proposals set out in the Command Paper have already been assessed by UN and Council of Europe experts as incompatible with the UK’s international obligations, including under the ECHR.²¹ The introduction of the legacy bill has been subject to a number of delays and its provisions will invariably be subject to legal challenge. Given this its implementation should not be considered a *fait accompli* and it is more than possible that the Police Ombudsman will retain legacy powers entirely, or in a transitional period for some time to come. We therefore urge the Department to seek to remedy this gap in powers as an outworking of the current review.

Immigration Officers

31. The OPONI Five Year Review states that the office “*also investigates ‘serious’ complaints about officers of the National Crime Agency when they are operating in*

¹⁸ Operation Greenwich report, Paragraph 11.60.

¹⁹ [https://hudoc.exec.coe.int/eng#%22EXEIdentifier%22:\[%22004-2202%22\]}](https://hudoc.exec.coe.int/eng#%22EXEIdentifier%22:[%22004-2202%22]})

²⁰ DoJ Consultation document, paragraph 62.

²¹ For further detail see CAJ Rule 9 Submission to the Committee of Ministers, October 2021, <https://caj.org.uk/2021/12/02/submission-to-the-committee-of-ministers-october-2021/>

Northern Ireland, police officers from Great Britain when they are supporting the PSNI and complaints about certain Immigration and Customs officials.”²²

32. In general terms we consider all law enforcement officers discharging policing type functions in NI should come under the full remit of OPONI, rather than limitations to the PSNI. We supported the extension of remit to the National Crime Agency in this context and have engaged with the Ombudsman previously regarding the specific extent to which the actions of Home Office Immigration Officers (Border Force and other Immigration Enforcement officers)
33. The extent to which OPONI has powers to investigate Immigration Officers were helpfully set out by the current Ombudsman in correspondence with CAJ.
34. This highlights that the OPONI legislation provides for an agreement between OPONI and the Secretary of State for arrangements and procedures similar to those provided under the same Act relating to a list of *specified enforcement functions*.²³
35. The Ombudsman sets out that the current agreement with the Home Office places “strict limitations upon the nature of complaints that I have the power to investigate” in relation to immigration officers. They types of complaints that can be investigated are listed in Schedule 1 of the agreement and concern circumstances when:
- That the exercise of an enforcement function by a relevant official led to the death or serious injury of a member of the public.
 - That in the exercise of an enforcement function a relevant official committed a serious assault or serious sexual offence.
 - That in the exercise of an enforcement function a relevant official is guilty of serious corruption.
 - That in the exercise of an enforcement function an incident occurs which raises an issue of significant public interest.²⁴
36. The Ombudsman also sets out that certain misadministration complaints against immigration officers can fall under the remit of the Parliamentary and Health Service Ombudsman (PHSO).
37. It is notable that many of the concerns CAJ and other organisations have regarding the actions of immigration officers do not necessarily involve the exercise of formal powers, despite clearly constituting enforcement. We have long had well documented concerns regarding the role of immigration officers in conducting

²² Five Year Review, page 6.

²³ “...section 60ZB of the 1998 Act provides for an agreement between PONI and the Secretary of State for the establishment of arrangements and procedures similar to those provided under Part VII of the Act in relation to the exercise of specified enforcement functions by relevant officials. Section 60ZB (3) defines ‘relevant officials’ as including Immigration Officers and section 60ZB (4) defines enforcement functions as: Power of entry; Power to search persons or property; Power to seize or detain property; Power to arrest persons; Power to detain persons and Power to examine persons or otherwise to obtain information.” “Section 60ZC(6) states that any agreement under section 60ZB must not provide for procedures in relation to so much of any complaint or matter as relates to functions conferred by or under Part 8 of the Immigration and Asylum Act 1999 (detained persons and removal centres etc.)” OPONI correspondence to CAJ, April 2020.

²⁴ OPONI correspondence to CAJ, April 2020.

selective passport checks on domestic NI-GB routes that have involved racial profiling (the form of racial discrimination where persons are singled out for attention by law enforcement officers on the basis of skin colour or other ethnic indicators). It is notable that Home Office guidance itself regards these type of operations within the Common Travel Area (CTA) as not involving the exercise of formal enforcement powers, e.g. to produce passports or question/examine passengers, but rather on the basis of unstated voluntary cooperation.²⁵

38. We would urge changes to ensure immigration officers in NI are accountable to the Ombudsman in NI in the same way as the PSNI, both in relation to misconduct (including racial profiling) and any offences suspected.
39. We consider it within the remit of the Department to seek to progress recommendations to enhance the powers of OPONI in relation to the conduct of immigration officers. The functions of OPONI are transferred and to the extent to which such an extension would engage excepted matters the reforms would be ancillary to transferred matters as part of this broader review process.

Proposal OPONI becomes an Officer of the NI Assembly

40. The Five Year Review sets out a proposal that OPONI cease to be an arm's length body of the NI Department of Justice and instead be accountable to the NI Assembly.
41. The Five Year Review sets out that:

The Police Ombudsman believes that to further enhance confidence in the Office's independence, it should be an 'Officer of the Assembly'. This change would also reflect the original vision for the Office as described by Dr Hayes and increase our independence from government, in line with the Venice Principles for the proper functioning and independence of Ombudsman institutions which have been adopted by the UN."²⁶

42. The Venice Principles represent an international standard. In relation to the role of the legislature this relates to a potential role in appointments, this states:

The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority.

The procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law.²⁷

²⁵ See: [Enforcement visits casework guidance \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/enforcement-visits-casework-guidance); "Home Office IOs [immigration officers] do not have all of their normal powers to carry out immigration controls in respect of persons travelling within the common travel area (CTA). Operation Gull relies on the voluntary cooperation of the travelling public. Officers are entitled to carry out intelligence led operations designed to intercept persons who should not be in the country on the basis of cooperation from the general public. However, individuals are under no obligation to comply..." (p20)

²⁶ Five Year Review, page 8.

²⁷ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e) Principles 6-7.

43. The Venice Principles also make reference to the legislature having a role in the removal of an Ombudsman, and powers to present findings and recommendations to the legislature (and Executive).²⁸
44. We note also the reference to the original vision of the Hayes review, we concur of the desirability to further examine the role of the legislature and OPONI in accordance with the Venice Principles.
45. We would caution however at this stage against a full transfer of OPONI to the status of an Officer of the Assembly, not least in the context of key safeguards as to the exercise of powers in the Assembly further to the Belfast/Good Friday Agreement having not been properly implemented.
46. This includes the implementation of the Bill of Rights, a key safeguard against the exercise of legislative power in a manner contrary to human rights standards. It also includes the key relationship between the Bill of Rights and the Petition of Concern in the Assembly. The Petition of Concern was to be exercised in relation to equality requirements, including the provisions of the ECHR and Bill of Rights. It has also been envisaged that the Human Rights and Equality Commissions have an adjudicatory role over whether the use of the Petition of Concern has been valid to this end. At present, despite some limited reform further to the New Decade New Approach Agreement (NDNA), the Petition of Concern can still be used as an effective veto without recourse to the Bill of Rights which also has not been implemented.
47. In this context, in the absence of the implementation of these core GFA safeguards it is foreseeable that a full transfer of OPONI under the auspices of the Assembly would risk potential interference in the work of the office by opponents of policing accountability (in general or in response to particular OPONI reports). This may involve seeking to roll back OPONI powers or the misuse of Petitions of Concern to stymie the functioning of the office, for example in non-approval of budgets.²⁹
48. In the worst case scenario there is a risk that the similar issues of having been unable to progress most recommendations from previous reviews into OPONI powers due to a 'lack of political consensus' could manifest itself on to the general functioning of the office. We would therefore urge both the prior implementation of key GFA safeguards in relation to the legislature and further examination of the implications of a transfer of sponsor arrangements on the discharge of OPONI functions.

Equality Screening

²⁸ Principle 11: The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law. Principle 18, "Ombudsman shall have the power to present, in public, recommendations to Parliament or the Executive, including to amend legislation or to adopt new legislation."

²⁹ In relation to legacy functions for an example of where an Executive Minister acted unlawfully in seeking to block a DoJ funding bid into legacy inquests see In the matter of an application by Bridget Hughes [2018] NIQB 30.

49. Whilst it is welcome the Department has duly produced an Equality Screening exercise to accompany the consultation, the current exercise is flawed and incorrectly completed.
50. The Needs, Experiences and Priorities section of the Equality Screening identifies the Section 75 categories PSNI officers are more represented in, (male, Protestant, unionist, white) and also makes reference to retired officers in the category of age. There is no reference however to the likely s75 categories of OPONI complainants, be this in relation to patterns of complainants in particular areas (e.g. current & legacy) or in relation to access issues for certain s75 categories that changes to OPONI powers and procedures may assist with.
51. The screening questions on potential impacts on equality of opportunity section is particularly flawed being limited to a sentence in the first box stating the Five year review proposals “would apply equally to all categories”. The words ‘as above’ are then copied into all other boxes and no impacts on equality are assumed.
52. This screening exercise has not been conducted compatibly with the provisions of the Departmental Equality Scheme. There should be analysis of potential equalities impacts through the implementation or non-implementation of proposals. For example, if there is no implementation of proposals on how to increase the compellability of evidence to OPONI how will this effect complainants (in current and legacy cases), and will this affect complainants in concentrated in particular s75 groups. If DoJ does not have the data to make meaningful conclusions this itself would be grounds under the scheme for triggering an EQIA.
53. Paragraph 4.16 of the DoJ Equality Scheme provides “*4.16 If a consultee, including the Equality Commission, raises a concern about a screening decision based on supporting evidence, the screening decision will be reviewed.*”
54. As a consultee by way of this submission we therefore formally trigger this paragraph 4.16 process seeking a review of the Screening Exercise, based on the supporting evidence, alluded to above that the original screening has not been done properly (i.e. in accordance with the Equality Scheme).

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