



**PONI Five Year Review 2020 – NIRPOA Position Paper**

**Introduction**

Under the provisions of Section 61(4) of the Police (Northern Ireland) Act 1998 the Police Ombudsman for Northern Ireland (PONI) has recently drafted a report to the Department of Justice (DOJ) – ‘the Review’. The Review sets out the legal and historical background to the workings of the office; and it makes 35 recommendations. A number of these recommendations would, if implemented, significantly affect the welfare and interests of members of the Northern Ireland Retired Police Officers Association (NIRPOA – ‘the Association’) as well as other retired members of the Royal Ulster Constabulary George Cross (RUCGC) and the Police Service of Northern Ireland (PSNI) who may not be members but whose interests the Association seeks to protect.

The Association is aware of widespread commentary that the description within the Review of PONI’s role and activities to date is inaccurate and misleading. More importantly perhaps, the Association strongly disagrees with a number of the recommendations contained in the Review and will oppose vigorously any attempt to implement them. It should be noted that the Association’s views on the relevant recommendations were not sought by PONI and no consultation with the Association has taken place.

The Association does not oppose all the recommendations which are relevant to its members. Nor does the Association comment on those recommendations which impact wholly or mainly on serving members of the PSNI. These would be a matter for the Police Federation of Northern Ireland (PFNI) to consider.

Were it not for the political background it might perhaps be thought surprising that an office which has so frequently and so manifestly been found wanting in terms of competence, judgement and indeed legal propriety should be seeking to arrogate to itself even wider responsibilities, powers and discretion. However this is what appears to be proposed by the Review. This paper will deal only with those issues which appear to have the potential for direct impact upon the welfare and interests of the members of the Association.

In summary, the Review seeks to downplay the full implications of the judgements in the Judicial Review (JR) which was brought by the Association (see below). It nevertheless still seeks to subvert those judgements by the introduction of new legislation. Further, it seeks to draw on the misnomer ‘Ombudsman’ for an organisation which is effectively a parallel police force to compare itself with legitimate ombudsman bodies; it attempts to draw parallels with developments in Scotland as well as in England and Wales which are highly misleading; it attempts to overthrow the provisions of ECHR by seeking powers to compel suspects and witnesses which were (and remain) unavailable even to real UK police forces when faced with terrorist activity; and it seeks to protect its infamous ‘public statements’ from actions for defamation.

The Association believes that what is required now, before any consideration is given to the recommendations contained in the Review, is an ***independent*** inspection and review of the performance of PONI to date, to be carried out by a competent body. This is because it is the Association’s view that PONI has, for twenty years, (i) abused the powers of the office to the disadvantage of our members; and (ii) displayed a staggering incompetence for which it has never been held to account.

Some may be aware of the Association’s response to PONI’s investigations and Section 62 statements regarding the North Belfast Ulster Volunteer Force (UVF) agent-handling case (Operation ‘Ballast’), the outrage known as the ‘Good Neighbour’ bombing in Londonderry and the Loughinisland murders. PONI’s public statements in relation to these matters were riddled with errors and attempted to draw conclusions which had no basis in the facts. PONI did not address any of the issues raised by the Association in respect of these grossly misleading public statements. In addition, many individual officers believe that they have suffered iniquity at the hands of PONI. Some of them have gone public and, eventually, received an apology, although in the case of the Detective Inspector and Detective Sergeant (now both retired) who were criticised in the Section 62 statement concerning the Omagh bombing, the 2007 apology was undermined two years later by the retired Ombudsman appearing publicly to repeat the unfounded allegation against them.

The Association is aware of numerous case histories of retired officers who have been subjected to protracted and delayed investigations, often it seems on the basis of no evidence whatsoever, with a dismissive attitude being shown to requests for information as to progress in the inquiry or likely next steps. Some of these case histories contain shocking examples of conduct by PONI officials which would draw significant criticism if they had been carried out by a police organisation which were subject to a complaints mechanism. As it stands there is no independent mechanism by which to curb the arbitrary use and abuse of these police investigatory powers or to hold PONI staff to account (see below). A number of these retired officers have intimated to the Association that they would be prepared to describe their experiences to an independent authority.

In respect of the inordinate delays in dealing with some legacy investigations implicating our members an inspecting body might like to remember that during the worst years of the recent ‘Troubles’ the RUCGC and the Director of Public Prosecutions (DPP) were expected to adhere to specified timetables and to update interested parties in relation to their investigations and proposed prosecutions. There have been legitimate criticisms made of both parties in respect of these issues – some by PONI itself – but there does not appear to be any onus on PONI, which is operating in a completely different and much more favourable environment, to address matters expeditiously.

Lest it be thought that these views represent only the self-interested and indeed biased position of the Association, the proposed independent inspection and review body should be invited to consider the views of the courts. In particular the Association would draw attention to the judgement dated 19 January 2018 of Mr (now Lord) Justice McCloskey on our JR (in particular paragraphs 70 – 103); the judgement of the Appeal Court dated 18 June 2020 in the same matter; and the judgement of the Appeal Court dated 4 May 2020 in the matter of the Rosaleen Dalton JR. The judges addressed both the *vires* of PONI’s Section 62 statements and, echoing our earlier concerns, the absence of any rationale for PONI’s conclusions which, in the Dalton case for example, ‘mystified’ them.

An inspecting body might also like to consider and report on the leaks and other failings, the use of publicity, the working procedures and the organisational culture in the office of PONI. It would be totally inappropriate for legislation on any new powers to be rushed through before proper consideration had been given to how PONI has been using those powers which it already has.

The Association would be interested to know what the Northern Ireland Human Rights Commission (NIHRC – ‘the Commission’) makes of this Review. The Commission’s comments in relation to the proposed legislation on legacy matters arising from the Stormont House Agreement (SHA) during the consultation process in 2018 made staggering reading, apparently endorsing all sorts of compulsions on members of the public which, had they been applied to suspected terrorists during the ‘Troubles’, would surely have aroused the Commission’s hostile interest. It would be hoped that the Commission might want to uphold the provisions and values of the European Convention on Human Rights (ECHR). The Association says that PONI has failed to abide by these provisions and that the Review proposes even further deviation from the ECHR.

**The Recommendations**

Although the body of the text of the Review considers the issues in a slightly different format, this paper will consider those recommendations which are most relevant to the Association in their numerical order. Direct quotations from the Review are in *italics* below.

Recommendation 11

***Recommendation 11***

***That the Police Ombudsman legislation should provide a discretion for the Ombudsman to determine whether to begin, continue or discontinue an investigation in circumstances where the Police Ombudsman considers it is in the public interest to do so. These circumstances can include where it is not proportionate to investigate a complaint further, where there is no reasonably practical outcome to be achieved and where the complaint is vexatious or ill-founded.***

*(New recommendation)*

This recommendation is clearly designed to increase the powers and the discretion available to PONI in relation to the commencement and termination of investigations. It is the view of the Association that PONI’s powers in this respect should be restricted rather than enhanced by any new legislation, as it appears to many through their own experience that PONI will manipulate and stretch the existing regulations in order to suit the agenda of the office-holder. Implementation of Recommendation 11 would therefore be a move in completely the wrong direction.

If the legislators were indeed minded to implement this recommendation, there would need to be a very clear definition of what constituted the public interest and what objective measures (other than the whim of PONI) might determine such issues. PONI would need to be held to account publicly for such decisions, something which does not happen at present.

Recommendations 14, 15 and 16

Recommendations 14, 15 and 16 may be considered together, as they form part of a single broader purpose. They represent a significant assault upon civil liberties in general and the provisions of ECHR in particular.

***Recommendation 14***

***That the legislation is amended to include an obligation upon any person (natural or legal), to produce any documents in their custody or control relevant to an investigation; further that the legislation to require any person to provide for inspection, examination or testing any other thing in their custody or control. These obligations must be met within a reasonable time.***

*(new recommendation)*

***Recommendation 15***

***That the Police Ombudsman legislation is amended to provide power to compel officers (serving or retired), as witnesses and suspects to attend for interview and produce documents, and to do so within a reasonable time. The interviewees must be required to bring all documentation and records in their possession and control.***

*(Recommended in 2007, 2011 and 2018 reviews)*

***Recommendation 16***

***That the High Court be given powers to deal with obstruction by any person of a Police Ombudsman investigation, where such obstruction is in connection with an investigation.***

*(new recommendation)*

It would be hard to exaggerate the threat which the demand for such wide-ranging new powers poses to the effective and equitable rule of law in a supposedly ECHR-compliant rule-of-law democracy.

In relation to Recommendation 14 it must be asked, who exactly does PONI have in mind? PONI has already described the obligations of the Chief Constable of the PSNI; and it seems unlikely that she imagines queues of retired (still less of active) terrorists waiting to present weapons, records and documents for examination. The most obvious potential target for such draconian powers is the retired police officer.

Incidentally it should be understood that the Association has never recommended that police officers should retain official police documents (let alone potential exhibits) in retirement; and it does not do so now.

Furthermore the suggestion that ‘*these obligations must be met within a reasonable time*’ is either laughable or else it is a deliberate provocation, considering the prolific, inordinate and inexcusable delays in PONI’s investigations of the conduct of many long-retired police officers. Some of these ‘investigations’ run to twenty years.

Recommendation 15 seeks to impose on members of the public (specifically retired police officers) a legal obligation which is completely outside all norms of UK law and procedure and which, when considered in conjunction with Recommendation 16, takes on a very sinister look indeed. We are not told what methods may be employed in order to seek to oblige these civilian witnesses to cooperate with PONI’s investigators, but sanctions for those who refuse or otherwise fail to comply with the demands which may be made upon them are to be sought by way of the High Court. Presumably this is because of the extensive powers which are available in such a forum, and also perhaps because of the lower standard of proof which may be required there.

There is very little by way of attempt to justify these recommendations in the text, which states, at paragraphs 4.20 and 4.21, *inter alia*:

*The Police Ombudsman’s investigation process, like a Coroner’s inquest, is inquisitorial in nature and not adversarial. Therefore the need for wide information gathering powers is enhanced . . .*

*. . . The Police Ombudsman has no power to compel any witness or suspect (whether a serving or retired police officer) to give a statement of evidence in a* *reasonable time. These powers are proposed for the PIRC on foot of Dame Elish Agioloni’s recent review of the Scottish police complaints legislation referred to previously in this report. The Northern Ireland Public Services Ombudsman (NIPSO) also has power to compel any public body in her jurisdiction or any staff or member or officer of that body; and also to compel any other third party who may have relevant information or documents, to give evidence and produce documents. The NIPSO may certify a matter of obstruction of her investigation as an offence to the High Court and that court may, after inquiry, deal with the person by way of criminal sanction. It is noteworthy that the Coroner has the power to compel evidence on documents and may fine an individual for failing to comply with a notice to do so under Section 17A Coroner’s Act (NI) 1959 as amended by Coroner’s and Justice Act 2009. A 2019 Supreme Court judgment held that the De Silva inquiry was not an article 2 compliant inquiry because it had no power to compel witnesses.*

It is simply not credible for PONI to claim to have a role which is somehow parallel to, or comparable with, that of a Coroner. Even PONI admits (see below) that the office has no power to make legal determinations, it being an investigatory body only. Similarly the Association has argued elsewhere that the name ‘Ombudsman’ is an unfortunate and misleading misnomer for such a body. It was intended by the late Dr Maurice Hayes to be headed by someone of high judicial standing. No such appointment has ever been made in the 23 years since the enabling legislation.

As to whether the processes adopted by PONI are accusatorial or inquisitorial it is suggested that some of the retired officers who have been subject to investigation might be invited to offer an opinion. Objectively viewed the process must be accusatorial if (as is the case) its function is to prepare cases for consideration by the DPP and ultimately the courts, which still operate under the accusatorial system.

An inquisitorial function for PONI could only ever be considered if the office were to have any role in determining criminal or disciplinary matters, which it does not. After two decades - and a protracted (and very expensive) JR - it appears from other parts of the present Review that even PONI now accepts that this is in fact the law (see below).

Furthermore it is wholly inappropriate to allow the uninformed reader to infer from the text of the Review that there is some sort of general movement within the United Kingdom (UK) towards compellability in such investigations. In relation to discipline matters it was always the case that serving officers could be directed to attend for interview with appropriate investigatory bodies, although there could never be any compulsion in relation to what they might or might not say in those circumstances. In relation to criminal matters suspects have the same rights and obligations whether they be serving police officers or members of the public. Retired police officers are members of the public. They have never been, and are not now, subject to police disciplinary procedures.

Recommendation 17

***Recommendation 17***

***That the legislation be amended to provide for a power to ‘determine’ a complaint in circumstances where no criminality or misconduct has occurred but the complainant has a legitimate grievance.***

*(new recommendation)*

This recommendation should be considered in light of the judgement in the Judicial Review brought by the Association (which, in fairness, it largely is) and may reflect the desire of the Ombudsman to assert the right to make comments about police methods or efficiency, a right which the Association has never challenged.

Paragraphs 3.4 and 3.5 of the Review set out PONI’s argument and are worth quoting in full:

*On 18 June 2020 the Northern Ireland Court of Appeal gave judgment in the judicial review Re Hawthorne’s and White’s application. The judgment outlined in detail the Court of Appeal’s views on the powers of the Police Ombudsman under the 1998 Act and in particular the question of the role of the Police Ombudsman. The Court held that the principal role of the Police Ombudsman is investigatory and not adjudicative. Further, that when the Ombudsman determines to submit a file to the Public Prosecution Service, appropriate recommendations should be made. A memorandum to the disciplinary authority should indicate whether disciplinary proceedings should be brought in respect of the impugned conduct. The Court was clear that thereafter the only role for the Ombudsman is to communicate the outcome of the proceedings to the complainant.*

*The question arose during the proceedings as to whether and in what circumstances the Police Ombudsman could ‘substantiate’ or uphold a complaint. The Court of Appeal held that the Ombudsman could ‘substantiate’ a complaint in relation to matters such as incivility or poor performance. The Court also held that although the Police Ombudsman had no power to make determinations in respect of retired officers it would be open to the Ombudsman to indicate in a public statement what recommendations if any, would have been made and the reasons for this. In its judgment the Court of Appeal made reference to a challenge to the* *former IPCC by West Yorkshire police. Similar arguments about the inability of the former IPCC (now IOPC) to uphold a complaint were made on behalf of the West Yorkshire police and the English Court of Appeal held there was no power to determine a complaint. As a result of this judgment, the IOPC sought and has now obtained amendments to the Police Complaints and Misconduct regulations and these changes are provided for in the Police and Crime Act 2017. It is proposed that similar amendments are required for this Office.*

The reader should beware of interpreting the decision of the Appeal Court in too broad a manner, as PONI appears to be doing in the cited paragraph. An examination of paragraph 54 of the McCloskey judgement (to which the appeal related) reveals that the learned judge was referring to the provisions of Section 64(2)(n) of the enabling legislation. This was designed to be linked to the discretion accorded to PONI to ‘provide limited compensation’ (that is, financial compensation) in those cases such as incivility or unsatisfactory performance in which the question of criminal charges or disciplinary proceedings did not arise.

Similarly great caution should be exercised when interpreting PONI’s claim that ‘*it would be open to the Ombudsman to indicate in a public statement what recommendations if any, would have been made and the reasons for this’.* This is taken somewhat out of context from that part of the judgement of the Appeal Court which related to paragraph 55 of the McCloskey judgement, wherein the learned judge referred back to the enabling legislation, specifically Section 63(1)(e). This was designed to enable PONI to state publicly what recommendations might have been made in relation to potential disciplinary hearings in a case in which the officer had already evaded liability for such proceedings by resigning from the police force.

It is very regrettable that PONI did not take greater cognisance of the deliberations of the IPCC and the West Yorkshire police rather earlier in the day. The Review reinforces this at paragraphs 4.22 and 4.23, which will also bear reproduction in full:

*The Court of Appeal in the Re Hawthorne and White’s application held that the Police Ombudsman has no power to determine or substantiate a complaint where criminal or disciplinary proceedings are involved. The Court confirmed the role for the Ombudsman is limited in those circumstances, to communicating the outcome of those proceedings to the complainant. The role of the Ombudsman is an ‘investigatory role’, with a power to make appropriate recommendations to both the PPS and the disciplinary authority as to the nature of any proceedings. The question arises as to whether a power to determine, such as those provided for to NIPSO, the Financial Services Ombudsman and also IOPC, is required. Dr Hayes in his 1997 review report envisaged a role in satisfying a complainant (for instance where their grievance was legitimate) or a police officer (that the allegations in the complaint were not upheld).*

*It has been confirmed with the IOPC legal advisor that the IOPC do not ‘uphold’ complaints that are to be the subject of criminal or misconduct proceedings. When those proceedings are completed the role is limited to communication of the outcome of those proceedings. As referenced at paragraph 3.5 above, the Police and Crime Act 2017 provided new powers for the IOPC to make determinations ‘on any other matter’. In those cases where the threshold has not been met for criminal or misconduct proceedings, the IOPC can still determine a complaint about a police officer(s). In practice this is a determination on whether the service provided was acceptable or unacceptable, or the IOPC have not been able to determine whether the service was acceptable.*

The IOPC (formerly IPCC) now recognises that there is a distinction between the roles of investigator and adjudicator. It is to be hoped that PONI is not now seeking to go behind the decisions of the courts in Northern Ireland and in England.

Recommendation 22

***Recommendation 22***

***That the Police Ombudsman has a discretion to publish any reports on investigations and the exercise of her functions when it is in the public interest to do so.***

*(new recommendation)*

It is hard to know what to make of this recommendation – but it is highly contentious. For two decades successive PONI office-holders have contended that such discretion already exists under the provisions of Section 62. And the present Review (see quotations below) appears to reassert this right or power. The Association has always contended that the power under Section 62 was intended to enable PONI to describe to the public any difficulties which had been encountered during an investigation (for example lack of evidence) or to make public recommendations to the Chief Constable for changes in procedures, training, equipment etc. PONI appeared to believe that Section 62 permitted the office-holder to publish reports which found police officers (serving or retired) guilty of criminal or disciplinary offences in cases where the evidence clearly did not even reach the threshold necessary to justify matters being taken forward by the appropriate authorities, be it the DPP and the courts or the Chief Constable and a disciplinary hearing.

Our objection to such kangaroo court activity was clearly upheld by Mr Justice McCloskey and subsequently by the Appeal Court.

Does the appearance of this recommendation mean that, despite what appears elsewhere in the text of the Review, PONI now belatedly accepts the judgement of the Appeal Court? At paragraph 1.9 the Review states:

*The Police Ombudsman may publish a statement as to her actions, decisions and determinations and the reasons for same in relation to the exercise of any of her* *functions under the 1998 Act (section 62). The Ombudsman uses this provision to publish significant public statements on historical and current investigations as well as the publication of cases studies in annual and thematic reports and in press articles.*

The manifest injustices which had arisen as a result of the abuse of Section 62 by successive office-holders may have been curtailed by the Association’s JR, the outcome of which is at least partially recognised by PONI. Paragraph 4.33 states:

*A public statement is not defined in section 62 and has been interpreted by the Office widely as covering a range of publications by the Police Ombudsman which include thematic reports, case summaries and press releases. There is no general power for the Police Ombudsman to publish reports on investigations as provided for in other ombudsman legislation.*

Paragraph 4.34 goes on to state:

*If it is accepted that the Police Ombudsman should have a general discretion to publish any report, it is important that there are safeguards for the protection of the privacy of individuals and the rights and interests of other persons. These safeguards are provided in Article 8 (right to privacy) of ECHR. There are also the requirements of natural justice and procedural fairness. The Court of Appeal (paragraph 56) of the Re Hawthorne and White judgment emphasised that when making public statements there is a need to respect the privacy of individuals and meet the requirements of procedural fairness.*

The Association does **not** accept that PONI ‘*should have a general discretion to publish any report*’, but we do welcome what appears to be a recognition that published reports should recognise the provisions of ECHR. Why was this not always the case? PONI appears to overlook the need also to refer specifically to Article 6, ECHR (right to a fair trial) in this section.

Nor does the Review appear to acknowledge the fact that it is bound to adhere strictly to all the requirements of due process, including the basic principle that a person who is subject to investigation by PONI, (as with any investigation by the PSNI or other UK policing body), is innocent until proven guilty in a court of law or before a lawfully constituted disciplinary authority. It has been the consistent failure of PONI to observe this fundamental principle that has resulted in the publication of Section 62 statements that were wholly outwith the lawful authority of the Ombudsman and were therefore *ultra vires*.

The consequence of PONI doing so was summed up by Mr Justice McCloskey at paragraph 56 of his judgement:

*Every “public statement” promulgated by the Police Ombudsman under section 62 of the 1998 Act has legal effects and consequences. Furthermore, as the present challenge demonstrates, each can have a major human impact, and may also impinge on, the legal rights of individuals. In addition such statements are made pursuant to a bespoke statutory framework and in practice their content will very frequently be the yardstick whereby judgements relating to the twin statutory aims of securing the efficiency, effectiveness and independence of the police complaints system and the confidence of the public and of members of the police force in that system, enshrined in section 55(4) will be made. The effect of these factors, in my judgment, is that public statements made under section 62 will be read and construed by the application of a relatively strict prism involving careful judicial scrutiny. The exercise of construction being an objective one, I consider the appropriate test to be that of the hypothetical impartial, fair minded and reasonably informed reader.*

And at paragraph 77 he added:

*The effect of the foregoing is that none of the police officers to whom these destructive and withering condemnations apply had the protection of due process. They were, in effect, accused, tried and convicted without notice and in their absence. None of the essential elements of the criminal or disciplinary process existed. In particular, and in very brief summary, there was no accusation, no presumption of innocence, no burden of proof, no opportunity to be heard, no right to confront one’s accusers and to cross examine witnesses, no legal representation and no right to disclosure, one of the key features of the modern criminal process.*

It is therefore clear that if there is to be any amendment to the legislation in respect of Section 62 statements it must be designed to ensure that the abuses which have been perpetrated by PONI to date cannot be repeated.

Recommendations 23, 24 and 25

These three recommendations may be considered together.

***Recommendation 23***

***That if Police Ombudsman legislation is amended to provide a general power***

***to publish reports, the Ombudsman ought to be required also to take account of the rights and interests of the complainant, police officer(s) and any other person when publishing a report.***

*(new recommendation)*

***Recommendation 24***

***That the legislation be amended to include a provision that requires the Police Ombudsman to give any individual who is the subject of allegations in a complaint or investigation an opportunity to comment on any allegations.***

*(new recommendation)*

***Recommendation 25***

***That the legislation be amended to require the Police Ombudsman to provide any officer criticised (explicitly or implicitly) in a public report with an opportunity to comment on those criticisms within a reasonable time. The Ombudsman will also be required to take into account their response and reflect that response in the public report.***

*(new recommendation)*

It might be considered churlish to fail to welcome these recommendations, but surely the conduct which is to be required were such legislation to be introduced ought to have been established automatically or by guidelines at the inauguration of the office, rather than being dragged out of PONI by means of Judicial Review. They are, after all, nothing more than that which common decency in public life requires – not to mention being implicit in the Salmon principles. At paragraph 4.36 the Review states:

*The need for procedural fairness in the production of a public report/statement was clarified in the decision by Mr Justice McCloskey (as he then was) in the case of Re Hawthorne & White in the court of first instance. If the Police Ombudsman is provided with a general power to publish any report on an investigation, then procedural fairness requirements include the following:*

1. *An individual must be given advance notice of those aspects of the public report on the investigation that are critical of him/her (either explicit or implicit criticism);*
2. *An individual must be given an opportunity to respond to those matters within a reasonable period of time;*
3. *Their response must be taken into account by the Ombudsman;*
4. *The individual’s response should also be accurately transposed into the final public report.*

Whilst in principle we do **not** accept the unfettered right of PONI to publish reports of the type which have been seen during the last two decades, these provisions seem to us to be a basic minimum if such reports are indeed to continue. It is not at all clear why it should ever have been necessary for them to be ‘*clarified*’ by Mr Justice McCloskey (as he then was).

In any event it could **never** be legitimate for such criticism to amount to a suggestion that any individual or group of individuals had been guilty of a criminal offence if the evidence had never been tested in any forum established for such a purpose – such as a criminal court. Yet this was precisely the purpose to which many of PONI’s Section 62 statements on legacy matters had been put.

Furthermore it is clear from context that the comments of the learned Judge presumed that there would exist to some degree an ‘equality of arms’ between the former officer who might be criticised and PONI, this being a clear requirement of Article 6, ECHR. For any retired officer to be able to defend himself or herself effectively, access would be needed to any relevant documentation which is held by the PSNI, the PPS and the courts. Full rights of discovery and disclosure would need to be embodied in any legislation introducing such a power.

And importantly, implicit in such ‘equality of arms’ would be the right of access to free and independent legal advice and potentially legal aid.

It is precisely to guard against this widening of the power of PONI to adjudicate and to make ‘findings’ that the current legislation confines its role to one of investigating allegations of a criminal nature alone against former police officers. No forum exists, nor is any proposed, wherein the probity of the evidence acquired by PONI can be tested, so that in the absence of a criminal trial there can be no legal basis for a Section 62 statement which publicly levels ‘criticism’ against any retired police officer. This is true whether the retired officer is named or given a cypher. In a small community identifications are easily made.

Furthermore no evidential threshold is identified in the recommendation, nor is there any indication given as to how the Article 6 and Article 8 rights of those to be so ‘criticised’ would be protected or indeed even acknowledged. And if Recommendation 26 (see below) were to be implemented, such criticism would not even be open to legal challenge before any court of law or other independent authority in which damages could be awarded.

Recommendation 26

***Recommendation 26***

***That all published reports and public statements of the Ombudsman are protected by defamation privilege.***

*(new recommendation)*

At paragraph 4.37 it is stated that:

*Currently there is no privilege against defamation proceedings attaching to Police Ombudsman reports or public statements under section 62 of the 1998 Act.*

This was news to many members of the Association who believed, perhaps erroneously as it now appears, that PONI’s Section 62 statements were indeed privileged. We continue to believe that **neither PONI nor anyone else should be above the law**. There is more to be said about this in relation to our Article 13 ECHR argument which will be rehearsed (once again) below.

To protect PONI from defamation suits is to imply that PONI is exercising some sort of judicial function after hearing contested evidence in open proceedings, which has never been the case.

Recommendation 35

***Recommendation 35***

***That, subject to consultation with NIPSO, the Police Ombudsman be added to schedule 3 of Public Services Ombudsman (Northern Ireland) Act 2016 as a listed authority******for complaints in respect of her administrative functions.***

*(new recommendation)*

##### In introducing this recommendation, the Review states at paragraph 5.16:

*Dr Maurice Hayes in his 1997 Review of the police complaints system in Northern Ireland recommended that the Police Ombudsman be in the jurisdiction of the Northern Ireland Ombudsman in respect of complaints of maladministration. The Police Ombudsman has informed the Minister of Justice of her intention to consult with NIPSO and to seek legislative amendment to the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act) in schedule 3 to that Act. This is to ensure that all complaints about service failure or maladministration on the part of her and her staff are investigated by NIPSO. This will provide for accountability for the administrative functions of the Office only. It will not be a route to appeal a decision on a complaint or investigation made by the Ombudsman and her staff.*

It should be noted that this recommendation specifically restricts the role of the Northern Ireland Ombudsman to matters of ‘*complaints about service failure or maladministration*’.

This is wholly unacceptable and, if implemented without significant additional provisions regarding the handling of complaints against the Police Ombudsman or her staff, represents a continuing derogation - without justification or even any attempt at explanation - from the provisions of Article 13, ECHR. We make no apology for raising yet again, as we have done without success or even proper acknowledgement, in many fora since 2007, this serious breach of our rights – the basic rights which are accorded to all other citizens.

When the Public Services Ombudsman (Northern Ireland) Act 2016 was introduced we drew attention to the fact that of all the public bodies that were to be subject to such accountability the Police Ombudsman was noticeably absent; this was despite the fact that this powerful body had no other complaints mechanism and here was an opportunity to remedy the defect. We were met with obfuscation, delay and ultimately no action whatsoever – as usual.

There is no other investigative authority in the UK which exercises all the powers of a chief constable (for example in relation to arrest and detention, interview under caution, search of property and seizure of material, recommendation for prosecution, use of intrusive surveillance powers etc) which is not subject to some form of independent complaints mechanism. This is not about maladministration, this is about the apparent abuse of power and the misuse of powers which, of itself, may fall short of the commission of actual criminal offences.

It is intolerable that this situation has persisted and has been allowed to persist; and it is shameful that the Ombudsman herself should shy away from using the present Review as a vehicle for recommending that it be put right.

The Northern Ireland Human Rights Commission appears to have been as guilty as various officers of state and politicians appear to have been in wilfully ignoring this issue after it has been brought to their attention. We have been told by many, including a Justice Minister, that, if we have a complaint, we should use Judicial Review. When we did so – eventually successfully – we were charged in excess of £100,000 for the privilege. Without an independent complaints system – with retrospective powers – to hold PONI to account, we will have no confidence in any future mechanism for investigating our own conduct.

**Conclusion**

PONI appears to have led a charmed life since its inception, with the institution and its officers seemingly impervious to challenge or scrutiny, let alone sanction or even criticism. There may well be political considerations which have led to this outcome. Some may think that such higher considerations are not a matter for the Association, but these considerations can **never** justify the perpetuation of rank injustices, the flagrant abuse of the provisions of ECHR and the potential aggravation of these problems by hurried and ill-considered legislation.

If a public body which has a legitimate investigative function but no adjudicative responsibility – such as PONI – is granted the power to make public statements relating to matters which it has investigated then this power must be exercised in a responsible fashion. It cannot be allowed to offer baseless ‘opinions’ which have the potential to damage the reputations of individuals or public organisations and to create or exacerbate anxieties which are felt by the relatives of victims or the law-abiding public at large.

To seek to perpetuate such an abuse, and indeed to reinforce it by offering in addition the protection of immunity from civil remedy, would be to flout the findings of the Appeal Court chaired by the Lord Chief Justice. Even to consider such new legislation in all the present circumstances would be wholly unacceptable and indeed grossly irresponsible.

A full and independent inspection and review of PONI, its powers and how it has exercised them to date is now necessary. This should be carried out by a qualified body with relevant experience, such as one of Her Majesty’s inspectorates. Only after such an inspection has been completed, and the problems which have been identified are addressed, should consideration be given to any new legislation in respect of PONI.

Belfast

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Maryfield, 100 Belfast Road, Holywood, BT18 9QY

Telephone 028 9039 3568 | Email [info@nirpoa.org](mailto:info@nirpoa.org) | Web [www.nirpoa.org](http://www.nirpoa.org/)