

**EQUALITY IMPACT ASSESSMENT
FOR INVESTIGATION OF STATE RELATED
DEATHS BY THE OFFICE OF THE POLICE
OMBUDSMAN**

November 2009

OFFICE OF THE POLICE OMBUDSMAN FOR NORTHERN IRELAND

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1.0 Introduction

- 1.1 The role and responsibilities of the Police Ombudsman are by their nature difficult and complex but none more so than the responsibility of investigating a complaint by a member of the public, or a referral by the Chief Constable, when a person dies in the custody or in the presence of police officers or otherwise as a consequence of police conduct. In Northern Ireland over the past 40 years 3,665 people were killed in the course of “the troubles”. 1,012 of these people were members of the security forces or the police. 365 people were killed as a result of military or police actions. The investigation of state related deaths requires the utmost independence and transparency and it has been an important challenge to the Office to have in place the necessary skills, experience, technical capacity to carry out such investigations. Investigators of the Police Ombudsman should never be guilty of acting with a conflict of interest.
- 1.2 Coping with these challenges and managing resources in compliance with the law and doing it fairly for all staff has created difficulties for managers and staff in the Office. This paper sets out the difficult issues which these matters present for the Police Ombudsman. It sets out how the matters have been handled and proposes a formal policy based on principles which should underpin the working of the Office in relation to these matters from this time forward.

2.0 Background and Context

- 2.1 The circumstances and the context in which the Office of the Police Ombudsman was established are regarded as unique. Establishing an oversight and investigation body, which was transparently independent of the policing command in Northern Ireland, is central to the legislation and the operation of the Office. In Great Britain, because of the number of different policing services and policing authorities, the ability to investigate serious matters using a neighbouring police force is normally possible and practical though that does not stop accusations or allegations of a lack of independence. The new Independent Police Complaints Commission is helping address this particular problem.
- 2.2 Northern Ireland legislation makes provision for us to draw on seconded police officers from England, Scotland and Wales. The presence of seconded police officers in this Office has always been acknowledged, particularly in the early days, that we needed a capacity of experience and technical ability in order to take on some of the investigative challenges which came to the Office.
- 2.3 Additionally the Office has relied on contracted agency support using retired police detectives from outside Northern Ireland. However the number of seconded and contracted investigators has decreased as our capability and capacity has developed and increased.

- 2.4 While the experience and skill of police officers has been important in the operation and work of the Office, we have held to the principle that recruitment of permanent staff would be through normal competitive processes, based on merit and not on the basis of previous occupational status. The Office has therefore within its workforce, a range of staff from many occupational and investigative backgrounds, including some officers who served in the RUC, the Police Service of Northern Ireland (PSNI) and also officers from a military background and other enforcement agencies.

3.0 PSNI - Historic Enquiries Team (HET)

- 3.1 In April 2004, the Prime Minister gave a commitment to finding ways in which Northern Ireland could deal with its past and one such way approved by Government, was the need to examine deaths here that were related to the security situation during the period 1969 until the Belfast (Good Friday) Agreement in 1998. In March 2005, the Government gave a commitment in providing additional funding to the Chief Constable to set up the Historical Enquiries Team (HET). The HET was constituted to review, and when necessary, re-investigate all deaths, which occurred between 1969 – 1998. The resourcing of the HET by the Chief Constable reflected a strategic policy to ensure that the review of all deaths, whatever the circumstances, would be resourced through contracted and retired detectives from Great Britain so that senior investigators of unresolved murders were not reviewing their own work or the work of their colleagues past or present. He also established a separate investigative unit in London to assist this policy.

4.0 Independence of investigations

- 4.1 The investigation of deaths occurring as a consequence of security and anti-terrorist operations were generally regarded as a particular feature within the Government initiative. Such deaths within Northern Ireland during the Troubles have, almost without exception, been contentious with attending allegations, some of these the subject of applications to the European Court. The PSNI cannot investigate any matter where the actions of a member of the police force may have resulted in a death of another person. This is provided for within the legislation underpinning the Office - Section 55 of the Police Act 1998. In support of this, there is in existence, Senior Counsel's opinion, which concluded that the Police Ombudsman had exclusive jurisdiction in the investigation of all alleged police related State killings. In another part of the advice, it stated that the police would not have the investigative competence in such cases and Senior Treasury Counsel confirmed that legal opinion.
- 4.2 There were also additional human rights considerations under Article 2. Investigations of State involved death have to be Article 2 compliant. The independence of the HET, under the command of the Chief Constable, could be subject of challenge if there was no clear

hierarchical independence, even though the resourcing of HET investigations appeared to provide for operational independence and independent reviews. Article 2 of the European Convention on Human Rights requires that investigations are wholly independent of those under 'or potentially under' investigation and that such investigations should involve the family of the deceased person. Demonstrating explicit compliance with Article 2 would indicate that there must be consideration of the impact on an investigation of any party who may have hierarchical, institutional, or practical connection with the matter. In other words, it is not enough that someone who may have been involved in an operation in which there was a killing, is not at a later stage party to an investigation of the matter, but others who may be connected to those people in the same institution or structure or management of the body, should not have an influence or impact on the process or outcome of an investigation.

5.0 Operation Banner

- 5.1 When the Government deployed the British Army in Northern Ireland, it did so in support of the RUC; the Government maintain they did not deploy the British Army to fight a war but to act in support of civilianised policing in responding to troubles local to this part of the United Kingdom. In 1976, following a number of killings by the Army, ultimate direction and control of military operations in Northern Ireland was given to the Chief Constable of the RUC. In practical terms, most of the police related killings would have involved a direct or indirect presence or support of military forces. Policy issues in relation to independence of personnel cannot be easily separated between police and the military, even in those situations where the military may have been involved in the killing with no police presence. While it is clear that all personnel within the RUC or PSNI operate within this jurisdiction, that is not the case with regard to all personnel who may have served in the British Army because not all parts of the Forces (e.g. Navy) and not all Regiments of the British Forces were deployed here or were here for all of the relevant period. While it may be possible to distinguish between those who had an institutional or structural connection with state forces they may not however be perceived as having a practical or relevant connection in terms of compliance.

6.0 Setting up of Sapphire Team

- 6.1 In January 2006, we made a business case for setting up of a special team to deal with HET related referrals and the important pre-requisite of being compliant with Article 2 principles, were set out for Government in the business case. In essence we made a proposal that we would set up a separate Sapphire Team to undertake this unique and separate function.

- 6.2 The original proposal indicated that the Team could be resourced by one seconded Senior Investigator, the core investigative, intelligence and analyst resources, and that the majority of the investigative staff, should be provided from outside Northern Ireland. A role for an Administrative Team Manager and two administrative support staff could be deployed from within the Office with no difficulty. The principle of investigators being Article 2 compliant was clearly set out and is consistent with the fact that the Chief Constable had set up a similar structure within PSNI. Government gave an approval in principle for the initiative to proceed with very limited funding. By the time we became operational, the Police Ombudsman with my support, indicated a preference that the work of the Sapphire Team should also be open to directly recruited staff Investigators, provided those staff would not be contravening Article 2 requirements or breaching our duty to secure confidence as mandated by Section 51 of the Police Act.
- 6.3 The issues in relation to Article 2 have therefore always been an extremely important for the Police Ombudsman. Since the Government proposal to set up HET, and the decision by us to set up a team in this Office, dedicated to HET referrals, the challenge to us as a small organisation, particularly in terms of keeping faith with Article 2 principles has become even more difficult.

7.0 Legal Issues

- 7.1 The right to life and the right of any person to expect the State to protect that right in a civilised democratic State, is paramount. Where the State has been involved directly or indirectly in the loss of a life, the relatives or family of a deceased person have a right for that killing to be investigated independently of those who may have caused or contributed to the death. Under the European Court, case law would support that this right extends to those people who may have a connection to the killing simply by virtue of the fact that they are part of the same structure, institution or hierarchy of the organisation or organisations involved.
- 7.2 Considering such connections does not infer any lack of integrity of any individual but merely seeks to remove the potential for allegation that any undue influence or interference in the outcome of the investigation may take place and ensures compliance with the Convention, thereby and of itself, meeting the requirement to secure confidence in the complaints system under Section 51.
- 7.3 It is equally a matter of principle that the family of the deceased has the right to be involved and informed of all such matters and if their perception is that there is a lack of independence or impartiality, then the State has an obligation to deal with that perception. These imperatives apply as far as the European Court is concerned, to all deaths occurring in the jurisdiction at any time, but the legal requirement to be compliant applied from 2000 onwards when the

British Government ratified the European Convention on Human Rights.

- 7.4 The British Government has been subject of at least 2 adverse judgements since 2000 and one of those matters has been subsequently referred to this Office for investigation. The judgement, however whilst specific to particular cases, indicates a general obligation on the Government and on this Office to be compliant in all cases which could come within the same parameters. It is believed that there are about 50 police related State deaths and other investigations where issues of Article 2 might apply because of the involvement of military forces in support of police when individuals have been killed.

8.0 Fair and equal treatment of staff considerations

- 8.1 As a body we should operate under existing legislation in terms of the Fair Employment and Treatment Order 1998 and the Northern Ireland Act 1998. The Order requires all public authorities not to discriminate on ground of Religious belief or political opinion. The Act requires us to have regard to the groupings listed under Section 75 of the Act. The Office is also subject to the provisions of other anti-discriminatory legislation for example Race Relations Order which prohibits discrimination on the grounds of race, ethnicity or national origin and the Sex Discrimination Order. We must employ on the basis of merit and demonstrate that we do so in a fair and equitable manner.
- 8.2 Employing a workforce, which is representative of our community in terms of race, religion and gender etc, meets basic benchmarks but it is also important that staff have the opportunity to develop and progress within the organisation and for it to be on the basis of merit alone. If it is the case therefore that a particular group of staff are excluded from a particular function or area of work, then our advice is that we could be directly and/or indirectly discriminating against those staff.
- 8.3 Likewise we must not deliver services which impact adversely or unfairly on the key groups listed in the Northern Ireland Act (1998) and again our monitoring and profiling of service delivery, provides significant reassurance that we seek to do this impartially. We must also consider if the application of a policy whereby we exclude or include any particular group of staff, would impact on how our services are perceived. A particular community, for example, may feel that this could result in a less than impartial or independent service being delivered. We have significant evidence in writing from legal representatives of families, that large sections of both communities would perceive the independence issue as central to our investigative competence and their confidence in the Office.
- 8.4 In relation to both these issues therefore the obligation on us as an employer is to consider if a policy, once adopted, would impact unfairly

on a particular group, whether that is within the organisation, or as a consequence of using particular staff, the service which is delivered impacting differentially on a particular community or group of people.

- 8.5 If it is the case that an organisation is caught between two or more legal obligations and feels compelled to comply with one obligation over and above another, then the organisation must do everything in its power to mitigate any potential damage or impact and devise a policy which is a proportionate means of delivering its legitimate aims and legal duties. As with employment law, there is always an obligation on an employer to be seen to be fair and reasonable in how it operates.

9.0 Equality Impact Assessment

9.1 Aim of the Policy

The background to the policy and issues raised are clearly articulated in the preceding sections of this report. The aim of the policy is to:

“Ensure that Investigations of State involved deaths conducted by the Office of the Police Ombudsman for Northern Ireland are complaint with Article 2 of the European Convention on Human Rights, whilst giving due regard to any potential impact on the Office’s responsibilities to discharge it’s public duties under Section 75 of the Northern Ireland Act 1998 and other relevant employment legislation affecting employee rights”.

9.2 Consideration of available Data and Research

In order to assist the Office assess the extent of the impact of the use of this policy on the included groups, the Office collected quantitative data and qualitative information from a variety of sources.

The Office carried out an analysis of the employment background of staff currently employed within the Office to establish the extent of any potential impact on the basis of the relevant section 75 categories.

The Office held an open meeting with staff to explain the issues involved with regards to the policy and the potential impacts.

The Office formally discussed the application of the policy and the potential impacts with staff trade union representatives through the normal consultative machinery the JNCC (Joint Negotiating and Consultative Committee).

The Office also consulted a number of research papers from the Committee on the Administration of Justice and Relatives for Justice, submitted to the Directorate General of Human Rights and Legal Affairs of the Council of Europe.

The Office also sought legal advice from its contracted legal advisors on the issues raised within this policy.

9.3 Assessment of impacts

Analysis of employment history of current staff within the Office of the Police Ombudsman indicates that 16 staff have an employment history which would give rise to concerns about compliance to article 2 should they be deployed in State Death related investigations. This represents 10.6% of the total workforce of 151. By reference to statistics produced by the Equality Commission, the Office has determined that those employed within “Security – Related Occupations” are more likely to be designated from the Protestant Community and be of the Male gender, thereby creating a risk of potential indirect discrimination towards employees from those categories by placing restrictions on their deployment within the Sapphire Team.

Having given consideration to the assessment of the impact, the Office gave consideration the possibility that application of the policy could be potentially unlawful. In considering this point the Office addressed particular attention to a number of factors:

1. The powers of the Police Ombudsman as determined by the Police Act section 51(4) of which provides that:

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

- (a) the efficiency, effectiveness and independence of the police complaints system; and
- (b) the confidence of the public and of members of the police force in that system.”

2. The content of Article 2 of the European Convention on Human Rights and the Right to Life.
3. The Business Case which established the setting up of the Sapphire Team in 2006.
4. Counsel’s advice.

In doing so the Office came to the conclusion that in the event of any potential claim or complaint in respect of Equality Legislation, the Office could defend the claim on the basis that the policy was necessary and that it was a reasonable and proportionate means to achieve a legitimate aim.

Nevertheless, as required under Section 75 of the Northern Ireland Act, the Office gave consideration as to whether there was any alternative measure which would achieve the aim desired without the differential impact identified.

9.4 Consideration of Measures

One of the main concerns of employees and potential employees in relation to this policy is the availability of employment, promotion and training opportunities as a consequence of the policy.

In order to mitigate the impact the Office maintains a flexible working structure which enables the Police Ombudsman to exercise his statutory powers by deploying staff within the Office in and out of roles and or functional areas in order to secure:

- (a) the efficiency, effectiveness and independence of the police complaints system; and
- (b) the confidence of the public and of members of the police force in that system.”

Thus when promotion opportunities arise no article 2 restrictions apply within the eligibility criteria and the Office remains confident in its ability to deploy staff in appropriate working areas. The Office, in almost all circumstances, recruits and promotes to a particular job category and not a particular job in a particular area. Similarly, with regards to training opportunities, generic investigative skills are applicable across teams and there are no training opportunities which are solely applicable to the Sapphire Team.

A similar situation applies to direct recruitment to almost all posts within the Office, with the exception of the most senior positions within the Office and a very few specialist roles.

The Office also gave consideration to how the application of this policy could contribute to the community at large and the requirement of the Office to conduct its functions in line with Section 75 of the Northern Ireland Act. The Office recognises the potential that the application of this policy could create a position where one section of the community might feel that the Office is providing a less than independent and impartial service. The regular monitoring and profiling of service delivery currently provides significant reassurance that the Office does carryout its functions impartially. The Office also has significant evidence in writing from legal representatives

of families affected by state related deaths, that large sections of both communities would perceive the independence and impartiality issue as central to our investigative competence and their confidence in the Office.

9.5 Formal consultation

The Office has consulted widely with a range of directly and indirectly affected stakeholders (including the Equality Commission), on the likely impact of this policy. A number of face to face meetings were conducted as a consequence of the consultation exercise and several written responses were received.

Internally, all staff received a written briefing note from the Chief Executive and an “open house” presentation was given to staff by the Chief Executive. The Policy was also subject to discussion with Trade Union representatives in the formal setting of the Joint Negotiating and Consultative Committee.

9.6 Decision following consultation

The Office received written responses from a number of groups. Generally the views were supportive relating to the difficulties the Office is confronted with in respect of this policy.

The Office has not changed its primary decision to exclude staff, with previous employment history within the RUC and the Armed Forces between 1969 and 1998, from being deployed in the investigation of state related deaths by the Office of the Police Ombudsman. However, the consultation process has given rise to a further action which the Office will carry out which may contribute to mitigating the impact of the policy.

The Office will develop a policy on conflicts of interest which will have the capacity of dealing with conflicts of interest covering not only the period 1969 to 1998 but also the post 1998 period.

A further recommendation received from consultees was the necessity for monitoring of any potential impact to take place.

9.7 Publication

The Office will publish the outcome of this Equality Impact Assessment in line with the methodology set out in the Equality Scheme for the Office established under Section 75 of the Northern Ireland Act 1998.

9.8 Monitor for adverse impacts

The Office recognises that it has a responsibility to monitor the impact of the application of this policy in the future. The Office has a good track record in monitoring the impact of equality of opportunity on its workforce, potential workforce and those who utilise the services of the Office and also those who are the subject of investigation by the Office. Primarily this monitoring is conducted through the following:

- Monitoring of complainants
- Monitoring of police officers investigated following a complaint
- General public survey on the services of the Office
- Annual monitoring return to the Equality Commission under the Fair Employment and Treatment Order
- Article 55 reviews of employment trends and patterns
- Annual reports to the equality Commission on the operation of the Equality Scheme established under Section 75 of the Northern Ireland Act 1998.

In addition to this, the Office is committed to setting up specific monitoring procedures regarding the application of this policy within the Office. As a result the Office will monitor the following in relation those staff members who may be impacted by the policy:

- The HR Department will put arrangements in place to record training opportunities made available and compare the outcome against other comparative staff members.
- The HR Department will put arrangements in place to record Promotion opportunities made available and compare the outcome against other staff members.
- Impact will be reported upon during the annual monitoring report to the Equality Commission.

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CHIEF EXECUTIVE

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