



Northern Ireland
Assembly

Committee for Justice

**OFFICIAL REPORT
(Hansard)**

**Office of the Police Ombudsman for
Northern Ireland**

26 January 2012

NORTHERN IRELAND ASSEMBLY

Committee for Justice

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Seán Lynch
Mr Alban Maginness
Ms Jennifer McCann
Mr Basil McCrea
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr David Hughes	Department of Justice
Ms Mandy Morrison	Department of Justice

The Chairperson: This evidence session will be reported by Hansard. I welcome to the meeting David Hughes, head of policing policy and strategy division, and Mandy Morrison of the same division. At this point, I hand over to them. I am sure that members will have some questions.

Mr David Hughes (Department of Justice): Thank you very much. We are grateful for the opportunity to brief the Committee on the Department's discussion paper on the future operating model of the Office of the Police Ombudsman for Northern Ireland (OPONI) and on our plans to consult publicly on the possibilities for reform.

I am sure that there will be the opportunity during the course of the consultation for the Committee to contribute to the discussions around the best operating model for the OPONI in the medium and the long term. Today, we will focus on any questions that arise about the consultation.

The impact of recent reports into the office of the ombudsman is that there is a consensus on the need for reform to restore public confidence in OPONI's work and to redress perceived shortcomings regarding governance and how the office is organised. Those are primarily immediate issues to be tackled in the short to medium term.

The proposed consultation exercise outlines the potential for significant changes in both the long and short term to the current legislative framework and governance arrangements for OPONI to ensure that the office fulfils its functions with the confidence of the public.

The full proposals are set out in two documents, both of which have been shared with the Committee. The first is a consultation paper entitled 'Future Operation of the Office of the Police Ombudsman for Northern Ireland'. The paper was produced by the Department in response to recommendations in a report by Tony McCusker, which was published in June last year, and which addressed allegations about the running of the office and the relationship between the ombudsman's office and the Department. It asks a number of questions to determine whether the arrangements for police oversight in Northern Ireland strike the right balance. It also sets out the background and legislative basis for OPONI; the position in other jurisdictions; and international models of civilian oversight. The paper also considers the practical impact of current arrangements and options for the way forward.

The main points of discussion are, first, whether the current model of the Office of the Police Ombudsman as a corporation sole continues to be the most appropriate. Secondly, it asks whether it is appropriate that the Police Ombudsman might have a policing background. It thirdly questions whether the functions of the Police Ombudsman could be located as part of a broader justice ombudsman or a collection of justice ombudsmen in a public sector ombudsman's role or should remain as a stand-alone office. It further asks whether the proposals for adjustments to the role and powers of the ombudsman that emerge from the five-year review are appropriate. The paper does not reach conclusions, but seeks to encourage discussion and debate.

The second document is the police ombudsman's five-year review report on the working of Part VII of the Police (Northern Ireland) Act 1998. This report was made by the Police Ombudsman, who, by virtue of section 61(4) of that Act, is required to conduct a review of the office's powers and functions at least once every five years and to make a report to the Minister. As you know, that report was laid in the assembly on Monday, as is required by the Minister before consulting publicly.

The report contains 26 recommendations. It rolls out the recommendations of the previous review, in 2007, which were not progressed. It makes three new recommendations related to the status and terms of the appointment of the ombudsman and the desire for legislative provision to appoint an interim ombudsman. Those are also among the main issues that are examined in the Department's discussion paper.

Some of the most significant proposals in the ombudsman's recommendations include, first, being able to compel officers and retired officers to attend interview and provide documentation in the investigation of grave and exceptional matters. Secondly, reducing the term of the ombudsman to five years, with the option of reappointment for a further five years. Thirdly, it recommends the extension of the ombudsman's remit to include civilian policing posts. Fourthly, it proposes the amendment of the complaints regulations to allow the investigation of cases occurring directly as a result of police action or indirectly as a result of police operations, despite the fact that the death might otherwise have previously been investigated by the police.

Some of the previous review recommendations are not followed through. The ombudsman is of the view that they are not necessary, as the office already has adequate powers relating to those matters. Those include the power to arrest non-police officers involved in crime for which police officers are being investigated; the power to recommend suspension of an officer, to direct informal discipline, or to direct a payment to a complainant; and the power to direct that informal discipline be applied in cases where a complaint is substantiated.

Together, the two documents set out options on a range of matters relating to the governance of OPONI and the legislative provisions that govern complaints against the police. They rehearse those issues and provide a springboard for discussion and public debate. It is important to stress at this point that the consultation does not affect the appointment of a new ombudsman, but seeks to explore options for the longer-term change.

Most of the proposals, if accepted following consultation, would require amendment to the primary and secondary legislation. That work would be informed by public consultation responses. Related guidance on a range of matters would also then require revision. Although no specific legislative vehicle has been identified, it is the Department's intention to move ahead as appropriate.

The Minister will seek to launch the public consultation exercise early in February, and the consultation would run for 12 weeks. It is our intention to consult as widely as possible, which will include holding a number of discussion workshops to which key stakeholders, organisations, individuals from third sector organisations and, of course, members of the public will be invited. Given the current financial climate, I reassure the Committee that we are endeavouring to keep the costs of the consultation exercise to a minimum, and any cost will be met from existing budgets.

In conclusion, we welcome the Committee's views on the approach being taken in this consultation, particularly on the clarity of the papers being provided, the questions being asked and the handling of two distinct papers in a parallel consultation exercise. Members may well have a view about the reform proposal set out, and we may be able to answer questions. We will certainly be pleased to discuss the proposals with the Committee again during the consultation exercise.

The Chairperson: Thank you. I will pick up on a few points. The oversight of the Police Ombudsman is something that I and others have raised repeatedly. The Retired Police Officers' Association has made it clear that it believes that section 62 of the 1998 Act, which allows the ombudsman's office to make a statement of case, is in breach of article 13 of the European Convention on Human Rights, because it has no remedy to challenge that statement. You touch on that in your paper. It asks whether there is a need for a mechanism to oversee investigations conducted by the Office of the Police Ombudsman. In the preamble to that, you almost lead people to come to the conclusion that there should not be, because you say that the office's role is that of a regulator and that there is a question about adding a further check on the regulator. The Assembly Ombudsman or the other bodies do not have an oversight of how they carry out what you are comparing as a regulatory role of the Police Ombudsman. Why ask the question with that preamble, which is, pretty much, dismissing the idea?

Mr Hughes: It certainly invites responses, but it also sets the context in which the Police Ombudsman has been set up to be an ombudsman. It is perfectly appropriate to make that point; any respondent to the consultation may make the point, as the Retired Police Officers' Association did. It is asking the question in the context of the nature of an ombudsman's office.

The Chairperson: I think that everyone agrees that there is a lack of confidence in the office; there always has been, from the day and hour it was established. That lack of confidence has always been there, whatever angle you come from. One of the main criticisms has related to the section 62 issue. The Retired Police Officers' Association said:

"Secondly, the Government must amend the provisions of section 62 of the Police Act which enable the Ombudsman to make inaccurate and damaging public statements that are not subjected to any recognised evidential test and yet are not vulnerable to challenge. Experience has shown that this power is regularly abused without any opportunity for redress by those who are adversely affected."

It is very clear from what the Retired Police Officers' Association said that it feels that there needs to be an oversight mechanism. Indeed, to create confidence in the ombudsman's office among the public, and particularly among those who either serve or have served in the police, it is a prerequisite for anything that is done to look at how the office functions.

I ask that you review the preamble, in which you ask the question but dismiss the basis for it by almost suggesting that, because no other ombudsman has that oversight role, the Police Ombudsman should not have it either. No other ombudsman's office has ever had the same level of criticism or controversy that this office has had since the day and hour that it was established. I think you need to look at how that is worded. The question should be there, but the preamble concerns me.

I also want to talk about the question of who should fill the post and whether it should be someone with a police background. You mentioned Dr Hayes's report. His suggestion is that the position should be filled by a judge or a senior judicial figure. Should that question not be in the consultation document? You ask the question about whether someone with a police background should be allowed to go for the job. I think you are missing Dr Hayes's recommendation that it should be someone with a judicial background. I think that should be a question in the consultation document.

People have said that statements made by the holder of the office should be based on evidence. Someone with a judicial background is best placed to do that. I think that that is why Dr Hayes made that recommendation, which fed into Patten. What are your thoughts on whether that should be included?

Mr Hughes: I am happy to take your point that the discussion has been around the issue of greatest contention most recently rather than looking at the longer term. Questions have been asked in the past about the policing background but not necessarily about a specific background from which a future Police Ombudsman might be chosen. I am happy to take that point away and look at how it might be incorporated.

The Chairperson: OK. The statutory report will go out to public consultation. Is it the Minister's intention, or has he decided, to publicly consult on all of it and put it out in its entirety, or are there aspects that he feels do not need to be consulted on publicly? Will he put out only an element of the report for consultation?

Mr Hughes: No. The whole thing, as received from the Police Ombudsman, will go out for public consultation. We seek the views of consultees on all aspects.

Mr Weir: Thank you for the presentation, David. You highlighted the way forward in respect of the statutory report, which came from the ombudsman's office. There are obviously a lot of controversial aspects, but, it is not really your report, and those will come out in the consultation. Concerns have been raised about the compellability of former police officers.

I want to ask you about the main document and the consultation paper on the future operation of the Office of the Police Ombudsman. The Chairman highlighted one gap. We should be looking at a range of questions that allow people to give their views. You are obviously a lot more familiar with the document than I am, so I may have missed this point. There is mention that, at present, the scope includes dealing with historical cases. However, is there any specific section that asks questions on whether it is right that historical cases are within the scope of the ombudsman's office and, if the answer to that question is yes, whether those are dealt with appropriately at present?

Mr Hughes: I will have to remind myself whether the issue of historical cases is raised in the document. Yes it is.

Mr Weir: Again, I am happy to be pointed to a particular aspect, but, from what I saw of the document, there is simply a passing mention of the issue of historical cases. I did not see anything by way of questions on that matter.

Mr Hughes: No. In effect, it is setting out the current situation and saying that, if there is to be any alternative, it is actually part of a bigger debate and not specifically the Minister of Justice's debate.

Mr Weir: David, I have to say that I find that unacceptable in terms of the contents of this bit. There was a lengthy debate in the Assembly. It is clearly a very controversial issue and there is a range of views on it, but the issue of whether the ombudsman's office deals with the past is the elephant in the room and is creating a lot of problems. The Assembly passed, albeit by a very narrow margin, an amended version of a motion stating that it should be taken out of the scope of the ombudsman's office. I appreciate that there is going to be a high level of controversy over it, and there will be very different views, although I think it is fair comment to say that even those who would support it remaining within the ombudsman's office are not very happy with the way that the ombudsman's office has dealt with those broad historical cases. A document entitled 'Future Operation of the Office of the Police Ombudsman for Northern Ireland', in which no views at all are sought on whether historical cases should be dealt with by the ombudsman's office is utterly ignoring the elephant in the room. I do not regard it as appropriate to not even have a question on that to seek people's views. I think it is a glaring omission from any such document.

Mr Hughes: In response, I will make the point that the paper makes: that is a debate that goes beyond the terms of a paper about the Police Ombudsman.

Mr Weir: With respect, the Assembly gave a view on that, which was that it should not form part of the scope of the ombudsman's office. Although there are very wide issues that have to be looked at, having a document entitled 'Future Operation of the Office of the Police Ombudsman for Northern Ireland' without dealing with what the scope of that office is seems to simply beggar belief.

Mr Hughes: The purpose of the discussion document is about the operation model for the Police Ombudsman and, save any alternative structures, there is no place for those functions to be addressed.

Mr Weir: With respect, again, that misses the point. If you are looking at the future operation of the Office of the Police Ombudsman, surely a question should be: is it appropriate for the scope of the office to be dealing with historical cases, or should they be dealt with elsewhere? If it is within the scope of the office, should those be dealt with differently from the way we have been dealing with them up to now? Ignoring those questions leaves the consultation document fundamentally flawed. There are a lot of issues with the ombudsman's office. That is probably the number one controversial issue in dealing with the past, and it is unsatisfactory to simply say that it is not really an issue here because it should be looked at in the wider context of wherever else we go. I do not think it is satisfactory to simply ignore the issue in the document.

Mr Hughes: It does not ignore the issue. It clearly makes the point that it is part of a wider debate —

Mr Weir: With respect, it ignores it if it simply makes passing reference to it. I have no problem with the range of questions in the paper. I agree with the Chair about the exclusion of the issue of whether someone should come from a judicial background. All those questions are grand not being in there, but to not have a question or any opportunity for people to have input about what they believe the scope of the office is makes the entire document flawed. I appreciate, David, that you are hardly in a position today to be able to commit to including that, but I urge you to take that issue back, because I think that it makes the consultation document flawed and, to be perfectly honest, completely ignores what was said in the Assembly on the debate on the future of the Police Ombudsman. I appreciate that you are probably not in a position to comment beyond what you have said.

Mr Hughes: I am very glad to take the point that you made very clearly.

Mr Weir: OK. Thank you.

Mr B McCrea: I agree with Peter that this is the elephant in the room. The reason why we are having the debate is because there is concern. A large amount of that concern comes from the historical aspect. So we should be prepared to have wider consultation with people to see what they think.

I want to ask two specific questions. I was reading through the options, such as whether to have plurality of ombudsmen. I am not sure what the collective noun actually is. Last week, we took evidence from the Public Prosecution Service. It was interesting to learn that it also has no oversight arrangements. I think that it indicated that that might not be a bad thing. Therefore, I wonder whether you would consider the whole range of the criminal justice system. If you will have oversight on one aspect of it, namely policing, why is there not oversight on every aspect?

Mr Hughes: I just want to make sure that I am clear: your question is whether there should be an ombudsman for every part of the justice system?

Mr B McCrea: You state in the paper that there is a Prisoner Ombudsman and a Police Ombudsman. Why not have a public prosecution ombudsman? There is no oversight in that area, and the Public Prosecution Service has a particular role.

Mr Hughes: That is a good question. I know that the paper is cast specifically around the question of the Police Ombudsman. Of course, one option is how to fit together ombudsman services in the justice field. Whether there should be a single ombudsman for all parts of the justice system is a much bigger question. It has not been included in this paper because it is about the Office of the Police Ombudsman. Nevertheless, I recognise the question that you ask.

Mr B McCrea: The fact is that item 7 — of which paper I am not sure — deals with a justice ombudsman or an office of justice ombudsmen. If you are talking about the justice system, surely it includes more than just the police?

Mr Hughes: Yes. I recognise entirely the point that you are making. The paper has not been cast to ask that much bigger question, because the question that is being asked is how the Police Ombudsman's functions should be —

Mr B McCrea: But there are questions about whether to have multiple ombudsmen. Part of the point that Peter was making was that it is more than just an academic exercise. It is not just a five-year review. It is a fundamental review of the oversight of policing and, potentially, the criminal justice system. It should be treated as such. If you try to make it a narrow and more controllable issue, I do not think that it will work. We need a complete review.

I will just put my second question for efficiency. Sometimes, there is concern about overlap. Why do we not, therefore, consider the relationship between the ombudsman with responsibility for police oversight and the Policing Board, which has responsibility for oversight of policing?

Mr Hughes: In practice, the distinction between the two generally — I will not say comprehensively — is well understood whereby the Policing Board holds the Chief Constable to account on the operation of PSNI and the ombudsman has a role to, effectively, hold individual officers to account through a complaints system. I know that the ombudsman has a further role in investigating. However, again, what you propose is not so much a review of the operation of the ombudsman's office, but a review of the policing architecture.

Mr B McCrea: Correct. My final point is that you need to include that somebody will also have to deal with historical inquiries. That is the real issue that we will have to tackle. I am happy for you to say that you acknowledge my interest in those matters. That is fair enough. However, that is the situation. That will not resolve the issue that we have to resolve.

The Chairperson: Before I bring Ms McCann in, I want to pick up on the point that Mr McCrea made about the separate Police Ombudsman and the creation of a justice ombudsman. Around that, you mentioned that we have a separate Police Ombudsman and a separate Prisoner Ombudsman. As their statutory bases are not the same, I would be wary of joining those two offices together. The Police Ombudsman's role is statutorily laid out, but the role of the Prisoner Ombudsman is not. I would be wary about those roles being connected, as it would almost elevate the Prisoner Ombudsman to a level that it is not at.

Mr Hughes: It is just a reflection of the fact that there is Police Ombudsman and a Prisoner Ombudsman. In many ways, their functions are similar, albeit the Police Ombudsman has a statutory basis and the Prisoner Ombudsman does not. However, there are similarities in their practices, and both obviously exist.

The Chairperson: As long as that is not an indication of proposals to come forward for a statutory Prisoner Ombudsman. That discussion has not happened and a decision would need to be taken on that.

Mr Hughes: I was going to say that that discussion has not happened.

Ms J McCann: You are very welcome. Am I right that the business area that this work falls under is the safer communities directorate?

Mr Hughes: Yes.

Ms J McCann: Given the wide range of police accountability that the ombudsman is responsible for, is that the right place for that work to be located in the Department?

Mr Hughes: Sorry, are you asking whether should it be located in the safer communities directorate?

Ms J McCann: Yes. You are dealing with police accountability on a wide range of issues. Is that the right place for that to be?

Mr Hughes: The safer communities directorate covers an enormously wide range. The fact that it falls within the policing policy and strategy division recognises that supporting effective policing contributes to the overall objective of having safer communities. Having an effective complaints system and Police Ombudsman's office supports effective policing, and, in so doing, supports the delivery of safer communities. I hope that explains how it all fits together. We are talking about organisational structures and the titles in the Department that endeavour to reflect the work that we do. Am I missing something in your question?

Ms J McCann: It was just that I saw that the work is being dealt with by the safer communities directorate. The ombudsman deals with police accountability across the board, and I do not feel that it is the right place for that work to be located. It was just a comment.

In your opening remarks and in the paper, you said that you intend to speak to a number of key stakeholders. I think that you mentioned the Commission for Victims and Survivors, the Human Rights Commission and the PSNI. You did not mention Criminal Justice Inspection or the Policing Board. Are they not also key stakeholders?

Mr Hughes: We were not being restrictive. We will go to the full range of stakeholders.

Ms J McCann: Was that just an oversight?

Mr Hughes: No, it was just illustrative of the kind of organisations that we wanted to mention.

Ms J McCann: OK. Thank you.

Mr McCartney: In the Minister's foreword, he talked about restoring confidence and trying to make the system as transparent as possible. With that guiding me, your opening remarks and the section entitled "Recent History" refer to Tony McCusker having investigated a number of allegations. He found that there was interference between the Department and the workings of the office. Is that right?

Mr Hughes: He identified specific instances that gave him concern. He concluded that there was no systemic interference.

Mr McCartney: No, he did not. I remind you that he found that there was interference in the office by the Department. He was not just concerned.

Mr Hughes: To cite his report, he did not discover:

"any evidence of systemic interference or meddling".

He raised issues of concern.

Mr McCartney: I am glad that you used the word systemic, because that was a topic of discussion. He was not asked to find whether there was systemic interference; rather, he was asked to find whether there was interference in the answers that were given. I would have liked that to have been reflected in the commentary.

Michael Maguire's report is referred to in paragraphs 2.16 and 2.17. Paragraph 2.16 states:

"The inspection report, published ... found the legislative framework to be sound, reporting that it provided a strong framework for the operational independence of a police complaints body."

However, the next paragraph states that "significant concerns were raised", and no commentary was offered as to what those concerns were. Anybody reading the document would have no concept of the findings of those two investigations.

Mr Hughes: The reports of those investigations are on the record. The purpose of this paper is to examine specifically the questions about the operational model.

Mr McCartney: I accept that. The information in paragraph 2.16 will also be on the record, yet it was found necessary to put that in. Those two paragraphs taken together are somewhat misleading in relation to the overall report that Michael Maguire presented to the Committee.

Mr Hughes: The intention was not to precis those reports; rather, it was to set the context in which that particular discussion paper is being cast. The particular point that arose from Michael Maguire's report was that the legislation that governs the operation of the office, is, in itself, sound. Therefore, the discussion is on the basis of a sound legislative basis.

Mr McCartney: OK. Should there have been some provision for the latest appointment?

Mr Hughes: Sorry?

Mr McCartney: I think that he is described as the interim chief executive.

Mr Hughes: The paper is for discussion and it will be out for consultation for many weeks. The purpose is to look at the medium to longer term, rather than at specific arrangements in the intermediate period.

Mr McCartney: I ask that because paragraph 2.12 states:

"the legislation establishing the Police Ombudsman does not provide for an interim to exercise powers and this appears to be an oversight which needs to be rectified."

However, there is now an interim chief executive, and, in recent days, we have heard the ombudsman quoting legal advice as to why and how he made that appointment. Have you seen that legal advice?

Mr Hughes: The advice provided to the ombudsman?

Mr McCartney: Yes.

Mr Hughes: I have seen elements of the legal advice that was supplied to the ombudsman. There is no statutory basis for an interim Police Ombudsman. What we are talking about at present is an interim chief executive, which is a different post.

Mr McCartney: Did the legal advice that you have seen allow the ombudsman to make that appointment?

Mr Hughes: Of an interim chief executive?

Mr McCartney: Yes.

Mr Hughes: Yes. There is nothing statutorily to prevent the appointment of an interim chief executive in that way.

Mr McCartney: That nearly contradicts the statement that says:

"the legislation establishing ... does not provide for an interim"

It obviously does.

Mr Hughes: It does not provide for an interim Police Ombudsman. Those are two different posts.

Mr McCartney: It just says interim. That could be an interim whatever. Interim Police Ombudsman is not in the text.

Mr Hughes: We can clarify that. That is not a problem.

Mr McCartney: Can the Committee be provided with a copy of that legal advice? I asked a question of the Office of the First Minister and deputy First Minister on Monday, and that Department seems to be questioning the legal advice that there had to be an interim.

Mr Hughes: That legal advice was provided to the Police Ombudsman, so I think the Committee would have to ask the Police Ombudsman.

Mr McCartney: We will have to ask the Police Ombudsman?

Mr Hughes: The legal advice was to the Police Ombudsman.

Mr McCartney: Did the Department not have sight of it? You had sight of it.

Mr Hughes: Some elements of the advice were shared —

Mr McCartney: No, you did not say that some elements were shared. You said that you had had sight of it. The Department has seen it.

Mr Hughes: We have had sight of elements of the advice that was provided to the Police Ombudsman.

Mr McCartney: We scrutinise the Department, not the Police Ombudsman.

Mr Hughes: Yes.

Mr McCartney: If we are going to do this in an open and transparent way, I am asking you: can we be provided with that advice, which the Department has obviously got hold of.

Mr Hughes: I would have to take advice on the propriety. My understanding is that, if legal advice is provided, it is for the person to whom that legal advice is provided to determine who can see it in addition.

Mr McCartney: Did the Department discuss his appointment with the Police Ombudsman? Is that why you had to have sight of the legal advice?

Mr Hughes: The legal advice was about how the functions of the ombudsman may be conducted rather than about the appointment of a chief executive.

Mr McCartney: I am not sure what you are saying. That is not the context in which I asked the question.

Mr Hughes: I must have missed the question, and I apologise.

Mr McCartney: You may have; that can happen. The Police Ombudsman has referred to legal advice that he received about appointing the interim chief executive, when there is already an acting chief executive. The Committee is aware that there is an acting chief executive. A lot of people were confused because the ombudsman said that he would resign, but then he changed his mind and said that he was going to resign but that he was going to have an interim chief executive. What was the process that allowed that to happen?

Mr Hughes: The appointment of an interim chief executive is not directly related to the legal advice or the question of the presence or absence of a Police Ombudsman. It is an administrative matter that the Police Ombudsman has sought to put in place.

Mr McCartney: No. The Police Ombudsman has said publicly that there is no legal provision for him to resign or leave the office absent. That is the basis on which he is making the appointment. The First Minister and deputy First Minister, in an answer to the Assembly on Monday, seemed to be at odds

with that, and they said that they had seen the same legal advice that the ombudsman and the Department saw. Can you share that advice with us so that the Committee can make up its mind? We are being asked to come up with a solution that will, in essence, bring about an interim ombudsman. We want to see the process that led to the recent appointment so that we can see the basis on which we will go forward.

Mr Hughes: Again, I reiterate that the question that was posed for legal advice was about how the functions of the ombudsman might be delegated in the absence of an ombudsman. The appointment of an interim chief executive is not directly connected to that; the inspection report recommended that an interim chief executive be appointed. The two things, obviously, have happened at the same time, but the appointment of an interim chief executive could happen in any organisation any number of times. It is not directly related —

Mr McCartney: We already have an acting chief executive, but the interim chief executive is taking over the functions of the ombudsman. I assume that the person who takes over in the interim will be the accounting officer.

Mr Hughes: Yes, as chief executive. That person would need to be the accounting officer.

Mr McCartney: In other words, replacing the ombudsman.

Mr Hughes: No. The ombudsman is not the accounting officer; the chief executive is the accounting officer.

Mr McCartney: OK. You can see the confusion that is arising around this.

Mr Hughes: I think that you are putting your finger on the fact that the arrangements for the ombudsman's office, where there is a Police Ombudsman in whom the statutory functions reside, and an executive office, which is headed by a chief executive, who is also the accounting officer, and 143 other people in addition, is not a very common arrangement. It is quite a complicated arrangement. The paper highlights the fact that, if you do not have a Police Ombudsman, all that you have is an executive office, which is headed by a chief executive.

Mr McCartney: Other people have read the legal advice on that and have come to a different conclusion.

Mr Hughes: The question is not of whether you need to have in place a Police Ombudsman for the delegation of functions to executive officers, because, in practice, if a Police Ombudsman is in place, they do the job but have 144 other people who operate under that statutory power. The question is: does there need to be an ombudsman for that delegation to occur to the executive office? So the question of whether there is an acting chief executive or an interim chief executive is an administrative matter, but the high-level question is of how the statutory functions of the Police Ombudsman are conducted if there is not a Police Ombudsman in place.

Mr McCartney: What role did the Department have in the process to secure the interim — you need to watch your words here — chief executive? Can you go through the process that led to that?

Mr Hughes: I cannot detail the process, because I did not have particular involvement in it. The Police Ombudsman did seek assistance from the Department, and the Department provided assistance in that.

Mr McCartney: Why did the Police Ombudsman seek assistance from the Department? I cannot work that out.

Mr Hughes: That is probably a question for the Police Ombudsman on how he wanted to manage the finding, identifying and —

Mr McCartney: It is also a question for the Department, because the Department saw the legal advice and could have said that an interim chief executive was not needed.

Mr Hughes: Again, I want to separate those two issues out. The Police Ombudsman sought the Department's assistance in finding an interim chief executive quite separately from the question on the legal point about how the Police Ombudsman's statutory functions are delegated in the absence of the ombudsman. Two quite separate processes and questions were being raised and addressed by the Department.

Mr McCartney: A number of issues will arise from that at the end. Chair, I do not think that we can progress this.

Mr Lynch: Paragraph 2.11 of the consultation paper refers to the special retrospective powers that have been given to the Office of the Police Ombudsman. It implies that those were extended after the office was set up. In fact, the office was empowered under the Police Act 2000. Is that right?

Mr Hughes: The original legislation was cast so that it would apply from the present day onwards and would concern the present and future without the retrospectivity. The retrospectivity was allowed subsequent to that.

Mr Lynch: Yes, but that Act precedes the establishment of the office. Is that right?

Mr Hughes: The 1998 Act provided the statutory basis on which the office was established.

Mr Lynch: So the grounds for the exercise of those retrospective powers is also strictly limited. Is that right?

Mr Hughes: Yes, it refers to grave and exceptional circumstances.

Mr Dickson: Most consultation papers set out a preamble, a purpose and the reason behind them. They then ask a series of questions. I appreciate that the more questions they have, sometimes the more difficult it is to get a full understanding from the respondents. It seems to me that, no matter what part of the argument you are coming from in the Committee about the issues that have been raised, they are all raised in the body of the document. Where they are not clearly teased out is in the questions. The questions do not seem to me to be all-encompassing, and that, potentially, is part of the problem. At the very least, something to consider noting might be that it is not an exhaustive list of questions and that, therefore, respondents are invited to comment on the totality of the document. Therefore, that allows people to respond to issues such as the role of the ombudsman in historical cases.

On Mr McCartney's point, there is some clumsy language. I hope that that is all it is. I would have sought to distinguish between an interim ombudsman and an interim chief executive by stating very clearly that there was an acting chief executive. I have never heard the words interim chief executive applied anywhere in the public sector. The common phrase is acting chief executive where the chief executive is absent. At best, that is very clumsy language.

At paragraph 2.12, there is clearly a typographical error. I hope that is all it is. It reads, "for an interim." There is a problem there. For an interim what? I hope it is an interim ombudsman.

Mr Hughes: It is intended to be an interim ombudsman. We can clarify that.

Mr Dickson: That ties up the matter.

It seems to me that all the issues, contentious and otherwise, are contained in this, from the Minister's foreword right through to the questions raised by Mr Maguire. They are all there. However, the full response to them is not invited in the questions. It may be helpful for another paragraph to be added, or indeed a comment on the questions, in order to invite a rounder response from the respondents. It may also be that you can assure us that some of that will be sought in the public consultation exercise, where you actually go out and listen to people, as well as seek their written responses.

Mr Hughes: I can assure you that the intention is to provoke discussion. Consultation documents often provide questions in order to provide a framework. I am not sure that officials ever expect the only responses to be the answers to the questions because the issues are raised in the paper. However, it can be made more explicit that there are issues in the paper on which we are very happy to receive responses.

Mr Dickson: You heard from people in the room today that they emphasise aspects that are in the preamble. Some of them think that the preamble should be more specific or directive. However, no one in this room disagrees that all the issues that they have asked about are contained in the preamble. However, those who are being consulted need to be pointed to the fact that everything in the preamble to the questions is there for discussion.

Mr A Maginness: I will try to be brief. I want to ask about the Judicial Appointments Ombudsman — I hope I do not take you by surprise with this. What is the Minister trying to do in relation to what he describes as considering alternative means of delivering the functions of the Judicial Appointments Ombudsman? Have you any idea what he means?

Mr Hughes: May I take that question away? *[Laughter.]*

Mr A Maginness: I am sorry. I was just curious as to that.

Clearly, this is a very contentious issue in relation to the ombudsman. I want to express my confidence in the way that the office operated under Baroness O'Loan. I do not subscribe to the view that there was any failing or lack of confidence in the office during her term of office. Obviously, there are contrary views around the table. However, putting it into context, the Police Ombudsman's office, certainly in the early years of the establishment of the PSNI, made a valuable contribution to creating confidence in the PSNI. If we start to deconstruct the office in the way that some colleagues who do not share my views suggest, we are in danger of unravelling some of the confidence that has been established in the PSNI. I say that by way of a health warning.

Specifically around the issues that have been raised, there are two documents, and they form the consultation. Is that correct?

Mr Hughes: Yes.

Mr A Maginness: There is a point of substance that relates to oversight of the ombudsman. It is a curious one. It seems to me that the whole point of having an ombudsman is that they are the ultimate authority in determining complaints. If you bring in an oversight body, you are in a sense undermining that authority and independence. That seems to me to be a contradiction in terms. I just make the point to you that I have not come across any other jurisdiction where another body is, effectively, scrutinising the work of an ombudsperson, or an ombudsman, in its Scandinavian form. I would be interested to know whether there are any such examples of an ombudsman where there is that sort of scrutiny. You may well have an example at hand; I do not know.

Mr Hughes: No; we are not aware of any examples. The point is made in the paper that, by definition, the purpose of an ombudsman is of final arbiter. I think the controversy that can surround the operation of an ombudsman's functions and the decision of an ombudsman is that, if you have a further point of appeal, that controversy merely moves up the chain to the next level. By that I mean potentially; I am not saying that that necessarily happens, but that would be the risk.

Mr A Maginness: So having an oversight body would be a very exceptional situation.

Mr Hughes: I am not aware of any.

Mr A Maginness: I thought there was a danger in the way the paper was presented in the idea of having an oversight body and a change in the way in which the ombudsman's office was constructed. I thought there was a danger of those two things being conflated, because the discussion that you have here on page 22 of your paper mentions the establishment of an oversight board, which is really the oversight body that we are talking about. You then go on at paragraph (iv) A to mention the

replacement of the current model with a commission, and at paragraph (iv) B to suggest a separate commission arrangement for historic cases only. My understanding is that the replacement of a current model with a commission would be something similar to the Republic of Ireland where I think there are three people, but is the idea of having corporation sole and having a number of individuals who then become a commission confusing?

Mr Hughes: I think the suggestion is that there are options apart from corporation sole, so the alternative would be to replace the corporation sole as something that resides in the individual in post with a commission, effectively creating something quite different.

Mr A Maginness: Is that not being confused? Do you see in the discussion paper the establishment of an oversight body as quite separate from the replacement of the current model with a commission?

Mr Hughes: Yes; that is an alternative option.

Mr A Maginness: Right, so, paragraph (iii) stands alone; it is not linked to paragraph (iv).

Mr Hughes: No; the options are (i) retain the status quo; (ii) appoint deputies; or (iii) establish an oversight board. Paragraph (iv) is the replacement of a commission, but then (iv) B is a separate commission.

Mr A Maginness: I thought there was a danger in the way that was laid out that it could be conflated with the commission idea.

Mr Hughes: No; I think these are alternative options.

Mr A Maginness: Thank you for that clarification.

The Chairperson: David, in the ministerial foreword to this, the second paragraph states:

"public confidence has been damaged in respect of the adequacy of processes, robustness of report conclusions particularly in respect of historic cases".

Was a survey carried out, or on what basis was that assertion made that public confidence has been damaged?

Mr Hughes: I think that it is really in light of the public debate, in which those who speak publicly challenge the reasons for the public confidence in the ombudsman's office.

The Chairperson: Has that assessment, therefore, been made on the basis on individuals' public comments, as opposed to a survey that will stand over such comment?

Mr Hughes: Yes. That characterises the matter.

Mr Dickson: Surely, the two reports, Chair, are in the public domain — the McCusker report and Dr Maguire's report. That is serious public comment.

Ms Mandy Morrison (Department of Justice): I would just add that we are all clear that reform is needed, and we are putting review proposals forward. There are also concerns around the previous five-year review and how that is taken forward. So it is really in response to the findings and the things that have been accepted in the public domain as not correct.

The Chairperson: That is good, and it leads me to my next point. The penultimate paragraph states:

"I am keen to agree a package of reforms to restore public confidence".

Earlier, I made the point that for some there has never been confidence in that office since it was established. So we have established that the basis for public confidence is public comment that has

been made. In 2001, prior to what the Minister currently deems a lack of confidence, the Chief Constable said in response to the Omagh report by the ombudsman's office:

"The Ombudsman accuses the Chief Constable and ACC Crime of 'defective leadership, poor judgement and a lack of urgency'. These accusations are rejected absolutely."

That is public comment in a report from the police.

Let me quote from a paragraph headed "Conduct of the Ombudsman's Review":

"PSNI agrees with the Ombudsman that she must be able to have confidence that police will deal honestly, openly and willingly with her requests. PSNI is committed to the principle of independent oversight which should act as an important reassurance to the public and, when necessary, as a safeguard for the police. But the police service in its turn is entitled to expect from the Ombudsman's office the same high standards of professionalism, rigour, openness and fairness. The Chief Constable and other officers criticised in the Ombudsman's report were denied a fair and reasonable opportunity to make a considered and informed response to the draft report. Requests that such an opportunity be provided were unreasonably refused. PSNI does not believe that the requirements of natural justice have been met by the procedures used in compiling the Ombudsman's report."

That was a public comment made in 2001, and that is my point: why is there only now a need to restore public confidence in the Office of the Police Ombudsman when that was the police response in 2001? That was how it felt that the ombudsman's office had carried out its investigation and compiled its report on the Omagh bombing. That is why I make the point about the need for an oversight of the Police Ombudsman's office.

Mr Hughes: You need to recognise that we are responding to, in the first instance, allegation and criticism of investigation and reporting, which have brought into focus issues around the ombudsman's office that the Minister and Department are determined to address. Hence, the document in front of us raises those issues. I can see how it may well be that more issues are touched on than specifically raised. That may be something that needs to be taken into account in the drafting of the document. However, I am addressing here the issues that were raised recently and that are being addressed by the Minister and the Department now.

The Chairperson: The point I make is that the language that is used in that suggests that a problem has arisen only of late. In light of what I said earlier, that is clearly not the case. One perspective is that there is a lack of confidence in the office from one angle, and a different form of lack of confidence from another.

Mr McCartney: The only case to be made is that Tony McCusker and Criminal Justice Inspection have no vested interest. In 2001, the statement made by the then Chief Constable involved a vested interest.

The Chairperson: In all of this, we will require legislation to make any of those changes, so you will need everybody's confidence.

Mr Hughes: We are aware of that.

Mr Weir: Obviously, a number of points have been raised by different people — maybe there are different sides to this — about things that are missing from the document or things that need changed. David, you indicated that you will take those away. To be fair, to put it at a relatively low hurdle, not many of us feel that it is absolutely right at this stage. Do we know, Chair, what the process is for it to come back? It could be a revised document, or, alternatively, the Department and Minister could say that they are 100% confident that everything is right and that they intend to stick by what is there. What is the process?

The Chairperson: The Committee has made a number of points from a number of different angles, so I made the assumption, maybe wrongly, that you would reflect on that and give us another document.

Mr Hughes: We will certainly take away the observations and comments of the Committee. We will discuss with the Minister how he wants to proceed and whether to revert to the Committee with a revised document or take those observations into a new document and put it out to consultation.

Ms J McCann: Raymond made the request about the legal opinions. Given that there is some confusion, can we get the two legal opinions that belong to the Attorney General and the Department?

The Chairperson: We can ask the Department for them.

Ms J McCann: Given the confusion around the role of Mr Lewis, who is the interim chief executive, could we have him in to ask him directly what his role is, rather than people surmising what it is or no one knowing what it is?

The Chairperson: Yes. We will ask the interim chief executive to come to the Committee. The ombudsman waived the privilege to the Department in sharing the legal advice, so I assume that it should not be a problem for us to get it.

Mr Weir: I have no problem with that. However, maybe we should see what response we get on the issue of the legal opinion before we have the interim chief executive in because it could shed some light or take us in a different direction. Alternatively, we may not get it. It is just from a sequencing point of view.

Mr McCartney: That is fair enough. Michael Maguire said that he would update us on the changes that he has asked for. As part of that process, somewhere along the line, he might have a view of where the ombudsman's office is at before we start getting in to consultation.

The Chairperson: Thank you.