

Memorandum of Understanding between the Director of Public Prosecutions and the Police Ombudsman for Northern Ireland

Introduction

- 1.** This Memorandum of Understanding (MoU) establishes a framework for co-operation and information sharing between the Director of Public Prosecutions for Northern Ireland ("**the Director**") and the Police Ombudsman for Northern Ireland ("**Police Ombudsman**"), collectively referred to as "**the parties**" throughout this document.
- 2.** The Police Ombudsman recognises the statutory responsibilities and powers of the Director, as provided for by the Justice (Northern Ireland) Act 2002 ("the 2002 Act").
- 3.** The Director recognises the statutory responsibilities and powers of the Police Ombudsman, as provided for by the Police (Northern Ireland) Act 1998 ("the 1998 Act").
- 4.** This MOU is a statement of intent that does not give rise to legally binding obligations on the part of either the Director or the Police Ombudsman. The parties have determined that they do not exchange sufficient quantities of personal data to warrant entering into a separate data sharing agreement, but this will be kept under review.

The role and function of the Director of the Public Prosecution Service

- 5.** The Public Prosecution Service (PPS) is the principal prosecution authority in Northern Ireland, and an independent non-Ministerial Department. The PPS was established in 2005 by the 2002 Act and is led by the Director. The Director is assisted by the Deputy Director of Public Prosecutions and the staff of the PPS, including barristers and

solicitors who have been designated as prosecutors, pursuant to section 29(5) of the 2002 Act.

6. The statutory functions of the PPS are to take over the conduct of all proceedings which are instituted in Northern Ireland on behalf of any police force; to institute, and have the conduct of, criminal proceedings in any other case where it appears appropriate for him to do so; and to give police forces such advice as appears to him appropriate on matters relating to the prosecution of offences.

Functions and powers of the Police Ombudsman

7. The Police Ombudsman is a corporation sole appointed by Her Majesty the Queen under Part VII of the 1998 Act. The Police Ombudsman's primary function is to independently and impartially investigate all complaints and referrals made to her about the conduct of the members of the Police Service of Northern Ireland. The Police Ombudsman also has power to commence an own motion investigation where she has received no complaint and it appears to her to be in the public interest to do so in accordance with the provisions of section 55(6) of the 1998 Act. The Police Ombudsman must exercise her powers so as to secure an efficient, effective and independent police complaints system, and to do so in the way she thinks best calculated to secure the confidence of the public and of the police in that system (section 51(4) of the 1998 Act).

The Police Ombudsman also has jurisdiction in respect of complaints about the following organisations when operating in Northern Ireland:-

- The Police Service of Northern Ireland including designated civilians
- The Belfast Harbour Police
- The Belfast International Airport Police
- The Ministry of Defence Police



- The National Crime Agency

In addition, the Police Ombudsman has jurisdiction to investigate serious¹ complaints about:

- Mutual Aid police officers from Great Britain
- Certain Home Office employees (Immigration officers, designated customs officials and custom revenue officials).

Purpose of MOU and Information Sharing

8. The purpose of the MoU is to enable the parties to share relevant information which enhances their ability to exercise their respective functions.
9. This MoU should not be interpreted as imposing a requirement on either party to disclose information in circumstances where doing so would breach their statutory responsibilities. In particular, each party must ensure that any disclosure of personal data pursuant to these arrangements fully complies with both the General Data Protection Regulation and the Data Protection Act 2018. The MoU sets out the legal framework for information sharing, but it is for each party to determine for themselves that any proposed disclosure is compliant with the law.

Submission of Police Ombudsman Investigation Reports and Case Files to the Director

10. Under the 1998 Act, the Police Ombudsman will conduct an investigation into relevant complaints. Where it is considered that a criminal offence may have been committed by a member of the police

¹ serious complaints are defined in section 60Zb of the 1998 Act.

force, the Police Ombudsman pursuant to section 58 of the 1998 Act shall then send a copy of the investigation report to the Director of Public Prosecutions, together with such recommendations as appear to her to be appropriate. A report shall be sent even in cases where the Police Ombudsman considers the criminal offence which may have been committed is now statute barred.

- 11.** In those cases where a summary only offence is approaching its statute barred date and no file has been submitted by the Police Ombudsman to the Director, she shall in appropriate cases submit a request to the Director for a protective summons (Form 1) to be issued. In some cases it will be appropriate for the Police Ombudsman to seek prosecutorial advice (see paragraphs 14-19 below) in order to decide whether to make a Form 1 request.
- 12.** The Director may seek further information from the Police Ombudsman in order to make a fully informed decision as to prosecution.
- 13.** In circumstances where the police have conducted an investigation that is related to a complaint made to the Police Ombudsman and have submitted a file to the PPS, in order to maintain the confidence of the police and public as required by section 51(4) of 1998 Act, the Police Ombudsman will not send her report to the Director until any proceedings arising from the police investigation are concluded. This is subject to the process outlined at paragraph 28 below that will ensure that the Director is able to fulfil his disclosure duties in respect of any ongoing proceedings.

Prosecutorial Advice

- 14.** Prosecutorial advice is guidance provided by the Director to investigators. It is limited to issues bearing directly upon the prosecution of offences, such as the quality and admissibility of evidence, or the evidence needed to support the prosecution of a person for a particular offence. The Director does not provide prosecutorial advice upon investigative matters (e.g. the lawfulness of a proposed arrest or search), although the consequence for any

prosecution of an unlawful exercise of such powers is a matter upon which prosecutorial advice might properly be sought.

- 15.** Pre-charge advice is a specific example of prosecutorial advice which occurs when advice is sought by investigators about the specific charges, if any, which should be preferred against any person suspected of committing a criminal offence.
- 16.** It will rarely be appropriate for the Director to offer a firm view as to whether a criminal offence has been committed in circumstances where the Police Ombudsman has completed an investigation without identifying any suspects.
- 17.** Unlike the position in respect of police forces there is no statutory requirement for the Director to provide prosecutorial advice to the Police Ombudsman. However, the Director will endeavour to respond to all reasonable requests for prosecutorial advice received from the Police Ombudsman.
- 18.** In general requests for prosecutorial advice should be made in writing to the Regional Office for the area where the offence being investigated is believed to have been committed. Points of contact within the various PPS offices are provided at Annex A.
- 19.** Requests for prosecutorial advice in relation to serious or complex investigations should be made by the Senior Investigating Officer to the Assistant Director of Central Casework Section, PPS. In any cases involving a fatality or serious sexual offence the Assistant Director of Central Casework Section will consider whether the matter ought to be dealt with by the PPS's Serious Crime Unit. In serious or complex cases it is likely that an early meeting will be of assistance and the Police Ombudsman will actively consider requesting such a meeting.

Principles of Information Sharing

- 20.** Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and in particular section 63 of the 1998 Act, the Police Ombudsman will alert the Director to any

potential breaches of the legislation regulated by the Information Commissioner in relation to PPS material that are discovered whilst undertaking functions and duties, and provide relevant and necessary supporting information.

- 21.** Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at his discretion, the Director will alert the Police Ombudsman to any potential breaches of the legislation regulated by the Information Commissioner in relation to PONI material that are discovered whilst undertaking functions and duties, and provide relevant and necessary supporting information.
- 22.** Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at their discretion, the parties will:
 - Communicate regularly to discuss matters of mutual interest (this may involve participating in multi-agency groups to address common issues and challenges); and
 - Consult one another on any issues which might have significant implications for the other organisation.
- 23.** The parties will comply with the general laws they are subject to, including, but not limited to, relevant data protection laws; the maintenance of any relevant statutory codes of practice; and comply with any governance requirements in particular relating to security and retention, and process personal data in accordance with the statutory rights of individuals.

Lawful Basis for Information Sharing

- 24.** This MoU should not be interpreted as imposing a requirement on either party to disclose information in circumstances where doing so would breach their statutory responsibilities.
- 25.** Each party should ensure that any disclosure of personal data pursuant to these arrangements fully complies with relevant legislation, General

Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA 2018).

Information Disclosed by Police Ombudsman to the Director

- 26.** The Police Ombudsman may obtain information during the course of her investigations which may be relevant to ongoing criminal cases investigated by the PSNI and in respect of which the Director has received a police investigation file for a decision as to prosecution. The Director's statutory functions are set out above and this MoU governs information shared by the Police Ombudsman to assist the Director to meet those responsibilities. To the extent that any such shared information comprises personal data, as defined under GDPR and DPA 2018, the Police Ombudsman is a Controller and therefore must ensure that she has a lawful basis to share it and that doing so would otherwise be compliant with the data protection principles. The Police Ombudsman must also ensure that sharing the information in question is consistent with her legal powers.
- 27.** In addition to section 17 of the Anti-Terrorism, Crime and Security Act 2001 (2001 Act) and sections 3 and 7A of the Criminal Procedures and Investigations Act 1996, section 63 of the 1998 Act and section 36(3) of the DPA 2018, may provide both the lawful basis, from a data protection perspective, and the legal power for the Police Ombudsman to share information with the Director. Under these particular provisions, the Police Ombudsman is not prohibited or restricted from disclosing information to the Director by any other enactment or rule of law provided it is *"for the purposes of any criminal proceedings"*.
- 28.** In the circumstances outlined in paragraph 26 (i.e. where the Director has received and is considering a decision as to prosecution in a related police investigation file; or is conducting proceedings in relation to same), the Police Ombudsman will write to the Director advising that she is investigating a matter and that she may hold relevant information. The Director will be invited to provide the Police Ombudsman with an outline of the case against the defendant and any



known or anticipated defence (which will enable the Police Ombudsman to review all related information). Upon receipt the relevant Police Ombudsman investigator will review the material and confirm with the Director if it may reasonably be considered capable of meeting the test for disclosure under sections 3 and 7A of the Criminal Procedures and Investigations Act 1996. As additional evidence and information is gathered, further reviews will take place.

- 29.** All information that is to be provided following a review by the Police Ombudsman as described above will be provided to the Director and not directly to the defence. If a third-party application is made by the defendant in relation to material held by the Police Ombudsman that is not in the possession of the PPS, the Police Ombudsman will arrange to supply the information and documents to the Court for its consideration and may in addition make submissions as to why the Court should not disclose information and documents to the defendant and other parties to the proceedings.
- 30.** Normally, only information and documents which assist the defence or undermine the prosecution case will be provided by the Police Ombudsman to the Director. There may however be exceptions and the Police Ombudsman will have regard, as above, to sections 51 and 63 of the 1998 Act, section 5 of the Criminal Law Act (Northern Ireland) 1967 and section 17 of 2001 Act. This is without prejudice to any other gateway providing the Director with the lawful authority to obtain information and documents held by the Police Ombudsman.
- 31.** In determining the extent to which it is necessary and proportionate to provide information to the Director, the Police Ombudsman may consider the extent to which the same information could be made available by PSNI.

Information to be disclosed by the Director and his staff to the Police Ombudsman

- 32.** There may be certain circumstances where the Police Ombudsman will seek access to material held by the PPS when conducting an investigation into police misconduct and/or criminality.
- 33.** Both the Police Ombudsman for Northern Ireland and the Director of Public Prosecutions for Northern Ireland are “competent authorities” as defined in part 3 of the Data Protection Act 2018. Schedule 7 DPA 2018 details competent authorities, with the Police Ombudsman named at paragraph 20 and the Director named at paragraph 48.
- 34.** Both the Police Ombudsman and the PPS are processing data for law enforcement purposes under part 3 of the DPA 2018 in line with their statutory responsibilities. The statutory functions of the Police Ombudsman are set out in paragraph 7 above. The statutory functions of the PPS are set out in paragraph 6 above.
- 35.** Section 36(3) DPA 2018 provides that competent authorities may share data collected for law enforcement purposes with other competent authorities provided:
- (a) the controller is authorised by law to process the data for the other purpose, and
 - (b) the processing is necessary and proportionate to that other purpose.
- 36.** In determining the extent to which it is necessary and proportionate to provide information to the Police Ombudsman, the Director may consider the extent to which the same information could be made available by PSNI.
- 37.** The Director may wish to assert privilege in relation to material held on PPS files.

Method of Exchange

- 38.** Appropriate security measures shall be agreed to protect information transfers in accordance with the sensitivity of the information and any classification that is applied to the sender.

Confidentiality and Breach Reporting

- 39.** Where confidential information is shared between the parties it will be marked with the appropriate security classification.
- 40.** Where one party has received information from the other, it will consult with the other party before disclosing the information to a third party or using the information in any criminal or other court proceedings.

Disclosure of Recommendations

- 41.** It will normally be the case that the Police Ombudsman does not disclose details of any recommendations for prosecution (or otherwise) made to the Director. The decision whether to prosecute or not is a decision solely for the Director to make. If details of the Police Ombudsman recommendations were routinely made available to others it could impinge upon the independent decision-making of the Director. Furthermore, the confidentiality attaching to recommendations as to prosecution encourages the Police Ombudsman to provide a candid assessment of the strengths and weaknesses of the case.
- 42.** There may, however, be exceptional circumstances where it would be appropriate to disclose the Police Ombudsman recommendation. Exceptional circumstances can include where the Police Ombudsman is obliged by law to disclose the recommendation or where it is necessary for the purposes of any civil or criminal proceedings, or where procedural fairness so requires. In any such circumstances, the Police Ombudsman and the Director will consult in advance of any proposed disclosure of the Police Ombudsman recommendation.

General Awareness and Understanding

43. The key contacts of the Police Ombudsman and Director, where appropriate, will seek to maintain general awareness and understanding of each other’s functions and legal obligations and will liaise with each other to ensure that issues are appropriately identified.

Key contacts

44. The parties have identified a key individual who is responsible for managing this MoU. These are set out below.

Public Prosecution Service	Police Ombudsman’s Office
<p>Michael Agnew – Deputy Director of Public Prosecutions</p> <p>Email: <u>michaelagnew@ppsni.gov.uk</u></p> <p>Telephone: 02890 897193</p> <p>Address: Belfast Chambers 93 Chichester Street Belfast BT1 3JR</p>	<p>Paul Holmes – Director of Current Investigations</p> <p>Email: paul.holmes@policeombudsman.org</p> <p>Telephone: 02890 828600</p> <p>Address: New Cathedral Buildings 11 Church Street Belfast BT1 1PG</p>

Duration and review of the MOU

45. The parties will monitor the operation of this MOU and will review it every three years.



46. Key contacts will maintain an open dialogue between each other in order to ensure that the MoU remains effective and fit for purpose. They will also seek to identify any difficulties in the working relationship, and proactively seek to minimise these.
47. Any minor changes to this MoU identified between reviews may be agreed in writing between the parties.
48. Any issues arising in relation to this MoU will be notified to the key contact for each party.
49. The parties will communicate regularly to discuss matters of mutual interest, and meet quarterly in order to discuss relevant ongoing Police Ombudsman files.
50. The parties will consult one another on any issues which might have significant implications for the other organisations.

Signatories

Police Ombudsman: Mamie Anderson

Director: S. Henry

Date: 31 March 2022