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Northern Ireland Public Services Ombudsperson Bill

1 Introduction

This paper provides information on the Northern Ireland Public Services Ombudsperson (NIPSO) Bill. It highlights key areas within the Bill that the Committee may wish to consider further and which were significant issues that emerged during the initial proposals by the OFMdFM Committee.

2 Background

What does an Ombudsman do?

According to the Ombudsman Association:

Ombudsmen exist to deal with complaints from ordinary citizens and consumers about most public bodies and some services in the private sector. The services provided by ombudsmen are free of charge¹.

¹ Ombudsman Association: <http://www.ombudsmanassociation.org/about.php>

What does a public services ombudsman do?

The broad remit of a public services ombudsman is to investigate complaints of maladministration or service failure made by members of the public against public bodies.

What is the purpose of this Bill? Will it do anything that couldn't be done by simply amending the existing legislation?

The NIPSO Bill amalgamates the existing offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints. In practice, these roles are performed by the same person² although they exist under separate pieces of legislation: the Ombudsman (Northern Ireland) Order 1996 and the Commissioner for Complaints (Northern Ireland) Order 1996³.

Given the changes envisaged in the Bill, it would not be practical to update the separate legislation for the Commissioner and Ombudsman. The 2010 public consultation by the COFMdFM found that a single office would be widely welcomed⁴.

Will the new office have an expanded remit in comparison to the two offices it seeks to replace?

Yes. The Explanatory Memorandum is clear that “Where differences in the 1996 Orders required a policy choice to be made the Committee’s approach has been, where possible, to “level up” in terms of the powers and remit of the NIPSO and the remedies available to a complainant.”⁵ This is explored further in section 3.

Have any other jurisdictions reformed the office of Ombudsman?

Both Scotland and Wales implemented new ombudsman arrangements following devolution. The Scottish Public Services Ombudsman Act 2002 merged the offices of the Scottish Parliamentary and Health Service Ombudsman, the Local Government Ombudsman For Scotland and the Housing Association Ombudsman For Scotland.

The Public Services Ombudsman (Wales) Act 2005 established an equivalent office in Wales.

England and the Republic of Ireland have long-established ombudsman offices.

² Currently Dr. Tom Frawley.

³ The office was established in 1969, but these pieces of legislation reflect the current powers and responsibilities. The Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997, to include complaints about doctors, dentists, pharmacists and optometrists (ophthalmic opticians) providing family health services and prison health care, and by other health care professionals in Health and Social Care: <http://www.ni-ombudsman.org.uk/About-Us.aspx>

⁴ Draft Explanatory Memorandum, NIPSO Bill.

⁵ As above.

3 The Northern Ireland Public Services Ombudsperson Bill

This section looks at the parts of the Bill and:

- lists the main areas where the office has been given additional powers or an expanded remit
- highlights other significant areas that the Committee may wish to explore further.

List of main changes/areas of expansion to the Ombudsperson's remit

What happens now	What the Bill will provide for
<p>Financial accountability 1996 Orders give OFMdfM power to approve expenses and number of staff of existing offices.</p>	<p>Bring new office into line with relationship between Comptroller & Auditor General and the Assembly's Audit Committee.</p> <p>This avoids perception of conflict of interest as OFMdfM is a body under the Ombudsman's remit. Helps to cement independence of the new office.</p>
<p>Recruitment Responsibility of OFMdfM.</p>	<p>Becomes responsibility of Assembly Commission, in line with the Ombudsman needing to be (as in other jurisdictions) an officer of the legislature.</p> <p>The Assembly Commission is a body under the remit of the new office, but OFMdfM believes the composition of the Commission means that it is well placed to manage potential conflict of interests.</p>
<p>Bodies within the remit of the NIPSO Listed in schedules to the legislation.</p>	<p>Committee had considered the principle of 'following the public pound' but felt that a list of bodies would provide certainty as to which bodies could be investigated.</p> <p>NIPSO has new power to investigate maladministration in relation to university students.</p>
<p>Public procurement Commissioner is free to consider complaints about procurement carried out by public bodies other than government departments. On the other hand the power of the Ombudsman to investigate procurement by Northern Ireland departments is limited to the process leading up to the decision to award a contract - not the award decision itself.</p>	<p>Power for the new office is 'levelled-up' to that of the Commissioner.</p>
<p>Professional judgement in social care The Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997 provides that complaints about a range of health care providers can encompass issues of clinical judgement without any need to first establish that there has been maladministration - in all other areas the existing legislation prevents the questioning of the merits of a decision taken without maladministration.</p>	<p>In the case of social care, complaints about professional judgement cannot be considered unless it has first been established that there has been maladministration.</p> <p>The Bill addresses by providing that complaints about professional judgement will be considered on the same basis as those about clinical judgement.</p>
<p>Role of MLAs</p>	<p>Bill removes requirement for complaint to come via MLA,</p>

The Commissioner can receive complaints directly from members of the public, while the Ombudsman legislation states that it must be received from a MLA acting on behalf a person.	but MLAs can still represent aggrieved persons.
Residency requirement A complaint to the Ombudsman is not admissible unless the person aggrieved is resident in Northern Ireland or the complaint relates to events which took place whilst the complainant was resident in Northern Ireland.	Residency requirement is removed. Bill is clear that complaints can only be made about action taken by listed authorities and that those authorities only have functions which relate to Northern Ireland.
Time limits for complaints Complainants should submit complaints within 12 months of the listed authority's internal complaints process having been exhausted.	Time limit reduced to 6 months but Ombudsperson has discretion to accept complaints outside this timeframe.
Referral by listed authority No mechanism for a listed authority to refer complaint to Ombudsperson.	Bill provides that the NIPSO should have discretion to accept complaints referred by a listed authority on the same basis as the Scottish Public Services Ombudsman.
Consultation and cooperation Commissioner for Complaints legislation as a result of which the Ombudsman can disclose information to the effect that a person is likely to constitute a threat to the health or safety of any other person.	The NIPSO Bill provides that if at any stage in the course of considering a complaint or conducting an investigation, the NIPSO forms the opinion that the matter could be the subject of an investigation by a UK or Irish Ombudsman (in relation to North/South implementation bodies) or another relevant body then the NIPSO must consult that body and may cooperate with it. The other relevant bodies are the Commissioner for Children and Young People for Northern Ireland, the Commissioner for Older People for Northern Ireland, the Equality Commission and the Northern Ireland Human Rights Commission ('Human Rights Commission').
Defamation Existing office holders enjoy protection from claims of defamation in respect of publication by them of matters required or authorised to be published under the existing legislation. Ombudsman Order extends this protection to MLAs in relation to communications with the Ombudsman.	Bill provides that same protection afforded to MLAs is extended to persons aggrieved in their communications with the Ombudsperson.
Alternative resolution of complaints 1996 Orders provide that the purpose of an investigation includes effecting a settlement of the matter where it appears to the Ombudsman or Commissioner to be desirable.	The Welsh Ombudsman legislation makes specific provision for action short of conducting an investigation to resolve a complaint. The Bill therefore provides that the NIPSO may take any action which the NIPSO considers appropriate with a view to resolving a complaint.

Part 1 – the Northern Ireland Public Services Ombudsperson Bill

Part 1 establishes the office of NIPSO, guarantees the independence of the office except in regard of reporting and budgetary matters, outlines the appointment process and abolishes the offices of Assembly Ombudsman and Commissioner for Complaints.

Part 2 – Investigations

Part 2 outlines how the Ombudsman will conduct investigations, the bodies liable for investigation and complaint referral. It allows referral by Members of the public or persons acting on their behalf. A listed authority may also refer a complaint to the Ombudsman if it cannot resolve a complaint.

Power to investigate on own initiative

The ability to initiate an investigation is a common feature of ombudsman offices. However, it is absent in England (in relation to the Parliamentary and Health Service Ombudsman), Scotland, Wales and (currently) Northern Ireland. In these jurisdictions, therefore, the Ombudsman must be in receipt of a complaint before he or she can act:

The difference between an own-initiative investigation and more conventional systemic investigations is the ability of the ombudsman to pursue the investigation in a more targeted and proactive manner and detached from any particular complaints. To facilitate such work, more than one ombudsman organisation has now established a dedicated team within their organisation to focus on the pursuit of systemic investigations⁶.

The Ombudsman in the Republic of Ireland does have the power of own-motion investigations – an example of this was a report into the role of the public health service in the provision of nursing home care for the elderly. In 2009 the Ombudsman was challenged by the Department of Health on her ability to carry out wider reviews unprompted by specific complaints. The Ombudsman responded robustly, commenting that “It is implicit in the Ombudsman model adopted by the Oireachtas in 1980 that the role involves far more than the investigation of individual complaints”.

In some instances, ombudsman offices have established dedicated teams within the organisation to pursue own-motion investigations.

Matters which can be investigated

The NIPSO can investigate alleged maladministration as a result of action taken by a listed authority. However, there are four specific service providers where this does not apply:

- Health and social care bodies
- General health care providers
- Independent providers

⁶ Trevor Buck, *The Ombudsman Enterprise and Administrative Justice*, 2011

- Universities

The NIPSO may investigate health and social care providers, general health care providers and independent health care providers, in matters relating to professional and clinical judgement.

The Ombudsman is given a new power to investigate maladministration as it relates to university students.

Procedure

In line with ombudsman offices in other jurisdictions, a person cannot avail of the Ombudsman's services until they have invoked and exhausted the listed authority's complaints procedure.

Part 3 – Miscellaneous and General

Reports

The Bill provides that the Ombudsman must lay before the Assembly a general report on the exercise of his/her functions. This is also currently the case. However, a new provision allows the Ombudsman to lay before the Assembly a special report on an investigation in circumstances where:

- An injustice has been sustained by a person aggrieved, and
- The injustice has not been, or will not be, remedied or adequately remedied

The Explanatory Memorandum provides further commentary on this:

The Assembly's standing orders may provide for the handling of such special reports but it is envisaged that the report would be considered by an appropriate committee and the listed authority would be asked to account for its actions. The Committee considered that this option should be open to the NIPSO in relation to all listed authorities⁷.

Accountability – who should the Ombudsman report to?

The Scottish Public Services Ombudsman had previously called for a closer working relationship with a Parliamentary committee in part because "A stronger link with a Committee would also allow the Parliament to hold the Ombudsman to account more effectively"⁸. At that time the Ombudsman reported to the Local Government and Communities Committee and this appears to still be the case (although the Committee has been renamed as the Local Government and Regeneration Committee)⁹. The relationship appears to have been placed on a formal footing, with the Committee

⁷ Draft Explanatory Memorandum, Northern Ireland Public Services Ombudsman Bill

⁸ 2009-10 Corporate Plan of the Scottish Public Services Ombudsman

⁹ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69751.aspx>

having a dedicated page for this aspect of its remit.

In the Republic of Ireland the Ombudsman reports to the Joint sub-Committee on the Ombudsman, the parent committee of which is the Joint Committee on Public Service Oversight and Petitions. The remit of the sub-committee is to:

...establish a formal relationship with the Ombudsman and will agree guidelines on collaborative working. The Committee will also have a right of initiative in bringing specific matters to the Ombudsman for attention and may liaise with other Ombudsmen, regulatory public bodies or bodies established for the purpose of redress.

Should there be a designated Committee to whom the NIPSO would be accountable?

Disclosure

The current legislation provides “a power for the Secretary of State and heads of departments to serve a notice on the existing offices effectively prohibiting them from disclosing information or documents which would in the opinion of the Secretary of State or heads of department be prejudicial to the safety of Northern Ireland or the United Kingdom or otherwise contrary to the public interest”¹⁰. The Committee agreed by a majority to retain this power and change “heads of departments” to Northern Ireland Ministers.

Similar provision exists with regard to Ombudsmen in other parts of the UK and Ireland.

The Parliamentary and Health Services Ombudsman (England) has reported two occasions on which Ministers have intervened to give notice regarding non-disclosure of information. The following is an extract from her report *Access to Official Information: Monitoring of the Non-statutory Codes of Practice 1994-2005*¹¹:

Section 11(3) cases

Under section 11(3) of the Parliamentary Commissioner Act 1967 it is possible for a Minister of the Crown to give notice that, in respect of any document or information, in the opinion of the Minister ‘...disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of the state or otherwise contrary to the public interest.’ Throughout the duration of the Ombudsman’s office there was no evidence to suggest that this power had ever been used before: in 2003 it occurred twice, both times in (non-statutory) Code cases. In both instances, the issuing of the notice resulted in the Ombudsman deciding to discontinue her investigation.

(In the first case the Cabinet Secretary certified that the information sought about the development of policy leading up to the Human Rights Act 1998 related to the proceedings of a Cabinet Committee and could not, therefore, be provided to the Ombudsman).

The second...in which the bodies complained about were the Lord Chancellor’s Department and the Cabinet Office, has a

¹⁰ Draft Explanatory Memorandum, Northern Ireland Public Services Ombudsperson Bill

¹¹ <http://www.official-documents.gov.uk/document/hc0506/hc00/0059/0059.pdf>

more complicated history. In this case, which also related to the private interests of Ministers, a similar notice was issued. As before, the Ombudsman discontinued her investigation. However, in this case the complainant, a journalist, took the step of seeking a judicial review of the Government's decision to issue the section 11(3) notice. Shortly before the hearing was due to take place the Government withdrew the notice, enabling the Ombudsman to re-open the investigation. Once again, however, the departments concerned, in particular the Cabinet Office, handled matters very poorly, resulting in a failure to respond to the Office's recommendations despite repeated promptings. The Ombudsman therefore had to issue a report without the benefit of any substantive comments from the departments.

Schedule 1 – the Ombudsperson's salary

The following table lists the salaries of the Scottish Public Services Ombudsman, Public Services Ombudsman Wales and the Ombudsman in the Republic of Ireland:

Office	Salary	Comments
Scottish Public Services Ombudsman	£83,000	Figure taken from Resource Accounts for year ending 31 March 2010
Public Service Ombudsman for Wales	£135-140,000	Figure taken from Resource Accounts for year ending 31 March 2010 Remunerated at Group 5 of the Judicial Scale
Office of the Ombudsman, Ireland	€191,306	Salary has been reduced as a result of voluntary pay cuts.

There is clearly a significant difference in the salary of the SPSO compared to his counterparts in Wales and the Republic of Ireland. The office of the SPSO explained that this was historical and it had made representations to the Scottish Parliamentary Corporate Body to the effect that the remuneration did not reflect the status of the office. However, to date this has not been addressed.

The European Commission for Democracy through Law issued a "Draft Vademecum on the Ombudsman Institution" in March 2010, in which the Commission addressed the status of the office of Ombudsman:

Whatever the status the Ombudsman institution is assimilated with – the judiciary or public officials – it is always given an appropriately high rank. The high rank is one of the essential factors that guarantee the Ombudsman's independence from political interference and enable that institution to function effectively and efficiently¹².

¹² http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf

The Bill provides that the Ombudsperson's salary will be subject to an upper limit of the maximum payable in the Northern Ireland Civil Service¹³.

¹³ Draft Explanatory Memorandum, Northern Ireland Public Services Ombudsperson Bill