

Northern Ireland Ombudsman's Briefing to
the Ad Hoc Committee Meeting established
to scrutinise the NIPSO Bill

Background and History of the Northern Ireland Ombudsman's Office

1.1 The word Ombudsman is Scandinavian and means 'representative of the people'. The first Ombudsman was created in Sweden in 1809 and its purpose was to impartially investigate complaints about government and public administration. The Office of the Northern Ireland Ombudsman comprises two statutory offices which were both first established in 1969 under the Parliamentary Commissioner Act (NI) 1969 and the Commissioner for Complaints Act (NI) 1969. The Parliamentary Commissioner Act (NI) 1969 created the first 'Ombudsman' in Northern Ireland following on from the creation of a similar office – the Parliamentary Commissioner for Administration whose jurisdiction extended to England, Wales and Scotland. The creation of a second office in of Commissioner for Complaints expanded the reach of the 'Ombudsman' to local government, health and housing. It is noteworthy that Northern Ireland was ahead of Scotland and Wales in having its own Ombudsman's office at that time. It was not until 1973-4 that a Local Government Ombudsman was established for England and Wales and Scotland in 1974-5 to deal with the administrative aspects of NHS and local government. The Northern Ireland Ombudsman remains unique in a number of respects however; in particular because there is an employment jurisdiction across both remits and also the Commissioner for Complaints has two unique remedies in the form of court actions; one which permits a complainant to seek damages in the County Court and the second which permits the Attorney General to seek relief in the High Court where a body is 'persistently' maladministrative in its actions. This background of early innovation and reform is worthy of reflection given the current legislative proposals.

1.2 The 1969 Acts were repealed and replaced in 1996 and the statutory offices were rebranded as the Assembly Ombudsman for Northern Ireland (provided for by the Ombudsman (NI) Order 1996) and Northern Ireland Commissioner for Complaints (provided for by Commissioner for Complaints (NI) Order 1996). The 1996 Orders have differing rules and jurisdictions and this can be confusing for the public and complex for staff to apply. For instance, a complaint about a government department currently requires MLA sponsorship; whereas a complaint under the Commissioner for Complaints Order about a body (such as NIHE) can be made directly to the office. Further, the Assembly Ombudsman can access legal advice held by a body he is investigating and no

such right of access applies in his role as Commissioner for Complaints. These legislative and jurisdictional differences raise important issues of principle such as access to redress for the citizen and also the openness and accountability of public service providers.

- 1.3 Against this background the proposed legislative reforms are a welcome and necessary innovation. The creation of the office of the Northern Ireland Public Service Ombudsman (NIPSO) will mark a significant milestone in the accountability arrangements put in place by the Northern Ireland Assembly to ensure every citizen in Northern Ireland is served by a system of public administration that is characterised by fairness, openness and accountability. Given that the current legislation underpinning my office was based on the Parliamentary Commissioner Act 1967 - it is timely that the Ombudsman's legislation is modernised to reflect changes in public service delivery and a continually increasing public expectation of what public services deliver.
- 1.4 In 2003 OFMdfM commissioned Deloitte to undertake an independent review of the Offices of Assembly Ombudsman for Northern Ireland and Commissioner for Complaints for Northern Ireland (AOCC) [Part 1 of the Review] and a salary review [Part 11 of the Review]. Part 1 of the Deloitte review was completed in 2004 (see attached at Annex A) and its central recommendation was a programme of modernisation for the office including new legislation that would merge the two statutory offices and establish a new office of a Public Services Ombudsman for Northern Ireland. The Review recommended that central to the modernisation agenda was the creation of a similar 'one stop shop' to the offices that had been established by the creation of devolved ombudsmen in Scotland and Wales. In addition a further key aspect of the modernisation was the need to secure a closer relationship between the Ombudsman and the Assembly. A particular conclusion of the review was that the Ombudsman should be explicitly one of three statutory officers of the Assembly, along with the C&AG and the Examiner of Statutory Rules.
- 1.5 The recommendations of the Deloitte Report, taken in the round, reflect the need for a particular relationship with the Assembly as they also included details of how

the responsibility for the appointment should rest with the Assembly and also that the Assembly should determine the salary for the post. The report proposed the term of appointment would be for a single period of seven years to reflect a similar approach to the ombudsman appointment in Wales. The Welsh Ombudsman's appointment is for a single term of seven years. It is important to note the Scottish Ombudsman appointment is for a term of five years renewable for two further terms of five years (a full term therefore potentially of 15 years). However, setting the Scottish role aside, the Deloitte Review considered that the most appropriate office on which to model the new NIPSO was the Ombudsman for Wales.

2.0 The New Legislation (NIPSO Bill)

2.1 In June 2010 the OFMdFM Committee (the Committee) of the Northern Ireland Assembly agreed to sponsor the legislation recommended in the Deloitte Review. The Ombudsman had approached the Committee because the OFMdFM Department had indicated that, given its responsibility for a busy legislative programme for government and limited OLC capacity, it did not have the resources to undertake the development of the new legislation. The fact that the Committee decided to sponsor the Bill is in itself unique as traditionally the role of an Assembly Committee is to scrutinise draft legislation as proposed by an Executive Department. I am grateful to the OFMdFM Committee for undertaking this role and for developing legislation that will potentially create the most modern and innovative Ombudsman's office in these islands.

2.2 A public consultation was held in September 2010 on the proposals for the new legislation which included details about the new Public Services Ombudsman appointment, tenure and salary. The consultation questions developed by the Committee were framed to reflect the policy proposals contained in Parts 1 and 2 of the Review. A total of 33 responses to the 2010 consultation were received by the Committee from a wide variety of organisations including other Public services Ombudsmen, bodies in jurisdiction, the C&AG, the Equality Commission, the British and Irish Ombudsman Association (BIOA) the International Ombudsman's

Institution. The majority of respondents supported the policy proposals for the establishment of a single office of Public Services Ombudsman for Northern Ireland.

2.3 A second more focused consultation was completed in 2011 which considered a limited number of aspects of the proposed extension of the Ombudsman's remit including the proposal for own initiative powers; the extension of jurisdiction to the area of public procurement by NI departments; and also the inclusion of schools, universities and FE colleges in jurisdiction. There was broad agreement for these significant extensions of responsibility to be undertaken by the new Northern Ireland Public Services Ombudsman (NIPSO).

2.4 On 16 September 2013 the Report of the Committee was introduced into the Assembly by the Chair of the OFMDFM Committee¹. The Assembly approved the Committee's report after a debate on the comprehensive set of policy proposals that had been agreed by the Committee in relation to the NIPSO legislation. The proposals reflected the approach suggested by the Deloitte Report and supported closer links with the Assembly to secure the NIPSO's position as an Officer of the Assembly. It is important to note the Chair of OFMDFM's explanation on the linkages of NIPSO with the Assembly:

'Time does not permit me to describe our proposals in great detail, but I shall try to cover the key points. The Committee proposes to enhance the NIPSO's relationship with the Assembly, reinforcing the independence of the ombudsman while providing accountability through the Assembly and its Committees. The Assembly Commission, rather than OFMDFM, would organise the recruitment and selection process to identify the best candidate, as well as determining the NIPSO's salary. The Assembly would nominate a candidate for formal appointment as NIPSO by Her Majesty, as the Assembly currently does in the case of the Comptroller and Auditor General... Where the current legislation refers to approval from or accountability to OFMDFM, that

¹ www.niassembly.gov.uk/assembly-business/officialreport/reports-13-14/16September-2013

would be replaced by reference to the Assembly. The NIPSO would be accountable to an Assembly Committee for his or her budget, as is the Comptroller and Auditor General, and existing reporting arrangements could be enhanced by Standing Orders.'

I welcome the proposal for closer links with the Assembly as this reflects the constitutional status of the Ombudsman as the officer of the legislature to hold the Executive to account. It is to the legislature that an Ombudsman looks when his/her recommendations have not been complied with and the power to bring a 'special report' to that body in such circumstances confirms and underpins this special relationship.

- 2.6 As recommended by Deloitte a key part of Local Government Reform was providing for my Office to undertake two additional functions; the investigation of complaints of alleged breaches of the mandatory Local Government Code of Conduct (the Code); and the adjudication on these complaints where appropriate. This is a significant extension to my jurisdiction and in March of this year I issued guidance on the Code of Conduct for Councillors which has been welcomed². This guidance was issued to assist Councillors as they undertake their new functions (including the planning function) from 1 April of this year. It is noteworthy that the original proposal for a Local Government Standards regime in Northern Ireland was based on an entirely different model that included monitoring officers and Standards Committees in each Council, an investigative resource provided for by my office and an adjudicating tribunal to decide on sanctions for breach of the Code.
- 2.7 A PWC financial appraisal of this model for ethical standards in local government (a replica of the Welsh model) estimated the cost to the public purse of this multi-tiered ethical framework at approximately £800,000. In response and in order to reduce cost to the public purse, the then DOE Minister, Alex Atwood MLA, invited the Office of the Commissioner to undertake investigations and, where appropriate,

² <http://www.ni-ombudsman.org.uk/niombudsmanSite/files/05/058c7c9d-a343-4ccf-9751-e0c8668a5159.pdf>

adjudicate in these arrangements for new ethical standards which would therefore include investigation, adjudication, providing guidance and taking any action instead of or in addition to an investigation (mediation, alternative dispute resolution etc). At no extra salary, the current Ombudsman agreed to be accountable for the organisation and delivery of these discrete roles. The current costs of £260,000 [excluding any legal challenge], represents a saving of £550,000 on the original PWC costings. Clearly this significant additional function is being undertaken and will be undertaken by the NIPSO, and this approach meets the current requirement of funding restraint in the public service.

- 2.8 The Committee's policy proposals contained in the NIPSO Bill include the additional role of NIJAO with responsibility for the examination complaints of maladministration in relation to the judicial appointments process. The NIJAO role will be high profile and complex given the range of listed judicial posts that it encompasses. This role is currently held by a separate office holder, Mr Karamjit Singh CBE, and its transfer to NIPSO will translate into savings to the public purse.

3.0 The NIPSO Bill

- 3.1 As stated above, my current role is to investigate complaints of maladministration about a wide range of public services in Northern Ireland including health, social care, housing, planning and education. There are a total of 175 public bodies in the Ombudsman jurisdiction. In addition, I can also investigate complaints about the clinical judgment of GPs, dentists, opticians and independent health care providers. In undertaking this aspect of my jurisdiction (currently healthcare complaints form two thirds of my caseload) I can seek the advice of Independent Professional Advisors (IPA) and my decisions on care and treatment are therefore informed by expert advice on what care is reasonable in all the circumstances.
- 3.2 The NIPSO Bill was introduced in 20 April 2015 and proposes the merger of the two existing statutory offices to remove the public's confusion created by two separate and differing legislative frameworks. The public will have direct access to the NIPSO as a result of the removal of the requirement for MLA sponsorship for complaints about

Northern Ireland departments. However, importantly the Bill provides that an MLA can still support an individual in bringing a complaint to the NIPSO. The Bill proposes a number of significant changes to the Ombudsman powers and jurisdiction, these are outlined below.

3.3 The NIPSO Bill adds a number of new bodies such as the Assembly Commission and the C&AG to come into the NIPSO jurisdiction. The extended remit to include these bodies is as a direct result of the Deloitte recommendations. The policy aim is to ensure that all publicly funded bodies are in jurisdiction. The proposals are for staged introduction of the new bodies to allow my office to liaise with the new stakeholders and also for bodies to prepare to come under the NIPSO remit. For instance, on commencement of the Bill (April 2016) the Northern Ireland Audit Office (NIAO) and the Assembly Commission will come into the NIPSO jurisdiction for complaints of maladministration. In the autumn of 2016, it is proposed that HE and FE colleges and the two Northern Ireland universities (QUB and UU) come into the jurisdiction of the Ombudsman in respect of complaints of maladministration brought by students. Currently, there is no provision for a student to complain to an independent third party about maladministration on the part of HE, FE colleges and Northern Ireland universities. Northern Ireland is the only part of the UK where students do not have an external right of redress for maladministration and the NIPSO Bill will address this access to justice issue. It is interesting to note that universities are in the remit of the Scottish Ombudsman and students only can complain to his office about maladministration. In addition, universities are within the Irish Ombudsman's remit since 2012 for complaints of maladministration from students (not staff). There is no provision in either ombudsman's jurisdiction to permit students to appeal questions of academic judgment and there is no such proposal in the NIPSO Bill.

3.4 As part of the incremental approach to implementation of the NIPSO legislation, in April 2017, all publicly funded schools in Northern Ireland will come under the NIPSO jurisdiction. Currently complaints from pupils or parents are made to the Board of Governors and although the Board is comprised of internal and external representatives there is no independent third party mechanism to investigate complaints of administrative failings. The NIPSO legislation will permit parents and

pupils to complain about maladministration on the part of a publicly funded school. It is noteworthy that previously, schools were under the jurisdiction of the Ombudsman but were removed in the 1980s as a result of the Conservative government's policy of giving increased autonomy to the Board of Governors of schools.

3.5 The Ombudsman has established an Implementation Committee to undertake the work of NIPSO implementation, a copy of the paper establishing that Committee and its Terms of Reference are attached at Annex B. There are five discrete work streams for in house working groups reporting to the Committee Chair (the Deputy Ombudsman) comprising;

1. Process and Procedures
2. Organisation Development and Human Resources (ODHR)
3. Communications
4. Governance and Accountability
5. NIPSO Website

The Communications working group has developed a communication strategy to engage with the new bodies coming into jurisdiction of the NIPSO and a programme of stakeholder engagement will be rolled out in 2015/16 and 2016/17 to better inform the new bodies. A training package for new bodies has been developed as well as guidance on Effective Complaints Handling and NIPSO staff will be delivering this package to help inform new bodies in jurisdiction of their obligations under NIPSO.

4.0 New Powers

4.1 It is proposed that the NIPSO will have power to investigate systemic maladministration on his/her own initiative. This power will only be exercised on the basis of evidence of administrative failure. The UK Ombudsmen are among a small number of Ombudsmen in Europe who do not possess own initiative powers. This power has been provided for in the Irish Ombudsman legislation since 1980, it exists in the European Ombudsman's legislation and in Ombudsman legislation Sweden, Austria, Malta, Canada, New Zealand and many other international states. It is seen as

a useful recourse through which to investigate administrative failures particularly where an individual may be unable or reluctant to bring a complaint. For instance, where an individual is in an institution and he/she or family members fear retribution if a complaint is made about failures in care. It is noteworthy that the Finance Committee of the Welsh Assembly and the Cabinet Office in England has now followed the lead taken by the Northern Ireland Assembly. In England and Wales the Ombudsmen are seeking own motion powers to enhance their toolkit for dealing with systemic maladministration. The Finance Committee of the Welsh Assembly has just issued a report on the proposed changes to the Welsh Ombudsman's jurisdiction³ and own initiative powers are proposed for his office. Further the Cabinet Office has just launched a consultation on a Public Services Ombudsman for England which also proposes own motion powers⁴. The example of Northern Ireland as leading the way on this issue has been widely quoted at a recent international conference⁵.

4.2 Currently under the Ombudsman (NI) Order 1996 which deals with complaints about Northern Ireland departments and their statutory agencies there is provision for access to legal advice obtained by the department or body. In some instances a body claims their actions have been as a result of legal advice and it can be important to establish whether this is in fact correct. That provision does not extend to bodies however to bodies in the Commissioner for Complaints jurisdiction. Those bodies that need not provide access to legal advice include housing, health and social care bodies. The NIPSO Bill proposes that the Ombudsman will have access to legal advice of all bodies in jurisdiction, provided that advice is not disclosed in a published report.

4.3 I, like all other ombudsmen, conduct all investigations in private and currently I have no explicit power to publish my investigation report. My office is required to publish an annual report which contains a selection of anonymised case summaries of the complaints investigated. I have from time to time published case digests in addition to my annual report to better inform the public and bodies in my jurisdiction about my

³ <http://senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=11936>

⁴ <https://www.gov.uk/government/consultations/public-service-ombudsman>

⁵ Nick Bennett, Welsh Ombudsman, Ombudsman Association Conference, Loughborough University , 14 may 2015

work. These digests also contain anonymised case summaries. The 1996 Orders provide that every investigation must be conducted in private and there is a strict statutory bar on disclosure of information obtained which binds the recipients of my reports (the complainant, the body and in health care cases the commissioning body). That statutory bar on disclosure extends beyond the completion of an investigation and therefore all my investigations reports warn the recipients of the need to maintain confidentiality. I currently lay my case digests and annual reports containing anonymised case summaries before the Assembly and that gives me the implicit authority to publish such reports. I adopt this practice following on from the practice of the Parliamentary and health Service Ombudsman in Westminster given the close legislative links. In Scotland (SPSO) and Wales (PSOW), the practice has emerged that all decisions and reports are published. In recent years I am aware that the Local Government Ombudsman moved to full publication of all reports and decisions but this was on a staged basis as it took almost two years to change administrative practices. There is also a resource implication to full publication to be considered, both SPSO and PSOW have an internal resource dedicated in part to managing the external dissemination of reports and subsequent media interest in those reports.

- 4.4 The NIPSO Bill does provide for the Ombudsman to publish his/her report in the public interest. I welcome this and note that it is a power which is the equivalent to that currently employed by the Welsh Ombudsman. In addition the NIPSO will have discretion as to which investigation reports to publish. This is partly based on the Welsh model. In Wales, the Ombudsman publishes approximately 13-18 public interest cases each year in addition to publishing case digests and his annual report. In addition he will provide a copy of a report to any person that seeks a copy. While the NIPSO proposals do provide that the NIPSO will have a discretion to provide a report to any person that he/she thinks fit, this is arguably not the same as an explicit power to publish everything. The current NIPSO proposals do in my view meet the requirements of accountability and transparency and leave a discretion to the Ombudsman . I am also aware that in the NIPSO Bill as is the position currently there is a provision outlining the purpose of an investigation which is to attempt to effect a settlement. This provision does not exist in SPSO and PSOW legislation and full

publication could have a chilling effect on bodies being willing to settle a case. However, ultimately this is a matter for the Assembly to decide and I would suggest a staged approach with a review after two years of reporting in the public interest to ascertain the effects of this reporting . I would anticipate that any NIPSO would publish the public interest factors in deciding when to publish a report.

4.5 The Ombudsman (NI) Order 1996 currently prevents the Ombudsman from investigating complaints about commercial and contractual matters in relation to Northern Ireland departments and their statutory agencies. The Commissioner for Complaints (NI) Order 1996 however does permit investigation in relation to such matters in respect of bodies under this jurisdiction. This power has been used on several occasions in respect of Commissioner for Complaints bodies notably in local government tendering exercises. As proposed the NIPSO Bill will remove the statutory bar on Ombudsman investigations in relation to commercial and contractual matters for Northern Ireland Departments and their agencies and this is to be welcomed. In practice, this will permit NIPSO to investigate matters relating to administrative failure concerning public procurement matters across all public services provided. This will benefit SMEs who cannot afford to take costly legal proceedings by way of judicial review in order to challenge a procurement decision.

4.6 In addition to or instead of an investigation, the NIPSO will have power to resolve complaints informally using methods such as early resolution or mediation. This ADR provision is based on the Welsh legislation and it will, in my view, be a useful tool in the NIPSO toolkit to save investigative resources where a complaint can be resolved to the satisfaction of the body and the complainant.

5.0 Removal of Employment Jurisdiction

5.1 Currently, staff of bodies in the Ombudsman jurisdiction can complain about any matter relating to their employment including recruitment, pay, discipline and grievance matters. These comprise on average 12-15% of my caseload but can be complex and are often emotive and difficult to resolve. The Deloitte Review recommended and OFMdfM Committee agreed that there is adequate provision for public sector employees to bring their employment grievances to other bodies such as

the Equality Commission, Labour Relations Agency, the Industrial Tribunal and the Courts. Therefore the employment jurisdiction is to be removed from NIPSO which I welcome since no Public Services Ombudsman has this remit and it is unfair to private sector employees that their public sector colleagues should have an avenue of redress that they do not have.

6.0 Accountability Arrangements

6.1 The NIPSO Bill provides for closer links between the Ombudsman and the Assembly. The Ombudsman appointment may be on a two thirds majority of the Assembly, and the Assembly Commission will make arrangements for recruitment and appointment of the NIPSO. The Ombudsman, like the C&AG and Examiner of Statutory Rules, will be explicitly an officer of the Assembly. The NIPSO will be accountable to the Audit Committee of the Assembly for his corporate and business plans and his use of resources. The issue of new accountability arrangements is a discrete part of the implementation project see Annex B. The Deputy Ombudsman and my Director of Finance and Corporate Services have met with the Clerk of the Audit Committee and a draft MOPU is being developed. Currently, the Ombudsman functions are funded by the Assembly and this funding will remain under the NIPSO arrangement with finance staff continuing to use the DFP supply route for funding bids as part of the budget process.

8.0 Issues raised by Mr Allister MLA

8.1 These were as follows:

- Clause 18 of the NIPSO Bill provides only for complaints by students of maladministration about university brought to the NIPSO. Mr Allister raised the issue that there is a gap in relation to complaints from the staff of QUB and UU.
My response is as follows -
- The NIPSO Bill removes all employment matters for the NIPSO jurisdiction. This is an important part of the policy sitting behind the NIPSO Bill as recommended by

Deloitte. No other Public Services Ombudsman has an employment jurisdiction for the reasons set out above at section 5 of this paper.

- Clauses 34 and 35 provide for the NIPSO to publish reports in the public interest. Mr Allister MLA suggested that the default position should be that all reports should be published in the public interest to meet the requirement of openness and accountability. He referred in particular to the report in relation to the Presbyterian Mutual Society (PMS) and suggested that this should have been published in the public interest. My response to this is as follows -
 - A summary of the PMS report was in fact published in a case digest and my annual report. Ultimately the reporting of all reports and decision letters (except where there are particular issues of confidentiality and privacy) is important but it brings with it administrative and resource issues and there is the question whether such reporting would prevent the NIPSO from achieving a settlement. I would suggest staged approach with the current NIPSO proposals being a starting point and a review in the future (say two years) to ascertain if there should be wider reporting and whether in fact the Public Interest Reporting has in fact had a ‘chilling ‘ effect on settlements with bodies.
- Mr Allister MLA raised the issue that there is no enforcement mechanism for Ombudsman’s recommendations and that a body can simply ignore them. My response to this is as follows -
 - A classical Ombudsman’s recommendations are not binding and if they were this would make them a court or tribunal. The reason that they are not binding is that the ‘enforcement’ mechanism for the recommendations is the reporting to the legislature in the event that the recommendations are ignored. This Parliamentary Accountability link is key. The system of justice that is provided for by ombudsmen is different and it is based on the force of ‘moral’ suasion and parliamentary oversight to achieve compliance. These mechanisms for reporting to the Assembly where injustice remains unremedied are provided for in the NISPO bill for all bodies in jurisdiction.

- In any event the NIPSO Bill provides for a county court enforcement mechanism and the Attorney General's power to seek High Court relief in certain circumstances. The former permits complainants to bring the NIPSO report to the County Court where injustice has been sustained as a result of maladministration. The county court will have power to award damages. These court based enforcement mechanisms will extend across all bodies in jurisdiction.
- Clause 41 of NIPSO Bill provides for an MOU between the SOS and the NIPSO to deal with non-disclosure notices where the SOS raises issues of national security for matters in the public interest. Mr Allister MLA considered a MOU should extend also to the Executive Ministers. My response is as follows
 - The Chair of the OFMdfM Committee explained that clause 41 provided for an MOU with the SOS only in relation to national security issues. Mr Allister MLA remained concerned that there is a gap in relation to explanations of 'the public interest'. An MOU with the Secretary of State is on narrow grounds to cover issues of national security. The Secretary of State is in a different position as regards NIPSO from Executive Ministers whose actions will be overseen by NIPSO. There would be a substantial risk of the perception that the NIPSO was not independent from the Executive if it were to enter into an MOU with the head of the Department he has power to investigate. This proposal would undermine the independence of the NIPSO. I consider that to extend an MOU to Executive Ministers would raise in the public's mind suspicion and a perception of lack of independence and I do not consider it is necessary or desirable to extend this.

.Conclusion

May I take this opportunity to thank the Chair and members of this Committee and staff for their support and interest in this Bill which will be a unique opportunity to shape the Ombudsman's office for the future?

Dr TOM FRAWLEY CBE

