

From: Kate McCullough
Assistant Assembly Clerk

To: Ad Hoc Committee Members

Date: 20 May 2015

**Additional Papers from the Evidence Session with the NI Ombudsman
19 May 2015**

At the meeting on the 19 May 2015 a number of additional publication and papers which were provided by the NI Ombudsman for information at the meeting of the 19 May 2015.

The Ombudsman's Briefing Paper

- Deloitte Review – Annex A (page 2 – 1.4). Below is link to the Deloitte Review report.

<http://www.ofmdfmi.gov.uk/review-assembly-ombudsman-part1.pdf>

-
- The establishment of an Implementation Committee to undertake the work of NIPSO implementation and the Terms of Reference. Annex B (page 8 – 3.5).

These papers are both attached.

Additional Information

- Extract from a publication by C White “Enforcing the Decisions of Ombudsmen – the Northern Ireland Local Government Ombudsman’s Experience” (1994) 45 NILQ 395

This extract is attached.

- 40 Years of the Office of the NI Ombudsman – Reflections in Time (2010)

This publication is not available on line but can be viewed in the Secretariat Office in Room 276.

**OFFICE OF THE FIRST MINISTER AND DEPUTY
FIRST MINISTER**

**REVIEW OF THE OFFICES OF THE ASSEMBLY
OMBUDSMAN FOR NORTHERN IRELAND AND THE
NORTHERN IRELAND COMMISSIONER FOR
COMPLAINTS**

PART 1 REPORT

March 2004

FINAL REPORT

**Deloitte MCS Limited
19 Bedford Street
Belfast BT2 7EJ
Northern Ireland**

CONTENTS		Page
1.	INTRODUCTION	1
1.1	Introduction	1
1.2	Terms of Reference	1
1.3	Our Approach	2
2.	BACKGROUND	3
2.1	The Ombudsman's Origin	3
2.2	The Ombudsman's Purpose	3
2.3	The Ombudsman's Roles	4
2.4	The Ombudsman's Discretion	6
2.5	The Ombudsman's Location	6
2.6	Other Means of Accessing the Office	6
2.7	Support Services	7
2.8	Interaction with Government Departments	7
3.	THE ORGANISATION AND PERFORMANCE OF THE OMBUDSMAN'S OFFICE	9
3.1	Introduction	9
3.2	Handling Enquiries and Complaints	9
3.3	Number of Enquiries	10
3.4	Number of Complaints	10
3.5	Pattern of Complaints	11
3.6	Business Activity 2002-03	12
3.7	Average Clearance Times	12
3.8	Results of Cases Completed and Reported	12
3.9	Maladministration	13
3.10	The Funding of the Office	13
3.11	Audit	13
3.12	Corporate and Business Planning	14
3.13	Corporate Governance	14
3.14	The Office's Organisation	15
3.15	Workload Management	15
3.16	Manpower Levels	16
3.17	A Strategy for Human Resources	17
3.18	Support Services	18
4.	AN AGENDA FOR CHANGE	19
4.1	Introduction	19
4.2	New Legislation	19
4.3	MLA Sponsorship	19
4.4	Different Final Remedies	19
4.5	Registered Housing Associations	20
4.6	Assembly Standards Commissioner	20
4.7	Local Authority Standards Commissioner	20
4.8	Employment Matters	20
4.9	Challenging Merits of Decisions	20
4.10	Systemic Reviews	21
4.11	Following Public Funds	21
4.12	Health Services Complaints	21

CONTENTS

	Page
4.13 Justice Functions	21
4.14 Use of the Title 'Ombudsman'	22
5. BENCHMARKING WITH OTHER PUBLIC SERVICES OMBUDSMEN	23
5.1 Introduction	23
5.2 Arrangements in England	23
5.3 Arrangements in Wales	24
5.4 Arrangements in Scotland	25
5.5 Arrangements in the Republic of Ireland	26
5.6 Workload Comparisons	26
6. CONSULTATION WITH KEY STAKEHOLDERS	29
6.1 Introduction	29
6.2 Customer Attitude Surveys	29
6.3 The Ombudsman	29
6.4 Comments on Possible Changes	30
7. A WAY FORWARD	32
7.1 Introduction	32
7.2 Issues of Scope	32
7.3 Procedures and Remedies	40
7.4 The Northern Ireland Assembly	40
7.5 Auditing Public Sector Complaints Processes	41
7.6 Annual Outreach Programme	42
7.7 Vexatious Complainants	42
7.8 Alternative Dispute Resolution	43
8. THE NORTHERN IRELAND PUBLIC SERVICES OMBUDSMAN	44
8.1 Introduction	44
8.2 Present Position	44
8.3 An Agenda for Change	44
8.4 A Way Forward	44
8.5 The Northern Ireland Public Services Ombudsman	46
8.6 Resource Implications	47

APPENDICES:

I	Membership of Project Board
II	Organisations within the Jurisdiction of the Assembly Ombudsman
III	Public Bodies within the Jurisdiction of the Commissioner for Complaints
IV	The Ombudsman's Complaints Process
V	Stakeholder Consultation
VI	"Public Knowledge and Awareness of the Northern Ireland Ombudsman" – A Survey by Research and Evaluation Services – Executive Summary

1. INTRODUCTION

1.1 Introduction

This report concludes Part 1 of a review commissioned by the Office of the First Minister and Deputy First Minister (OFMDFM) of the Offices of the Assembly Ombudsman for Northern Ireland (AO) and the Northern Ireland Commissioner for Complaints (CC). Throughout this document and for ease of reference we refer to the post-holder as 'the Ombudsman' and to the Offices as 'the Office'.

We propose future arrangements for the Ombudsman and have taken account of the views of and needs of customers, staff and their trade unions and other stakeholders to:

- ensure that proper structures are put in place so that the Office can deliver its work effectively and in a coordinated way; and
- provide a strong focus on improving future performance.

1.2 Terms of Reference

The terms of reference for the review were:

"The review must focus on the future arrangements for the Offices of the AO and CC. It must consider and make recommendations with regard to the feasibility of combining the functions of the Offices and the potential for a restructured Office to include the conduct of local government elected representatives and appointees to public bodies within jurisdiction.

In particular the review must address the scope of the matters which would come within the investigative and oversight remit of the proposed structure, including:

- *cases of maladministration by public authorities in Northern Ireland;*
- *measures to maintain and improve standards and encourage good governance in public administration in Northern Ireland;*
- *a mechanism for ensuring that all relevant public authorities are included within the remit of the proposed structure;*
- *the procedures to be adopted in referring matters for investigation and the nature of the remedies which would be available following investigation;*
- *the merit of an authority to initiate the investigation of matters at the discretion of the Ombudsman;*
- *the arrangements for reporting to the Northern Ireland Assembly;*

- *the appropriateness of including other investigative roles within the remit of the proposed structure; and*
- *the administrative, legislative and resource arrangements necessary to underpin the proposed structure."*

1.3 Our Approach

A Project Board – membership at Appendix I - provided overall direction to the project and met on four occasions.

We approached the review in 5 stages viz:

Stage 1 – Project Set Up and Situation Analysis

In the **Project Set Up** phase we agreed with the Project Board the scope, timing and deliverables of our review.

In the **Situation Analysis Phase** we gained an appreciation of the Ombudsman's Office and the associated operations and activities. We also achieved an understanding of the historic levels of performance of the organisation and this was essential to developing practical future structures and processes. Our main outputs are an objective analysis of the current and historic operation and performance of the Ombudsman (as detailed in Section 3) and the agenda for change described in Section 4.

Stage 2 – Benchmarking

We examined the roles of the Ombudsman and compared these with similar offices in the British Isles. Whilst we are aware there is no direct comparator to the Ombudsman the exercise sought to report on the roles, functions and structures of the offices and provide comparable performance and activity information where possible. This information is set out in Section 5.

Stage 3 - Stakeholder Consultation

We relied on Customer Attitudes Surveys carried out for the Ombudsman to give us a customer perspective.

We conducted an extensive consultation process on a one-to-one basis with key stakeholders to ensure that the review was fully informed of all relevant matters and to begin the process of preliminary consultation on the nature of the possible changes. The results are summarised in Section 6.

Stages 4 and 5 – Activity Modelling and Options Appraisal

We examined the projected levels of activity that might derive from implementing the range of changes being considered. We modelled the possible impact on complaints cases; reports and associated activities that might arise based on both our benchmarking and the stakeholder consultation processes. We consolidated all the previous work into a comprehensive options appraisal that identifies in Section 7, a preferred way forward for the Ombudsman. In section 8 we set out our vision for the Northern Ireland Public Services Ombudsman.

2. BACKGROUND

2.1 The Ombudsman's Origin

The office of Ombudsman was established in 1969 against the backdrop of the creation of the Office of Parliamentary Commissioner for Administration in Great Britain in 1967 and local pressure in Northern Ireland in respect of civil rights and related complaints about discrimination in employment and housing in particular.

The Ombudsman is appointed by Royal Warrant and is wholly independent of Government and the public bodies that he investigates. He is an Officer of the Northern Ireland Assembly.

The current Ombudsman is Mr Tom Frawley who has been in post since September 2000. He was appointed following a public advertisement and a competition administered under the rules for Public Appointments.

The way in which the Ombudsman works, the bodies that he can investigate and the types of case that may be investigated are determined by the relevant legislation.

2.2 The Ombudsman's Purpose

The purpose of the Ombudsman is:

'To provide an independent, effective and free system for investigating complaints from people who claim to have suffered personal injustice through maladministration by Northern Ireland government departments, agencies, public and local bodies and the National Health Service.'

The Ombudsman's role is of a 'quasi-judicial' nature; having thoroughly and impartially investigated complaints that are properly made to him, he determines whether or not maladministration has taken place and, if so, whether the complainant has suffered an injustice. As such he neither defends the body being complained against nor does he 'champion' the complainant.

Importantly while the word maladministration is not defined in legislation, it is accepted as embracing a wide range of conduct including neglect, bias, delay, incompetence, perversity, arbitrariness, rudeness, refusal to answer reasonable questions, neglecting to inform an individual, on request, of his rights or entitlements, giving inadequate or misleading advice, faulty procedures, etc.

The legislation gives the Ombudsman wide powers of discretion in deciding whether to take up a complaint and also the manner in which he may decide to investigate it. Where he considers there are issues that warrant investigation it then falls to the body concerned to explain its actions to the Ombudsman's satisfaction. Where he concludes that an injustice has arisen as a result of maladministration he recommends what he considers to be an appropriate remedy. His objective is to put the complainant into the position that existed before the maladministration happened.

2.3 The Ombudsman's Roles

The offices of Assembly Ombudsman (AO) and Commissioner for Complaints (CC) are differentiated in terms of jurisdiction; means of access for complainants and ultimate remedy if a recommendation is ignored.

2.3.1 The AO

The legislation that underpins the Office of Assembly Ombudsman is the Ombudsman (NI) Order 1996.

The main function of the Assembly Ombudsman is to investigate complaints of alleged maladministration by Northern Ireland Government Departments, their agencies and the Cross Border Institutions set up under the Belfast Agreement (see Appendix II for a complete list of the bodies within jurisdiction). Complaints to the AO must be made through a Member of the Northern Ireland Assembly. The AO's Report on the investigation is made to the sponsoring Member who may pass a copy to the complainant. The complainant can refer their complaint through any Member of the Assembly.

Should a Department refuse to implement the recommendation of the AO he has the power to make a Special Report to the Northern Ireland Assembly on the matter.

In November 2001, at the request of the Speaker of the Northern Ireland Assembly, the Ombudsman agreed to provide an investigation service for the Assembly's Committee on Standards and Privileges. The legislation to formalise this arrangement was being moved through the Assembly when the body was suspended in October 2002. The role involved the investigation of complaints against MLAs referred by the Committee that may involve a breach of the Code of Conduct and Guidelines on members' behaviour, which had been adopted by the Assembly.

2.3.2 The CC

The legislation that underpins the authority of the CC is the Commissioner for Complaints (Northern Ireland) Order 1996 and the Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997.

The function of the CC is to investigate complaints of maladministration against the public bodies listed in the relevant Orders (see Appendix III for a complete list of the bodies within jurisdiction). A person can complain directly to the CC if they believe they have suffered personally as a result of maladministration by a body that comes within his jurisdiction. His Report on the investigation is made directly to the complainant.

If a Public Body refuses to implement the recommendation of the CC, the complainant has the right to refer the report to the County Court and ask for the award of damages.

2.3.3 Shared Elements of AO and CC

There are many elements of approach and practice that are shared by both offices.

The core values of the offices are: courtesy, openness and integrity.

Complaints must be in writing and should generally be made within 12 months of the action complained of.

The complaint must be from "a person", which can include a corporate body. The complaint should contain, as a minimum, the complainant's full name and address, the name of the body/bodies complained of, details of the alleged maladministration, the date when this action occurred and how the individual was affected by it. The Ombudsman cannot deal with anonymous complaints or complaints where the author demands anonymity.

Every written complaint made to the Ombudsman (whether it is considered to be within jurisdiction or not) is acknowledged in writing.

Before accepting a complaint, the Ombudsman would usually expect the complainant to have raised the complaint with the body complained of and to have afforded the body an opportunity to respond.

Whilst the relevant legislation provides the statutory authority for the Ombudsman to undertake his investigation, he is also constrained by the same legislation in that there is a range of matters that he cannot investigate. He is not authorised to 'second guess' a discretionary decision (egg a planning approval) which has been reached without any maladministration in the administration of the process.

He cannot generally investigate matters that would be more appropriate to the courts, matters that are the subject of ongoing legal action and matters where the complainant has, or had, a right of recourse to a tribunal. Both pieces of legislation define "tribunal" as including any authority, body or person having power to determine any matter. He does have a narrow discretion in cases where he judges it inappropriate to expect the legal or tribunal route to have been followed.

All aspects of the investigation of a complaint are covered by confidentiality requirements. The Ombudsman and his staff cannot be compelled to give evidence in court in respect of information obtained during an investigation.

The Ombudsman has absolute privilege in respect of what he publishes in a report.

Complainants who are in doubt whether a body, or indeed a specific complaint, is within the Ombudsman's jurisdiction are encouraged to contact the office for advice.

2.4 The Ombudsman's Discretion

The Ombudsman is given a wide discretion by the legislation. His investigations are conducted in private and he may determine his own procedure for an individual investigation. In the course of a particular investigation he may obtain information from such persons and in such manner as he thinks appropriate. This may well include an interview with the complainant, a detailed examination of the relevant papers held by the body and interviews with officials. Refusal to provide evidence to the Ombudsman, or indeed providing false evidence, has the same effect in law as contempt of the High Court.

2.5 The Ombudsman's Location

The Ombudsman's office is located in Progressive House, 33 Wellington Place, Belfast. This location was specifically chosen some 20 years ago to be accessible to all sections of the community, to provide accessibility for disabled people and, importantly, to emphasise the independence of the Office from the bodies that are within its jurisdiction.

The Office occupies two floors of the building and the facilities provide self-sufficiency in terms of a Conference/Training room, catering support, interviews, medical examination room and reference library.

2.6 Other Means of Accessing the Office

In addition to the investigation of written complaints, the Office provides a number of other services to the public:

- **a telephone help line** provides advice on complaints. The free phone is provided through a 24 hour answering machine thus ensuring that calls made outside office hours can still be dealt with;
- **a facility for personal callers at the Office.** The Office is open to the public from 9:30 am to 4:00 pm A dedicated interview room is available where members of the public may receive advice in private;
- **an up-to-date record of the other main ombudsmen and other sources of advice.** Where a complaint is outside the Ombudsman's jurisdiction the Office will direct the complainant to the most appropriate source of help and advice;
- **a website** (www.ni-ombudsman.org.uk) which contains information about the role of the Office, lists the bodies within the Ombudsman's jurisdiction, provides 'hot links' to other ombudsmen/complaints bodies (where available) and provides a complaint form to help complainants make a complaint to the Ombudsman. **The Ombudsman will also accept initial complaints by e-mail** (ombudsman@ni-ombudsman.org.uk);
- **talks to interested groups** on the role of the Ombudsman;

- **information literature** - the Office supplies interested bodies and individuals with literature detailing the role of the Ombudsman and other ombudsmen/complaints bodies.

2.7 Support Services

The Department of Finance and Personnel (DFP) provides the Office with

- an administrative service in relation to routine payroll matters, advice on human resources and a welfare officer facility;
- accommodation services through Office Accommodation Branch and professional input to those accommodation services through Construction Service;
- the purchase of office equipment through Procurement Service and for which a service level agreement is in place.

As landlord, the Progressive Building Society provides the standard landlord services within the building on foot of the lease.

The Office employs external accountants to provide advice on resource accounts (Helm Corporation) and internal audit services (Beeches Management Centre). External audit is the responsibility of the Northern Ireland Audit Office.

Independent legal advice is provided as required by an external solicitor and independent medical advice is obtained from a retired senior medical practitioner.

The Ombudsman has authority to appoint any other necessary professional or technical advisers, e.g. medical, civil engineering, etc. that particular cases may require. A key issue in the appointment of such advisers is to ensure that they are independent of the public body under investigation. On occasions this necessitates appointment of advisers from outside Northern Ireland.

2.8 Interaction with Government Departments

The founding legislation provided DFP with a role in relation to the Ombudsman. On devolution this responsibility was transferred (by a Transfer of Functions Order) to OFMDFM with effect from 1 December 1999. The designated functions are:

- determining, by statutory order, the salary of the Ombudsman;
- approving staff numbers and conditions of service;
- approving the expenses of the Office; and
- promoting subordinate legislation under the relevant Orders e.g. amending the list of bodies covered by the Ombudsman or determining matters not subject to investigation etc.

OFMDFM is also responsible for taking forward any primary legislation required for the Office and monitoring any alterations to jurisdiction, which would flow from legislation proposed elsewhere by government departments.

In relation to staff matters the Office operates within the normal NI delegated authority in respect of staffing i.e. only posts above Grade 7 (Director) would require specific authority. Conditions of service are those of the Northern Ireland Civil Service and therefore do not require other specific authority,

In practice the Office deals directly with DFP Supply Division in relation to annual resource estimates and ongoing financial monitoring.

3. THE ORGANISATION AND PERFORMANCE OF THE OMBUDSMAN'S OFFICE

3.1 Introduction

In this stage of our work we gained an appreciation of the Ombudsman's Office and the associated operations and activities. We also achieved an understanding of the historic levels of performance of the organisation and this was essential to developing practical future structures and processes.

3.2 Handling Enquiries and Complaints

The Ombudsman's Complaints Process is detailed in Appendix IV.

The Office's caseload is based on two main areas of work (with administrative and secretarial support):

■ Advice and Information

Each year the Ombudsman's office receives numerous oral complaints and enquiries (by telephone and in person) on a variety of issues and concerns. In each case every effort is made to provide assistance, appropriate information or referral to the appropriate authority;

■ Complaints Handling

Written complaints are first examined to see whether they are within the Ombudsman's jurisdiction and, if so, whether there is prima facie evidence of maladministration and injustice. If neither applies, the complaint is not accepted.

In some, usually less complex cases, where there appears to be a genuine grievance, a detailed investigation will not be mounted until the Investigating Officer has contacted the responsible body to attempt to obtain an early resolution.

In recognition of the changes brought about by the development of complaints procedures in the public sector, a complaint is generally regarded as being premature if it is made before the relevant body has been given a meaningful opportunity to respond. In this circumstance a complainant is requested to forward their complaint to the Chief Executive of the relevant body. If the complainant is still unhappy at the response received they can then seek the intervention of the Ombudsman.

Where the informal approach is unsuccessful, where the evidence suggests a systemic flaw or where it is obvious from the start that an early settlement would be unlikely, the complaint is investigated in detail.

3.3 Number of Enquiries

Phone calls to the Office have risen significantly since 1996 and the number of interviews in the Office has stabilised in the past three years. Typically, phone calls can take around 10 minutes, but some can be much longer and personal interviews average some 30 minutes.

Table 3.1
Number of Phone Calls and Interviews 1996 – 2002/03

Year	Phone Calls	Interviews
1996	1340	21
1997	2010	153
1998/99	1254	132
1999/00	752	61
2000/01	1554	88
2001/02	2379	84
2002/03	2572	86

Source – The Ombudsman's Office

In 2002/03 641 telephone calls and 72 interviews related to bodies and matters within jurisdiction.

3.4 Number of Complaints

The number of written complaints to the Office has risen by some 26 per cent over 10 years. In more recent times, apart from 1997 (the result of a TV campaign) and 1998/99 (figures covered 15 months) the number of written complaints received per annum has averaged close to present levels.

Table 3.2
Number of Written Complaints 1996- 2002/03

Type	1996	1997	1998/99	1999/00	2000/01	2001/02	2002/03
AO	253	327	342	256	209	250	262
CC	384	432	387	308	292	303	298
HS	0	0	57	66	85	107	103
Total	637	759	786	630	586	660	663

HS = Health Service cases

Source – The Ombudsman's Office

The principal factors that have an impact on the workload of the Office are:

- the increasing public awareness of the right to complain;
- the increasing public expectation for detailed explanation of their case;
- the increasing public perception of a right to be interviewed during the investigation;
- the quality of the output of the Office;
- the “signposting” to the Office in the internal complaints processes of public bodies; and
- the general increasing public awareness of the existence of the Office and its standing.

The Northern Ireland Assembly did not create an undue workload increase in terms of direct impact as suspension occurred before any arrangements were put in place to take evidence on the work of the Office. However there was an increase, mainly at senior management level, in handling correspondence from Members subsequent to the issue of reports and in giving evidence to a number of Assembly Committees on wider issues.

3.5 Pattern of Complaints

The pattern of complaints over the most recent five years shows a broad level of consistency year on year in the main areas of work with the Miscellaneous element producing the main increase in number of cases.

The apparent levelling off of Health and Social Services complaints is important as this area of jurisdiction, effective from 1 December 1997, represents significantly complex and intensive casework. Planning cases are also developing in complexity. Personnel cases that focus on the handling of internal grievances or promotion also tend to be closely argued by complainants because of the very direct personal impact and the ready availability of background information. This trend has a consequential impact on the resources required to deal with such cases.

Table 3.3
Main Areas of Written Complaint 1998/99 – 2002/03

Type	98/99	99/00	00/01	01/02	02/03
Housing	138	123	122	115	99
Planning	63	85	46	74	72
Health	58	66	85	107	87
Personnel	156	99	110	115	110
Misc.	371	257	223	249	295
Total	786	630	586	660	663

Source – The Ombudsman's Office

3.6 Business Activity 2002-03

The Office's business activity during the year 2002-03 compared to the previous year is set out in Table 3.4.

Table 3.4
Office's Business Activity 2002-03

	2001/02	2002/03	%
Brought forward	89	130	+ 46.1
Complaints received	660	663	+ 0.5
Cleared without enquiry	295	280	- 5.1
Cleared after enquiry	217	244	+ 12.4
Completed and reported	81	97	+ 19.8
Settled	26	22	- 15.4
Carried forward	130	150	+ 15.4

Source – The Ombudsman's Office

3.7 Average Clearance Times

The average clearance times (weeks) taken from receipt of investigatable complaints to the issue of an Investigation Report are shown below.

Table 3.5
Average Clearance Times

	2001/02	2002/03
AO	14.5	18.4
CC	13.6	15.4
Health	16.1	21.6

Source – The Ombudsman's Office

The Office considers that the longer clearance times are indicative of the increasingly complex nature of complaints subjected to investigation together with deep commitment of the parties to be rightness of their cases.

3.8 Results of Cases Completed and Reported

The findings for the 97 cases completed and reported in 2002/03, compared with the 81 similar cases in 2001/02, are shown in Table 3.6.

Table 3.6
Findings in Cases Completed

	2001/02			2002/03		
	AO	CC	HC	AO	CC	HC
Reports	23	52	6	34	59	4
Maladministration	10	16	2	10	13	1
Settlements	10	16	2	9	11	1

Source - *The Ombudsman's Office*

3.9 Maladministration

In 2002/03, maladministration was found in 24 of the complaints accepted for in-depth investigation, a decrease of 4 (14.3 per cent) on 2001/02.

3.10 The Funding of the Office

The Office is funded by the Assembly (or the UK Parliament) by Vote on the same basis as a government department and is answerable only to the Assembly (or Parliament). As a result, the Office is not dependent on grant funding from any of the government departments or public bodies, which the Ombudsman has power to investigate.

Table 3.7
Office Funding 2002-03 and 2001-02

	2002-03 Actual £000	2001-02 Actual £000
Staff costs -		
Wages & salaries	539	471
Social Security costs	40	36
Other pension costs	80	70
Total	659	577
Other administration costs -		
Consolidated Fund charge*	134	117
Other	344	358
Total	478	475
Operating Income	-	-
Net Operating Costs	1137	1052
Staff numbers - wte	19.03	17.4

Source - *The Ombudsman's Resource Accounts 2002-03*

*This relates to the Ombudsman's salary, social security and pension costs, which are met by the Northern Ireland Consolidated Fund.

3.11 Audit

The Office's Resource Accounts for the past two financial years received an unqualified audit opinion.

Some difficulty was experienced by the Office in preparing the Resource Account for 2001-02 due to the availability of the external consultant. This matter and the need for better computer security were addressed in the external auditors management letter. Management responded positively to the suggestions for improvement. The management letter for 2002-03 is awaited.

The internal audit report for 2002-03 was completed in May 2003. It identified one Priority 1 Finding on Operational Procedures, nine Priority 2 Findings and six Priority 3 Findings. The only significant weakness identified was in relation to the need to expand the Finance Manual to include certain operating procedures and management has agreed to do so and has indicated that this will be completed by end January 2004. Other matters have been, or are being, addressed.

3.12 Corporate and Business Planning

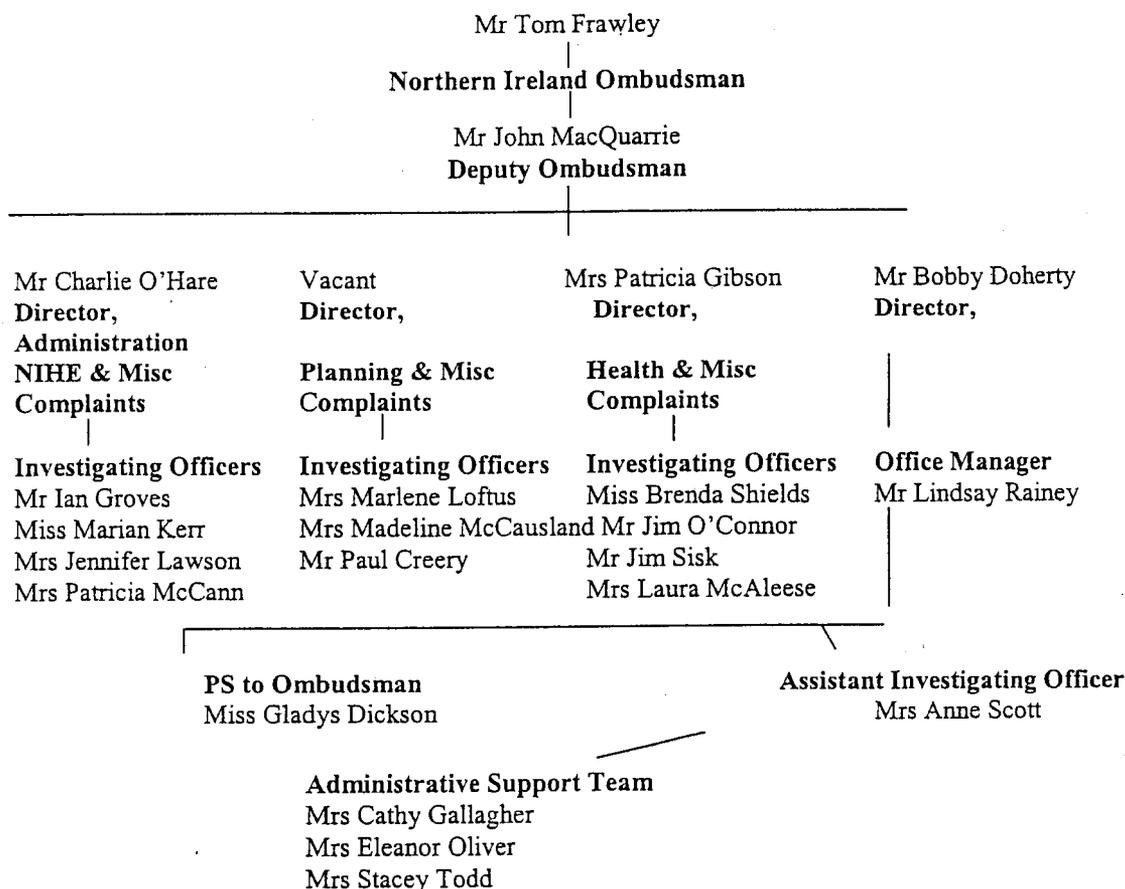
The Office has commenced work on a Corporate and Business Plan and this should be completed as soon as possible. There is broad acceptance by staff of the vision and ethos of the Office and it will be important to enhance this by developing a business planning culture. This will require staff involvement in the development of the Plan and ownership of the objectives and targets set. Forward job plans would have to be revised to reflect the overall Plan in personal objectives and targets.

3.13 Corporate Governance

The Ombudsman is the designated Accounting Officer. Good work has been done in preparing a Corporate Governance Statement and associated policies. An Audit & Risk Management Committee has been established. The senior management team meets each month and reviews all business matters.

3.14 The Office's Organisation

The present organisation structure is as follows:



We believe the organisational structure broadly meets present requirements and that the Directorates properly reflect the sectors that give rise to significant numbers of complaints. We comment later on the Administration team.

3.15 Workload Management

In 2002-03 the number of cases cleared by each directorate was Health 61, Housing 158 and Planning 133. The average number of cases cleared by investigators was 35 within a range of 22 to 53. This is by no means a scientific measure of workload or productivity but it does highlight the need for effective workload management.

In terms of the clearance of registered cases the following statistics are of interest.

Table 3.8
Clearance of Registered Cases

Timescale from Receipt	2002-03		April - Oct 2003	
	Cases	%	Cases	%
Within 3 months	205	58	114	59
3-6 months	68	19	40	17
6-9 months	27	8	18	8
9-12 months	30	8	17	7
> 12 months	24	7	21	9

Source - *The Ombudsman's Office*

At end October 2003 there were 56 cases more than 26 weeks old and these with the longest being 109 weeks old. Some 50 per cent of the cases were in the Health directorate reinforcing the complexity and sensitivity of these cases. The Senior Management Team formally reviews all cases each month. We recognise the arguments for ensuring the highest level of quality in clearing registered cases but we consider there is a need for more sophisticated performance measures to be adopted by the Office both for internal management purposes and for assuring complainants from the outset that their complaint will be dealt with thoroughly and expeditiously.

It is our view that whilst the database of information and the collation and production of casework statistics is well advanced, more use could be made of IT support in managing the initial sifting and subsequent tracking of registered cases. For example, with proper training and software support the administrative staff could input information direct to the database as calls are received. The possible recording of telephone calls should also be considered for training and monitoring purposes. These issues are worthy of more detailed examination by the Office.

Some staff also suggested that there needed to be proper account taken of down time in cases. The handling of 'protest' letters following a decision could be time-consuming and should be monitored. There should be a computer-assisted follow up to check that organisations have actually complied with the Ombudsman's recommendations.

We noted good support for the Office's approach to casework handing, described as 'cradle to grave'. This provides a reasonable mix of complex and less complex cases for investigators and ensures the complainant has one point of contact with the Office throughout. We also recorded a view from some staff that the initial screening of cases for investigation could be more robust in filtering out inappropriate cases and the Office should consider whether further measures are needed.

3.16 Manpower Levels

There is some substance in the view amongst the Investigation staff that similar posts in other jurisdictions are graded at a higher level - see Section 5. The complexity of the work has changed since the last job evaluation was carried out in 1992 and we consider a review is long overdue.

As noted above some staff feel that more resource should be committed to the initial screening of cases to ensure that resources were devoted to appropriate cases.

In addition to the need for a concentrated and continuing effort on casework, we noted that the finance and corporate services needs of the Office have grown considerably in recent times especially with resource accounting, the need to follow up internal audit reports, freedom of information, risk management and records management and disposal. There is a need for a new IT strategy for the Office and it is clear that there is little capacity to move on these within present resources. We also believe that the Office needs to develop an equity monitoring system that will help to establish its impact on society and assist in targeting promotional activity.

The Director of Administration post is temporary and is to be reviewed on the retirement of the present post-holder in May 2004. The implementation of this Report will also fall largely to the Administration team. There is an urgent need to decide on an appropriate structure and resource level for the future.

Our preliminary view is that a new corporate services structure on the following lines might be appropriate –

Director of Corporate Services (Grade 7)	
Staff Officer	Staff Officer Executive Officer 1
PS/Ombudsman	Administration Officers (3)
Ombudsman's Secretariat*	Customer Services, Finance & Office Management

*The Secretariat would be within the Corporate Services Directorate but report direct to the Ombudsman

This structure would result in the addition of 1 Staff Officer post at an annual cost of £35,000. This would meet the Ombudsman's view, with which we agree, that there is a case for an in-house research facility (presently contracted in), combined with a need to provide executive support for the Ombudsman in addition to secretarial services. One key task identified by the Ombudsman is to understand more clearly why certain groups do not use public sector complaints processes.

The loss of key staff on retirement over the next two years will add to the pressures and succession planning should commence now.

3.17 A Strategy for Human Resources

There is a high level of staff commitment to the Office and a dedication to operating in a fair and impartial manner at all times. The average length of service of those we interviewed was eight years and they consider there is a positive working atmosphere and practical support for training and personal development. They also feel that the fact that they are seconded civil servants has not compromised in any way the independence of the Office and this is borne out by our consultation with stakeholders.

We believe however that the Office should develop a human resource strategy and enhance its equality and diversity programmes. Job descriptions need to be prepared or updated. Recruitment to the Office has benefited from an assessment centre approach and the employment opportunity of working for a time in the Ombudsman's Office should be available to the wider public sector. Also there is a need to have an external panel of trained investigators that can be utilised on an ad hoc basis in line with any unforeseen increase in workload.

The Ombudsman applied in March 2000 under the Cross Border SME Recognition Scheme and with a score of 270-299 was awarded Silver recognition. The highest score was for quality systems and processes and below average scores were recorded on people satisfaction and impact on society.

The Office has not sought IIP accreditation but is using the EFQM model as their framework to drive quality management within the organisation.

3.18 Support Services

The Office needs to have in place transparent mechanisms for the supply of support services to enhance its separation from the executive. Notwithstanding the difficulty already experienced, the Office should put in place proper service level agreements with DFP on payroll management and advice on human resources.

The arrangements for contracting legal and medical advice commenced initially on an ad hoc basis but they have become essential support services for the Office and will continue to be so in the future. The Office should keep the nature of the relationship and the terms on which the services are retained under review.

We also enquired whether the Assembly Commission could be a possible provider of recruitment and support services to the Office in the future. There is a possibility in the medium term when the Commission is fully restored that this might prove beneficial and underpin the independence of the Office. The position should be kept under review.

4. AN AGENDA FOR CHANGE

4.1 Introduction

We set out below the issues forming an agenda for change in the Ombudsman's present arrangements.

4.2 New Legislation

The current legislative arrangement has its genesis in the creation of two separate offices in 1969. The Orders consolidated in 1996 effectively replicated the original legislation in terms of maintaining two separate legal Offices which causes confusion in the mind of the public and MLA/MPs about the identity and relevant jurisdiction of the Offices.

We were told that the Commissioner for Complaints role is not readily perceived as on a par with the Assembly Ombudsman i.e. some public bodies do not seem to recognise they could be called before an Assembly Committee on foot of a case referred to in the Ombudsman's Annual Report.

Our terms of reference ask us to consider the merits of a single and comprehensive legislative vehicle, combining both Offices and removing the present differential approach to jurisdiction, access for the public and ultimate remedy. A number of minor differences of jurisdiction would also need to be resolved e.g. the letting of contracts is not in jurisdiction for AO but is in jurisdiction for the CC.

4.3 MLA Sponsorship

One such issue is the current requirement for MLA sponsorship of the individual's complaint in Assembly Ombudsman cases which is said by some to be out of keeping with current thinking on access to remedy. The Commissioner for Complaints legislation ensures direct personal access by the aggrieved individual.

4.4 Different Final Remedies

The Ombudsman's conclusion in a case of maladministration is to make a recommendation as to remedy and we have been asked to comment on the present differential approaches.

Where a Government Department declines to implement a recommendation the Ombudsman would report the Department to the Assembly and it would then fall to MLAs as to how to take the matter forward – probably by way of a Committee hearing. This final recourse has never been used in Northern Ireland.

In a CC case, the complainant could go to the County Court and seek the award of damages in respect of "costs incurred and the opportunity lost". This recourse has not been utilised for many years and was primarily envisaged as a remedy in cases of discrimination in employment cases.

It also came to our attention during the conduct of the Review that in the case of General Health Service providers e.g. GPs, Opticians, Dentists etc. and Independent Providers e.g. an Independent Clinic, that recourse to the County Court is not available to the aggrieved person, This group of providers can disregard the CC's recommendation and it has also been identified that they can disregard the recommendations of the earlier Independent Review Stage of the HPSS Complaints Procedure.

4.5 Registered Housing Associations

Registered Housing Associations are coming into jurisdiction on 1 April 2004. There are some 40 associations and under the existing legislation all aspects of their activities, including employment matters, will come within the Office's remit. The Department for Social Development has been asked to co-ordinate an information programme through which the Ombudsman can meet the Associations, review their complaints processes and develop protocols and procedures that will facilitate interaction with the Office.

4.6 Assembly Standards Commissioner

As indicated in Section 2.3.1 above, the Ombudsman provided an investigation service to the Committee on Standards and Privileges on an ad hoc basis until the Assembly was suspended in October 2002. It is anticipated a reconvened Assembly would put this role on a formal legislative footing.

4.7 Local Authority Standards Commissioner

There is an acknowledgement on the part of the Department of the Environment, which has lead responsibility for local government in Northern Ireland, and others that if the present voluntary code of local government conduct were to become mandatory, the Ombudsman might be a viable option in the possible models needed to monitor standards and have the additional merit of providing a uniform approach standard for elected representatives at Local and Assembly level.

4.8 Employment Matters

We were invited to consider the appropriateness of retaining wide-ranging employment and employment related issues as they affect public and civil servants, within the Ombudsman's jurisdiction. The original provision was an initiative to address perceived religious discrimination in employment when the Offices were established in 1969.

4.9 Challenging Merits of Decisions

The current legislation precludes the Ombudsman from questioning the merits of discretionary decisions in the absence of maladministration other than in cases involving clinical judgement. However, many complaints, such as those in Planning, centre on such decisions.

The Ombudsman asked us to consider in cases where the decision appears to be of questionable quality, whether it would be more in keeping with public perception of modern standards of service for the Ombudsman to be able to examine a range of circumscribed discretionary decisions.

4.10 Systemic Reviews

The UK and French Ombudsmen alone within the European Community are precluded from initiating a review of any particular area of public administration where concerns may have been identified but about which a specific complaint from a directly affected individual must be received before an investigation can be undertaken.

We were told this is an issue which arises from time to time where elected representatives or concerned individuals bring a set of circumstances to the Ombudsman but have to be advised that, in the absence of a complaint from a directly affected person, he has no locus to query a trend or pattern of complaints that suggest a wider review is warranted.

4.11 Following Public Funds

We were also invited to consider whether the Ombudsman's jurisdiction, like that of the Comptroller & Auditor General, should follow public funds through to the relevant administration. At present major areas of expenditure such as Colleges of Further Education, Local Management of Schools and the Universities are outside jurisdiction.

4.12 Health Services Complaints

We were advised that the current review of the Health Service Complaints Procedure might alter the process by deleting the current element of Independent Review from the process. If Independent Review were removed the Ombudsman would be likely to receive a number of complaints, which have not been tested at the Health Board level within the HPSS. A number of these complaints could require him to engage independent professional advisers with a potential impact on investigation times and on the overall cost of investigating complaints that are already the most complex, time intensive and expensive investigations.

4.13 Justice Functions

The Ombudsman considers that the transfer of responsibility for Justice issues to the NI Assembly could have a significant impact on his Office. Such a transfer would bring the Probation, Prison and Youth Justice Services within jurisdiction. The remit of the GB Prisons Ombudsman, who operates from within the Home Office, does not cover Northern Ireland.

Prior to the introduction of Direct Rule in 1972 the Office had prison complaints within its jurisdiction. However the developments in individuals' rights and heightened expectations of complaints investigation in the interim would imply that this extended jurisdiction could impact significantly on workload. Such a transfer could also bring the office of the Police Ombudsman within jurisdiction as envisaged in the Hayes Report, which preceded the setting up of that office. This would represent a further addition of a sensitive and potentially contentious area of responsibility.

4.14 Use of the Title 'Ombudsman'

The use of the title "Ombudsman" is protected by law within some countries e.g. New Zealand and Malta. The description can only be used with the permission of the Ombudsman who has been established by Parliament. This is to prevent offices that do not have the requisite level of independence and powers of examination from taking the title and diluting the impact of what was intended by Parliament as a title synonymous with the final level of recourse outside the judicial remedy for the individual citizen.

We were asked by the Ombudsman to consider whether the permission of the Northern Ireland Assembly should be needed for the use of the title locally.

5. BENCHMARKING WITH OTHER PUBLIC SERVICES OMBUDSMEN

5.1 Introduction

We examined the roles of the Ombudsman and compared these with similar offices in the British Isles. Whilst we are aware there is no direct comparator to the Ombudsman the exercise sought to report on the roles, functions and structures of the offices and provide comparable performance and activity information where possible.

5.2 Arrangements in England

5.2.1 The Parliamentary Ombudsman

The Parliamentary Ombudsman looks into complaints from members of the public, which must be referred by MPs, about maladministration by government departments and other public bodies. She also investigates complaints about problems in obtaining access to government information. In addition to England, her jurisdiction extends to government departments and public bodies exercising reserved functions in Northern Ireland, Scotland and Wales.

The Parliamentary Ombudsman is independent of Government. She is a Crown Servant, appointed by Her Majesty The Queen, and reports to Parliament. The Select Committee on Public Administration oversees the work of her office. She is Accounting Officer for the organisation and staff are employed directly. She has the powers of the High Court to obtain papers and interview anyone she wishes for the purposes of an investigation.

5.2.2 The Health Services Commissioner

The same person has always held the position of Health Services Commissioner and the Parliamentary Ombudsman. She is able to review complaints of maladministration against the NHS and since 1993, the care and treatment of patients and the actions of family health practitioners. Over 90 per cent of the claims now received refer to clinical matters. There is no requirement for sponsorship of complaints by MPs. Staff are employed directly.

5.2.3 The Local Government Commission

There are three Local Government Ombudsmen in England who investigate complaints against local authorities, education appeal committees, housing action trusts, police authorities and a range of other bodies providing local services. Similar arrangements apply to appointments, tenure of office and the ability to rely on High Court powers to obtain written and oral evidence. Staff are employed directly.

Most of the complaints relate to local authorities and can cover housing, housing benefit, planning, social services, school admission appeals and special educational needs.

The Local Government Ombudsmen also have a role in disseminating guidance notes on good practice on complaints handling. They have been working with the Audit Commission relating to Comprehensive Performance Assessments for County and local authorities. A pilot scheme commenced for district councils.

The Commission for Local Administration has the most developed corporate and business planning process with goals on volume, cost and speed of casework. Quality standards for staff are also set through a new performance framework.

Investigation staff in the Commission for Local Administration are paid in the salary range £27,420 - £34,413, similar to the Deputy Principal grade in Northern Ireland.

5.2.4 Policy Developments

Following the Colclough Report in 2000 the Government announced its intention to promote legislation in due course to bring together the existing Ombudsmen to provide an integrated service. Several Ombudsmen would serve together in a new collegiate structure. MP sponsorship of complaints to the Parliamentary Ombudsman may not be required. The Select Committee on Public Administration has been critical of the delay in bringing forward the necessary legislation but there is unlikely to be movement on what would be a major piece of legislation in this Parliament.

In the interim consideration is being given to some modest legislative change to promote joint working between Ombudsmen. The Parliamentary Ombudsman/Health Service Commissioner and the Commission for Local Administration now share the same office in central London.

5.3 Arrangements in Wales

Government decided in March 2003 to combine the work of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales and the Commissioner for Local Administration in Wales. New primary legislation is needed to establish the Public Services Ombudsman for Wales (PSOW) and public consultation ends in December 2003.

As an interim measure arrangements are in hand to enable the functions of the three posts to be held by the same individual. The Parliamentary Ombudsman will continue to have jurisdiction on matters reserved to the Westminster Parliament.

Final decisions on the scope and functions of the PSOW will be made in due course. It is possible that the PSOW could:

- have extensive coverage of public bodies in Wales;

- continue to exclude from jurisdiction, personnel matters and commercial transactions;
- retain jurisdiction substantially based on investigating complaints of maladministration (and 'service failure' in health matters) – no sponsorship of complaints will be required;
- restrict challenges on the merits of decisions to clinical judgement only;
- be empowered to assist potential complainants to prepare their complaints;
- issue advice and guidance about good administrative practice following investigations into systemic weaknesses arising from complaints;
- facilitate the resolution of complaints by appropriate means without the need to issue a formal report in every case; and
- retain similar provisions on redress.

The appointment of the PSOW will be by the Crown with provisions on security of tenure during a fixed term. The PSOW will be Accounting Officer and staff will be employed directly. Decisions will be made soon on organisational structure and staffing levels/grades in the PSOW.

5.4 Arrangements in Scotland

The new Scottish Public Services Ombudsman (SPSO) commenced in October 2002. The bodies within jurisdiction cover the Scottish Parliament, Scottish Administration, Health Service, Local Government, Housing and a wide range of other public bodies and tribunals (administrative actions of staff only).

It is not a one-stop shop as other bodies exist e.g. Parliamentary Ombudsman for matters reserved to the Westminster Parliament, Parliamentary Standards, Ethical Standards, Police, Information, and there are plans for Children and Human Rights Commissioners.

Complaints of injustice or hardship can be considered about poor service, failure to provide a service, administrative failure and complaints about the NHS. Complaints are no longer required to be sponsored by MSPs. Excluded are properly made decisions, complaints that could go to a court or tribunal, personnel issues, and most commercial or contractual matters.

There is explicit authority to achieve informal resolution of complaints and to carry out systemic reviews related to casework.

The SPSO and her three part-time deputies are appointed by the Crown on the nomination of the Scottish Parliament. The Ombudsmen hold appointments for 5 years and normally no longer than two consecutive terms will be permissible with retirement at 65.

The Scottish Parliamentary Corporation determines remuneration and resources. The SPSO is Accounting Officer for the organisation. Staff are employed directly.

The first year has been one of concentration on amalgamating the offices into one, finding accommodation, resolving structure and grading issues, developing a comprehensive complaints handling process and purchasing new IT systems with considerable associated training.

The current year will see an increased attention on corporate and business planning and enhancing the accessibility of the service. The Ombudsman is taking on responsibility for the independent review level of complaints against the Health Service and additional staff are being recruited.

5.5 Arrangements in the Republic of Ireland

The Ombudsman is appointed by the President on the passing of a resolution by both Houses of the Oireachtas. She holds office for a period of 6 years and has security of tenure – retirement at 67. The Director General is the designated Accounting Officer for the organisation.

The Ombudsman also carries out the separate functions of Information Commissioner and Referendum Commissioner and she is a member of the Standards in Public Life Commission.

Following preliminary examination the Ombudsman can investigate an action 'that has adversely affected a person' and has been taken without proper authority, on improper grounds, the result of negligence and carelessness etc. She has authority to initiate her own investigations.

Exclusions from jurisdiction apply where the matter is before the court, there is a statutory right of appeal to the courts, there is an appeal to an independent appeal body, or the matter relates to recruitment or employment etc. Clinical judgement in health matters is excluded from remit

The Ombudsman employs staff directly. The Office is developing a new Corporate Strategy and has established a comprehensive Human Resources Strategy. The investigators grade is equivalent to the NI Deputy Principal level.

5.6 Workload Comparisons

A comparison of the Office's workload etc with other public services ombudsmen is set out in Table 5.1.

We are conscious that this comparison can only be of broad interest given the different scale, jurisdiction and complaints processing models utilised by the various organisations. We do believe however that the comparison with Wales could be a more productive one. Bearing in mind the more restricted jurisdiction there, the figures may nevertheless raise the need for a debate about the efficiency and cost effectiveness of the NI Office in terms of manpower numbers compared to workload, and this needs to be taken forward by the Office.

Table 5.1
Workload Comparison with Other Public Services Ombudsmen

Ombudsmen	Number of Enquiries	Number of Formal Complaints Received	Annual Budget £m	Staff Numbers wte	Cost Per Formal Complaint £
Local Government – England	15000	17610	11.67	209.3	663
Parliamentary Ombudsman – England	14381	2015	6.45	79.5	3200
Health Service Commissioner – England	102	3999	8.87	58	2218
Republic of Ireland	8501	3209	2.2Euro	31.5	685 Euro
Local Government – Wales	941	931	1.04	17.1	1117
Northern Ireland	2658	663	1.04	20	1569

*Information on Scotland is not available in this form.

Source – British & Irish Ombudsman Association [BIOA] (except final column)

The following table also shows in comparison to other organisations that the NI Ombudsman betters most others in terms of the average time taken to determine complaints and issue reports. There is however a higher percentage of cases cleared in +26 weeks, which the Office suggests is due mainly to complex planning and health cases. The NI Ombudsman also has the lowest percentage of complaints upheld. This could be explained in a number of ways. For example, it might suggest, as mentioned earlier in this report, that the initial assessment of cases could be more robust. On the other hand if as has been mentioned to us the Ombudsman exercises his discretion in favour of some degree of investigation notwithstanding an apparently weak prima facie complaint, it would follow that the Ombudsman would uphold a lower percentage of cases. It might also suggest that public bodies in Northern Ireland are more thorough in their handling of complaints in the earlier stages. The Office will wish to pursue these comparisons in more detail in their follow up to this report.

Table 5.2
Comparison of Performance Indicators

Ombudsmen	Percentage of Complaints Determined within 13 weeks/14-26 weeks/27-52 Wks	Average Time –Complaints Determined Weeks	Average Time to Issue Reports Weeks	Complaints Upheld in whole/part %
Local Government – England	53.9/24.5/15.1	15.5	52.6	32
Parliamentary/ Ombudsman – England	88/3/6	31	40	85
Health Service Commissioner – England	N/A	N/A	64	19.1
Republic of Ireland	33.8/21.2/24.7	27	N/K	47.6
Local Government - Wales	79.6/16.5/ 3.7	8	17.6	16.2
Northern Ireland	57.9/19.2/16.1	10.2	17.3	10.8

*Information on Scotland is not available in this form.

6. CONSULTATION WITH KEY STAKEHOLDERS

6.1 Introduction

We relied on Customer Attitudes Surveys carried out for the Ombudsman to give us a customer's perspective. We conducted an extensive consultation process on a one-to-one basis with key stakeholders – see Appendix V - to ensure that the review was fully informed of all relevant matters and to begin the process of preliminary consultation on the nature of the possible changes.

6.2 Customer Attitude Surveys

The Office carried out Customer Attitude Surveys in 1996 and 1998 and responded to the findings, which were largely positive. A further survey is planned during 2004.

In June and July 2003 Research & Evaluation Services carried out a survey on public attitudes and knowledge of the Northern Ireland Ombudsman as part of the Northern Ireland Social Omnibus Survey. The Executive Summary is at Appendix VI. The key findings were that public awareness of the Ombudsman was very high at 85 per cent with awareness levels higher among the better educated and higher social classes. 57 per cent knew the role of the Ombudsman and equal numbers (47 per cent) were either satisfied or dissatisfied with how the Ombudsman handled their complaint – an outcome largely dictated by the decision on the complaint. Fifty-nine per cent of respondents perceived the Ombudsman to be independent of government with 27 per cent believing that the Ombudsman was part of government. Just 26 per cent know that if the complaint is against a government department the Ombudsman should be contacted via an MLA.

6.3 The Ombudsman

The Ombudsman and his Office are highly regarded by key stakeholders and the main points made were:

- the Ombudsman has an essential role to play in improving standards of service in the public sector;
- the Ombudsman's investigative process is considered to be thorough and the findings generally acceptable;
- no one raised any question about the impartiality and fairness of the Ombudsman and most pointed to the need to retain, and enhance if possible, the independence of the Office;
- some stakeholders have issues over the time taken by the Ombudsman to complete investigations but understand that many of the cases are complex and sensitive;

- a few commented that they could be kept better informed of progress in cases – once a reply is given it could be a considerable time before there is any further engagement;
- many review the Ombudsman's Annual Report for trends on complaints and welcome the feedback on good practice;
- whilst recognising the quality of staff in the Office a number of stakeholders considered that the employment opportunity in the Office should be available to the wider public service;
- some also queried whether there was sufficient training on legal skills to enable staff to cope with the greater complexity of cases;
- many commented on the willingness of the Ombudsman to expand the awareness of the Office and some considered that there should be a structured annual outreach programme.

6.4 Comments on Possible Changes

Stakeholders were invited to comment on the possible changes to the Ombudsman's scope and jurisdiction and to introduce any other issues. The following is a summary of comments:

- dealing with complaints of maladministration is and should remain the Ombudsman's core business and we should be careful about proposing significant extensions to the role that would detract from a concentration on casework;
- the prior consultation on the addition of registered housing associations to the Ombudsman's jurisdiction in April 2004 has been exemplary and planning for their introduction is well advanced;
- there is no support amongst stakeholders for altering the basis tests of maladministration and injustice;
- the amalgamation of Offices and a single legislative vehicle is well supported;
- the Standards Commissioner role would be re-activated on an ad hoc basis once a working Assembly is established and subsequently legislated for in an Assembly Standards Bill;
- there is general recognition that the Ombudsman could perform a similar role as a local government standards commissioner if the code of conduct becomes mandatory but there are no plans for early legislation in this regard, but some pointed to the scale of such an operation and the capacity of the Ombudsman to properly carry out the task;
- the views on MLA sponsorship for Assembly Ombudsman cases vary considerably with political opinion broadly in support of retention and most others in favour of removal;

- the views of stakeholders about the Ombudsman's present jurisdiction for employment matters are finely balanced with most recognising that there continues to be a significant number of complaints each year;
- the majority of stakeholders oppose any proposal that the Ombudsman should be able to challenge the merits of discretionary decisions, other than clinical judgement which is within scope. We were informed that Third Party Appeal in planning cases is under active consideration;
- there is general support for the Ombudsman having a power to initiate systemic investigations but only if there is sufficient evidence arising from casework and provided there is no duplication with other organisations, such as the Comptroller and Auditor General;
- the presumption should be that all public sector organisations must be within scope with any exceptions being justified by the existence of an independent review process for dealing with complaints in excepted organisations;
- whilst clearly a matter for the UK Government, it is possible that responsibility for Justice matters could be devolved in the lifetime of the new Assembly;
- the Review of Public Administration should bring some rationalisation to public services but without a significant impact on the Ombudsman's workload.
- it is possible following public consultation in early 2004 that the independent review stage of Health & Social Services Complaints Procedures will remain albeit in a different process;
- we were also informed that Independent Case Examination is working effectively in social security and child support in Northern Ireland and could usefully be extended to other bodies;
- some commentators said that Northern Ireland needs a single gateway for public sector complaints. Research carried out for the Review of Public Administration describes general public dissatisfaction with public sector complaints processes and there is reasonable support for the Ombudsman having a role in auditing those processes and ensuring best practice;
- Alternative Dispute Resolution mechanisms are not well developed in Northern Ireland and there is no early prospect of any initiative between the courts and the Ombudsman in promoting mediation cases;
- there was concern on the part of some stakeholders on the issue of vexatious complainants and the possible involvement of the Ombudsman was raised.

7. A WAY FORWARD

7.1 Introduction

We have examined the projected levels of activity that might derive from implementing the range of changes being considered. We modelled the possible impact on complaints cases; reports and associated activities that might arise based on both our benchmarking and the stakeholder consultation processes. We consolidated all the previous work into a comprehensive appraisal that identifies a preferred way forward for the Ombudsman.

7.2 Issues of Scope

7.2.1 New Legislation

We consider that there is a strong case for a single Office of the Northern Ireland Public Services Ombudsman under the law, reporting to the Northern Ireland Assembly on all areas within jurisdiction. This would require primary legislation.

The Office is presently operated as one unit and there would be no tangible benefits in terms of cost savings. There would be considerable administrative benefits in simplifying processes and in promoting the Office to the general public.

7.2.2 MLA Sponsorship

In England the Collcutt Report in 2000 commented on the question of MP sponsorship of cases to the Parliamentary Ombudsman –

“We believe that the MP filter can no longer be sustained in the era of joined up government and we strongly recommend that it is abolished”.

Government expressed support in principle for the Collcutt Report and indicated that legislation would be promoted in due course. However that legislation has not been forthcoming and is unlikely to emerge in this Parliament. The MP filter remains and there are conflicting views on whether removal would now be supported by a majority of MPs.

In Scotland the legislation setting up the new Ombudsman service removed the need for MSP sponsorship of complaints. There is no requirement for sponsorship of complaints by elected representatives in Wales or in Ireland.

MLAs currently sponsor some 40 per cent of the complaints lodged with the Ombudsman each year. In our stakeholder consultation there was majority support for removing the requirement for MLA sponsorship of complaints in the interests of freeing up direct access to the Ombudsman.

Political opinion however was broadly in favour of retaining sponsorship and in ensuring no diminution in the important constitutional role of elected representatives in seeking redress for their constituents.

We believe there is a balance between these points of view. Removing MP/MLA sponsorship does not necessarily remove the elected representative from the process. It would however remove a mandatory step in the citizen's access to the Ombudsman but many may still prefer to go to their elected representative and this could be encouraged in any new arrangements. The intention of the Ombudsman is to have a wide and meaningful engagement with the Assembly and MLAs – see 7.4 – and to utilise their good offices in supporting his work and in enhancing the accountability of the executive. This could provide a more meaningful and productive way of involving MLAs generally.

We suggest therefore that the way forward should be to allow a complainant to deal direct with the Ombudsman or to authorise an MLA to do so on their behalf. In the latter case the Ombudsman would deal directly on the complaint with the MLA as at present. These provisions, combined with a clear explanation of the role the Assembly and its MLAs should play in support of the Ombudsman's Office, might be persuasive.

Removal or retention of MLA sponsorship would have no direct impact on the Office. There could be an indirect impact if the number of complaints were to increase as has happened recently in Scotland and in England in 1984 when councillor sponsorship was removed from complaints to the Local Government Ombudsman. This would however be impossible to quantify.

7.2.3 Registered Housing Associations

There are some 40 registered housing associations, employing over 1500 staff and with 25,000 houses in management. The 8 largest associations manage 70 per cent of the houses. Some 3300 special needs tenants are supported in accommodation. A complaints scheme managed by the Department of Social Development (DSD) has been in place since 1994.

The associations come within the scope of the Commissioner for Complaints on 1 April 2004. The Ombudsman has commenced an awareness and information programme for directors, managers and staff of the associations and their tenants.

Statistics from DSD show a relatively low level of activity on the complaints scheme:

Table 7.1
Complaints Under DSD Scheme

	2002	2003 (9 months)
Total Contacts	26	27
Complaints Received	14	7
Refused as internal complains procedures not exhausted	6	4
Investigations	8	3

Source – DSD

Complaints cover anti-social activity, housing allocations, housing transfer and house sales. Employees of the Associations will now have an additional remedy for employment matters and this could add to the present number of complaints. The Ombudsman has decided to allocate this new work to the Housing Directorate and to cover it within existing resources. We agree but the position should be kept under review.

7.2.4 Assembly Standards Commissioner

The probability is that Ombudsman's role as Assembly Standards Commissioner would re-commence on an ad hoc basis once a working Assembly is in place and Statutory Committee business has resumed. New legislation on the lines of the former Assembly Standards Bill could be in place within a further six months.

In October 2001 the Ombudsman accepted the Speaker's invitation to investigate complaints made to the Standards and Privileges Committee on a case-by-case basis pending legislation. The Ombudsman reported to the Committee on 28 June 2002 that there had been 3 cases, 2 had been withdrawn and 1 report had been made. The Ombudsman and his deputy had handled the cases and spent 25 hours on them. The Committee was happy for other investigation staff to be involved in future and noted that the Office's computer security system had been enhanced to ensure confidentiality of the paperwork. 2 other cases lapsed when the Assembly was suspended in October 2002.

There were too few cases to form any basis for future planning. The sensitivity of handling such cases is obvious and a new section would probably be warranted in due course, especially if local authority and public appointee standards were brought within jurisdiction at a later date. In the interim the external panel of trained investigators – see section 3.17 – could be utilised in support of the Ombudsman if there was a sudden increase in workload. However, we could not recommend any new organisation or additional resources at this stage. The level of business should be kept under review.

7.2.5 Local Authority and Public Appointees Standards

There is little likelihood of any early moves on new legislation to establish an Ethical Standards regime for local government elected representatives in Northern Ireland, as applies in the rest of the United Kingdom. It may be that this will be considered in the medium term. We note that the Department of the Environment does not collect statistics on the present level and nature of complaints against the conduct of local councillors.

Similarly there are no proposals to legislate for a standards regime for public appointees to NDPBs in Northern Ireland, as has happened in Scotland.

Some concern was expressed to us about the scale of the task faced by a single commissioner of standards in investigating allegations of misconduct of all elected representatives and public appointees. The number of such offices is over 1500. However we believe that in principle the Ombudsman could take on such a task and this could be justified in terms of both equity and uniformity of approach and the efficient use of resources. Other models are possible and the position should be reviewed at the appropriate time.

7.2.6 Employment Matters

The NI Ombudsman is unique amongst Ombudsmen in the British Isles in continuing to have a jurisdiction for employment matters. The debate on the retention or removal of employment matters from jurisdiction is finely balanced.

A number of stakeholders suggested to us that continued jurisdiction is now inconsistent with the full range of specific remedies developed since 1969 e.g. equality, employment and human rights legislation and the creation of the Pensions Ombudsman service. In particular, it is argued that recourse to the Ombudsman gives public servants in Northern Ireland, but not those under the jurisdiction of the Parliamentary Ombudsman, an additional avenue of complaint over and above all other citizens in relation to employment and recruitment matters. This is considered to be inconsistent with equality and does not acknowledge the development of a refined industrial relations infrastructure within the public sector.

However those in favour of retention of the jurisdiction point to the number of cases considered each year by the Ombudsman where maladministration is found and where they believe no other remedy is available. They also argue that the conclusions of the present Review of Public Administration could lead to a significant upheaval in public sector employment and it would be insensitive and inappropriate to remove the present remedy.

The cases examined by the Office have averaged 111 in each of the last three years. Of these, 64 per cent were in respect of complaints that were internal to organisations and the remainder focussed on recruitment competitions, which had been open to public advertisement and competition.

The following table shows the level of business on employment matters in the past three years:

Table 7.2
Employment Cases Received 2000-01 – 2002-03

	Recruitment	Discipline/ Grievance	Promotion	Pension	Other	Total
00-01	38	42	11	1	19	111
01-02	37	38	16	0	22	113
02-03	43	23	5	2	34	109
Total	120	103	32	3	75	333

Source – The Ombudsman's Office

Table 7.3
Closed by Investigation Reports

	Recruitment	Discipline/ Grievance	Promotion	Pension	Other	Total
Upheld	10	2	2	1	3	18
Partially Upheld	4	6	1	0	0	11
Not Upheld/ Criticism	7	1	4	0	1	13
Not Upheld	13	7	10	0	1	31
Total	34	16	17	1	5	73

Source – The Ombudsman's Office

Over the three-year period the Ombudsman upheld some 5.4 per cent (18 cases) of the total number of complaints received. He partially upheld a further 11 cases and offered criticism in 13 cases. In total these accounted for 12.6 per cent of cases received. It has not been possible on the information presently available to us to establish the equality aspects of the present jurisdiction.

We are mindful that the essential role of the Ombudsman is to give redress to the citizen against the administrative action or inaction of the Executive. We also recognise the equality implications of the jurisdiction and agree that public and civil servants should not remain in an advantageous position on employment matters compared with other citizens. One option would be to limit the Ombudsman's jurisdiction to publicly advertised competitions by public bodies and government departments. However we consider there are sufficient remedies available to deal with most of the cases that come to the Ombudsman and we recommend the removal of employment matters from jurisdiction, subject to the outcome of an equality impact statement.

If the jurisdiction were totally removed then the direct saving in investigators would be 2 wte or 18 per cent of the existing complement with further savings on administrative time. If the recruitment jurisdiction only were retained then the saving would be 1 wte or 9 per cent of the investigators' complement. There would be other indirect savings on the administration of the Office.

7.2.7 Challenging Merits of Decisions

There is virtually no support from stakeholders for the lifting of the blanket ban on the Ombudsman investigating discretionary decisions where no maladministration has been identified. This is a longstanding and common feature of Ombudsmen's schemes in the British Isles.

We are aware that the Ombudsman feels that such a challenge would be useful in some of the planning cases that come before him. We were informed by the Planning Service of the current work in considering whether a Third Party Appeal system should be introduced in Northern Ireland. An initiative such as this could go some way to alleviating the Ombudsman's concerns.

We consider that, with the exception of the present provision in health service cases, the Ombudsman should continue to be concerned with faulty administration rather than the merits of decision-making. The Ombudsman is not an alternative to the courts, tribunals or to ministerial appeal or other authorities that are empowered to examine discretionary decisions.

7.2.8 Systemic Reviews

The Ombudsman considers that it would be in the public interest if he had authority to initiate an investigation on a more comprehensive basis than an investigation of a complaint from an individual where he had cause, reflecting facts disclosed by a normal investigation, that there was a potential systemic problem with that area of public policy or service delivery.

Most stakeholders supported this proposal but with provisos. The possible duplication with the work of the Comptroller and Auditor General was an issue as was the capacity of the Ombudsman to undertake such reviews. We believe that there should be full consultation and agreement with the C&AG before the Ombudsman commenced a review. We also suggest that there could be a number of ways in which such reviews could be progressed. The Ombudsman could invite the organisation to take forward a review and keep him informed. He could invite experts to conduct a review on his behalf. In any event the Ombudsman's in-house resource would be related to the overall control and direction of such work.

There would a cost associated with an authority to initiate systemic investigations. We suggest that this function could be accommodated within our recommendation for a research capacity and the desirability of providing direct executive support to the Ombudsman – see 3.16.

7.2.9 Following Public Funds

We support the general principle that organisation's substantially funded from public monies should be within the Ombudsman's jurisdiction unless they are explicitly excluded. Such exclusions would have to be justified on a case-by-case basis and under current legislation the gatekeeper role is the responsibility of OFMDFM.

Bodies such as the Equality Commission and others use the specific designation of organisations in the Ombudsman's legislation as the basis for defining public bodies within their remit. We consider this is a transparent process that should remain.

We have mapped the public bodies presently within the Ombudsman's jurisdiction and those outside. The vast majority of bodies are already within jurisdiction but there are a number of exceptions such as the Assembly Commission and the Northern Ireland Audit Office which is in contrast to the position in Scotland. Those that need to be reviewed against the principle we have suggested are:

- further education colleges;
- local management of schools;
- universities;
- bodies such as:
 - The General Teaching Council for Northern Ireland;
 - Northern Ireland Higher Education Council;
 - Northern Ireland Council for Integrated Education;
 - Integrated Education Fund;
 - Northern Ireland Water Council;
 - Northern Ireland Economic Council;
 - Drainage Council;
 - Historic Buildings Council;
 - Historic Monuments Council; and
 - Armagh Observatory and Planetarium.

Each of these should be considered afresh with a view to inclusion in list of bodies within the Ombudsman's jurisdiction, and by extension the jurisdiction of the Equality Commission and others. Any new additions to the Ombudsman's jurisdiction are likely to be minimal and associated casework could be absorbed within existing resources.

OFMDFM should have a role to ensure in the longer term that the relevant Department address this issue when creating new bodies.

7.2.10 Health Service Complaints

The Ombudsman recognises that he could be affected by the wide-ranging HPSS Complaints Procedure Review and has drawn attention to the potential workload and resource implications of any changes to the HPSS procedures or structures. He believes it is also important to note the opportunity offered by the Independent Review for Boards to test how services they are commissioning are performing.

We agree that removal of Independent Review could potentially double the Ombudsman's present workload on Health Service complaints. Consultation on the Review is about to commence and will be concluded early in 2004. Decisions will be made following consultation but at this stage we believe it is unlikely that Independent Review will disappear or that the Ombudsman will be invited to take on an independent review function. We have not therefore considered any change to the status quo.

We refer in Section 4.4 to the case of General Health Service providers and Independent Providers where the final remedy of recourse to the County Court is not available to the aggrieved person. This issue must be resolved in the drafting of new legislation for a single office of Northern Ireland Ombudsman.

7.2.11 Justice Functions

Timing on the devolution of Justice functions is uncertain but when it happens all justice bodies currently within the scope of the Parliamentary Ombudsman would come within the Northern Ireland Ombudsman's jurisdiction. The reality is there have been a small number of complaints from these bodies (2 in 2002-03) in recent years. The employment jurisdiction if it was still in place when devolution of justice functions happened, might add some business but again this could be accommodated within existing resources.

Whilst this would be a matter for the devolved administration the consensus is that there would be no major change to the justice regulatory machinery in the period following devolution.

7.2.12 Use of the title 'Ombudsman'

This is a matter that would fall within the jurisdiction of the Assembly. Any move to restrict the use of the title would conflict with the present position of the Parliamentary Ombudsman and the Northern Ireland Police Ombudsman. We believe that the designation of the present Ombudsman as "Northern Ireland Public Services Ombudsman" would give sufficient emphasis to the new Office.

7.3 Procedures and Remedies

We support the Ombudsman's suggestion that in new legislation a uniform approach to minor differences of jurisdiction in existing legislation for the two Offices should be resolved by utilising the existing jurisdictional remit of the Assembly Ombudsman e.g. commercial and contractual matters would not be subject to investigation.

The Ombudsman's preferred option as to the final sanction would be for the emphasis to be placed on the central role of the Assembly in terms of public administration and the existing Assembly Ombudsman recourse to make a Special Report extended to cover all cases. Should this approach be held to infringe the autonomy of any public body, he suggests that the preferred alternative would be for that public body to be required to publish in nominated local newspapers a notice detailing the case and describing the Ombudsman's findings and conclusions in a content and format that would be approved by the Ombudsman.

Within Great Britain, we are aware that the Local Government Ombudsman has had the sanction of requiring local authority to publish in the press the fact that an adverse report has been disregarded. There would be some evidence that this is not a particularly effective sanction if the public body has taken a determined stance against the Ombudsman's findings. In Northern Ireland the involvement of the court is unique within the traditional Public Sector Ombudsman model however it may provide an appropriate and relevant recourse within the context of ECHR legislation. It has also been effective.

We support the Ombudsman's option which would reinforce the centrality of the Assembly but we believe that the involvement of the court should be retained as a remedy for complainants in cases involving local government.

7.4 The Northern Ireland Assembly

We believe that in future the appointment of the Ombudsman should continue to be made by Her Majesty The Queen but following a resolution of the Northern Ireland Assembly. Tenure should continue to be guaranteed as at present although we would suggest for the future, fixed term appointments of say five years with the opportunity for renewal, except on grounds stated in the legislation. There should be an independent method of determining the Ombudsman's salary.

We believe that further measures should be adopted to bolster the independence of the Ombudsman in his decision-making role, whilst ensuring proper accountability to the Northern Ireland Assembly for the use of resources and the overall performance of the Office.

The Ombudsman should continue as Accounting Officer and be answerable to the Assembly through the Public Accounts Committee for the propriety and regularity of public funds. In addition we believe he should have clear accountability for the Office's performance, but not decisions, to an Assembly Committee (similar to the Audit Committee's arrangements in relation to the Comptroller and Auditor General) that would deal with performance, resources and salary.

The Office's Corporate Plan would be the means of informing the Committee of future plans and the Committee would be supported in its work by DFP on Supply. The arrangements would be a matter for the Assembly but we suggest that it might be an appropriate role for the Assembly Commission or the Committee of the Centre.

The Ombudsman's Annual Report would be presented to the Assembly as a set piece occasion. We also support the Ombudsman's intention for the Assembly to gain a greater ownership of his work by encouraging the statutory departmental committees to examine the relevant aspects of his annual report.

7.5 Auditing Public Sector Complaints Processes

There is general support for the Ombudsman undertaking an "audit" role in relation to public sector complaints process and in ensuring best practice.

We are aware from our benchmarking that the Scottish Public Services Ombudsman may issue guidance to listed authorities on the performance of their duties to publicise information about the Ombudsman in their complaints scheme and in their correspondence with complainants.

We also noted that the Local Government Ombudsman in England has been working with the Audit Commission relating to Comprehensive Performance Assessments for county and unitary authorities and this is now being developed for district councils. The Local Government Ombudsman has recently commenced a pilot scheme in sending an annual letter to 120 local authorities containing an analysis of the types of complaints over the year, together with information about outcomes, examples of good practice and scope for improvement.

The Irish Ombudsman has recently updated his Guide to Standards of Best Practice for Public Servants.

These are examples of how other Ombudsmen are seeking to enhance the deliverance of better complaints services by bodies within their jurisdiction and we consider that a similar initiative is required in Northern Ireland.

In our discussions with the Review of Public Administration team we were informed that their research had revealed a lack of confidence in complaining about public services. In specific terms:

- 61 per cent were not confident or not at all confident that a complaint would be dealt with to their satisfaction;
- 22 per cent of respondents had complained about public services; and
- 56 per cent of these were dissatisfied or very dissatisfied with how the complaint was dealt with;
- 35 per cent of respondents said they had wanted to complain but didn't.

These findings point to the need for a structured response and we consider that the Ombudsman is well placed to take the initiative in this area. We are mindful not to place unnecessary burdens on the Office but we consider that the Ombudsman should develop a code of best practice on complaints handling; issue a quarterly digest of recent cases highlighting good and best practice; and audit on a sample basis the complaints handling arrangements in those organisations which generate more complaints to his Office.

We believe this approach for the Ombudsman could be added to the work of the new resource (see 3.16) together with an additional administrative officer at an overall cost of £15,000.

We were impressed by Independent Case Examination and feel that this could be extended to a wider range of services as part of a best practice initiative. This would have the prospect of ensuring early resolution of complaints and filtering out cases that might otherwise go to the Ombudsman.

7.6 Annual Outreach Programme

The Ombudsman has made admirable efforts to promote the work of the Office and there is evidence that public awareness is very high among the better educated and higher social classes (see 6.2). He is keen to direct his outreach programme to those groups in society who may not be well disposed, or able, to pursuing complaints e.g. elderly people.

An annual outreach programme should be developed, utilising all means of communication, and targeted at the MLAs and other public representatives, bodies within jurisdiction, complainants and potential complainants, advice bodies and the general public. It might be appropriate for him to procure professional advice to help target the promotion activity and an annual budget of £25,000 is recommended.

7.7 Vexatious Complainants

The issue of vexatious complainants arose during consultation with stakeholders. Some felt that the Ombudsman could play a useful role in taking over such cases on referral by their organisation.

We have considered this proposal and our conclusion is that such a role is already provided for in present arrangements. If the organisation has fully considered the allegations made and has determined that there is no substance in the complaint then the complainant can be advised of his right to pursue the complaint with the Ombudsman. It would be legitimate for an organisation to cease any further correspondence with the complainant unless new evidence was produced in support of the allegations.

The Ombudsman points out however that complainants who might be regarded as vexatious are almost always concerned with the decision taken and not the process that was used. The Ombudsman can only be of limited practical assistance in such cases.

7.8 Alternative Dispute Resolution

We held discussions with the Northern Ireland Court Service and senior judiciary on the potential for greater utilisation of Alternative Dispute Resolution (ADR) mechanisms in civil justice. We were informed that ADR pilot schemes proposed in the Northern Ireland Review of Civil Justice had not yet been implemented and that there was a preference for litigation in this jurisdiction. We would contend there is potentially some merit in the Ombudsman being viewed as a suitable ADR mechanism in certain judicial review cases except where points of law or human rights considerations are at issue. We conclude from our discussions however that the matter should not be pursued at present but the Ombudsman should keep the position under review.

We support the general trend to encourage a greater focus on early resolution of cases coming before the Ombudsman and the removal of any legislative barriers. In this context the Ombudsman should ensure that his investigators are trained in mediation skills.

8. THE NORTHERN IRELAND PUBLIC SERVICES OMBUDSMAN

8.1 Introduction

In this section we draw together the recommendations of our report and conclude with our vision for the new office of Northern Ireland Public Services Ombudsman.

8.2 Present Position

We set out in Section 3 a number of recommendations on the organisation and performance of the Ombudsman's Office:

- work on producing the Corporate and Business Plan should be completed as soon as possible (3.12);
- more sophisticated performance measures should be adopted (3.15);
- more use could be made of IT support in casework and statistics should cover all aspects of the process (3.15);
- investigator posts should be evaluated and a new corporate services structure should be implemented (3.16);
- a human resource strategy should be developed (3.17); and
- present support services arrangements should be formalised in proper service level agreements (3.18).

8.3 An Agenda for Change

In Section 4 we have set out the extensive agenda for change in the Ombudsman's present arrangements and examined these in the context of benchmarking (Section 5) and the views of key stakeholders (Section 6). The developments in the work of Ombudsman in the United Kingdom are supportive of the need for change locally. The comments from stakeholders underline the high regard for the Ombudsman and his Office and demonstrate an acceptance of the need for change.

8.4 A Way Forward

In Section 7 we set out the arguments for and against change in present arrangements and conclude:

- there is a case for a single Office of The Northern Ireland Public Services Ombudsman (7.2.1);
- MLA sponsorship should not be mandatory but MLAs should be encouraged to play a greater role in the work of the Ombudsman (7.2.2);
- registered housing associations will come within jurisdiction on 1 April 2004 (7.2.3);

Del

- the role of Assembly Standards Commissioner would recommence on an ad hoc basis once a working Assembly is in place and Statutory Committee business has resumed (7.2.4);
- if legislation on Ethical Standards for Local Authority and Public Appointees Standards is introduced in future the Ombudsman could in principle undertake the role of Commissioner but other models are possible (7.2.5);
- employment matters should be removed from the Ombudsman's jurisdiction, subject to the outcome of an equality impact statement (7.2.6);
- with the exception of the present provision in health service cases, the Ombudsman should continue to be concerned with faulty administration rather than the merits of decision-making (7.2.7);
- the Ombudsman should have authority to undertake systemic reviews flowing from individual complaints and following consultation and agreement with the Comptroller and Auditor General (7.2.8);
- the Ombudsman should have jurisdiction over all organisations substantially funded from public monies unless they are explicitly excluded and OFMDFM should perform the gatekeeper role (7.2.9);
- these will be no significant implications for the Ombudsman in the Review of HPSS Complaints Procedures or in the devolution of Justice functions (7.2.10 and 7.2.11);
- minor differences of jurisdiction in existing legislation should be resolved by utilising the existing jurisdictional remit of the Assembly Ombudsman e.g. commercial and contractual matters would not be subject to investigation (7.3);
- the procedures and remedies for the combined Office of Ombudsman should reinforce the centrality of the Assembly but recognise the accountability of local government and ensure that remedies can be pursued against General Health Service providers and Independent Providers (7.2.10 & 7.3);
- the Ombudsman's relationship with the Assembly should be enhanced on the lines of the present Audit Committee arrangements for the Comptroller and Auditor General (7.4);
- the Ombudsman should take initiatives to ensure best practice in public sector complaints handling and Independent Case Examination could be usefully extended to other services (7.5);
- the Ombudsman should target those groups presently not utilising complaints processes generally or making use of his Office in particular through an annual outreach plan (7.6);
- no special provisions are needed in handling vexatious complainants (7.7);
- mediation could be used in encouraging a greater focus in the early resolution of complaints coming before the Ombudsman (7.8).

8.5 The Northern Ireland Public Services Ombudsman

Our vision for the new Office of Northern Ireland Public Services Ombudsman is a combined Office for public bodies within jurisdiction with a single point of entry and consistent remedies and a focus on the core business of investigating complaints.

Key features would be:

- the inclusion of registered housing associations within jurisdiction;
- a resumption of the Assembly Standards Commissioner role;
- no power to challenge the merits of discretionary decisions, except in health service cases;
- no employment jurisdiction;
- MLA sponsorship as an option for complainants;
- assumption of responsibility for administrative actions of bodies in the justice sector following devolution;
- additional public bodies within remit on the principle of following public funds e.g. further education colleges;
- an authority to initiate systemic investigations flowing from casework following consultation and agreement with the Comptroller and Auditor General.
- an emphasis on early resolution of complaints with formal investigations the last resort;
- a direct interest in how public bodies within jurisdiction are processing complaints;
- an ability to co-operate with other Ombudsmen in carrying out investigations either jointly or on their behalf;
- an annual outreach plan to extend awareness of the Office using all communication techniques.

Possibly Over Long Term

- a role in the procedures for regulating the conduct of district councillors and public appointees on foot of any mandatory Codes of Conduct.

8.6 Resource Implications

The net resource implications of the proposed changes are demonstrated in the following table.

Table 8.1
Net Resource Implications of Proposed Changes

A. Evaluation of Investigator Posts:			
	Year 1 £000s	Year 2 £000s	Year 3 £000s
No change	0	0	0
Partial upgrade – a number of posts only	+25	+25	+25
Full upgrade – all posts	+50	+50	+50
B. Corporate Services Structure:			
	+35	+35	+35
C. Employment Matters:			
No change	0	0	0
Full removal	-60	-60	-60
Partial removal	-30	-30	-30
D. Systemic Reviews:			
(Covered in B)	0	0	0
E. 'Auditing' Public Sector Complaints Processes			
	+15	+15	+15
F. Annual Outreach Programme			
	+25	+25	+25

The range of net additional costs is broadly affordable as shown in Table 8.2

Table 8.2
Range of Net Additional Costs

	Year 1 £000s	Year 2 £000s	Year 3 £000s
Worse Case (full costs and no savings)	+125	+125	+125
Best Case (no change on grading of posts, full removal of employment jurisdiction plus other costs)	+15	+15	+15
Probable Case (partial upgrade of posts, partial removal of employment jurisdiction plus other costs)	+70	+70	+70

APPENDIX I
MEMBERSHIP OF PROJECT BOARD

Appendix I

Membership of Project Board

Mr Ian Smith, Chairman

Mr John MacQuarrie, Deputy Ombudsman

Mrs Dorothy Angus, Director of Corporate Services, OFMDFM

Mr Denis McCartney, Director of Legal Services, OFMDFM

Mr Aubrey Playfair, Head of Finance, OFMDFM

In Attendance:

Mr Bobby Doherty, Director of Administration, The Ombudsman's Office

APPENDIX II
ORGANISATIONS WITHIN THE JURISDICTION
OF THE ASSEMBLY OMBUDSMAN

Organisations Within the Jurisdiction of The Assembly Ombudsman

Northern Ireland Government Departments

Department of Agriculture and Rural Development
Department of Culture, Arts and Leisure
Department of Education
Department of Employment and Learning
Department of Enterprise, Trade and Investment
Department of the Environment
Department of Finance and Personnel
Department of Health, Social Services and Public Safety
Department for Regional Development
Department for Social Development
Office of the First Minister and Deputy First Minister

Government Agencies

Business Development Service
Child Support Agency
Driver and Vehicle Licensing Northern Ireland
Driver and Vehicle Testing Agency
Environment and Heritage Service
Health and Social Services Estates Agency
Land Registers
Ordnance Survey
Planning Service
Public Record Office
Rate Collection Agency
Rivers Agency
Roads Service
Social Security Agency
Statistics and Research Agency
Valuation and Lands Agency
Water Service

Other Organisations

An Implementation body to which the North/South Co-operation (Implementation Bodies) (NI) Order 1999 applies
Civil Service Commissioners for NI
Office of the Director General of Electricity Supply for NI
Office of the Director General of Gas for NI

Tribunals (Administrative Functions only)

Child Support

Compensation for Loss of Employment through Civil Unrest

Disability Appeal

Fair Employment

Industrial

Industrial Court

Lands

Planning Appeals Commission

Provision of General Medical Services List

Medical Appeal

Mental Health Review

Registered Homes

Rent Assessment Committees

Social Security Appeal

Vaccine Damage

Water Appeals Commission

APPENDIX III
PUBLIC BODIES WITHIN THE JURISDICTION OF THE
COMMISSIONER FOR COMPLAINTS

Public Bodies within the Jurisdiction of The Commissioner for Complaints

Agriculture Research Institute
Arts Council
Board of Trustees of National Museums and Galleries of NI

Central Services Agency
Commissioner for Children
Community Relations Council
Council for Catholic Maintained Schools
Council for the Curriculum, Examinations and Assessment
Council for Postgraduate Medical and Dental Education

District Council, a joint committee appointed by two or more district councils for a purpose in which those councils are jointly interested, and any committee or sub-committee of a district or joint committee (26)

Development Corporation established under Part III of the Strategic Investment and Regeneration of Sites (NI) Order 2003

Education and Library Boards (5)
Enterprise Ulster
Equality Commission

Family health services in the National Health Service where provided by doctors, dentists, pharmacists and optometrists (ophthalmic opticians) - with effect from 1 December 1997

Fire Authority for Northern Ireland
Fisheries Conservancy Board
Fishery Harbour Authority

General Consumer Council for Northern Ireland

Harbour Authority within the meaning of the Harbours Act (Northern Ireland) 1970
Health and Safety Agency
Health and Safety Executive
Health and Social Services Boards (4)
Health and Social Services Councils (4)
Health and Social Services Trusts (18)
Housing Executive

Industrial Training Boards
Invest Northern Ireland

Labour Relations Agency
Laganside Corporation
Livestock and Meat Commission
Local Government Officers' Superannuation Committee
Local Government Staff Commission

Mental Health Commission

New town commissions established under the New Towns Acts (Northern Ireland) 1965 to 1968 and any of their committees or sub-committees

Office of the Certification Officer

Practice and Education Council for Nursing and Midwifery

Rural Development Council

Special Health and Social Services Agencies such as the Blood Transfusion Service, Regional Medical Physics, Health Promotion and Guardian Ad Litem Agencies

Sports Council

Staff Commission for Education and Library Boards

The Strategic Investment Board Ltd.

Tourist Board

Ulster Sheltered Employment Limited

Youth Council for Northern Ireland

APPENDIX IV
THE OMBUDMAN'S COMPLAINTS PROCESS

THE PROCESS:

Stage 1 - Initial Sift

Each complaint is checked to ensure that:

- the body complained of is within jurisdiction;
- the matter complained of is within jurisdiction;
- it has been raised already with the body concerned;
- it has been referred to me by an MP (where necessary);
- sufficient information has been supplied concerning the complaint; and
- it is within the statutory time limits.

Where one or more of the above points are not satisfied a letter will issue to the complainant/MP explaining why I cannot investigate the complaint. Where possible, this reply will detail a course of action which may be appropriate to the complaint (this may include reference to a more appropriate Ombudsman, a request for further details, reference to the complaints procedure of the body concerned, etc.).

Where the complaint is found to satisfy all of the points listed above, it is referred to Stage 2 (see below). The Office target for the issue of a reply under Stage 1 or reference to Stage 2 is currently 5 working days.

Stage 2 - Preliminary Investigation

The purpose of this stage is to ascertain whether there is evidence of maladministration in the complaint and how this has caused the complainant an injustice. At this stage enquiries will be made of the body concerned. These enquiries take the form of informal telephone calls to the body and/or a written request for information to the chief officer of the body. In Health Service cases it may also be necessary to seek independent professional advice. Once these initial enquiries have been completed, the complaint is referred to a Director of Investigation who decides what course of action is appropriate for each complaint. There are three possible outcomes to this stage of the investigation process:

- a. where there is no evidence of maladministration by the body - a reply will issue to the complainant/MP explaining that the complaint is not suitable for investigation and stating the reasons for this decision;
- b. Where there is evidence of maladministration but it is found that this has not caused the complainant a substantive personal injustice - an Investigation Report will issue to the complainant/MP detailing the findings of my preliminary investigation and explaining why it is considered that the case does not warrant further investigation. Where maladministration has been identified, the Report may contain criticism of the body concerned. In such cases a copy of the Report will also be forwarded to the chief officer of the body; or
- c. Where there is evidence of maladministration which has apparently also led to a substantive personal injustice to the complainant - the case will be referred to Stage 3.

The Office target for the issue of a reply under Stage 2 or reference to Stage 3 is currently 13 working weeks.

Stage 3 - In-depth Investigation

If, at the outset of this stage of investigation, the maladministration and the injustice caused can be readily identified, I will consider whether it would be appropriate to seek an early resolution to the complaint. This would involve me writing to the chief officer of the body outlining the maladministration identified and suggesting a remedy which I consider appropriate. If the body accepts my suggested remedy, the case can be quickly resolved. However, should the body not accept my suggestion or where the case would not be suitable for early resolution a full formal investigation of the case will be undertaken. Such an investigation will involve interviewing the complainant and the relevant officials and inspecting all the relevant documentary evidence. Where the complaint is about a Health Service matter, including clinical judgement, professional advice will be obtained where appropriate from independent clinical assessors. At the conclusion of the investigation I will prepare a draft Report containing the facts of the case and my likely findings. At this point the case will be reviewed with the complainant. The body concerned will be given an opportunity to comment on the accuracy of the facts as presented, my likely findings and any redress I propose to recommend. Following receipt of any comments which the body may have I will issue my final Report to both the complainant/MP and to the body. This is a very time consuming exercise as I must be satisfied that I have all the relevant information available before reaching my decision.

The Office target is to complete a case involving a Stage 3 investigation within 12 months of initial receipt of the complaint.

Oral Complaints/ Enquiries

During 2002/03 the Office dealt with 2,572 telephone calls and there were 86 personal callers.

Of these, 641 telephone calls and 72 interviews related to bodies and matters within my jurisdiction. I have included as Appendices to Sections 2, 3 and 4 details of the bodies complained of and the outcomes of the oral complaints which were received by telephone/interview.

The remaining 1,931 telephone calls and 14 interviews related to complaints where either the body or the subject of the complaint were clearly outside my jurisdiction. In such cases Administration Section staff give as much advice/information as they can about other avenues which may be open to the persons concerned to pursue their complaint and, if possible, provide appropriate contact information.

APPENDIX V
STAKEHOLDER CONSULTATION

Appendix V

Stakeholder Consultation

Group A - General

Public body

Contact - Chief Executive unless otherwise noted

NDPBs

NI Housing Executive

Paddy McIntyre

NI Tourist Board

Bob McMillen, Director of Corporate Policy

Southern Education & Library Board

Helen McClenaghan

Health Service

Northern H&SS Board

Stuart McDonnell

Altnagelvin Hospital Trust

Raymond McCartney, Deputy CX (telephone discussion)

Eastern H&SS Council

Jane Graham – Director

District Councils

Belfast City Council

Peter McNaney

Down District Council

John McGrillen

Fermanagh District Council

Rodney Connor

Civil Service Departments

(Permanent Secretaries)

OFMDFM

Nigel Hamilton HOCSNI and Will Haire

DARD

Pat Toal

DCAL

Aideen McGinley

DENI

Gerry McGinn

DEL

Alan Shannon

DETI

Bruce Robinson

DFP

Andrew McCormick

DRD

Stephen Quinn

DSD

John Hunter

NIAO

John Dowdall, Comptroller and Auditor General

Executive Agencies

Planning Service

Ian Maye

Water Service

Charlie Grimes - Head of CX Secretariat

Roads Service

Maurice Galbraith - Head of CX Secretariat

Social Security Agency

Chris Thompson

Child Support Agency

Gerry Keenan

Others

Staff Commission E&LB	Philip Robinson, Deputy Chief Executive
Equality Commission	Evelyn Collins
Local Govt Staff Commission	Adrian Kerr
NIPSA	John Corey
North South Ministerial Council	
Pat Donaghy Assistant Joint Secretary	

Political Parties

Official Unionist Party	Robert Coulter, MLA
Social Democratic & Labour Party	Alastair McDonnell, MLA & Patricia Lewsley, MLA
Democratic Unionist Party	Richard Bullick, Policy Advisor
Sinn Fein	Conor Murphy, MLA
Progressive Unionist Party	David Ervine leader and MLA
Northern Ireland Women's Coalition	Jane Morrice former MLA

Group B – Specific

The Review	Tom Frawley - the Ombudsman
Registered Housing Associations	David Crothers - Director of Housing, DSD
Local Government Standards	John Ritchie - Director of Local Government, DOE
Assembly Standards/Assembly Commission	Lord Alderdice – former Speaker of the Northern Ireland Assembly Arthur Moir - Clerk of the Northern Ireland Assembly John Torney - Principal Clerk to the Standards and Privileges Committee
Justice Matters	Stephen Leach - Director of Criminal Justice, NIO
Employment Matters	Doreen Brown - PEFO, NIO
Review of Public Administration	Greg McConnell - Director, RPA
Independent Case Examination	Jodi Berg - Independent Case Examiner
Alternative Dispute Resolution mechanisms	Laurene McAlpine - Director of Policy and Legislation, NI Court Service
Public Pay Policy	Mr Justice (now Lord Chief) Kerr & Mr Justice Weatherup - Judicial Review Gareth Johnston, Central Personnel Group, DFP
Judicial Salaries	Anthony Carleton, Acting Director of Corporate Services, NI Court Service
Legal Services	Michael Lynch, Partner. Elliott Duffy Garrett
Medical Advice Services	Dr Philip McClements

APPENDIX VI
“PUBLIC KNOWLEDGE AND AWARENESS OF
THE NORTHERN IRELAND OMBUDSMAN”
– A SURVEY BY RESEARCH AND EVALUATION SERVICES

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

This report presents the findings of a survey on public attitudes and knowledge of the Northern Ireland Ombudsman. The survey was carried out by Research & Evaluation Services in June and July 2003 and was conducted as part of the Northern Ireland Social Omnibus Survey. The survey is based on a representative sample of 1000 adults (aged 18+).

Public awareness of the Northern Ireland Ombudsman was found to be very high at 86%, with awareness levels higher among the better educated and the higher social classes. However, set against this finding is the finding that a significant proportion of respondents (41%) reported that they did not know how to go about making a complaint against either a government department or public body in Northern Ireland, with 30% reporting that in such a situation they would go directly to the government department or public body concerned. Just 7% said that they would go directly to the Ombudsman, with a further 11% going directly to a political representative. In terms of the actual role of the organisation, the majority (57%) of all respondents reported that they knew what the role of the organisation is. Television was found to be the most common source of awareness of the organisation.

The majority of respondents (59%) in the survey perceived the Northern Ireland Ombudsman to be independent of government, with 27% of the view that the organisation is part of government. In availing of the services of the Ombudsman, the majority of those who were aware of the organisation reported to be aware that the public body/government department which you complain of should be afforded a reasonable opportunity to address the grievance before complaining to the Ombudsman (69%), with 61% aware that the initial approach should be made in writing. However, just 26% knew that if the complaint is against a government department, the Ombudsman should be contacted via an MLA (Member of Legislative Assembly) or MP (Member of Parliament) during the suspension of the Assembly.

Just 9% of respondents had ever made a complaint against a public body, health or social services organisation or government department, with approximately a third (35%) of these complaints being made in the last 12 months. The survey further revealed that the majority (53%) of those who had taken a complaint against such organisations, were dissatisfied with how the organisation handled the complaint, with the main reasons for dissatisfaction being that nothing had been done as a result of the complaint and being given the 'round around'.

Among those who had made a complaint, less than a fifth (17%) had approached the Ombudsman, with equal numbers (47%) being satisfied and dissatisfied with how the Ombudsman handled their complaint.

Almost a quarter of all respondents in the survey (24%) indicated that they had at one time considered making a complaint against a government department, health services organisation or other public body. The main reason cited for not pursuing a complaint was that they felt that it wouldn't do any good, with others saying that they felt that the complaint was not important enough or that they could not be bothered. Indeed across the whole sample, the majority (72%) of respondents were of the view that it would be difficult to make a complaint against a government department, health services organisation or other public body.

Approximately a third (31%) of respondents rated the quality of services provided by government departments, health services organisations or other public bodies as excellent or good, with 22% rating the quality as poor or very poor. In terms of perceived change in service standards in recent years, 22% felt that standards in government departments, health services organisations or other public bodies had improved, with 37% saying that they had remained the same, and 39% of the view that service standards had got worse. Finally, 37% of respondents felt that people in Northern Ireland would be likely to make a complaint in cases where service standards in public organisations were poor, with the majority (59%) of the view that people would be unlikely to make a complaint.

Annex B

SMT PAPER ON NIPSO IMPLEMENTATION

1. Introduction

1.1 The NIPSO Bill (the Bill) will be introduced into the Northern Ireland Assembly by the Chairman of the OFMDFM Committee, Mr Mike Nesbitt MLA, in November 2014. The formal introduction into the Assembly is the first stage of the legislative process. The Deputy Ombudsman is a member of both the Bill and Implementation teams. The Bill is now at draft 8 and a final discussion on the Bill and the financial implications took place on 15 October 2014 in relation to the current final draft. At that meeting, the Committee considered the draft Bill and a confidential paper on the financial implications of the Bill. The Ombudsman has been provided with a copy of that paper which is at Appendix 1.

1.2 The purpose of this paper is to inform the Ombudsman and SMT of the final draft Bill (version 8.2) and the indicative timetable for enactment. This paper is a thought starter on a number of key implementation issues and work streams that must be initiated and completed in order to ensure successful and timely implementation. Section 2 of the background to the legislative proposals and a comparison between the current proposals and the recommendations of the independent Deloitte Review (2004) commissioned by the OFMDFM is provided. The paper concludes with a number of recommendations which were discussed and agreed at SMT on 9 October 2014, provided at section 5 of the paper.

2. The Deloitte Review

2.1 Following consultation with a wide stakeholder group on proposals to reform the Northern Ireland Ombudsman's Office, Part I of the Deloitte Review made a number of recommendations. The recommendations comprise three main strands:

- The modernisation of the Ombudsman's office;
- The merger through legislation of the two statutory offices of Assembly Ombudsman and Northern Ireland Commissioner for Complaints;
- Additional powers and extension of jurisdiction.

Part II of the Deloitte Review examined the salary and benefits of the Ombudsman and his staff. This paper does not deal with Part II of the review or the implementation agenda.

2.3 A key theme of the recommendations for legislative reform was to ensure that the Ombudsman was placed on a statutory footing similar to that of the Comptroller and Auditor General (C&AG), as an officer of the Assembly. It is this theme which has helped shape the proposed accountability and reporting structure in the NIPSO Bill.

2.4 In advance of the NIPSO legislation, and in accordance with the Deloitte recommendations, Housing Associations were placed under the Ombudsman jurisdiction in 2004 and justice bodies also came under jurisdiction in 2010 when police and criminal justice powers were devolved in the Assembly. However, not all of the Deloitte recommendations were accepted. Deloitte recommended that both the function of Assembly Commissioner for Standards and Local Government Standards Commissioner should be part of the NIPSO. As you will be aware, the Assembly created a separate office of Assembly Commissioner for Standards in 2012, although under part 9 of the Local Government (NI) Act 2014 (2014 Act) the role of investigating complaints under the new mandatory Code of Conduct for Councillors was placed under the remit of the Northern Ireland Commissioner for Complaints. In addition, part 9 of the 2014 Act provided for the Commissioner's adjudication in cases where a breach of the Code of Conduct was found.

2.5 The current version of the draft NIPSO Bill adopts the bulk of the Deloitte recommendations although it does in some significant respects depart from the Deloitte proposals. The Bill (following Deloitte) provides for:

- A single office of *Northern Ireland Public Services Ombudsperson*;
- A single legislative instrument;

- Removal of the MLA filter;
- Removal of the employment jurisdiction;
- Own initiative powers where the NIPSO finds evidence of systemic maladministration;
- Extension of remit to schools, FE and HE institutions, Northern Ireland Audit Office and Assembly Commission [Committee];
- Accountability and reporting mechanisms similar to that of C&AG;
- Creation of a 'one stop shop' Ombudsman's office as in Scotland and Wales.

2.6 Although the draft NIPSO Bill does replicate the bulk of the Deloitte proposal, it does also draw heavily on the Welsh legislation with the inclusion of provisions relating to:

- Alternative Dispute Resolution;
- Co-operation with other Ombudsman and Commissioners;
- Publication of reports in the public interest.

Also, the Ombudsman had sought the removal of features such as the formal hearing and County Court mechanism to be extended to all bodies. IN addition, the Committee sponsoring the Bill has sought to make explicit those powers which the Court of Appeal in JR55 have decided are not currently provided for in Commissioner for Complaints legislation in relation to financial redress and special reports to the Assembly.

3. Implementation Issues

3.1 The NIPSO Bill raises a number of issues in relation to implementation:

1. Procedural and operational changes for accepting complaints and dealing with ongoing AOCC investigations;
2. Informing bodies in remit of procedural and jurisdictional changes;
3. Developing an own initiative model and data tracking;

4. A communication strategy for the NIPSO Bill and the changes in jurisdiction;
5. New governance and accountability relationship with Northern Ireland Assembly;
6. NIPSO branding/website;
7. Commencement of NIPSO provisions (staged or single commencement);
8. Organisational development and staffing issues (including review of structure and job specifications);
9. Recruitment to NIPSO post;
10. Outreach activity for new bodies to come in remit (see Appendix 2 for list);
11. Public announcements/publicity for NIPSO Bill.

In relation to (9) this is the responsibility of the Assembly Commission and in relation to (11) this is the responsibility of OFMDFM. In relation to (11) this is a joint responsibility with the Northern Ireland Assembly and AOCC.

- 3.2 The implementation issues were considered by SMT and it was noted these have resource implications. However, given the current public sector cuts it is unlikely that significant AOCC additional resources will be allocated to the implementation project. A paper highlighting the resources needed by AOCC and NIPSO to deal with the implications of NIPSO was discussed at SMT. In addition, the Committee has now invited the Ombudsman to respond to its own NIPSO costing paper and a response is being prepared. A key part of the communications strategy is the website development and a bid will be made for resources for 2015/16 for the development of the website.

4. Work Streams

4.1 The purpose of the SMT paper of 9 October (Appendix 4) was to consider whether an Implementation Working Group can be established to ensure smooth implementation. SMT agreed this approach and a number of work streams were identified and project something included:

1. Procedural/operational matters (M McAleer);
2. Organisational development and HR related issues (C McIlhatton/John McGinnity);
3. Communications strategy working group (J McGinnity and S Martin);
4. Governance and accountability mechanisms (J McGinnity and A Scott).
5. Website working group (M McAleer).

Project Approach

4.2 The implementation timetable is driven by the legislative timetable. The Ombudsman has invited the Committee in writing to provide an indicative timetable for Royal Assent (letter of 20 October 2014). However, a clear indication has been given that the NIPSO will be fully operational 1 April 2016.

4.2 It is important that work streams are divided across the office and that staff are engaged in the change. It is proposed that each Director should lead one or more work streams where relevant to their role and also staff should be engaged through working groups led by a Director with a focus on project planning and delivery. The Deputy Ombudsman will chair the Implementation Working Group meetings which will be minuted to be held monthly in the lead up to the new legislation. The first meeting will be held on 3 December 2014.

4.3 The risk register should include implementation issues relating to the proposed NIPSO legislation and organisational changes.

5. Next Steps

5.1 It was agreed at SMT that:

1. Implementation Working Groups to be established. J O'Brien should work with each of the working group leads to produce agreed terms of reference by 24 November 2014;
2. Each SMT member has a role in relation to NIPSO implementation and leads a work stream;
3. Implementation progress reports will be provided by the Deputy Ombudsman to SMT and Audit Committee;
4. AOCC staff engagement and participation is encouraged and supported at an information session to be held to coincide with the introduction of the NIPSO Bill into the Assembly.
5. A copy of this paper be made available to Chair of Audit Committee and members. [The restricted Appendix 1 will not be provided as the Committee seek a response from the Ombudsman and DFP Supply].

MARIE ANDERSON

23 October 2014

NIPSO Implementation Committee (IC) Terms of Reference

1. To coordinate and oversee the work of the five NIPSO implementation work streams namely
 - a. Process and Procedures
 - b. Organisational development and human resources (ODHR), - including an Employee Engagement sub-group.
 - c. Communications
 - d. Governance and Accountability
 - e. Website
2. To ensure the progress of NIPSO implementation and to approve working group recommendations and decisions.
3. To manage the interfaces/overlaps between the working groups and where necessary decide upon and assign specific tasks to the most appropriate project lead.
4. To regularly review and update the NIPSO implementation risk register including the consideration of contingency measures in the event of slippage and/or significant amendments to the legislation
5. To provide implementation progress reports from the chair of the IC to SMT and Audit Committee. In addition the Chair, as a member of the Assembly NIPSO Bill team and the Assembly Implementation team, will report also on progress to the Assembly's Implementation team.

out in Northern Ireland are performed only in cases of foetal handicap. If this is the case then it seems that there is one legal issue yet to be tested. That is the question of whether or not it is lawful to procure a miscarriage where the objective is not to preserve the life of the mother (or her physical or mental health), but rather is to terminate the life of a foetus which medical opinion has determined to be in some way handicapped.

Would such a termination be lawful after the judgment in *Re A* and *Re K*? As the law now stands it would seem that the types of termination which have taken place in the penumbra of doubt prevailing before the law was clarified would not be lawful. Neither *Re K* nor *Re A* directly address the question of foetal handicap abortions. Given that such cases appear *prima facie* unlawful, and given the continuing influence of the various societal forces I have identified above and that foetal handicap is allegedly the most common reason for terminations that are carried out in Northern Ireland it would seem reasonable to suggest that this issue may come before the Northern Ireland courts in the foreseeable future. Such litigation would be beset with all the problems of a friendly action in that it seems highly probable that such a case will be initiated by a health care professional. Consequently the question of whether abortions on grounds of foetal handicap should be performed is unlikely to be sufficiently examined. There appears to be a presumption amongst certain parts of the medical profession and the general public that terminations on grounds of foetal handicap are acceptable. Yet this seems to say more about our societal attitude towards the disabled than it does about the rightness or wrongness of such abortions.²⁰ If the High Court (and the case is unlikely to be considered at a higher level) decides that the "law" on abortion should be extended to cover foetal handicap along the lines of section 1(1)(d) of the 1967 Act²¹ then it will have missed a vital opportunity to address the question of what our attitude as a society should be towards the disabled.

TONY MCGLEENAN

20. Post has described this trend as "the tyranny of the normal".

21. S 1(1)(d) provides a defence to a charge of unlawfully procuring a miscarriage where "there is a substantial risk that if the child were born it would suffer from such physical and mental abnormalities as to be seriously handicapped". For a critique of this ground for abortion see Morgan, "Abortion: the unexamined ground" [1990] *Criminal Law Review* 687.

ENFORCING THE DECISIONS OF OMBUDSMEN — THE NORTHERN IRELAND LOCAL GOVERNMENT OMBUDSMAN'S EXPERIENCE

INTRODUCTION

In the mid 1980s a topic of considerable concern to the Commissioners for Local Administration in England and Wales, and their counterpart in Scotland, was how to secure the compliance of local authorities with those of their reports finding maladministration. The "failure rate" (the number of reports not complied with, referred to in the statistics as "unsatisfactory outcomes", expressed as a percentage of the total number of reports finding maladministration) was, at that time, approximately 6 per cent, 4.4 per cent and 5 per cent in England, Wales and Scotland respectively.¹ This prompted a search for a more effective method of enforcement and in doing so provoked some debate about how best to enforce ombudsmen's reports and about how best ombudsmen should function. The suggestion that initially found favour with the Commissioners was court enforcement. However, this idea seemed to run counter to the accepted understanding of ombudsmanship. According to the classic formulation ombudsmen are intended to operate by use of persuasion, reason and conciliation, and all in an informal manner. Resorting to the courts in order to ensure that some of their judgments would be implemented seemed to be contrary to this.

The issue was taken up in 1985 by the Select Committee on the Parliamentary Commissioner which devoted its third report to the issue, and recommended that its jurisdiction be extended to allow it to perform the same function in relation to the local government ombudsmen that it performs with regard to the Parliamentary Commissioner for Administration.² Court enforcement could be resorted to if the involvement of the Committee failed to have the desired effect. It also featured in the Widdicombe Report which recommended that court enforcement be adopted, based, it appears, on the views then held by the Commissioners.³ However, the model of enforcement ultimately implemented, by the Local Government and Housing Act 1989, was not court enforcement. The 1989 Act has furnished British local government ombudsmen with a form of enforcement power very much in keeping with traditional ombudsmanship. Following a finding of maladministration sustaining injustice, the local authority is required to consider the report and respond within three months. If it fails to respond to the satisfaction of the ombudsman a further report can be issued. Failure to comply with that means that the ombudsman may compel the local authority to publish, in a local newspaper, a statement of the reasons for its refusal to comply with the report and an account of how an

1. "The Conduct of Local Authority Business", Cmnd 9797 (1986) (hereafter referred to as the Widdicombe Report) para 9.67.

2. "Local Government Cases: Enforcement of Remedies", HC 448 (1985-86) (hereafter "Select Committee Report").

impasse has been reached.⁴ The system, which has been in place since 1990, has produced 35 statements⁵ and on only one occasion has the issuing of a statement led to a "satisfactory outcome".⁶ The provision is an odd form of enforcement in that it usually results in two "injustices". The injustice suffered by the complainant is not remedied and there is a second, collective, "injustice" suffered by the taxpayers of the local authority in question, who must ultimately foot the bill for the newspaper advertisement. Presumably the rationale of the power is that, through the ballot box, the electorate will "punish" those local authorities who refuse to implement the local government ombudsmen's decisions. In 1990-91, the first full year of the new mechanism's operation, the "failure rate" in England and Wales was slightly in excess of 6 per cent. The annual rates of unsatisfactory outcomes since then cannot yet be finalised as a number of complaints await settlement. Whilst the "failure rate" may very well fall, the actual number of unsatisfactory outcomes remains high, indeed higher than it was in the mid-eighties, and the issue does not appear to have disappeared.

It is likely that the present system will remain in place for a number of years to come but the question of whether or not reports of the ombudsmen should be enforced by the courts has not disappeared entirely. Government issued a warning to local authorities, in the "Citizen's Charter",⁷ that should the rate of non-compliance with ombudsman decisions rise again it would consider the introduction of a court enforcement power like that in use in Northern Ireland. Government may not be very serious about implementing the threat and the ombudsmen are not now advocating such a move.⁸ If it does at some future date seriously consider introducing the Northern Ireland model then detailed consideration should be given as to how it works and, probably more importantly, the environment in which it works.

THE NORTHERN IRELAND MECHANISM

Section 7 of the Commissioner for Complaints Act (NI) 1969⁹ allows the aggrieved individual to apply to the county court to have the ombudsman's

4. Ss 26 and 28 introduced the power for the English and Welsh ombudsmen whilst ss 27 and 29 did the same for the Scottish ombudsman.
5. Annual Report of the Commission for Local Administration in England, 1992-93, p 63.
6. Annual Report, 1992-93, *op cit*, p 44.
7. "Citizen's Charter — Raising the Standard", Cm 1599 (1991), p 43.
8. Annual Report 1992-93, *op cit*, pp 8 and 45.
9. The awkward structure of the Northern Ireland ombudsman's office is deserving of a lengthy explanatory footnote. The office is really two ombudsmen's offices in one; that of the Parliamentary Commissioner for Administration and that of the Commissioner for Complaints. Both these offices derive their validity from two separate Acts, in 1969, of the "old" Northern Ireland Parliament. The former investigates complaints against the regional governmental administration (ie the six Northern Ireland governmental departments which function under the aegis of the Northern Ireland Office) whilst the latter accepts complaints against local government and a variety of local bodies. These local bodies include not only the local district councils but the five Education and Library Boards; the four Health and Social Services Boards and the regionalised housing authority, the Northern Ireland Housing Executive, amongst others. The commonality between both titles — the word "Commissioner" — is the title by which the offices are referred to in the legislation and indeed by the office staff. However, I have used the title "ombudsman" throughout except when quoting from the legislation.

report upheld and a suitable remedy prescribed by the court. The court is empowered to award damages to compensate the complainant for any expense incurred in relation to the act of maladministration and for the loss of opportunity of acquiring benefit as a result of the maladministration.¹⁰ Injunctions may also be issued. Provision is made allowing the Attorney-General to apply to the High Court for an order where the body complained against had engaged in "continued and determined maladministration".¹¹ The ombudsman's report "shall, unless the contrary is proved, be accepted as evidence of the facts stated therein".¹² Under the County Court Rules governing the making of an application, the complainant has six months from the issuing of the reports in which to make the application.¹³

Parliamentary debates provide no clues as to why court enforcement of the ombudsman's reports was the chosen sanction. The inclusion of the power in the Bill provoked no comment in the Northern Ireland House of Commons. However, correspondence between the Ministry for Community Relations, the Director of the Commissioner for Complaints office and the First Legislative Draftsman's office do shed some light on the section. In the course of that correspondence, the First Legislative Draftsman stated that when the Bill was being drafted it was felt that it was "highly desirable to avoid giving the impression of over-controlling local and public bodies so as to make it more difficult to get persons of proper standing to play a full part in local government" and therefore the principle was that the "Commissioner should in the first instance proceed by way of investigation, negotiation and attempted settlement, leaving legal sanctions very much as a last resort".¹⁴

Given the political climate prevailing in Northern Ireland when the office was founded and that part of the office's role was to combat discrimination, provision for the court enforcement of ombudsman's reports is understandable.¹⁵ The "Notes on Clauses" relating to the provision allowing the applicant to recover for loss of opportunity seems to provide further evidence to support the suggestion that the power was introduced mindful of the office's remit to tackle discrimination. They make it clear that it was intended that it should be possible for a complainant to recover even

10. Subs 9 allows that the normal jurisdictional limits of the county court do not apply, whilst subsection 10 holds that nothing in the section affects the right to bring any other proceedings, criminal or civil.
11. S 7(5). To date there has been no occasion when the Attorney-General has had to exercise this power.
12. S7(8). The ombudsman, or a designated official, may sign a "Certificate of Authenticity" verifying the report.
13. S. R. & O. 1971 No 178 Rule 2(2). It is now almost impossible to ascertain whether the six-month rule has been complied with in the past. In fact when the solicitors for the applicants in one case requested the ombudsman to send details of the cases that had been pursued even though they were outside the six-month time limit (in order that they might cite those cases as precedents) the ombudsman's office was unable to oblige.
14. Letter from the First Legislative Draftsman to an official in the Ministry of Community Relations, 26 October 1970.
15. On this point see Himsworth, "Judicial Teeth for Ombudsmen?" Proceedings of a Conference held at the University of Edinburgh, 13 December 1984, p 55.

where he or she could not show that the benefit in question would have been granted. The "Notes on Clauses" state:

"It will be noted that under [loss of opportunity] the compensation is not limited to actual material loss in the strict sense that it will be necessary to prove that but for the maladministration the person aggrieved would have got the job, house or other benefit in question. Such a requirement would be unduly restrictive and would in certain cases (eg employment applications) impose a burden of proof which could be rarely discharged."

In at least one case the judicial interpretation reflected this view.¹⁶ When awarding one applicant £200 damages (plus costs) for being wrongly denied an opportunity to be interviewed for a job the judge stated that

"her chances of being appointed to this post were in my opinion very slight, almost negligible. The commercial post to which she was later appointed was more highly paid and caused an immediate advantage to her."¹⁷

It seems to have been anticipated that cases could arise where the maladministration amounted to discrimination but, as is often the case with allegations of discrimination, that definitive factual proof would not be easy to find given that the reasons for the decision are often known only to the decision-maker(s).

Throughout the history of the office, 32 county court applications have been made under this power, representing approximately 6 per cent of all findings of maladministration made by Northern Ireland's local government ombudsman.¹⁸ Whilst this small number suggests that the court enforcement option is infrequently exercised, it is worth noting that this rate is the same as the rate of "unsatisfactory outcomes" in England and Wales. Half the applications have been against local district authorities, with the other half against some of the local and public bodies which exercise many of those powers usually exercised in Great Britain by local authorities.

The court award is usually, though not necessarily, a monetary one. The damages have ranged from an award of £9.98 made against Dungan UDC in one of ten cases where the council incorrectly docked the pay of two of its employees for failing to attend at work in protest at the Government's introduction of internment in 1971,¹⁹ to an award of £100,064 in a case against Craigavon Borough Council because the council incorrectly refused to lease land to a GAA club.²⁰ The only case in which a monetary award was not made by the court was in the most recent case. In that case, against Cookstown District Council, the Court decided that the best way to ensure a remedy against the Council's improper refusal to give proper consideration to correspondence from a tenant's association (the Council believed members of the association to be members of Sinn Féin) was to order it to

16. Complaint CC186/76 v Northern Ireland Housing Executive.

17. The then Belfast Recorder, Topping J, quoted in the *Belfast Telegraph*, 16 March 1977.

18. Calculation based on figures contained in the Northern Ireland ombudsman's Annual Reports.

19. CC426/71.

20. CC573/79.

give full consideration to all future correspondence from the association.²¹ Seven applications have been settled out of court for some substantial sums.²²

In only one case did the court refuse to make an order for the applicant and that was in the very first application. This was that because whilst the ombudsman found that the complainant had been a victim of maladministration he concluded that the complainant had suffered no injustice as a result.²³ The court did not then need to make an award to remedy any injustice. It is unclear how this case managed to reach the court.

The right of appeal to the High Court, under section 7(4), has been exercised only once. The appeal, like the initial hearing, was concerned only with the level of damages.²⁴ As explained later no question of rearguing the finding of maladministration arises, nor has it arisen in practice. The case involved Craigavon BC's refusal to grant a lease to a GAA club to allow it to develop sporting facilities.²⁵ The outcome of the appeal was a reduction in damages payable to the club, from £107,763 to £100,064, and a stipulation that the club should make a payment to acquire the leases.²⁶

There are, perhaps, two key issues in assessing the operation of the provision. The first is the extent to which the ombudsman's report can be challenged and the issues reviewed in the county court.²⁷ In the course of framing the County Court Rules, under section 7(2), this particular issue loomed large. Whilst subsection 2 indicates that no challenge could be made to the report "in these proceedings", subsection 8 seems to contradict this by providing that the ombudsman's report "shall, unless the contrary is proved, be accepted as evidence of the facts stated therein". This apparent ambiguity prolonged the making of the Rules. The difficulties were eventually laid to rest by the First Legislative Draftsman. In a letter to an official in the Ministry of Community Relations, he wrote that:

21. CC130/85.

22. ~~CC671/78~~ v North Eastern Education and Library Board (4 applications in one); CC129/75 v Pigs Marketing Board; CC40/72 v Coleraine, Portrush and Portstewart Waterworks Joint Board; CC1003/70 v Northern Ireland Housing Executive.

23. CC507/70 v Purdysburn Hospital Management Committee.

24. In fact the appeal judge, Lord Lowry LCJ, in the course of his judgment stated that "the hearing on appeal has therefore, literally speaking, been an exercise in damage limitation". (18 NIB 21 at 23).

25. CC 573/79 v Craigavon Borough Council.

26. The case remains the *cause célèbre* of Northern Ireland ombudsmanship because following the appeal to the High Court the Local Government Auditor surcharged a number of the councillors, thereby making them ineligible to sit as councillors for a period of five years. The councillors appealed against the Auditor's decision and succeeded in having the sum reduced, and payable by fewer of them than had been originally surcharged. Initially 17 of the Councillors were surcharged a total of £225,719.05 by the Auditor. Sixteen of the Councillors appealed the Auditor's decision and succeeded in having the amount reduced to £84,457.85 payable by 13 of them.

27. One commentator has expressed the opinion that the Northern Ireland model allows for greater review of the ombudsman's report than it is currently the practice to engage in. (Himsworth, *supra*, n 16, p 55).

"All section 7(8) does is to make the Commissioner's report and any recommendations made by him admissible for the purposes of the assessment proceedings as evidence of any facts stated in them. It may subsequently transpire that the facts on which the Commissioner acted are not wholly right. He may, for example, have been misled into supposing that the extent of the claimant's loss was greater or less than it actually is but, nevertheless, his finding of maladministration is not reviewable by the court. The court is only concerned with the assessment of damages or with the power to insist on specific action being taken if damages alone will not suffice to secure justice."²⁸

At best, then, the only manner in which the local or public body could challenge the report is to contest the facts on which the ombudsman based his findings of maladministration. If it could prove that these, or at least one of the more vital, facts were incorrect then the county court judge would not award damages. It would separately be open for the body to challenge the finding of maladministration in judicial review.²⁹

It would seem that the cumulative effect of these subsections is that the county court judge assesses the damage to the complainant on the basis of the ombudsman's report. The report is relied on because the facts contained therein are presumed to be correct. However, that presumption is rebuttable, and the facts may be found to be incorrect. If that is so, then the finding of maladministration will fall and damages will not be awarded. There is, however, no other way that an ombudsman's finding of maladministration can be challenged in these proceedings. It is difficult to envisage a clash over the facts. The reason that the facts rarely give rise to difficulties is, I suggest, to be found in the investigatory process. It is the practice of the Northern Ireland ombudsman's office, where the ombudsman proposes making a finding of maladministration, to forward the draft report to the body concerned with a request to check the facts set out therein and to verify their accuracy. Hence the possibility of a factual mistake in the report is almost certainly eliminated. The ombudsman's report has certainly never been challenged in this way in a county court hearing arising out of section 7, and the county court has, in practice, "rubber-stamped" the report. That the county court should not have a greater freedom to review the report than it presently exercises clearly accords with the intention of the draftspersons.

The second key issue is whether this power would easily transfer from Northern Ireland to Great Britain. Political and administrative structural differences between Northern Ireland and Great Britain mean that the power might not transfer easily from one to the other.

The fact that Northern Ireland is a small jurisdiction means that the personality of the ombudsman may play a greater role than in Britain. In addition the traditional tensions that exist in Britain between central and local government, with the former, more often than not, being Conservative-run and the latter being Labour-controlled, are not found in Northern Ireland. It may be that because of this historical antagonism local authorities in Britain see the local government ombudsman service as an unnecessary, centrally imposed body fettering local authorities' discretion.

The tension in local government in Northern Ireland, on the other hand, exists between Unionist and Nationalist politicians within the council chambers, most especially between Unionist politicians and organisations that they perceive to be Sinn Féin fronts or as having Sinn Féin members. Probably, and most importantly, the small range of local governmental competencies in Northern Ireland, as compared to Britain, may also mean that conflict with the local government ombudsman is less likely than in Britain.³⁰ Bestowing a court enforcement power on ombudsmen may exacerbate existing tensions resulting in further "recalcitrance"³¹ by local authorities and possibly even a withdrawal, by some local authorities, from the jurisdiction of the ombudsmen.

The Northern Ireland model is a mechanism which converts "unsatisfactory outcomes" into "satisfactory outcomes", albeit that the body complained against may continue to harbour reservations about the ombudsman's report. Indeed the category of "unsatisfactory outcome" doesn't feature in the operation of the ombudsman's office in Northern Ireland. From the complainant's perspective section 7 is very welcome. It can only be initiated by complainants and, more importantly, will always ensure a satisfactory resolution of the dispute if the ombudsman's report has found maladministration sustaining injustice. It allows for no prolonged wrangling or prevarication by the body complained against and the respondent cannot "sit it out" by merely refusing to do anything about the report, as appears to be the case in Great Britain. By conferring on the complainant the right to make the application, the question of enforcement is taken out of the office's hands. Divorcing the office from the enforcement process may also contribute to the lack of resultant animosity between the ombudsman and the bodies subject to the jurisdiction of the office. As stated earlier the only involvement the office has in the process is to issue a Certificate of Authenticity, verifying the copy of the report, if requested to do so by the applicant.³² A previous Northern Ireland ombudsman expressed an additional advantage of the procedure by pointing out that with such a power backing his report the ombudsman has complete freedom to express

28. Letter, *supra*, n 15.

29. A number of such challenges have been mounted in the past. See, for example, Jones "The Local Ombudsman and Judicial Review", [1988] *Public Law* 608 and also *R v Commissioner for Local Administration ex parte Croydon LBC* [1989] 1 All ER 1033. Indeed, Jones makes the point that the objections of those that oppose judicial enforcement on the basis that it would be "inappropriate and unfair, since local authorities do not enjoy a statutory right of appeal against an adverse report" have "less force (at 621).

30. Northern Ireland local district councils are essentially responsible only for leisure services, refuse collection and the setting of the local rate.

31. It would be over-simplistic to categorise all refusals to adhere to reports of the ombudsmen as unjustified obstinacy. The reasons for the local authorities' reactions may be more complex than this. For example, a local authority might not wish to adhere to a report that it feels is not adequately reasoned. See, Crawford, "Complaints, Codes and Ombudsmen in Local Government" [1988] *Public Law* 246 at 259.

32. This has been done on every occasion on bar one.

his views, findings and suggestions for a remedy. An ombudsman without such a power might, in contrast, write a report with one eye on the respondent's reactions. He stated:

"Such freedom is, however, lacking in a situation where a commissioner has to tone down his language, his criticism and even his report and its findings for the purpose of ensuring that the report will in the end be acceptable to and acted upon by a particular body."³³

Nor does the existence of the power appear to adversely affect the ombudsman's relationship with local and public bodies.³⁴ The value of the power is that it is a method of involving the courts in the work of the ombudsman that strengthens the ombudsman's position, and not a procedure, like an appeal, that undermines it.

CONCLUSION

The mechanism has worked well in Northern Ireland and the model should not, I submit, be discarded too quickly. Whatever reservations the local authorities and the ombudsman may have from the complainants' perspective it certainly is more beneficial than the present system in Great Britain. However, the significant differences between the functions undertaken by local authorities in Great Britain and those in Northern Ireland mean that the procedure may not transfer easily across the Irish Sea. Given that the local authorities seem to be implacably opposed to such a development, court enforcement may prove to be useful in securing compliance with ombudsmen's reports as a weapon of last resort — a nuclear deterrent, so to speak — rather than as an actual sanction.³⁵

CIARAN WHITE*

33. Hugh Kernohan (Northern Ireland Ombudsman 1980-87) quoted in *Administrative Justice — Some Necessary Reforms*, The Justice — All Souls Committee Review of Administrative Law, Oxford, 1988, para 5.83.

34. Evidence of Hugh Kernohan, referred to in Select Committee Report, paras 20 and 21.

35. I wish to acknowledge the help given me in researching this article by the staff of the Northern Ireland ombudsman's office, especially the ombudsman, Mrs Jill McIvor, and her predecessor, Dr Maurice Hayes. My thanks also to Professor Bruce Dickson for his comments on an earlier draft. The finished product is a revised version of a paper given at the 1992 Political Studies Association Conference held in the Queen's University, Belfast. The research for this paper was undertaken while the author was a Research Assistant at the Queen's University, Belfast into the Northern Ireland ombudsman's office. The author takes full responsibility for all errors and opinions stated herein.

* Lecturer in Law, University of Ulster.

"ONCE A HIGHWAY, ALWAYS A HIGHWAY"

One of the differences between private rights of way and public rights of way or highways is the effect of non-use over a period of time. It is trite law that failure to exercise a private right of way over a period of time may be interpreted as an implied release of the right by the dominant owner through abandonment.¹ For this to occur however, non-use is not of itself sufficient.² The court must be able to infer that the dominant owner has demonstrated a fixed intention never at any time to assert the right himself or to attempt to transmit it to anyone else.³ The courts have been reluctant to lay down any guidelines of general application, so that in some cases a relatively short period of disuse will be sufficient to allow a finding of abandonment,⁴ while in others abandonment will not be inferred even where the right of way has not been exercised for a substantial period of time.⁵ In *Mulville v Fallon*⁶ the Vice-Chancellor explained:

"The extinguishment of easements, however created, may be by actual or implied release; the latter will be sufficiently proved by a cessation of user, coupled with any act clearly indicative of an intention to abandon the right; and if such intention be thus shown, the duration of the cesser need not be for twenty years or for any other defined period."

The question of abandonment not infrequently arises where a new way has been substituted for an old one.⁷ As will be seen, the same problem has arisen in the case of highways, where a new and more convenient road constructed at the public expense has replaced an old way which has then fallen into disuse. The question whether the old way can be reopened is the subject of this paper.

The problem which immediately arises is that in contrast to private rights of way, where the right of way is a public right, it is said that non-use will not result in the right ceasing to exist. The maxim is "once a highway, always a highway". The *locus classicus* of the maxim is the judgment of Byles J in *Dawes v Hawkins*.⁸ The substantive issue in the case was whether the defendant was liable in trespass for having broken down a wall erected by the plaintiff on the plaintiff's land. One of the defences was that the wall had been built across a public right of way and the defendant was entitled to remove the obstruction. What had happened was that sometime between 1809 and 1813 part of a highway had been enclosed by the owner of the land

1. See eg Gale, *Easements* (15th edn, 1986), p 371; Jackson, *Law of Easements and Profits* (1978), p 196.

2. *Ward v Ward* (1852) 7 Exch 838 at 839, per Alderson B. See also *Crossley v Lightowler* (1866) LR 3 Eq 279 at 292, per Page Wood VC.

3. *Tehidy Minerals Ltd v Norman* [1971] 2 All ER 465 at 492 per Buckley v *Aegan Hotels Ltd* (1989) 58 P & CR 163; *Carroll v Sheridan* [1984] ILRM 451.

4. *Crossley v Lightowler*, supra (25 years' non-use).

5. *Benn v Hardinge*, *The Times*, 13 October 1992 (175 years' non-use).

6. (1872) IR 6 Eq 458 at 463.

7. As in *Stevenson v Parke* [1932] LJ Ir 228.