
FROM: Kathy O'Hanlon - Clerk to the Committee for the Office of the First Minister and deputy First Minister

DATE: 18 June 2015

TO: Paul Gill, Clerk – Ad Hoc Committee on Ombudsperson Bill

SUBJECT: Public Services Ombudsperson Bill

At its meeting on 17 June 2015 the OFMDFM Committee considered your memo of 16 June 2015 seeking clarification on a number of issues.

Examiner of Statutory Rules

1. The Committee noted the Examiner's suggestions and agreed to request draft amendments to give effect to them. The only exception is the suggestion in paragraph 8 of the Examiner's paper on which the Committee will seek the Drafter's advice. When the Committee has considered and settled these amendments it will share them with the Ad Hoc Committee.

Comments from OLC

2. The Committee considered OLC's comments and has agreed to request draft amendments in a number of areas and seek the advice of the Drafter on others. When the Committee has considered the Drafter's advice it will write to update the Ad Hoc Committee.

Amendments

3. The Committee considered a number of draft amendments previously requested and agreed to forward these to the Ad Hoc Committee. A copy of the amendments is attached.

4. In relation to an amendment exempting the Ombudsperson from Article 27 of the Local Government (NI) Order 2005 the Committee noted that the NIPSO would have the same power as the High Court in relation to the production of documents relevant to an investigation and the attendance of witnesses and that this would take precedence over the restriction on disclosure of information in Article 27.

Universities

5. In relation to the issues raised by the University of Ulster regarding its campuses in Birmingham and London, the Committee noted advice from the drafter that these are outside the legislative competence as the Assembly cannot make law which would form part of the law of England. The University of Ulster indicated that the students at these campuses have access to the Office of the Independent Adjudicator.
6. In relation to Queen's University's concerns regarding Stranmillis and St Mary's colleges the Committee noted that these are described by Queen's as "*constituent colleges*", the specific term used in the note at the end of Schedule 3. You will also note that the amendments referred to above move the provision in the note to Schedule 3 into the body of clause 18 dealing with universities. The Drafter considers the provision in Clause 18(7) is wide enough to cover St Mary's and Stranmillis.
7. In relation to the four theological colleges that are members of the Institute of Theology at Queen's University, the Committee has agreed to request research on their status and relationship with Queen's.

Stakeholder recommendations

8. The Committee noted a request regarding a number of recommendations made to the Ad Hoc Committee arising from its stakeholder event on 28 May 2015, namely whether the Bill covered the recommendations made. The Committee agreed to consider this matter again at its meeting on 24 June 2015.

Clause 41

9. In responding to the Ad Hoc Committee the Committee noted Sinn Féin's consistent objection to Clause 41 in principle and all policy proposals flowing from it, and that the SDLP has consistently shared concerns regarding the operation of the Clause.

10. Clause 41 of the Northern Ireland Public Services Ombudsperson Bill ('the Bill') provides as follows:

41.—(1) A person to whom subsection (2) applies may give notice to the Ombudsperson with respect to—
(a) any document or information specified in the notice, or
(b) any class of document or information so specified, that in the opinion of that person, the disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of Northern Ireland or the United Kingdom or otherwise contrary to the public interest.

11. The effect of such a notice is to preclude the Ombudsperson from disclosing 'to any person or for any purpose any document or information specified in the notice. A notice may be issued by the First Minister and deputy First Minister acting jointly, a Northern Ireland Minister, or the Secretary of State.
12. Some members of the Ad Hoc Committee raised a concern that 'a Minister or the Secretary of State could 'come to the opinion that disclosure of information that was merely embarrassing or uncomfortable would be contrary to the public interest.'
13. The Committee was briefed on this issue by officials.
14. The Committee noted that there is no judicial authority exactly on point. Since 1967 there are only two known instances of the power to issue a non-disclosure notice being used, both in respect of investigations undertaken by the Parliamentary and Health Services Ombudsman in England and Wales. One notice was withdrawn, and the circumstances in the other case were very unusual (and would in fact now fall under the Freedom of Information Act 2000 and within the remit of the Information Commissioner).
15. Power analogous to that conferred by clause 41 has never been used as regards an investigation by the Northern Ireland Assembly Ombudsman. Nor have equivalent powers in respect of investigations by the Welsh and Scottish Public Services Ombudsmen been exercised.
16. However, the term 'public interest' is very common in legislation, and there is close parallel between the powers under section 41 and Ministers' common law power to withhold documents on the basis of Crown privilege (what is now called 'public interest immunity').
17. The Committee noted that Minister's power to withhold information in the public interest is closely circumscribed, and subject to oversight by the courts. In a leading authority, a seven-member appellate committee of the House of Lords gave guidance on the sort of grounds which would not afford to a Minister

adequate justification for objecting to production (or, in the instant case, disclosure)¹:

It is not a sufficient ground that the documents are "State documents" or "official" or are marked "confidential." It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.'

18. The Committee noted that for a Northern Ireland Minister or the Secretary of State to withhold information which was merely 'embarrassing or uncomfortable' on the basis that disclosure would be "contrary to the public interest" would be unlawful. Disclosure may only be restricted where 'the public interest would otherwise be damnified'. The reference to the safety of 'Northern Ireland or the UK' in clause 41 is of course consistent with a very limited power directed to this effect.

19. The Committee also noted that Ministerial decisions on disclosure in the public interest are subject to express judicial oversight. In *Conway v Rimmer*² the House of Lords noted:

'Production will not be ordered if the possible injury to the nation or the public service is so grave that no other interest should be allowed to prevail over it, but, where the possible injury is substantially less, the court must balance against each other the two public interests involved. When the Minister's certificate suggests that the document belongs to a class which ought to be withheld, then, unless his reasons are of a kind that judicial experience is not competent to weigh, the proper test is whether the withholding of a document of that particular class is really necessary for the functioning of the public service. If on balance, considering the likely importance of the document in the case before it, the court considers that it should probably be produced, it should generally examine the document before ordering the production (at p. 953; emphasis added).

¹ *Duncan v Cammell Laird Ltd* [1942] A.C. 624 at page 642

² [1968] A.C. 910

20. These authorities were referred to with approval by the UK Supreme Court in 2011, where it was noted that, in the event of a challenge to a Ministerial decision that disclosure of particular material was not in the public interest, '*it was for the court, not the minister, to balance the competing public interests*'.³
21. This would suggest that any Minister who is competently advised will recognise that his or her power under clause 41 is subject to judicial oversight. It would be a straightforward matter for the Ombudsperson (or other interested party) to judicially review the issue of a disclosure notice if he believed the power had been used improperly.
22. Given that these notices have rarely been used in relation to ombudsmen, and the consequent likelihood that there would be close scrutiny of any notice that may be issued – including, if necessary, review by a court of the material withheld - a majority of the Committee was content with Clause 41.

³ *Al Rawi v the Security Services* [2011] UKSC 34 at paragraph 142

Amendments to the Public Services Ombudsperson Bill

Amendment

Clause 18, page 7, line 37

At end insert –

‘(7) In this Act, references to a university include references to a constituent college, school or hall or other institution of a university.’

Chair, OFMDFM Committee

Amendment

Schedule 3, page 35, line 2

Leave out Note 1

Chair, OFMDFM Committee

Amendment

Clause 42, page 17, line 38

At end insert –

‘(i) a local government auditor within the meaning of Article 4 of the Local Government (Northern Ireland) Order 2005,

(j) the Comptroller and Auditor General, and

(k) the Health and Social Care Regulation and Quality Improvement Authority under the Health and Social Care (Reform) Act (Northern Ireland 2009.’

Chair, OFMDFM Committee

Amendment

Schedule 4, page 35, line 30

Leave out ‘Article 110 of the Planning (Northern Ireland) Order 1991’ and insert ‘section 203 of the Planning Act (Northern Ireland) 2011’

Chair, OFMDFM Committee

Amendment

New paragraph

Schedule 6, page 39, line 27

At end insert –

‘8A. Omit paragraph 13 (financial provisions and directions)’

Chair, OFMDFM Committee

Amendment

Clause 49, page 20, line 11

At end insert –

‘(3) The person holding office as Northern Ireland Judicial Appointments Ombudsman immediately before the coming into operation of this section ceases to hold that office upon the coming into operation of this section.’

Chair, OFMDFM Committee

Amendment
Schedule 3, page 33, line 30 to 32
Leave out lines 30 to 32

Chair, OFMDFM Committee

Amendment
Schedule 3, page 34, line 26
At end insert –
‘The Health and Safety Executive for Northern Ireland’

Chair, OFMDFM Committee

Amendment
Schedule 9, page 46, line 40
At end insert –

The Ombudsman and Commissioner for Complaints (Amendment) Act (Northern Ireland) 2015	The whole Act.
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Chair, OFMDFM Committee