



Northern Ireland
Assembly

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

**OFFICIAL REPORT
(Hansard)**

**Reform of the Office of the
Northern Ireland Ombudsman**

9 March 2011

NORTHERN IRELAND ASSEMBLY

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DEPUTY FIRST MINISTER**

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Members present for all or part of the proceedings:

Mr Tom Elliott (Chairperson)
Ms Martina Anderson
Mr Allan Bresland
Mr William Humphrey
Mrs Dolores Kelly
Mr Danny Kinahan
Mr Francie Molloy
Mr George Robinson
Mr Jimmy Spratt

Witnesses:

Mr Ray McCaffrey)	Research and Library Service
Mrs Marie Anderson)	Office of the Northern Ireland Ombudsman
Mr John MacQuarrie)	

The Chairperson (Mr Elliott):

We will now receive a briefing from Ray McCaffrey of the Assembly's Research and Library Service on issues that were raised previously by the Committee in relation to the consultation and the proposals. I invite Ray to the table.

Mr Ray McCaffrey (Research and Library Service):

Thank you, Chairperson. Members have the paper in front of them for reference. The Research and Library Service was asked to address a long list of questions based on responses that were received during the consultation process. The paper groups those together under three or four key themes, but, for the purposes of this presentation, rather than attempting to address every single issue, I will focus on what emerged as the overarching issues. Those can be broken down as potential overlap with existing bodies and the accountability and appointment of the ombudsman.

Turning to the issue of overlap with bodies that are already in existence, it is useful in that context to look at the examples of the Scottish and Welsh ombudsmen and similar types of bodies in Northern Ireland. The research found that there seemed to be two ways of addressing overlapping remits. The first is to legislate for joint working between organisations, and the second is by memorandums of understanding (MOUs) to outline the respective jurisdictions and how issues that cut across two organisations can best be addressed.

Section 21 of the Scottish Public Services Ombudsman Act 2002 places a duty on the ombudsman to consult other commissioners or ombudsmen in circumstances in which a complaint could be the subject of an investigation by a different office. The Welsh legislation contains provisions that are similar to Scotland's. In addition, the Commissioner for Older People (Wales) Act 2006 made specific provision for the commissioner to work jointly with the Welsh ombudsman in circumstances in which there was an overlap in their investigatory functions. The National Assembly for Wales may extend by Order the list of people whom the commissioner has to consult.

Along with the statutory obligations to consult and for joint working, the Scottish and Welsh ombudsmen have entered into memorandums of understanding with other organisations. That is particularly apparent in the case of Scotland. The research paper lists the bodies that the Scottish ombudsman has, to date, agreed MOUs with. The paper also includes a fairly typical example of a memorandum that sets out the arrangements for co-operation, how complaints will be handled, information sharing and consultation.

The Northern Ireland Ombudsman has concerns that entering into memorandums of understanding could be seen as undermining his independence and impartiality, although the office has in place mechanisms for minimising the duplication of effort. For example, when a

complaint is received, it goes through a process of validation, and, if appropriate, the complaint is signposted to another organisation that is best placed to deal with it.

There are a number of existing organisations in Northern Ireland that use memorandums of understanding in that way. Examples include the Regulation and Quality Improvement Authority, the Equality Commission, the Commissioner for Children and Young People and the Police Ombudsman. The table on page 10 of the paper provides further examples. An issue for consideration as regards the future direction of the office of the ombudsman is whether there should be a legislative duty to consult and co-operate with other commissioners or ombudsmen or whether that should be left to the discretion of the ombudsman via memorandums of understanding. Perhaps it could be a combination of both.

Turning to the appointment and accountability of the office, there is some variation in the length of time that the various commissioners and ombudsmen may serve in office. The Scottish ombudsman can be appointed for two five-year terms, with a third term possible only if it is in the public interest. However, recent changes mean that the next ombudsman will be appointed for one eight-year non-renewable term. Currently in Wales, the ombudsman is appointed for one seven-year term only. In Northern Ireland, the legislation stipulates that the ombudsman must leave office when he reaches the age of 65. However, the coalition Government in Westminster have recently introduced reforms around the default retirement age, which mean that people cannot be forced to retire just because they have reached the age of 65. Some consideration needs to be given to the extent to which that should apply, if at all, to the office of the ombudsman.

In comparison, the Northern Ireland Commissioner for Children and Young People and the Commissioner for Older People are appointed for a maximum of two four-year terms. The executive summary of the research paper says that it is two five-year terms; I apologise for that drafting error. The new Northern Ireland Assembly Commissioner for Standards will be appointed for one five-year term so, as you can see, there is a bit of variation in tenure.

As to accountability, the 2004 review of the office of the ombudsman carried out by Deloitte recommended that the office be accountable to the Assembly, through the Public Accounts Committee, for its performance but not for its decisions. Currently, the ombudsman is required to lay an annual report before the Assembly, but it has no statutory relationship with an Assembly Committee that could oversee the performance of the office. That lack of a statutory relationship

is an issue that has been raised by the Scottish ombudsman. He commented that a stronger link with a Committee would allow the Scottish Parliament to hold his office to account much more effectively.

In the Republic of Ireland, the ombudsman published a document in advance of the recent election which advocated a closer relationship with the Oireachtas. She believes that the work of the ombudsman could be enhanced by a direct reporting relationship with a specific Oireachtas Committee which both monitors and supports the work of the ombudsman. The ombudsman expects to have her investigations and recommendations reviewed critically by that Committee, which would make its own assessments.

This raises the wider and more fundamental question of where the office of the ombudsman should sit. The ombudsman is currently appointed under the Northern Ireland Constitution Act 1973, which states that he is to be appointed by the Queen. The current ombudsman was appointed on the recommendation of the Secretary of State in a period of direct rule, so we have not yet had a situation where the appointment needs to be made at a local level. The office currently falls within the Office of the First Minister and deputy First Minister, so any future appointment, as things stand, would be a departmental appointment. That is unusual, as ombudsmen are usually independent of the Executive.

At present, there is perhaps a lack of clarity as to how the Department would make that appointment when the time comes for it to do so. There may be issues around the role that the Secretary of State would play, if any, in the appointment process. One possible method of appointment, involving bringing forward new legislation, would be that undertaken for the Comptroller and Auditor General, who is appointed by the Queen on the nomination of the Assembly. An alternative would be to reflect the arrangements envisaged for the new Standards Commissioner, who will be appointed on a resolution of the Assembly. In that way, the Ombudsman would clearly become an officer of the Assembly, removed from the Executive.

Briefly, it is interesting to reference the reform of public services that has taken place in Scotland. That followed a 2006 inquiry by the Finance Committee of the Scottish Parliament, which looked at the accountability and governance of bodies supported by the corporate body of the Parliament. The inquiry was prompted by concerns about increasing costs, perceived shortcomings of budgetary accountability, the lack of consistency in governance arrangements

and some additional matters. The offices examined as part of the review included the Scottish Public Services Ombudsman, the Scottish Parliamentary Standards Commissioner, Scotland's Commissioner for Children and Young People and the Commissioner for Public Appointments in Scotland. The Committee's report noted that insufficient checks and balances were put in place to reassure Parliament that commissioners and ombudsmen represent value for money. It went on to recommend that bodies with similar roles and responsibilities should be amalgamated wherever possible. The potential to pool the resources of existing bodies should be considered wherever possible. Unnecessary direct remit overlap should be dealt with by removing responsibility from one of the bodies involved and adjusting the budgets accordingly. The result of this was the Public Services Reform (Scotland) Act 2010, which abolished certain bodies and enhanced the role of the Scottish Public Services Ombudsman, for example by transferring complaints about water services to his jurisdiction.

The Chairperson:

On page 21 of your research paper you list a number of bodies that are outside the ombudsman's remit. I notice that it is in the section entitled 'Following the public pound'. The paper also mentions the Audit Scotland 2005 report on Scottish councils. Are you indicating that that list of bodies under the Scottish model should be placed under the ombudsman?

Mr McCaffrey:

I am not really trying to link the two. Those bodies were identified by the Deloitte report and fell under what was classed as "following the public pound". In the absence of a statutory definition of what the "public pound" could be, I simply wanted to highlight that Audit Scotland had issued guidelines that could be followed.

The Chairperson:

Are you indicating that there could be a certain model or not?

Mr McCaffrey:

No; I was not trying to link those specific bodies.

Ms Martina Anderson:

Thank you for your paper. You were good enough to highlight some issues that we should consider. Given that issues for us to consider are highlighted in almost every section of the paper,

it would be remiss of us to just take this evidence today and not return to it. There are matters around updating the legislation, the impact that that would have, the extent of the memorandums of understanding, and so on. I do not know whether the Chairperson has concerns about time, and I know that today is a difficult day because we are all in and out of the Chamber, but I think there are a number of issues raised here that we really should take time to focus on.

The Chairperson:

Does anyone have any questions about the paper for Ray? No. OK. Thank you, Ray.

The Chairperson:

Good afternoon. Marie and John, you are very welcome. I begin to get quite nervous when I see the bundle of papers and the size of the briefcase in front of us. The proceedings are being recorded by Hansard for information. You have provided the Committee with a paper. Perhaps you could take 10 minutes to make your presentation, and then leave yourselves available for questions.

Mrs Marie Anderson (Office of the Northern Ireland Ombudsman):

Thank you for the opportunity to give further comment and evidence on the proposed change in refreshing the ombudsman's legislation. The paper answers some specific questions, and I am happy to speak to those if members have specific questions. It might be helpful at this juncture, particularly in light of the recent Law Society's response to the specific question about the ombudsman's powers, to clarify the role of the ombudsman. Mr Frawley has helpfully set that out in his introduction. However, I do not intend to take the full 10 minutes.

I will just remind the Committee that an ombudsman is an officer who has the duty of impartially investigating complaints of maladministration about government bodies. An ombudsman is not a court, nor is he or she subject to article 6 of the European Convention of Human Rights, and I can point to the relevant case law there. The ombudsman can play a role in securing accountability of government to citizens, and, in doing so, he acts as an agency of the Parliament. In this, the ombudsman uses what we would call moral suasion, as opposed to formal enforcement powers. An ombudsman cannot issue an order like a court. He is not a court of appeal. The ombudsman's powers of investigation are wide-ranging, and they have existed since the legislation was first introduced in 1969. I am aware that the Law Society is concerned that they are oppressive, but, to date, we have never had a complaint from any witness that our powers

are oppressive.

It is firmly established in academic literature and in case law that an ombudsman is not like a court, because an ombudsman does not determine rights and obligations. An ombudsman's role is inquisitorial and investigatory. Therefore, article 6 of the European Convention on Human Rights does not apply. I wanted to clarify that at the beginning because of the lateness of the recent response from the Law Society.

In other countries, the ombudsman works closely with the Assembly, and part of Deloitte's review and the thrust behind the consultation has been to improve the relationship with the Assembly. In response to some of the consultation questions, one specific question is should the ombudsman report to the Assembly? The ombudsman wants to be accountable to the Assembly for the purposes of the delivery of his services and his business plan. The ombudsman is also accountable to the courts by way of a judicial review in respect of his judgements, which are independent and impartial. Therefore, there are accountability mechanisms in place.

In essence, the ombudsman works in the system of administrative justice, rather than criminal or civil justice. Administrative justice is about the decisions made by public bodies that affect the lives of ordinary people. Thousands of those decisions are made every day.

I was just discussing with the former deputy before I came in here that there is no bar to who can appeal. Any citizen, regardless of age, can appeal. A child can appeal to the ombudsman provided that he or she has equivalent support. Therefore, it is important that the ombudsman's legislation is refreshed to reflect the world that we are in today, because, as I have indicated, it is based on 1969 legislation.

There are a number of areas that the Committee has asked us to look at. It specifically asked questions about the possibility that an extension of the investigation power into specific complaints could be extended into systemic review, and I am happy to respond to that, particularly if there are concerns about resources and accountability.

There is also a new function developing in the ombudsman's world. It is known as the design authority role. I am happy to take questions on the experience of Welsh and Scottish colleagues. There are also questions about a wider role for the ombudsman in relation to providing guidance

on good practice to public bodies. From my discussions with public bodies, and, particularly more recently with the justice bodies, I know that they would welcome that. I am happy to take any questions on those issues, and I am particularly mindful of the time constraints and of other matters that are taking up your concerns today.

The Chairperson:

OK. Thank you, Marie. In one of your responses in your written submission, you say that:

“the Ombudsman does have jurisdiction over some education authorities which include the Education and Library Boards as well as the Department of Education and the Department of Education and Learning.”

I assume that that is supposed to be the Department for Employment and Learning. Therefore, it does not have any jurisdiction at all over the Council for Catholic Maintained Schools (CCMS)?

Mrs Marie Anderson:

The ombudsman has jurisdiction over the CCMS, but he does not have jurisdiction over colleges of further and higher education and universities. Therefore, we recognise that there is a gap there. In England and Wales, it has been identified that the Office of the Independent Adjudicator for Higher Education deals with complaints of maladministration against higher education establishments. That is not the case in Northern Ireland, and it is a gap that Deloitte recognised and mentioned among the listed bodies that ought to come into jurisdiction under the principle of following the public pound.

The Chairperson:

OK. I assume that you would like to see the list of bodies in the Deloitte report that were outside the ombudsman’s jurisdiction coming under the ombudsman’s jurisdiction?

Mrs Marie Anderson:

We would indeed. That list, which is included at paragraph 4.6 of your consultation document, reflects the Deloitte review list. In particular, the ombudsman is well aware of his discussions with the Comptroller and Auditor General, and the Northern Ireland Audit Office is not currently in the jurisdiction of the ombudsman. Therefore, it was felt that its addition would increase accountability across the public sector.

Ms Martina Anderson:

Thank you very much for that. As someone who is very supportive of the change in the

legislation and agrees that it is required, I have had concerns throughout the process that there was a scoping of other areas that you believe should be under your remit. I would like to touch on the issue of trying to conduct an investigation without a complaint. Do you not think that, in those circumstances, it would be better if something that was brought to your attention was brought to the Comptroller and Auditor General, who would be the best person to pursue it?

Mrs Marie Anderson:

Our response suggests — and the Deloitte report recognised — greater collaboration and consultation between the two offices. The ombudsman has been asking for a broad discretion to conduct a systemic review. We have identified some possible triggers, and there are a number of routes to those triggers. One might be from the Comptroller and Auditor General conducting a systemic review himself. He might come across an issue when he is doing a value-for-money audit that should be referred to the ombudsman. Another might be that the ombudsman has an intelligence base in relation to complaints about particular bodies, so, if there was a critical mass, that might flag an area of concern. I also think that a Committee of the Assembly, if it saw an issue during the conduct of its business, should be able to refer the matter. Those are some broad indicators that the ombudsman considers might trigger the decision to conduct a systemic review.

Ms Martina Anderson:

Would it not lead to duplication if we have a body that can carry that out, but it is now suggested that it should come under the remit of the ombudsman?

Mrs Marie Anderson:

I agree. The aim is to avoid duplication in order to ensure maximum efficiency in the use of public resources. The ombudsman is a public resource. Going hand in hand with the systemic review power, there would be the equivalent of the section 25 power that the Welsh ombudsman has to collaborate with other bodies that also have investigatory and audit functions in order to avoid that duplication. We know from discussions with our Welsh colleagues that that is working well in Wales, particularly in relation to the Older People's Commissioner for Wales.

The Chairperson:

No other members have any queries. You got away very lightly, Marie and John.

Mrs Marie Anderson:

I am very grateful for that today and thank you again for the time. The Committee may require a written response to the serious concerns raised by the Law Society, and I am happy to provide that.

The Chairperson:

We have commissioned a research paper from the Assembly Research and Library Service, and we got a briefing on that just before we heard from you. We can make that available for you, if you wish to have it.

Mrs Marie Anderson:

There is one specific issue that I would like to reiterate in relation to the Law Society's consultation response, which we read with some concern because we thought that it showed a confusion of roles. The ombudsman model that is quoted by the Law Society as having determination powers is actually the Pensions Ombudsman, and that does determine matters, whereas the Northern Ireland Ombudsman is an investigation body, which investigates and makes findings and recommendations. The ombudsman does not have formal enforcement powers. Given the status of the body that raised the query, I would like to put that on the record.

Mr Spratt:

I think the Law Society is worried about you nipping in and stealing some of its work and its fat fees.

Mrs Marie Anderson:

I could not possibly comment on that, as I am a practising solicitor. The ombudsman is an alternative to the courts. It is an alternative dispute mechanism that is currently free to the public, and I am aware of the access to justice consultation, which is looking at all of those areas. Perhaps that is an area that would cause the Law Society some concern. I could not possibly comment any further than that.

Mr Spratt:

The Pensions Ombudsman is not actually based in Northern Ireland?

Mrs Marie Anderson:

It is a UK body. It has been described in Wade's 'Administrative Law' as a statutory tribunal. It is not the type of model of public sector ombudsman that we are proposing here. It would be helpful to say that it is, in essence, like a tribunal.

Mr Spratt:

Does it make judgements?

Mrs Marie Anderson:

It makes judgements as well as what we call determinations, whereas Mr Frawley currently produces a report and makes a recommendation which can or cannot be followed.

The Chairperson:

OK. Thank you very much.