



Northern Ireland  
Assembly

# Research and Information Service Briefing Paper

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**Tim Moore**

## Regulation of Public Appointments

### 1 Introduction

This briefing note has been prepared for the Committee for Finance, in the context of its consideration, during the Committee Stage, of the Functioning of Government (Miscellaneous Provisions) Bill.

The note provides information, firstly, on the Commissioner for Public Appointments for Northern Ireland and, secondly, on the Commissioner for Ethical Standards in Public Life in Scotland who, amongst other things, regulates how people are appointed to the boards of public bodies in Scotland.

The paper concludes by outlining the International Ombudsman Association Code of Ethics and Standards of Practice.

## 2 Commissioner for Public Appointments

The post of Commissioner for Public Appointments for Northern Ireland was established in 1995 by the 'Commissioner for Public Appointments (Northern Ireland) Order' (the Public Appointments Order). The legislation has been amended<sup>1</sup> on a number of occasions to take account of the progressive devolution of powers and duties to the Northern Ireland Executive.<sup>2</sup>

### Appointment

The Commissioner for Public Appointments for Northern Ireland (the Commissioner) is appointed by the First Minister and deputy First Minister acting jointly.

### Functions

The Public Appointments Order provides that the Commissioner:

- shall in the manner she considers best calculated to promote economy, efficiency and effectiveness in the procedures for making public appointments, exercise her functions with the object of maintaining the principle of selection on merit in relation to public appointments.
- shall prescribe and publish a Code of Practice on the interpretation and application by Departments of the principle of selection on merit for public appointment and shall adopt and publish from time to time such additional guidance to Departments as the Commissioner shall think fit.
- shall carry out an audit to review the policies and practices of Departments in making public appointments to establish whether the Code of Practice referred to in paragraph 2 is being observed.
- may require any Department to publish such summary information relating to selection for public appointments as she may specify in writing.
- may from time to time conduct an inquiry into the policies and practices pursued by a Department in relation to any public appointment or description of any public appointment.
- shall publish an annual report.

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<sup>1</sup> By the FMdFM exercising the powers conferred on them by section 23 (3) of the Northern Ireland Act 1998

<sup>2</sup> Copies of the legislation are available from the Commissioner's website <https://www.publicappointmentsni.org/our-role> (accessed 02/07/2020)

Whilst complaints are not directly referred to in the Public Appointments Order, the Code of Practice for Ministerial Public Appointments in Northern Ireland states, amongst other things, that:<sup>3</sup>

The Commissioner may decide to investigate a complaint which has come to her directly' [5.10].

Government Departments must have an effective system in place for handling complaints and for documenting the details of each complaint. The Department must make Complainants aware of their right to ask the Commissioner to investigate if they are dissatisfied with the Department's response. [5.12]

On completion of investigation of a complaint, the Commissioner's determination will be communicated to the complainant and to the Minister and the Permanent Secretary of the relevant Department setting out:

- the key conclusions and the reasons behind them; and
- any action the Commissioner intends to take, or requires the Department to take, in light of the investigation. [5.16]

Information on complaints and investigations conducted by the Commissioner will be summarised in the Commissioner's Annual Report. Anonymised reports on investigation and complaints will be published on the CPA NI website unless the complainant requests otherwise. [5.17]

### **Memorandum of Understanding and Financial Memorandum**

In 2015, a Memorandum of Understanding and Financial Memorandum was drawn up the Office of the First Minister and Deputy First Minister in consultation with the Commissioner.<sup>4</sup> In addition to stating the Commissioner's functions, duties and powers, the Memorandum of Understanding sets out:

- the rules and guidelines relevant to the exercise of the CPA's functions, duties and powers;
- the conditions under which any public funds are paid to CPA; and
- how accountability will be managed.

The Financial Memorandum sets out in greater detail certain aspects of the financial provisions which the Commissioner will observe.

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<sup>3</sup> Commissioner for Public Appointments Northern Ireland (2016) [Code of Practice for Ministerial Public Appointments in Northern Ireland Version JL2 December 2016](#) (accessed 02/07/20)

<sup>4</sup> [https://www.publicappointmentsni.org/sites/cpani/files/media-files/cpa\\_ni\\_memorandum\\_of\\_understanding\\_-\\_131015.pdf](https://www.publicappointmentsni.org/sites/cpani/files/media-files/cpa_ni_memorandum_of_understanding_-_131015.pdf) (accessed 02/07/2020)

## Classification

The Memorandum of Understanding and Financial Memorandum (MoU/FM) states that:

Relationships between the CPA, Ministers and the Department will be governed by the 'arms length' principle wherein the role of Ministers is to set the legal and financial framework including appointments and arrangements for the CPA's funding. Within this framework, the CPA determines her activities in accordance with her statutory responsibilities and the requirement of Government policy.

The MoU/FM also states that the First Minister and deputy First Minister are accountable to the Assembly for the activities and performance of the Commissioner, and that their responsibilities include:

- Approving the policy and agreed remit within which the CPA will operate
- Keeping the Assembly informed as appropriate on the CPA's performance in delivering her remit
- Carrying out any responsibilities specified in the CPA Orders including appointment of a Commissioner and approving the terms of conditions of service
- Approving and signing legislation (Prerogative Orders) to amend the Commissioner's role; and
- Providing resources and services and approving the amount of funding to be provided to the CPA.

## Budget

The Financial Memorandum sets out the financial relationship between the Executive Office (TEO), through its sponsor branch, and the Commissioner. The Commissioner is funded by TEO and, in co-operation with TEO Sponsor branch, the Commissioner establishes, implements and monitors its budgetary process and financial regime. In doing so, it adheres to the relevant processes set out in the Financial Memorandum and other relevant guidance issued by TEO.

## Staffing

The Commissioner, who is not a civil servant and is contracted to commit a specified number of days per year to her post and receives remuneration of around £24k. She is supported by three seconded officers (a Principal Business

and Policy Adviser, Compliance Officer, Business Support Officer) and team of 30 independent assessors.

### 3. Regulation of public appointments in Scotland

In Scotland a range of functions, including the regulation of conduct in public life and appointments to boards of public bodies, have over time been brought together under a single commissioner, namely, The Commissioner for Ethical Standards in Public Life in Scotland (the Ethical Standards Commissioner). In broad terms, the Ethical Standards Commissioner and his team:

- investigate complaints about the conduct of MSPs<sup>5</sup>, local authority councillors, board members of public bodies<sup>6</sup>, and lobbyists<sup>7</sup>; and
- regulate how people are appointed to the boards of public bodies in Scotland<sup>8</sup>.

Table 1 *Complaints investigated by the Commissioner for Ethical Standards in Public Life in Scotland*

<p><b>The conduct of MSPs</b> (The Scottish Parliamentary Standards Commissioner Act 2002)</p> <p>The Commissioner is required on receipt of a complaint to investigate whether a member of the Parliament has committed the conduct complained of and whether the relevant provisions cover that conduct. On completion of an investigation the Commissioner is required to report the findings to the Standards Committee. It is for standing orders to set out the means by which the Commissioner reports to the Parliament.</p>
<p><b>Local authority councillors</b> Ethical Standards in Public Life etc. (Scotland) Act 2000</p> <p><b>Board members of public bodies</b> Ethical Standards in Public Life etc. (Scotland) Act 2000</p> <p>It is the duty of the Commissioner to investigate and report to the Standards Commission for Scotland on cases in which a councillor or member of a devolved public body has, might have or is alleged to have contravened the councillors' or, as the case may be, the members' code.</p>
<p><b>Lobbyists</b> The Lobbying (Scotland) Act 2016</p> <p>The Commissioner must assess whether a complaint is admissible and, if it is, investigate the complaint and report upon the outcome of the investigation to the Scottish Parliament. The Parliament must publish guidance on the operation of the Lobbying (Scotland) Act 2016 and the Commissioner must have regard to the parliamentary guidance.</p>

<sup>5</sup> the [Scottish Parliamentary Standards Commissioner Act 2002](#)

<sup>6</sup> the [Ethical Standards in Public Life etc. \(Scotland\) Act 2000](#)

<sup>7</sup> the [Lobbying \(Scotland\) Act 2016](#)

<sup>8</sup> the [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003](#)

**Public Appointments** Public Appointments and Public Bodies etc. (Scotland) Act 2003

Where a breach of the relevant Code of Practice by a Scottish Minister meets certain criteria, the Commissioner must report the breaches to the Scottish Parliament

### Appointment

The Ethical Standards Commissioner is appointed by the Scottish Parliamentary Corporate Body (the SPCB) with the agreement of the Parliament. The Commissioner may be removed from office by the SPCB if:

- (a) the Parliamentary corporation is satisfied that the Commissioner has breached the Commissioner's terms and conditions of office and the Parliament resolves that the Commissioner should be removed from office for that breach, or
- (b) the Parliament resolves that it has lost confidence in the Commissioner's willingness, suitability or ability to perform that Commissioner's functions,

and, in either case, the resolution is voted for by a number of members not fewer than two thirds of the total number of seats for members of the Parliament.

### Independence

The Ethical Standards Commissioner, in the performance of her functions, is not subject to the direction or control of: any member of the Parliament; any member of the Scottish Government; or the Scottish Parliamentary Corporate Body.

### Finance and staffing

The SPCB sets the Ethical Standards Commissioner's terms and conditions of appointment; approves the Commissioner's annual budget; pays the remuneration and allowances of the Commissioner; pays any expenses properly incurred by the Commissioner so far as not met out of sums generated by the Commissioner and indemnifies the Commissioner in respect of any liabilities incurred in the performance of the Commissioner's functions.

The Ethical Standards Commissioner, as the Accountable Officer, is accountable for the organisation's expenditure and submitting annual budget bids to the SPCB for approval. The Commissioner's budget for 2018/19 is £915k.

### Staff and advisers

Subject to the approval of the SPCB, the Ethical Standards Commissioner may appoint staff on such terms and conditions as she determines. She is supported by 8.77 full-time equivalent members of staff and is based in Edinburgh. In addition, the Commissioner contracts with a panel of advisers who can be called upon to assist with appointment rounds to public bodies.

### Advice, assistance or other services

The Ethical Standards Commissioner may obtain advice, assistance or any other service from any person who, in her opinion is qualified to give it. She may also pay to that person such fees and allowances as she determines, subject to the approval of the SPCB.

### **Functions in relation to public appointments**

The Commissioner's functions in relation to public appointments are set out in section 7 and schedule 2 the Public Appointments and Public Bodies etc. (Scotland) Act 2003<sup>9</sup> (the Public Appointments Act). The provisions contained within section 7 are described in the relevant Explanatory Note as follows:

Subsection (1) provides for the Commissioner to prepare a Code of Practice which regulates the process for making appointments and recommendations for appointments by the Scottish Ministers to the "specified authorities" which are the office and bodies listed in Schedule 2. The Commissioner's remit applies to ministerial appointments and ministerial recommendations for appointment (in practice, Crown appointments), but not to the appointment of staff of the specified authorities.

Subsections (2) and (3) provide for the scope of the Code of Practice, which is to be prepared, amended and promulgated by the Commissioner.

Subsection (4) requires that the preparation of and revisions to the Code must be undertaken in consultation with the Scottish Ministers, the Parliament and the public.

In addition to preparing (and amending) a Code of Practice, subsection (5) provides that the Commissioner shall examine the methods and practices employed by the Scottish Ministers in making appointments and recommendations for appointments, including any particular appointment to those

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<sup>9</sup> [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003](#)

specified authorities listed in schedule 2. It also provides for the Commissioner to investigate complaints arising from any appointment to a specified authority.

Subsection (6) provides that the Commissioner can issue guidance on compliance with the Code of Practice to the Scottish Ministers, both generally or in specific cases where there is a breach of the Code.

Following this, subsection (7) provides that, in any case where it appears to the Commissioner that the Code of Practice has not been complied with in a material regard (i.e. if there has been a serious breach of the Code), the Commissioner has intimated that fact to the Scottish Ministers, and the Commissioner considers that the Code is unlikely to be complied with, or has not been complied with, within a reasonable time, action must be taken under subsection (8).

Subsection (8) provides that the Commissioner must report breaches of the Code by the Scottish Ministers which meet the criteria set out in subsection (7) to the Parliament. If the appointment has not been made, the Commissioner may direct the Scottish Ministers to delay making the appointment until consideration of the case has been concluded by the Parliament.

Subsections (9) and (10) provide that the Commissioner is to exercise functions with a view to ensuring that the appointments and recommendations for appointments to the specified authorities are made in a fair and open manner and that as far as possible all categories of people are given the opportunity to apply. In doing so, the Commissioner is to prepare a strategy in consultation with the Scottish Ministers and the Parliament which may include targets for ensuring diversity in the membership of public bodies.<sup>10</sup>

In her 'Summary of the Year' contained in the Ethical Standards Commissioner's latest Annual Report on Public Appointments, she noted that

As the time approaches for the Commissioner to formalise a new strategic plan for public appointments, a decision is pending on the future positioning of this office with regards to its regulatory role. Devoting limited resources to the production of thematic reviews, governance research and recommendations for improvement is only valuable if acted upon by relevant stakeholders, which generally has not been the situation of late. As such, liaison and firm intentional engagement with the Scottish Government is welcomed to ensure best value for money is delivered to the public under the upcoming strategic plan.<sup>11</sup>

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<sup>10</sup> [The Public Appointments and Public Bodies etc. \(Scotland\) Act 2003 Explanatory Notes](#) (accessed 02/07/20)

<sup>11</sup> The Commissioner for Ethical Standards in Public Life in Scotland (Nov 2019) [Annual Report on Public Appointments 2018-19](#) (accessed 02/07/20)



## 4. International Ombudsman Standards

The International Ombudsman Association (IOA) describes itself as a member-led, professional association committed to supporting organizational ombuds worldwide. Amongst other things, the IOA works to promote the continuous development of the organizational ombuds profession through its Standards of Practice and Code of Ethics. The IOA Code of Ethics provides a common set of professional ethical principles to which members adhere in their organisational Ombudsman practice. The four ethical principles are:<sup>12</sup>

### Independence

The Ombudsman is independent in structure, function, and appearance to the highest degree possible within the organization.

### Neutrality and Impartiality

The Ombudsman, as a designated neutral, remains unaligned and impartial. The Ombudsman does not engage in any situation which could create a conflict of interest.

### Confidentiality

The Ombudsman holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm.

### Informality

The Ombudsman, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to his/her attention.

The IOA Standards of Practice specifies the following five standards based on the principle of independence.

- (1) The Ombudsman Office and the Ombudsman are independent from other organizational entities.
- (2) The Ombudsman holds no other position within the organization which might compromise independence.
- (3) The Ombudsman exercises sole discretion over whether or how to act regarding an individual's concern, a trend or concerns of multiple individuals over time. The Ombudsman may also initiate action on a concern identified through the Ombudsman's direct observation.
- (4) The Ombudsman has access to all information and all individuals in the organization, as permitted by law.

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<sup>12</sup> The International Ombudsman Association <https://www.ombudsassociation.org/standards-of-practice-code-of-ethics>

- (5) The Ombudsman has authority to select Ombudsman Office staff and manage Ombudsman Office budget and operations

The complete Standards of Practice is contained in Appendix 1 to this briefing note.

## Appendix 1



INTERNATIONAL  
**OMBUDSMAN**  
 ASSOCIATION

## IOA STANDARDS OF PRACTICE

### PREAMBLE

The IOA Standards of Practice are based upon and derived from the ethical principles stated in the IOA Code of Ethics.

Each Ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the Ombudsman function in that organization and their consistency with the IOA Standards of Practice.

### STANDARDS OF PRACTICE

#### INDEPENDENCE

- 1.1 The Ombudsman Office and the Ombudsman are independent from other organizational entities.
- 1.2 The Ombudsman holds no other position within the organization which might compromise independence.
- 1.3 The Ombudsman exercises sole discretion over whether or how to act regarding an individual's concern, a trend or concerns of multiple individuals over time. The Ombudsman may also initiate action on a concern identified through the Ombudsman's direct observation.
- 1.4 The Ombudsman has access to all information and all individuals in the organization, as permitted by law.
- 1.5 The Ombudsman has authority to select Ombudsman Office staff and manage Ombudsman Office budget and operations.

#### NEUTRALITY AND IMPARTIALITY

- 2.1 The Ombudsman is neutral, impartial, and unaligned.
- 2.2 The Ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues. The Ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization.
- 2.3 The Ombudsman is a designated neutral reporting to the highest possible level of the organization and operating independent of ordinary line and staff structures. The Ombudsman should not report to nor be structurally affiliated with any compliance function of the organization.
- 2.4 The Ombudsman serves in no additional role within the organization which would compromise the Ombudsman's neutrality. The Ombudsman should not be aligned with any formal or informal associations within the organization in a way that might create actual or perceived conflicts of interest for the Ombudsman. The Ombudsman should have no personal interest or stake in, and incur no gain or loss from, the outcome of an issue.
- 2.5 The Ombudsman has a responsibility to consider the legitimate concerns and interests of all individuals affected by the matter under consideration.
- 2.6 The Ombudsman helps develop a range of responsible options to resolve problems and facilitate discussion to identify the best options.

#### CONFIDENTIALITY

- 3.1 The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following:
  - The Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission, given in the course of informal discussions with the Ombudsman; the Ombudsman takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, and even then at the sole discretion of the Ombudsman, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman.
- 3.2 Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue. Others cannot waive this privilege.
- 3.3 The Ombudsman does not testify in any formal process inside the organization and resists testifying in any formal process outside of the organization regarding a visitor's contact with the Ombudsman or confidential information communicated to the Ombudsman, even if given permission or requested to do so. The Ombudsman may, however, provide general, non-confidential information about the Ombudsman Office or the Ombudsman profession.
- 3.4 If the Ombudsman pursues an issue systemically (e.g., provides feedback on trends, issues, policies and practices) the Ombudsman does so in a way that safeguards the identity of individuals.
- 3.5 The Ombudsman keeps no records containing identifying information on behalf of the organization.
- 3.6 The Ombudsman maintains information (e.g., notes, phone messages, appointment calendars) in a secure location and manner, protected from inspection by others (including management), and has a consistent and standard practice for the destruction of such information.
- 3.7 The Ombudsman prepares any data and/or reports in a manner that protects confidentiality.
- 3.8 Communications made to the ombudsman are not notice to the organization. The ombudsman neither acts as agent for, nor accepts notice on behalf of, the organization and shall not serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization. However, the ombudsman may refer individuals to the appropriate place where formal notice can be made.

#### INFORMALITY AND OTHER STANDARDS

- 4.1 The Ombudsman functions on an informal basis by such means as: listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and – with permission and at Ombudsman discretion – engaging in informal third-party intervention. When possible, the Ombudsman helps people develop new ways to solve problems themselves.
- 4.2 The Ombudsman as an informal and off-the-record resource pursues resolution of concerns and looks into procedural irregularities and/or broader systemic problems when appropriate.
- 4.3 The Ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization.
- 4.4 The Ombudsman supplements, but does not replace, any formal channels. Use of the Ombudsman Office is voluntary, and is not a required step in any grievance process or organizational policy.
- 4.5 The Ombudsman does not participate in any formal investigative or adjudicative procedures. Formal investigations should be conducted by others. When a formal investigation is requested, the Ombudsman refers individuals to the appropriate offices or individual.
- 4.6 The Ombudsman identifies trends, issues and concerns about policies and procedures, including potential future issues and concerns, without breaching confidentiality or anonymity, and provides recommendations for responsibly addressing them.
- 4.7 The Ombudsman acts in accordance with the IOA Code of Ethics and Standards of Practice, keeps professionally current by pursuing continuing education, and provides opportunities for staff to pursue professional training.
- 4.8 The Ombudsman endeavors to be worthy of the trust placed in the Ombudsman Office.