



A response to Part 1 of Justice No 2
Bill on creating a Prison Ombudsman
for Northern Ireland

September 2015

Section A:

Introduction and Background

Role of the Northern Ireland Ombudsman

The Northern Ireland Ombudsman (the Ombudsman) is the popular title for two statutory offices, the Assembly Ombudsman for Northern Ireland and the Commissioner for Complaints for Northern Ireland. The Ombudsman investigates complaints about 'maladministration' arising from the actions or failure of government Departments, their Agencies, Health Trusts, and a wide range of other public bodies including the Housing Executive and local Councils. His jurisdiction also includes the investigation of complaints about the Northern Ireland Prison Service. The Ombudsman's jurisdiction is wide and his oversight covers bodies whose expenditure, taken together, amounts to two thirds of the annual expenditure of the public sector in Northern Ireland.

The Ombudsman's Office was established in 1969 and was the second such office to be created in the United Kingdom. The Ombudsman enjoys a privileged constitutional position, with appointment and removal from Office requiring both Royal approval and the agreement of at least two thirds of the membership of the Northern Ireland Assembly. The Ombudsman's office is not a corporate body and the Ombudsman himself has legal status of a 'corporation sole'. He is also an officer of the Northern Ireland Assembly.

Maladministration, the finding made by an Ombudsman, is not defined and can cover a wide range of administrative failures such as bias, delay, unfairness or neglect on the part of a public body.

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Introduction

This paper records the views of the Ombudsman in response to the Committee for Justice's call for evidence on Part 1 of the Justice (No 2) Bill. The Ombudsman welcomes the opportunity to contribute to this process and its central proposal that the Prison Ombudsman be placed on a statutory footing. In preparing this response the Ombudsman has considered the Department of Justice's (DOJ) consultation document and has also reviewed the academic research on the role of the Prisoner Ombudsman offices across the UK by way of background.

The Ombudsman has already been involved with DOJ officials and the Prisoner Ombudsman in discussions on the issue covered by the Bill and has considered the views expressed by stakeholders in the DOJ's consultation document. As further context against which this submission should be considered, the Committee will be aware of the OFMdfM Committee's Bill to establish the Northern Ireland Public Services Ombudsman (NIPSO) whose remit, if that legislation is adopted, will extend to investigation of complaints about government Departments, public services, alleged breaches of the Local Government Code of Conduct by local Councillors as well as complaints about the Judicial Appointments process and potentially also be required to fulfil a Complaints Standards Authority role for Northern Ireland

The core function of an *Ombudsman* is to investigate and report on complaints against public bodies¹. Therefore, in commenting on the proposed functions and remit of a Prison Ombudsman's office, the Ombudsman has focused particularly on the complaints handling and investigation functions of the proposed model. Given the wide ranging experience developed by this Ombudsman's Office over the forty five years of its existence, the Ombudsman is well placed to comment on these particular aspects of the proposed legislative model for a Prison Ombudsman. The Ombudsman has examined closely the prison complaints mechanisms in England, Wales and Scotland.

¹ Extract from Speech by Professor Nikiforos Diamandouras, European Ombudsman, to the 34th Session of the Asser Colloquium on European Law, The Hague, 15 October 2004.

The Ombudsman supports placing the Prison Ombudsman on a statutory footing which has the clear objective of providing an impartial, independent investigator for prisoner and visitor complaints of maladministration. However, the Ombudsman is concerned that the proposal to establish the office as a separate entity has additional cost implications at a particularly difficult time for public expenditure, when there is already a proposal to establish a new office of a Northern Ireland Public Services Ombudsman (NIPSO) this would, in his view, be an appropriate and cost effective legislative instrument for the establishment of a Prison Ombudsman on a statutory footing.

SECTION B:

1. Statutory Footing

1.1 The Ombudsman notes the purpose of the draft provisions which is to highlight the issues examined in the DOJ review of the Prisoner Ombudsman's role and office in order to meet the commitment contained in the Hillsborough Castle Agreement in February 2010. The Ombudsman has in this paper set out his views on Part 1 of Justice No 2 Bill. Placing the Prison Ombudsman on a statutory footing is essential to ensure the independence of that Office.

1.2 The Ombudsman does not seek to comment on all of the draft provisions in detail other than to comment on those outlined in section C of this paper. The Ombudsman seeks to highlight the fundamental principle of 'equivalence' which, in his view, must apply to all public services provided to prisoners. Specifically, the Ombudsman is of the view that a prisoner is entitled to the same quality of healthcare and treatment as all other members of the public. That principle also extends to the essential need for the same regulatory and oversight arrangements in respect of health care provision that exists for all other members of the public. In his role as Northern Ireland Commissioner for Complaints, the Ombudsman investigates complaints of maladministration (including those which involve clinical judgment) in relation to the actions of all health and social care bodies, health trusts, general health service providers and independent health service providers. The South Eastern Health and Social Care Trust (SEHSCT) is a body in his remit and he can investigate complaints of maladministration and failures in clinical judgement by SEHSCT staff who provide prison healthcare. As indicated above it is essential to avoid any ambiguity or confusion on the part of the prisoner, the prison staff and Health Trust staff by making it absolutely clear that the investigation of a prisoner complaint about the actions of SEHSCT health professionals are entirely the same as that provided to a member of the public. That is as follows:

He or she may complain about the Health Service to the Commissioner for Complaints; a role that will be subsumed into the Office of the Northern Ireland Public Service Ombudsman (NIPSO). The Ombudsman has expressed a willingness to meet again with DOJ and SEHSCT staff to clarify these issues.

- 1.3 The Ombudsman would also be happy to meet and give evidence to the Committee for Justice on the views expressed in this response if the Committee would consider that helpful.

2. Current Role of the Prisoner Ombudsman

2.1 The Ombudsman is aware of the background to the creation of the office of Prisoner Ombudsman, with responsibility for investigating complaints made by prisoners, ex prisoners and visitors about the Northern Ireland Prison Service (NIPS). In addition, the Prisoner Ombudsman undertakes investigations in relation to deaths in prison custody in order to meet the requirements of article 2 of the ECHR for an efficient, effective and independent investigation of these deaths. The Prisoner Ombudsman conducts both types of investigations pursuant to formal terms of reference from the Minister of Justice. In line with other public sector ombudsmen, the Prisoner Ombudsman does not make binding decisions; rather he makes recommendations to the Prison Service which can relate to a specific complaint. These recommendations can include a written apology or explanation for actions taken by NIPS in an individual case. In relation to deaths in custody, the recommendations may be more wide ranging in relation to prison and healthcare practices or procedures. It is noteworthy that most death in custody investigations have a 'healthcare' dimension to them.

Ombudsman's Comment

2.2 The Ombudsman has an established statutory remit in relation to healthcare in prisons pursuant to the provisions of the Commissioner for Complaints (NI) Order 1996². He investigates all complaints about the care and treatment provided to members of the public (including prisoners) by the SEHSCT. In relation to this healthcare jurisdiction, he has an explicit information sharing power³ permitting him to disclose information where any person (patient) may be at risk. More than 60% of complaints to the Ombudsman currently relate to health and social care matters, therefore his staff have considerable expertise in investigating health cases. Staff are supported by an established panel of

² As amended by the Commissioner for Complaints (NI) Order 1997.

³ Article 21 1 B of the Commissioner for Complaints (NI) Order 1996.

independent experts who the Ombudsman can ask to provide independent advice on particular cases; this advice can relate to a number of clinical specialities in investigating a single complaint.

2.3 The Ombudsman is of the view that the Prisoner Ombudsman's office has a small staff and it will always be challenging therefore to recruit and retain the level of expertise required to investigate the health aspects of deaths in prison custody. He therefore sees merit in combining the Prison Ombudsman role with that of the proposed new office of the NIPSO. The legislative vehicle to facilitate the integration of this work into the office of the Ombudsman would be the NIPSO Bill which will be finalised by the OFMdFM Committee following its scrutiny by the NIPSO Ad Hoc Committee of the Assembly.

3. Independence – A key criteria for Ombudsmen

3.1 There are differing systems for dealing with prisoner complaints in the UK. In England and Wales, a non-statutory office of Prisons and Probation Ombudsman⁴ (PPO) was established in 1994. That office deals with complaints from a prisoner population of over 88,000 in relation to 140 prisons. In Scotland the Scottish Public Services Ombudsman (SPSO) deals with complaints from a prison population of around 8,000 and 16 prisons. In Northern Ireland, with a prison population of less than 1,500, and three prisons, the Prisoner Ombudsman is the smallest office in the three jurisdictions. When established, the latter office was modelled on the PPO. As noted at paragraph 3.1 of the DOJ consultation document, the Prisoner Ombudsman is currently appointed by the Minister of Justice under section 2(2) of the Prison (NI) Act 1963 as extended by section 2 of the Treatment of Offenders Act (NI) 1968 and he reports directly to the Minister for Justice. As such, the Prisoner Ombudsman can be fairly described as an ‘executive’ appointee and this inevitably has the potential to undermine, in the public’s eyes, his independence.

3.2 The Ombudsman’s Association, the representative body for Ombudsmen in these islands, has established the Principles of Good Governance for ombudsman schemes. These are:

Independence;

Effectiveness;

Openness and Transparency;

Accountability;

Integrity; and

Clarity of Purpose⁵

⁴ Ombudsmen and Prisoner Complaints in the UK – Mary Seneviratne

⁵ ‘Guide to Principles of Good Governance’ (Ombudsman’s Association) available at www.oa.org.uk Page 4

Ombudsman's Comment

3.3 At the core of these six principles for ombudsmen schemes is the principle of independence. This is an essential prerequisite for ensuring that the office holder is free from interference by any body in his jurisdiction. While the Ombudsman accepts that the current arrangements, in practice, do not prevent the post holder from discharging his duties effectively, an appointment and funding as proposed by the Department for Justice under the Justice (No 2) Bill legislation will not meet the requirements of the 'independence' principle. The Ombudsman considers the office of Prison Ombudsman should be created under separate statutory arrangements which ensures that the appointment is not made by a member of the Executive. It is an important tenet of all public sector ombudsmen that their appointment is independent of government and of those they investigate.

4. Deaths in Custody

4.1 The differing models for prisoner ombudsmen in the UK were outlined at paragraphs 3.1 above. The Ombudsman does not accept that the investigation of deaths in custody is a suitable role for an ombudsman. In Scotland this role is undertaken by the Procurator Fiscal. In Ireland it is undertaken by the Inspector of prisons. In relation to deaths in prison custody, the Ombudsman considers that in the interests of consistency of approach and economies of scale these complex inquiries should be dealt with by the Police Ombudsman for Northern Ireland (PONI) or by the Coroner's office. Both offices have the credibility, necessary infrastructure, resources, expertise and skilled staff to investigate deaths in prison custody, indeed the Police Ombudsman currently investigates complaints of deaths in police custody. These arrangements if accepted would achieve savings to the public purse given the proposed costings for the establishment of a new office of Prison Ombudsman.

5. Information Gathering Powers

Ombudsman's Comment

5.1 The Ombudsman is aware that the issue of statutory 'footing' has been the concern of the existing and previous Prisoner ombudsmen. The Ombudsman recognises the advantages for that office in being placed on an independent statutory footing. There are particular difficulties relating to information sharing which the Ombudsman is aware of and has highlighted personally to the current and previous Prisoner Ombudsmen. In particular, the Ombudsman considers that the Prisoner Ombudsman should have specific statutory powers to obtain and disclose any information which are equivalent to the powers currently enjoyed by him and proposed under the new NIPSO legislation. The Ombudsman is concerned that the proposed information gathering powers for

the Prison Ombudsman are in his view incomplete and inadequate. It is important that in any draft legislation there are explicit and comprehensive powers to obtain and disclose information equivalent to those in the NIPSO Bill.

Staffing Issues

5.2 The Ombudsman notes that the dual role of investigating maladministration and deaths in custody requires a broad range of skills which can be difficult to establish and retain in a small office. The Ombudsman considers that one possible solution to this is to separate the two functional areas as in the Scottish model. The SPSO deals with prisoner complaints of maladministration and a separate official (the Procurator Fiscal) deals with deaths in prison custody. He considers that deaths in custody could as suggested above be dealt with by the statutory office of PONI or the Coroner. In relation to complaints of maladministration for prisoners and visitors, these should form part of the functions of the proposed NIPSO so that the investigative expertise for prisoner complaints can be developed, maintained and retained as part of a larger office.

Section C:

Comment on the Draft Clauses

In addition to the Ombudsman's comments above on the need for explicit and comprehensive information sharing and disclosure powers reflecting those in the NIPSO Bill, the Ombudsman has commented only on those other clauses in part 1 of the Bill which he considers require review by the Committee as follows:

- 1.1 Clause 1(i) - The Ombudsman considers that it is important to differentiate between the Prisoner Ombudsman who can only accept complaints from prisoners and visitors and The Prison Ombudsman. The Ombudsman has jurisdiction in relation to the actions of the NI Prison Service and also Prison Healthcare. The title Prison Ombudsman is somewhat misleading therefore given the construct of the new office which could better be described as the Commissioner of Complaints for Prisoners.
- 1.2 Clause 1(3) and Schedule 1 – The Ombudsman considers that it is appropriate that the appointment and removal of the proposed Prison Ombudsman be made by the Department for Justice, that the new body is funded by the Department and also has a role in relation to the approval of the terms and conditions of staff of the new body. These arrangements clearly do not meet the criteria of independence which is essential for an Ombudsman and as a result Schedule 1 is creating a Complaints Commissioner for Prisoners and Visitors that represents what the academics might consider as being a middle tier of complaints investigation. The first tier of the complaints handling process would be as is currently the case the NIPS internal complaints process.
- 1.3 Schedule 1 paragraph 5 - It is noted also that the salary of the new office holder is paid by the Department and again this undermines the independence of the role.
- 1.4 Schedule 1 paragraph 7 - For the reasons set out above it is also inappropriate that an Acting Prison Ombudsman be appointed by the Department.

- 1.5 Schedule 1 paragraph 12 - In order to ensure independence from the Department which is responsible for NIPS it is important that the new office holder lays his/her report on the functions of the office before the Assembly.
- 1.6 Schedule 1 paragraph 13 - It has been agreed with the Department that the new body should be in the jurisdiction of the NIPSO as at present and this clause should be removed if the Assembly ultimately decides to put the Office on a statutory footing.
- 1.7 Schedule 1 paragraph 14 - This exemption in the Data Protection Act 1998 solely relates to those ombudsmen who are independent and meet the Ombudsman Association criteria for Ombudsmen. Ultimately this is a matter which the Committee may wish to obtain the Information Commissioner's view on.
- 1.8 Clauses 2, 5, 6 and 11 as they relate to deaths in custody. As already stated above the matter of deaths in custody is not an appropriate as part of the remit of an Ombudsman. In any event the new body does not as provided for in the draft Bill have the necessary independence to comply with the requirements of an article 2 (ECHR) investigation.