



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Justice (No. 2) Bill: Prisoner Ombudsman for
Northern Ireland

1 October 2015

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Alastair Ross (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Sammy Douglas
Mr Paul Frew
Mr Seán Lynch
Mr Alban Maginness
Ms Bronwyn McGahan
Mr Patsy McGlone
Mr Neil Somerville

Witnesses:

Mr Tom McGonigle Prisoner Ombudsman for Northern Ireland

The Chairperson (Mr Ross): Tom, you will be aware that Hansard is recording the session and that it will be published in due course. Kick off when you are ready, and we will then open it up for questions.

Mr Tom McGonigle (Prisoner Ombudsman for Northern Ireland): Thank you, Chair, and "Good afternoon" to everybody. I will make a few introductory remarks to say that I strongly welcome the proposals to place the Prisoner Ombudsman's office on a statutory footing. I provided a written response that I hope you have had a chance to read and form some views on.

From my perspective, the main benefits and points in the Justice (No. 2) Bill include the following points. It would remove my office from prisons legislation. That is entirely appropriate. Indeed, it is very important to demonstrate the independence and impartiality of an office that should be seen as independent and impartial. Other statutory bodies have told me that it would increase their confidence in sharing information with my office. By that, I particularly mean the police, the Prison Service and the South Eastern Health and Social Care Trust, which is responsible for providing healthcare to prisoners. It would, for the first time, provide a statutory basis for us to investigate the Prison Service's conduct in cases of death in custody. That is very important, because Northern Ireland as a state has a responsibility to comply with article 2 of the UN Convention on Human Rights (UNCHR), and it could be deemed not to be doing that currently without a statutory basis for our investigations.

It is equally important to say that there are several things that the Justice Bill will not change. It is very much intended to legislate for an "as is" position. Again, I think that is correct. For example, it will require the Prison Service to answer complaints from prisoners in the first instance. It is the fundamental building block of any good ombudsman scheme that the body against which the

complaints are laid should be able to answer those in the first instance. That will not change. It does not provide my office with enforcement or discipline powers. Again, that is similar to most ombudsman arrangements. I think it is quite appropriate, but it is a matter that some prison officers might have had concerns about. That would not change under the Bill as it is currently drafted.

The final thing that is very important is that it will not, as things stand, change the arrangements for healthcare complaints and the healthcare dimension of deaths in custody. That is a bit hard for some prisoners and other people to understand, but there are existing statutory arrangements for dealing with healthcare complaints, essentially through the South Eastern Trust's arrangements. That works well. There are some operational difficulties in the healthcare dimension of deaths in custody. It can delay things for my office when we need to get access to information from the trust, and the delay can impact on bereaved families, which is a matter of concern. Those concerns can be addressed quite comfortably at operational level. They do not need legislation, but, as you are legislators, I need to draw your attention to them in the event that the arrangements might change.

I propose to curtail my remarks there. I could say a lot more, but I think that it is better not to pre-empt members' questions. I will summarise by saying that I think that a statutory footing for the Prisoner Ombudsman's office would strengthen its ability to fulfil the originally envisaged remit. That goes back to the Steele report in 2005, which said that a Prisoner Ombudsman's office:

"could make a valuable contribution to defusing the tensions which are bound to arise in prisons."

With that, I hand over to members for comments and questions.

The Chairperson (Mr Ross): Thank you for keeping it brief. That is refreshing at times. You said that one of the benefits of your office is its independence. How do you react to criticism asking about how independent you can be when DOJ appoints you and funds your office?

Mr McGonigle: I am pragmatic rather than purist about that, Chair. The reality is that my office has been and will continue to be advertised through an open advert. The appointment is made on merit. The appointee is appointed as a corporation sole, which is an independent appointment. The Prison Ombudsman would have a seven-year tenure, which, again, would help to copper-fasten independence. The terms of reference require the ombudsman to be wholly independent. I am over two years in the job now, and neither in my experience nor, as far as I am aware, in that of my two predecessors, has anybody ever tried to interfere with our independence. On a pragmatic, rather than a purist, basis I am quite content that independence would be fully assured.

The Chairperson (Mr Ross): In your view, is it preferable or would it make no difference if an independent body through which funding was made available appointed you?

Mr McGonigle: Again, it is not much different from ombudsman offices in the UK and, as far as I am aware in other jurisdictions, certainly in western Europe. I think the pragmatic approach is the important one.

Mr Douglas: Thanks for your presentation, Tom, and for the stuff that you sent through to us. What are the staffing levels in your present office?

Mr McGonigle: There are 12 in total. I am a public appointee, and the other staff are civil servants. They are seconded to my office by the Northern Ireland Civil Service. That is an arrangement that works well. Most of their training nowadays is done on the job. In the past, there was some dedicated investigative training.

The staff work well within the ethos of the office. It does not suit every civil servant; it is a very specialist function to deal with prisoners and undertake the investigative role in a way that is thorough, fair and impartial. There are 12 people in total.

Mr Douglas: Where the resources that are needed for the new office are concerned, will those 12 staff members transfer with you? Are you confident that you will be able to continue to do the job independently with the financial resources that you have?

Mr McGonigle: Yes, indeed. I have never made the case for either additional staff or different types of staff. I am content with the number of staff I have. I work closely with the Department of Justice to

make sure that we get the right staff. The number of staff we have at the minute and the competency base are right for the job. The number of staff and the level of Civil Service grades that they come from are about right, and it works well.

The financial resourcing is difficult, as it is for everybody. We have had to pare back on discretionary spend in lots of areas, but so far, we have been able to hold on to the number of staff that we need to do the job. At this point in time, the same people would transfer, and that makes sense.

The Chairperson (Mr Ross): It is a relatively small office, so does that present any difficulties with having individuals with the right skills? You look at deaths in custody and maladministration. As you have a relatively small office, is it a challenge for you to get the right skills from individuals?

Mr McGonigle: It is challenging, Chair. To pick up on a side point, you mentioned maladministration. Quite a few ombudsman offices deal only with that. One of the benefits of our office in the Northern Ireland prison setting is that we deal with issues that are wider than maladministration, and we can look at the merits of decisions that are taken by the Prison Service. A lot of what we do is about trying to broker solutions between prison staff and prisoners. We advocate on prisoners' behalf to do that, and that works well. So, it is wider than maladministration.

Coming back to your original question, getting the right staff is not easy. The Civil Service and the Department of Justice have worked with us on that. For example, we use the interchange scheme, which means that we have been able to recruit investigators, usually on a two-year basis, from other investigative-type offices like the Police Ombudsman's office. We have to be careful about which investigators or civil servants are selected to work with us, because it really does not suit everybody. We have had some people who came to work with us in the past, found the job was not for them and left quite soon. You are right: there is a challenge in that, but we can generally manage to deal with it.

Mr McCartney: Under the Bill, you do not have the power to compel witnesses to assist your investigations.

Mr McGonigle: No.

Mr McCartney: Do you think that would be of assistance to your role?

Mr McGonigle: I think it would be cosmetic, to be quite honest. In the two years that I have been in office, virtually 99% of Prison Service staff — mostly officers, but some governors as well — whom we have asked to help with investigations have come voluntarily. The power to compel would affect very few situations that we investigate, either deaths in custody or complaints. If we had that power, some people could turn up and say nothing or certainly say nothing of any value. I do not think that the power to compel would assist terribly, and I do not really think we need it.

Mr McCartney: What about the power to compel former members of staff? They may not have the same —

Mr McGonigle: There are certainly some cases of complaints or deaths in custody that go back some time and the people whom we need to interview are not available because they are no longer in the employment of the Northern Ireland Prison Service. I guess the outcome might well be the same: even if they were compellable and came along, if they felt that it would have an adverse impact on them they might not say anything of any use. As well as being cosmetic, it could cause conflict and would not be helpful — it would not benefit the purposes of the office any.

Mr McCartney: It was a good assertion that you made that, up to now, the cooperation has been excellent. It is good to put that on record. If someone felt that there was perhaps no compulsion, would you be limited by that? The current situation is fine, as you said, but in future, would it leave people maybe feeling that something was not properly investigated? A future ombudsman or somebody on their own might say, "If I had the ability to compel, I might at least have exposed a weakness in the system".

Mr McGonigle: To put it another way, I would certainly not resist having the power to compel. However, to come back to pragmatism versus purism, I am not sure that in 2015 it would add anything, but you are right: it might add something in future. If I had that power, I would not resist having it.

Mr McCartney: Is it the same when it comes to obtaining and disclosing information? Do you feel that the Bill is strong enough to ensure that you would get all the documentation? I accept that nobody has blocked you from doing that, but are the powers strong enough and rigorous enough?

Mr McGonigle: I think so. That is one of the real benefits of this legislation. For the first time, it would mean that there is a statutory authority. Prisoners and the families of deceased prisoners can see that the office has the statutory authority to obtain those documents, enter premises and require people to cooperate. When that is in legislation, it is a tremendous help in its own right.

Mr McCartney: I want to ask about clause 38 in particular. On a number of occasions, officials have been here on matters connected to British national security and the powers of the British Secretary of State. Each year, that is renewed and the Prison Service and the Department come here, but they have never really given us an explanation — I may be wrong — and it is difficult to understand where that power begins and ends. Do you envisage that a power would be given to the British Secretary of State in clause 38 to prevent you from carrying out an investigation?

Mr McGonigle: I do not. National security guidance has been in place since the devolution of justice powers in August 2010. It has never had to be invoked in any way, shape or form. That could change tomorrow for all we know, but I think it is like so many other matters — it is about adopting a reasonable and sensible approach to things. The guidance that was drafted in August 2010 has been redrafted and, I would think, should be made available to the Committee for its consideration. I am content with it. For me, there are two important aspects to it. It is guidance to which the Prisoner Ombudsman must have regard. I am quite content to have regard to it. It does not impede or shackle me as ombudsman or future ombudsmen in any way. National security guidance is not unique to the Prisoner Ombudsman in Northern Ireland; it is used in a wide variety of other oversight settings.

Mr McCartney: We have had some sessions with the Office of the Legislative Counsel (OLC), and one of the lessons that came from those is that perhaps the intention is there but, as you say, has never been used. The power could be there to be used in future. If you do not need a power, why would you ask for it to be in legislation? That is why I asked the question. I accept that you said that there have been no obstacles. It is the same with the power to compel witnesses, but it is about the ability to use it sometime in the future. That is why I asked, because it says in clause 38 that you "must have regard". If the guidance came to say, "do not investigate that", when the Bill says that you "must have regard", do you have to fulfil that guidance that says "do not investigate that" because it interferes with —

Mr McGonigle: I have taken legal advice on this matter as well, as you can well imagine. I am told that the guidance as currently drafted — it is still draft guidance in principle — does not fetter the Prisoner Ombudsman's office in that sense. It is guidance to which the Prisoner Ombudsman must have regard. I can work with that in a legal sense, as well as in spirit.

Mr McCartney: You do not see this as in any way being an impediment to carrying out any investigation.

Mr McGonigle: No.

Mr A Maginness: Thank you for your attendance today and for the work that you have done. Dealing with your office has certainly been a very constructive engagement, and I thank you for that.

Can you clarify one thing for me? Your office can investigate healthcare complaints. Is there any restriction under the new dispensation, or does that remain the same?

Mr McGonigle: That is not quite the case. The office cannot investigate healthcare complaints.

Mr A Maginness: Cannot?

Mr McGonigle: No. It never could, and it is not intended that it will.

Mr A Maginness: Can I just stop you there?

Mr McGonigle: Yes.

Mr A Maginness: There was a recent case of a death in custody. I know that it was not directly a healthcare complaint, but it was a death in custody that caused complaints about the level of healthcare. Is that an entirely different situation? Is it materially different?

Mr McGonigle: Maybe I should elaborate. We perform two roles: one is to investigate prisoners' complaints, and the other is to investigate deaths in custody. We never could and the Bill does not intend that we ever will investigate complaints about healthcare. That is, understandably, confusing for prisoners and for the public, so I welcome the chance to clarify it. A prisoner's complaint about their healthcare goes through the South Eastern Trust and, ultimately, if they are not content with the answer, to the Northern Ireland Assembly Ombudsman.

We investigate the healthcare dimension to deaths in custody. That is very important, because the interface between healthcare and the role of prison officers is so important. There is virtually no death in custody that does not have a healthcare dimension to it, whether that is mental healthcare, as in many cases. The two recent cases that we published, one this week and one last week, dealt with physical healthcare. We investigate the healthcare dimension of deaths in custody. I think that my office should continue to do that, because we have seen lots of examples of communication difficulties between prison staff and healthcare staff where things do not work out well, sometimes to the detriment of the prisoner.

It would be a mistake to have two different offices investigating, meaning the Prisoner Ombudsman Office investigating the Prison Service dimension and another office investigating the healthcare dimension. Somebody has to look at how those two offices operate together. The prisoner affected is under the care of the Prison Service. It has to make sure that he gets access to healthcare, but it is for the South Eastern Trust to provide it. You cannot separate those neatly; they are too interrelated.

Mr A Maginness: So, if I am a prisoner and I have a problem, such as a complaint about healthcare, at this moment in time and, indeed, in the future when your office is put on a statutory basis, I will still have to complain to the Assembly Ombudsman about healthcare —

Mr McGonigle: Ultimately, if you are not content with the trust's answer to you.

Mr A Maginness: — or the new office of the Northern Ireland Public Services Ombudsman (NIPSO) when that comes into being.

Mr McGonigle: Yes, that is right.

Mr A Maginness: Thanks very much for clarifying that. That is extremely useful. Obviously, Chair, something needs to be looked at to try to rationalise a rather confusing situation.

At the Bill's Second Stage, I referred to the new title of your office, which is "Prison Ombudsman". I just raised a query about the title. I felt, on reflection, that "Prisoner Ombudsman" was a better title because it captured what I thought was the essence of your function, which is to look into prisoners' complaints. I am still of that view. Would you care to comment on that to see whether you agree or disagree?

Mr McGonigle: Certainly. I support the proposed name change. It makes sense in emphasising the impartiality of the office. The term "Prisoner Ombudsman" apparently was coined at the outset of the office in 2005, and nobody can quite understand where it came from. However, what I have found during the just over two years that I have been in office is essentially that prisoners' expectations need to be managed. Because I am the Prisoner Ombudsman, they expect that I should find in their favour in complaints, and prison staff think exactly the opposite. They think, "You are the prisoners' ombudsman; therefore, you are automatically and inherently biased against us". For me, one of the key principles of this office is impartiality, and I am keen that it should be seen to be impartial. While the change might mean only a difference of two letters in the name, I think that it is symbolic. In fact, it is more than symbolic; it is very important. If the office is to be seen as an impartial one, the name should change. So, I support that. If you think about what I said about maladministration, you will find that we are about more than maladministration; we are about trying to broker solutions between prisoners and prison staff. I think that, to do that properly, we have to be impartial. Finally, I draw some analogies: my counterpart in London is the Prisons Ombudsman. We do not have a Pensioners

Ombudsman; we have a Pensions Ombudsman. There are good grounds on which to base the change.

Mr A Maginness: I can see the arguments both ways, and I will consider what you said. It struck me, in the first instance anyway, that "Prisoner Ombudsman" was the preferred title.

On the whole idea of the independence of the appointments system, as the Chair said, DOJ would carry out the actual appointment. Under the proposed NIPSO legislation, it would, in fact, be the Assembly, through the Assembly Commission, that would make that appointment. That might be a preferable way of doing it to remove any suggestion of bias, prejudice or lack of independence. It might be something worth considering.

Mr McGonigle: I would not resist that at all. Quite honestly, I think it is immaterial. I can see several tangible aspects of the role, as it is projected it should be, that will make sure that the independence is assured, but, if that were to be further strengthened through a different route or vehicle making the appointment, I would not resist it in any way.

The Chairperson (Mr Ross): Do you see any argument or do you have a desire to extend your role to look at issues involving the Youth Justice Agency or the Probation Board?

Mr McGonigle: There is a clause that allows the office to undertake all investigations as requested by the Department. I think that makes sense. To date, there have been very few scenarios where that might have arisen, but that possibility is at least included.

There is one issue that that sort of extension to the Probation Board or the Youth Justice Agency would need to be safeguarded against. Again, like the South Eastern Health and Social Care Trust, there are existing routes for prisoners to complain about those aspects, and there are existing routes for people to complain about Probation Board or Youth Justice Agency practice. Those routes are via their internal mechanisms and then to the Northern Ireland Assembly Ombudsman. We cannot have duplicatory provision; legislatively speaking, that would be a mistake.

Ms McGahan: This is not really a question; it is more a comment. I am picking up on the confusion that exists among prisoners when it comes to making complaints against the health service. I suggest that they could contact Tom Frawley's office, which is the public services ombudsman. Maybe Tom should be getting that information out there to prisoners, if that confusion exists.

Mr McGonigle: That is a fair comment. I have quite an open dialogue with the Northern Ireland Public Service Ombudsman's Office, as it is to be. I think that you are entirely right. The Patient and Client Council is already involved in helping to promote understanding amongst prisoners of exactly that type of scenario.

One issue is that the prisoner population changes so frequently, and an issue such as a healthcare complaint or a complaint about prison staff arises only sporadically for prisoners. It is not top of their agenda to retain that sort of information. Quite often, we get phone calls from prisoners making a complaint about healthcare. We can simply redirect them. It is not that hard to get it right, but it is just a structural error, I suppose, in how we are set up.

Mr McCartney: Again, this is a point for clarification. Clause 30, which is on complaints, refers to "a person visiting a prison". Does that include, say, independent visitors who come in, or is it envisaged that it will refer strictly to visiting relatives?

Mr McGonigle: It is envisaged that it will primarily focus on relatives of prisoners who are visiting. That is the purpose of it. The reality is that we have very few complaints from relatives. Who else are you thinking of that might be involved?

Mr McCartney: Say, for talk's sake, it is a teacher or a member of the Probation Board who is going in and feels that they have not been treated properly by a member of the prison staff.

Mr McGonigle: Their first route should certainly be through the internal channels. It would depend on what they were complaining about as well, I suppose.

Mr McCartney: I am just looking for clarity again. Much in the same way, it talks about how:

"a prisoner has been treated by a prison officer".

I assume that the definition of a prison officer includes governors.

Mr McGonigle: Of course it does, and lots of the complaints that come to us are about governors.

Mr McCartney: I again use the example, without prejudice, of a member of the vocational teaching staff. Would they be classed as a prison officer?

Mr McGonigle: Do you mean if a prisoner had a complaint about a teacher?

Mr McCartney: Yes.

Mr McGonigle: That would not come to us. This is one of the things that I have clarified with the Department of Justice in discussions about the Bill. The Probation Board has several staff who work in prisons. If there is a complaint about them and the prisoner takes issue with the risk assessment score, that is not eligible to come to us. It would go through the Probation Board's internal route first and then to the Northern Ireland public service ombudsman.

Mr McCartney: I can see that for that type of assessment. However, say a teacher, a vocational training staff member or Probation Board staff member was insulting or derogatory. What is the procedure there? Is that not part of your office? Would there be a separate complaints system?

Mr McGonigle: No, we are dedicated exclusively to the Prison Service and complaints about it, as well as to the healthcare dimension of deaths in custody. Lots of other organisations work in the prisons; NGOs for example. If their staff give rise to complaints, that has to be dealt with through the NGOs complaints mechanism and then the Northern Ireland public service ombudsman.

Mr McCartney: So, if a member of the health facility staff in Maghaberry were involved, would that complaint be made directly to the South Eastern Trust rather than to you?

Mr McGonigle: Yes.

The Chairperson (Mr Ross): If nobody else has any questions, there are a couple of points that I want to pick up on. To ensure that investigations are carried out in a timely manner, clause 32 does not place any requirement to initiate an investigation within a certain timescale. Is that something that you think would be of value? Is there any reason why you would resist it?

Mr McGonigle: There is no reason why I would resist it. I think it is one of several operational issues that will be dealt with in the rules that will underpin the legislation if it goes through. You make a very important point: it is important for prisoners to have their complaints dealt with as quickly as possible. We can deal with them only once they reach us. Sometimes it takes a considerable time for complaints to get through the two stages of the Prison Service process to our office, so I would have no objection to it. The clock would need to start to tick when we receive the complaint.

The Chairperson (Mr Ross): Finally, I would appreciate your view on whether a clause should be inserted into the Bill, modelled on section 58 of the Police Act, that would require you to disclose to the police where a report indicates that a criminal offence may have occurred.

Mr McGonigle: Yes. I think I said that in my written response, and the Department of Justice would agree with me. That stipulation is set out for deaths in custody; it should also be for complaints, because, I think, it is a common-law duty.

The Chairperson (Mr Ross): Nobody else has any questions. Tom, thank you very much. I appreciate your time.

Mr McGonigle: Thank you.