



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Justice (No. 2) Bill:
Northern Ireland Ombudsman

12 November 2015

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Members present for all or part of the proceedings:

Mr Alastair Ross (Chairperson)
Mr Paul Frew
Mr Seán Lynch
Mr Alban Maginness
Ms Bronwyn McGahan
Mr Edwin Poots

Witnesses:

Dr Tom Frawley	Northern Ireland Ombudsman
Ms Marie Anderson	Northern Ireland Ombudsman's Office

The Chairperson (Mr Ross): I welcome Dr Tom Frawley and Marie Anderson. It is good to see you both again. We are going to record the Committee session, and the transcript will be on the website in due course. When you are ready, please outline the key issues. If there are any questions, we will take those afterwards.

Dr Tom Frawley (Northern Ireland Ombudsman): Thank you very much. Chairman and members of the Committee, I am very grateful for the opportunity to give evidence today to the Committee on the proposals to put the investigation of prisoner complaints and deaths in custody on a statutory footing. It may be helpful to preface my views this afternoon by acknowledging that, ultimately, that decision on that particular issue will be taken by this Committee and the Assembly. However, I ask that any final decisions that the Committee may take are based on the fundamental principle of equivalence for prisoners in Northern Ireland. It is my view that prisoners, as with all other citizens, should have equivalent access to the same standard of public services and, in this context, access to a standard of healthcare that is the same as is available to all other citizens. A key aspect, therefore, of the principle of equivalence is the need to ensure that the oversight arrangements to hold the health service to account for prison health complaints should be the same as those that apply for all citizens, which is now the case since the Department of Health and the South Eastern Trust assumed responsibility for health in prisons.

My office currently investigates complaints about a wide range of public services, including, as I have said, the health service provided in prisons and also social care, housing, education, justice and services provided by central and local government departments. Indeed, as some members will be aware, a Bill to modernise the office of the Assembly Ombudsman and Commissioner for Complaints has reached Consideration Stage in the Assembly. The Northern Ireland Public Services Ombudsperson Bill proposes the extension of the ombudsman's powers in relation to social care and further and higher education, an own-initiative authority and, as in Scotland, a complaints standard authority role. Therefore, at the same time as this Committee is examining putting the Prisoner

Ombudsman on a statutory footing, the Committee for the Office of the First Minister and deputy First Minister is renewing and modernising the current Assembly Ombudsman's office, which is already on a statutory footing. I think that anyone looking at these developments would consider them confusing, not only for prisoners but for health and Prison Service staff. In my view, they cause unnecessary duplication and costs in having to deal with two separate organisations in relation to prisoner complaints.

The NIPSO Bill provides for a one-stop shop for all complaints about public services in Northern Ireland, mirroring similar arrangements in Scotland and Wales. I suggest that, in these times of austerity, it does not make sense to create a separate office of Prisoner Ombudsman when that function should be undertaken as part of the NIPSO office, as is now the case in Scotland. The Committee has seen the Scottish Public Services Ombudsman submission, which clarifies that the Scottish ombudsman investigates complaints from prisoners on a wide range of issues, including health, welfare and communication. This one-stop-shop approach would also, importantly, allow sectoral knowledge to develop so that this Assembly, the Department of Justice and the Northern Ireland Prison Service can have a complete overview of all of the issues that affect prisoners.

In England and Wales, prisoner complaints are dealt with by the Prisons and Probation Ombudsman, who also investigates deaths in custody. That body is non-statutory and, significantly, its independence has been called into question by academics such as Professor Mary Seneviratne because the Prisons and Probation Ombudsman in England is appointed by the Secretary of State for Justice. The independence of the office is particularly pertinent, given the requirement of independence for an article 2-compliant investigation in order to meet the obligations for effective investigation under the European Convention. The Equality and Human Rights Commission in the English jurisdiction has criticised the Prisons and Probation Ombudsman's involvement in deaths in custody for this reason.

I note that the Ombudsman Association and NIACRO submission to this Committee highlighted a need for distance from the Department of Justice for the Prison Ombudsman and, in particular, an appointment process that is independent of the Department of Justice. The situation in England and Wales is currently the subject of independent research by the University of Cambridge which, I am advised, will be published in December. I will be happy to submit it to the Committee when it is available. In Scotland, as the Committee is aware, the Scottish ombudsman investigates all prisoner complaints, while deaths in custody are investigated by the Procurator Fiscal. In Ireland, the Irish ombudsman has called for prison complaints to be investigated by his office. Currently, no office specifically investigates complaints in prisons. This has already been supported by a number of the political parties in the Republic of Ireland. In Scotland and in Ireland, deaths in custody are investigated by an office that is completely independent of the prison authorities.

I welcome the move to ensure that prisoners are given the same legislative protection as other Northern Ireland citizens. However, I am disappointed to note that the policy behind the Justice (No. 2) Bill is to legislate for the existing arrangements, which, I believe, represents a missed opportunity to create a modern and independent oversight regime for prisoner complaints. I therefore ask the Committee to consider very carefully the submission, for example, from the Ombudsman Association. There is a clear misunderstanding on the part of the Department of Justice in describing the new office as an ombudsman when, in effect, what is being further developed is an independent adjudicator for prisoner complaints. The view reflected in the Ombudsman Association response to the consultation process is that while the appointment process for the Prison Ombudsman is undertaken under the auspices of the DOJ and ratified by the Minister of Justice, it is not and cannot be described as independent and thus does not meet the essential criteria for membership of the Ombudsman Association — the national body for an ombudsman — or indeed membership of the International Ombudsman Institute, which is the acknowledged international membership organisation for ombudsmen.

In conclusion, therefore, if the Committee is minded to place the existing office on a statutory footing, then care should be taken to ensure that its title reflects its status as a complaints handler to avoid confusion and, potentially, criticism going forward, because it does not meet the current criteria required to be an ombudsman. I am happy to take questions, Chairman.

The Chairperson (Mr Ross): OK. Thank you, Dr Frawley. Have you had discussions with the Department around the idea of combining the two offices? If you have, what was the Department's response?

Dr Frawley: We did, Chairman. Initially, when the Prison Ombudsman was debated as a concept, the Department asked my office whether I would take that issue on. I said that I would if it was put on a statutory footing, but the Department did not wish to do that at that time. It created the Prison Ombudsman in the form that we currently have it. The original incumbent of the office, as members may be aware, was Brian Coulter, who immediately indicated that he wanted it put on a statutory footing. He was succeeded by Pauline McCabe who, equally, asked for that status. The most recent incumbent — I see that the post has been advertised again — is indicating that they too would wish it. My simple view — I had the benefit of listening to the exchanges in the last part of this meeting — is that when you have two ombudsmen, it becomes very confusing for people. Why do we have two ombudsmen in this arena? Equally, when people ask why we do not signpost one to the other, again I think that the issue is very much that the ombudsman is in our jurisdiction — the Prison Ombudsman — which again makes for another interesting perspective on it. And so, for the past number of years, my view has been that the solution would be to have an internal complaints process that is robust inside the Prison Service, as you have in health, education and local government. Failing satisfaction for the complainant in that internal mechanism, they have the right to come outside the system and say to the Northern Ireland Public Service Ombudsman, "I have not been treated fairly. I have not had the explanation that I am entitled to. I would like you to examine this." Therefore, they can be assured that their issue is being examined independently. Interestingly, the Assembly will now clearly be in charge of the ombudsman's appointment. The new ombudsman will be an officer of the Assembly. That important separation of executive and legislature is achieved, and I think that that makes for a much more coherent and sustainable model.

Again, if you look in detail — I would recommend that the Department of Justice does it — at the submission that you received from Scotland, you get a sense of how very quickly that has become robust and how well established it is. We have a jurisdiction for health, and I think that there are real issues for us in that relationship. For example, when a death in custody is examined, suddenly the health jurisdiction seems to become the prerogative of the Prison Ombudsman because that is their responsibility, and again confusion reigns. Suddenly, as there has rightly been significant criticism of the healthcare support in some of those death investigations, it is outside our arena and it is being dealt with in a different way, which in turn allows, if I may say so, the provider to say, "Who am I dealing with here? Who is actually pursuing these issues?" All I am saying is that, to me, this is an opportunity to create real clarity, but also separation. That, in turn, I believe, will give confidence to all parties, including staff who have issues, no doubt, in the centre of all this. If they are being complained of and there is not the independence that they would wish to see, then their perspective on these issues may not be fairly heard.

Importantly — I will now stop, Chairman; you know my capacity to go on — there is the issue of prisoners themselves, many of whom are incredibly vulnerable people, who should have the opportunity to know that it is an external organisation and a separate office whose only accountability is to a court, in the sense of judicial review and, ultimately, obviously, in terms of its performance, to the legislature. That is the model that we will see established, I have no doubt, in the Republic of Ireland; that is existing and succeeding in Scotland; and that, I think, will become the standard in England as well, over time. Rather than ratifying an arrangement which I consider does not meet the standards and criteria that we need, I intervened in this situation to say to the Committee that it has a role to play in deciding how it wants to proceed with this proposal.

Ms McGahan: Thank you for your presentation. I share some of your concerns. I have been fortunate in that I was involved from the very inception of the Public Services Ombudsperson Bill. I have heard all the evidence and arguments as to why certain organisations should not be within your remit, and so on and so forth. Look at the Prisoner Ombudsman: they have a remit to investigate complaints from people visiting their loved ones in the jail. Do they still fall under the concept of recipients of a public service? For example, a visitor could have endured a search that has gone too far; that is just one example that I can think of off the top of my head. Is that something that could fall under your remit?

Dr Frawley: Absolutely. That is a public service that is being delivered. How that service is delivered is no different to a patient or relative complaining about the way that they were spoken to or engaged with by a nurse in a hospital. It should not be any different. They are entitled to a standard of care within the perspective of the limitations that are inevitably in play in a setting like a prison. That would absolutely be an issue that we would look at.

Mr A Maginness: Thanks very much for your views, Dr Frawley. You raised interesting points about independence and the duplication of functions. There is plenty of food for thought. I have not made

my mind up on it. I hear what you say very loudly and clearly. Indeed, during the course of the discussions with the Prisoner Ombudsman, I got confused about the healthcare issue. It is still confusing when you consider a situation where somebody dies in custody but the Prisoner Ombudsman is able to investigate the healthcare aspects of that death in custody. Of course, he must do, otherwise it would be a nonsensical investigation. The confusion in function becomes even more pronounced there. There is an argument that goes along the lines that there may well be an expertise that the Prisoner Ombudsman office builds up over a period of time that can be effectively used for dealing with discrete complaints and, in particular, the discrete function of the examination of deaths in prison custody. That argument could be presented to counter what you have suggested.

Dr Frawley: I would argue — through you, Chairman, to Mr Maginness — that if you look at the remit of the Public Service Ombudsman and the range of the specific areas that it deals with, we have staff who have become very expert in health, planning and local government. That expertise builds up over time. I would argue that you get a much broader and richer mix of skills, expertise and insights through the range and diversity of the jurisdiction of the current ombudsman.

There is a little bit of me that recognises the benefits of specialisation, but smallness also brings familiarity and, sometimes, a lack of seeing the big picture because you are very close to it and have travelled the ground many times. For better or worse — it is not anyone's fault — you are close to and part of a closed system in the prison system. What is very healthy — you have had the benefit of it today, sometimes — is the fresh eye coming in and looking from outside at the situation. I would argue that you get the balance of the specialist and the fresher, more independent perspective from the outside and the scrutiny that comes with that. Interestingly — again, it is ironic — we have access to a panel of clinical experts for our health investigations, and the Prisoner Ombudsman has asked us whether it can have access to the same panel. We are now in a situation in which we are getting our expertise in that arena from the same source.

I do not, in any way, want to reduce this to cost, but, at a time when we are struggling with resources there are economies of scale to be achieved here in the administrative oversight, the financial support, the human resource support and so on, all of which we can bring into one arena. I have no doubt that the career structure that people would have in the bigger office and so on would also make it an attractive place for people to work, whereas, in prison, you are in a very specialist narrow arena. You are right to say that there may be some downsides to it, Mr Maginness, but, on balance — to me, at any rate, and I suppose I have a prejudiced position — the balance is significantly in favour of a single ombudsman dealing with these issues.

Ms Marie Anderson (Northern Ireland Ombudsman's Office): Chair, could I offer some data that might assist on the question of expertise? Two thirds of the complaints to our office are about healthcare and treatment. In many of those incidences, those complaints are about serious adverse incidents, including avoidable deaths. I would actually turn your argument on its head and say that the expertise lies in our office. We have that broader remit across all the health trusts in Northern Ireland and have the experience of investigating complaints about serious adverse incidents that have already been investigated by the South Eastern Trust, yet people remain dissatisfied. I would contend that the expertise argument is in favour of it going into the Public Service Ombudsman's remit because of the volume of cases and the expertise that is there.

The Chairperson (Mr Ross): To be clear, are you suggesting that deaths in custody will be dealt with by the Police Ombudsman?

Dr Frawley: The whole nature of that very specific and very difficult issue is such that we would argue for the Scottish solution. That is a separate arena. There are legal implications within it, with coroner's inquests and other things, and there is a potential for overlap, duplication and the handling of evidence in one way and it being interpreted in another. Why would we have a very expert office in the sense, for example, of the Police Ombudsman, who deals with deaths in police custody? We have another piece of our business — I am not saying that it is the same, but it is of a very similar nature because of the duty-of-care issue that was raised in the earlier debate — in which people with that expertise would look at that in the prison situation as well. I see opportunities to create a better alignment of those responsibilities than just putting it into an area like the ombudsman.

Deaths in prison custody are catastrophic but they are, thankfully, very limited. You need to build that critical mass of cases. There may be one death every year or, please God, none at all, but when they do happen, you need people with some knowledge of the system that they are operating in, plus the

legal environment that is particular, as you will know, Mr Maginness, to the circumstance of a death, particularly in custody.

Mr Lynch: It is not often that we have people looking for greater responsibilities and workloads. You said that you have the expertise. You were not here earlier when the head of Criminal Justice Inspection were present. Someone asked him whether he should go back into the prisons every couple of months because it was such a huge issue after the report. He said that he had too much on, his duties were too widespread and that he had responsibilities all over the criminal justice system. Would the same not happen with you, whereas the Prisoner Ombudsman would be more focused on what is happening within prisons?

Dr Frawley: Of course. One of the realities is that there are resources involved but, clearly, those resources already exist in the Prisoner Ombudsman's office. One would assume that they will not create new resources, so it would be the same resource moved into a different alignment and different organisational structure and culture, although I do not want to get into that word after what I have been listening to.

We deal with complaints, the number of which increases every year. We have to manage that increase. We change the way that we work; we refocus, restructure and try to optimise the resource. Of course, an expectation exists that, in a more difficult and challenging environment, the resources will be there, provided that there is a transfer to undertake the work that is currently being done. We do not see a problem there.

One of the things that disappoints me about the work that we do — there will be a difference with the NIPSO because we will be able to publish — is that we cannot publish anything currently, so we will get the opportunity to speak on the work that we do. The challenge that we face, in my opinion — it is no different to the very detailed conversation that you are having — is that, if we do not start learning from these complaints, it will be a travesty. It is bad enough that they happen once but, when people repeat them and they become systematic, there is a huge problem, and one can understand the frustration of political leadership in that circumstance. Our real focus now is about service improvement and public service improvement. While I do not have a counsel of despair that there will be so much of this that we cannot do it, we have to expect and assume that things will get better, and, as they get better, we can target our energies in different places. We deal with complaints on a scale that no other public body in Northern Ireland does, so we have that expertise in managing the quantitative side of it. It is no great indicator of our performance, but we have had only two judicial reviews of our decisions. That is two too many, you might say, but that is a very good return rate considering the amount of complaints that we have dealt with.

Mr Lynch: I have one final question. Have you quantified the cost that you would save? Do you have any idea of that?

Dr Frawley: That we would save?

Mr Lynch: What you would save by doing what you suggest.

Dr Frawley: All we do is realign the resource that we have. One does not know what the future holds but, like everyone else, we have some misgivings about what may happen to public finances come 1 April 2016. We will, I believe, gain an advantage from bringing this together. I have not looked at the detail of what that advantage will be, but our assumption is that we would get the current allocation, if it is decided to bring it to the office, and that, over time, any efficiency or cost savings that we achieved would be released back into the system. You would not have the Prisoner Ombudsman, so that would be one salary, but we would need to know the detail of the infrastructure and the staff that it had before we could make a clear statement about savings. Marie might comment on that.

Ms M Anderson: As director of operations in the ombudsman's office, I think that the initial saving would be in accommodation costs, perhaps IT costs and those sort of shared services, and the back-office support costs that, with a stand-alone office, the Prisoner Ombudsman is incurring on its own. We have premises in Wellington Place in Belfast that would certainly be able to house a directorate for prisons. It is in those areas where there will be a cost saving. Tom mentioned the salary for an ombudsman, but these are all matters that need to be looked at in the long term.

The Chairperson (Mr Ross): In paragraph 5.1, you said that you are concerned that the proposed information-gathering powers for the Prisoner Ombudsman are incomplete and inadequate. In what way do you feel they are incomplete and inadequate?

Ms M Anderson: I go back to the NIPSO Bill, which makes provision for very wide-ranging information-gathering powers that go as far as having access to legal advice, for instance. However, there are also a number of bodies that the NIPSO can share information with. It is not just about obtaining the information; it is also about who you can share it with. For instance, the NIPSO can explicitly share information with the Information Commissioner if there is an issue about privacy or access to information. That is not covered in the proposals for the Justice (No. 2) Bill. It is about the scope of the information that the body can have access to and whom it can share the information with.

Mr Frew: I understand the principle and the practicalities completely, but I want to ask about the mechanics. The Prisoner Ombudsman's office has 12 employees, I think, at the minute. You will have much greater numbers.

Dr Frawley: I am shocked to hear that it has 12, because I have 34 to look after all of the public services in Northern Ireland. If it has 12, that is a significant staff level.

Mr Frew: Am I right?

Mr A Maginness: Yes, you are right.

The Chairperson (Mr Ross): It is around that, yes.

Mr Frew: I do not know how I got that figure, but it is there.

Dr Frawley: Do not get me wrong: we do not assume that 12 staff would move, because — this is part of the problem — those 12 people, including the ombudsman, are probably the whole of their complaint-handling resource. It helps make my point that it is not the ombudsman but the complaints handler. Ombudsman is a misnomer, because you need to be independent of the body that is the subject of the complaints. That is the critical issue that was raised in the previous discussion. We would not assume that 12 people would come. I am sure that they will need four, maybe six people; they will say. There has to be proper resource for dealing with complaints, in the same way as for all health trusts and public bodies. They would need their own resource to deal with complaints internally, because it is only when that system fails that they would come to us or we would take over the complaint.

Mr Frew: A lot would merge into the Prison Service.

Dr Frawley: Correct.

Mr Frew: Your office would take the pure complaint investigators. You talked about a directorate in your office. Are there any other directorates in your office?

Dr Frawley: There are. The NIPSO Bill proposes a directorate for local government standards. There is already one in place in our office, so we deal with local government standards separately. There is a proposal — I do not want to assume that it will be passed by the Assembly, because I may live to regret it — that judicial appointments will come into our office. There is also a proposal currently being debated for a complaints standards authority. In other words, we would be the like the Kitemark for complaints handling, and every public body would require our stamp to show that is operating an acceptable complaints-handling system. We think that would be very important in creating a high-quality complaints model. We have separated those out from our core business of public service complaints. So, we have experience of directorates, and I believe that we operate them as discrete areas very effectively.

Mr Frew: Do people and expertise transfer within your organisation? Are you agile in that way?

Dr Frawley: We encourage that. In fact, the people staffing our local government standards directorate are from our investigative family, if you like. I think that there is real merit in that sort of movement across, because people become overfamiliar and settled. I have no doubt that expertise

from prisons has relevance elsewhere. Because the Civil Service has decided that it wants to limit secondments to two years, which is sensible for them, we, who have been dependent on secondees until now, recognise that we will have to recruit all our own staff, as two years would not be meaningful for us; in our opinion, people only become effective after two years in terms of learning their skills. We will, therefore, have a separate identity, although we will take staff from other parts of the public service, I have no doubt. People from the Department of Health or local government might want to come and work with us. All the time, we have got that knowledge-management piece that you are referring to, where we move the expertise around. If someone has a particular skill set and we have a complaint that needs that expertise, we will match the expertise to the individual.

Mr Frew: What contact does your office have presently with the Prisoner Ombudsman or even the Police Ombudsman? Is there any engagement on best practice? I know that you probably cannot go into any detail on cases, because you are still bound by confidentiality, but surely you meet and engage on good practice?

Dr Frawley: I will let Marie speak on that, because she has achieved a lot more in this area than I have.

Ms M Anderson: First, we are in contact with the Police Ombudsman's office to redirect complaints that wrongly come to our office because some people think that we are the Police Ombudsman. As far as sharing good practice is concerned, the Police Ombudsman's office has helped to train our staff to interview to PACE standards on the local government standards side of our work. We have been in contact with the Prisoner Ombudsman too. In fact, I have trained Prisoner Ombudsman staff on privacy and data protection, good complaints handling and good records management. There is sharing in the ombudsman community.

Mr Frew: I completely understand the principle, and anything that can pool resource and expertise in one place that then can spread out would be of considerable help. I feel as if I write to you every week, Tom, and usually hand you big piles of paperwork to sort out.

The Chairperson (Mr Ross): Fan mail? *[Laughter.]*

Dr Frawley: I live in hope, but no.

Mr Frew: I understand the principle completely. Thank you.

Ms McGahan: Can you provide the number of prisoners who have made complaints to your office regarding the provision of healthcare?

Ms M Anderson: Since 2012, we have had 69 prisoner complaints; so far this year, we have had 11 complaints from prisoners on healthcare. Those range from medication, treatment and complaint handling to mental health issues. Access to drugs is an issue, as sometimes drugs that they were obtaining from their GP are restricted when they move into prison. I am happy to show you the breakdown. We have that here with us. Prisoners have our Freephone number. I have taken a call from a prisoner using our Freephone number. As with every other ombudsman, if they have not complained first through the internal system, they should do so.

Ms McGahan: That is helpful.

The Chairperson (Mr Ross): Thank you both very much. We are sorry for keeping you waiting so long.