



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Northern Ireland Judicial Appointments
Ombudsman — Rationalisation of Functions:
DOJ Briefing

21 February 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Alex Easton
Mr Tom Elliott
Mr William Humphrey
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Jim Wells

Witnesses:

Ms Geraldine Fee	Department of Justice
Mr David Lavery	Department of Justice
Mr Martin Moore	Department of Justice

The Chairperson: I welcome Mr David Lavery, the director of the access to justice directorate, and Ms Geraldine Fee and Mr Martin Moore from the jurisdictional redesign division in the Department of Justice. The session will be recorded by Hansard and published on the Committee web page in due course.

Mr Lavery, I invite you to outline your paper, after which members will have some questions.

Mr David Lavery (Department of Justice): Surely. Thank you, Chairman, and thank you for the opportunity to speak to the Committee about the future of the Office of the Northern Ireland Judicial Appointments Ombudsman. I had a brief introductory statement, but, in the interests of time, I will edit that quite a bit because you have been briefed extensively by the current office holder.

The point that we wish to emphasise is that the Department believes very much that the ombudsman function in relation to complaints about judicial appointments is important because it strengthens confidence in the process of appointing judges. The purpose of the review that the Department has undertaken is not to question the ombudsman's functions but to determine where that office sits administratively because, as you heard, it is quite a small office.

So our guiding principle has been to disturb the functions as little as possible but look at how the office is supported administratively. The running costs of the office are modest, as the Committee will have seen, and were reduced from about £91,000 in 2010-11 to £64,000 last year. Nevertheless, because

the caseload, as you heard, is quite small, we thought it appropriate to look at the future administrative arrangements for supporting the office and whether there may be scope to reposition it.

The preferred option, which we outlined in the paper before the Committee, is to co-locate the office with that of the new Public Services Ombudsman. I think, Chairman, that perhaps you slightly misspoke earlier: I think that you said commission, but we are not abolishing the Office of the Judicial Appointments Ombudsman. Our proposal is that it would remain as a quite distinct legal entity but be held at the same time by the person appointed to be the Public Services Ombudsman for Northern Ireland. That would have the benefit of drawing on the administrative support of the Public Services Ombudsman's organisation and probably save the total running costs of the Judicial Appointments Ombudsman. The saving would be modest. Nevertheless, it is likely that it would be about £60,000.

We recommend co-location because we think that the roles of the Public Services Ombudsman and the Judicial Appointments Ombudsman are complementary as both look at maladministration. The Northern Ireland Public Services Ombudsman will have a significant resource of relevant investigative skills and expertise to draw upon. At the same time, we think that we could protect the benefits of the distinct role of the Judicial Appointments Ombudsman by retaining that as a separate legal appointment but, as I said, to be held at the same time by the Public Services Ombudsman.

The Committee has already spent some time exploring the issue of eligibility. There will be eligibility restrictions on the appointment of the Public Services Ombudsman, but, as far as I am aware, they will not go as far as the restrictions on appointment that currently apply to the Office of the Judicial Appointments Ombudsman. Specifically, as you heard, the current arrangements are that a person cannot be appointed Judicial Appointments Ombudsman if he or she has been a practising lawyer or held judicial office.

As we recognise that it would be difficult for different eligibility requirements to apply to the Public Services Ombudsman and the Judicial Appointments Ombudsman should they be brought together in the way that we suggested, that issue would have to be addressed. We suggest three possible approaches. One would be simply to remove the additional disqualifications that currently apply to the Judicial Appointments Ombudsman and rely on a general conflict of interest test, which the current Northern Ireland Ombudsman clearly has to apply on a case-by-case basis. As we all know, no matter what disqualifications or eligibility tests are applied, conflicts of interest can arise. As Mr Singh said already this afternoon, his opposite number in England was appointed subject to a restriction on lawyers or judges holding that position. Nevertheless, a perceived, if not an actual, conflict of interest arose in nine cases. My point is simply this: no matter how you restrict appointment, you must, at the end of the process, have a general test of a general conflict-of-interest standard to which any ombudsman or office holder must adhere.

We have suggested alternative ways, if that does not commend itself to the Assembly. First, to retain the disqualifications for lawyers or judicial office holders for judicial appointment complaints. The benefit of co-locating that with the public services ombudsman is that that is a much bigger organisation.

Secondly, there is a deputy ombudsman and senior investigators, so, if circumstances were to arise in which the public service ombudsman were someone who had previously been a lawyer or a judge, any judicial appointments complaints coming to that office might be dealt with by the deputy ombudsman or another senior person.

Thirdly, you could at least consider reducing the number of restrictions on eligibility to exclude only those people who have held judicial appointments, for example. I can see that, in public perception terms, someone who was previously a judge investigating complaints about the process of appointing judges might not look quite right. However, I am sure that it is conceivable that lawyers such as academic lawyers or lawyers from across the water who have not practised in Northern Ireland could be found. Therefore, one could tailor the eligibility requirements in the way in which I am suggesting.

Of those three approaches, I think that simply aligning the eligibility restrictions with those that will apply in the future to the new office of public services ombudsman would be a workable solution if, at the end of the day, there is still a general conflict-of-interest test to be applied case by case.

As to the way forward, what we have proposed in the paper that is before the Committee is not necessarily novel. As you have heard this afternoon, complaints about the judicial appointments process in Scotland lie with the Scottish Public Services Ombudsman. To answer Mr Maginness's question, a separate person deals with complaints about the investigation of judicial conduct. There is

a distinct office dealing with judicial conduct complaints, but the Scottish Public Services Ombudsman deals with complaints arising in relation to judicial appointments.

If the Committee were minded to agree that there would be a benefit in co-locating the role of the Judicial Appointments Ombudsman with that of the public services ombudsman, in the future, that, obviously, could be achieved through the legislation, which, we understand, will be introduced in the Assembly by the Committee for the Office of the First Minister and deputy First Minister to create the office of public services ombudsman or by subsequent legislation promoted by the Department of Justice.

Chairman, we very much welcome the Committee's views on the way forward. My colleagues and I are happy to answer any questions that the Committee might have for us.

The Chairperson: Mr Lavery, thank you very much for your briefing. I have a couple of questions. The option at paragraph 26(b) is to retain the restrictions and delegate to the deputy ombudsman, or to a senior director if the deputy is not able to do it. Given the low level of complaints, is an ombudsman from another jurisdiction a feasible option? You would absorb the function, it would remain as that separate function, and, as we have had so few complaints, you would just bring in an ombudsman from another jurisdiction to do this for us, unless the workload increases.

Mr Lavery: One would hope that the relatively low number of complaints is a sign that the judicial appointments system is reasonably satisfactory. However, I argue that the benefit of having this co-located with the public services ombudsman would be that institutional learning would be brought to bear. If you just bring in someone from England when the occasional complaint arises about a judicial appointment, the person will, to some degree, take the learning with them. There is at least an argument that if you have a public services ombudsman looking across a range of administrative activity, that ombudsman can share best practice and learning by retaining the investigation of even a judicial appointments complaint within that organisation. Equally, however, I concede that, if it were simply impossible to find someone who did not have a conflict of interest, bringing someone in from outside in an individual case would be a possibility. We heard this afternoon that Mr Singh is quite regularly asked to sit in England because of perceived conflicts of interest.

The Chairperson: My final question is on the appointment process for the Northern Ireland Public Services Ombudsman. Perhaps I am wrong in what I am picking up from what Tom Frawley indicated, but your paper indicates that the Department is content with whatever option it might be. For example, the appointment could be by the Assembly Commission and not, therefore, recommended to the Queen for ratification. The Commission, which is obviously made up of Assembly Members, would carry out the process and recruit and appoint the individual. The appointment would be based on the Commission alone, with no further referral, as there is in the current process, in which the Queen ratifies the appointment. From what I am picking up, and I might be wrong, Tom Frawley seems to be saying that that would cause a concern around the independence of the role. In speaking to the current post holder, just before you came to the table, I picked up that he would share that concern. Is that something that the Department has given thought to? If the Assembly does go for the Assembly Commission option, would that be of concern?

Mr Lavery: I respect Mr Singh's observations. However, I cannot quite see that some final, largely nominal, involvement by the Sovereign is material to that issue. The real issue surely must be that we have a rigorous, open and transparent appointment process based on merit. Presumably, that is what the Assembly Commission would seek to achieve. Having the appointment then technically signed by the Queen seems to me to be more symbolic than substantive. Unless colleagues want to offer a view rashly, we will just say that we are neutral on that. It seems unlikely that a process for appointing the public services ombudsman that would command the support of the Assembly would be such as not to be suitable for the appointment of the Judicial Appointments Ombudsman.

The Chairperson: Thank you.

Mr McCartney: The briefing paper states that this is a "review of arm's-length bodies". In essence, is this a cost-saving measure?

Mr Lavery: That is what gave rise to it, Mr McCartney. However, I have to concede that it is not an expensive office. It is very small. It is a singleton post, plus one person providing administrative support. A couple of years ago, Mr Singh took the initiative to reduce it almost to a virtual office. The running costs have gone down by around one third. Nevertheless, we were expected, throughout

government, to look at all arm's-length bodies. A number of the arm's-length bodies associated with the Department of Justice are likely either to change or be repositioned. In the next evidence session, you will hear some suggestions about another, much bigger arm's-length body, the Legal Services Commission. We have looked at that, and there is a suggestion that it might be repositioned.

The trigger point was the need to review all arm's-length bodies, and there are arguments for and against almost any arrangement. Having a relatively isolated, small, singleton post seemed to us to have as many disadvantages as advantages. Therefore, bringing it alongside, and resourced from, the public services ombudsman's office seemed to us to be a natural fit, because both posts look at maladministration. We also looked at, for example, whether the Judicial Appointments Ombudsman could draw administrative support by sharing back-office support with the Police Ombudsman or the Prisoner Ombudsman. We did not think that that was quite a good fit, because the work that they do is of a quite different character to the work that is being done by the Judicial Appointments Ombudsman, which is an investigation of acts of maladministration. That is exactly what the public services ombudsman would do.

Mr McCartney: When the office holder goes into the public services ombudsman's office, the post will no longer be a recognised office, so it will be another service provided by the public services ombudsman. Is that the way that it will work out?

Mr Lavery: We are trying to create almost a two-for-one offer. The person who is appointed to be the public services ombudsman would hold, at the same time, a separate appointment of Judicial Appointments Ombudsman for Northern Ireland, with its own legislative underpinning and arrangements. Therefore, if, one week, you were having a hearing about public services, you would have the new ombudsman in the chair, and, if you were having a hearing such as this a week later about judicial appointments complaints, you would have the same person before you, but the person would be wearing two different hats, if you like.

Mr McCartney: Yes, but there is provision that the post can be tasked to someone else, so the public might not see it in those terms. They might see it as a reduction in scrutiny.

Mr Lavery: I do not know why they would see it as a reduction in scrutiny. As I said at the outset, this is designed to maintain a very transparent system for investigating the occasional complaints that you receive about maladministration in judicial appointments. It would have its own rules, its own procedures and its own code to follow, so the public-facing aspect and, perhaps as importantly, the complainant-facing aspect should look like a very bespoke arrangement, even though its administration is located in the public services ombudsman's office.

Mr McCartney: I understand that the fact that there are a low number of complaints means that it is not a burdensome office, but, in the past, people have said that the Office of the Police Ombudsman and the Office of the Prisoner Ombudsman could be combined. People would then say that, if there is a caseload, issues that are better attended by single entities can be put to "z" on the list of priorities. How do we safeguard against that?

Mr Lavery: Our suggestion is that what the ombudsman is currently doing is exactly what Dr Frawley does. He looks at an administrative process and an allegation from someone that there has been maladministration. The actual process of investigation would be broadly similar in either circumstance. We are not suggesting that we abolish the post of Judicial Appointments Ombudsman until it is added to the list of things that the public services ombudsman does. We are saying that there will be a separate and distinct process for judicial complaints but that the same person could do both jobs. That seems to me to retain the independent dimension that you are perhaps referring to.

Mr A Maginness: That would be true if you did not expand the role of the ombudsman. If you were doing so, you might have to look at this again.

Mr Lavery: I think that there are interesting things further up the road. You have already touched on a couple of them with Mr Singh: should there be an audit function; and should there be someone to look at how complaints about judicial conduct are administered? There is not one perfect model for that. Looking around Britain and Ireland, I see that there are different approaches. For example, in England, you have a Judicial Appointments and Conduct Ombudsman, who also deals with conduct complaints. In Scotland, you have a Public Services Ombudsman who deals with judicial appointment complaints and a separate office for judicial conduct complaints.

Therefore, if the Assembly were to return to this and say, "There should be an audit of judicial appointment procedures", it would have to look at where that function would best fit. I am not immediately convinced that the Prisoner Ombudsman's office or the Police Ombudsman's office would be the right place for an audit function. You might argue that Criminal Justice Inspection or the Equality Commission should be doing something if you are looking for somewhere to place the statutory duty to achieve a judiciary that is reflective of the community. That is what you would be auditing.

Mr A Maginness: I agree that if you were to move the post, it would not be moved to the Prisoner Ombudsman or the Police Ombudsman, who are overloaded anyway. Those are separate functions, so the public services ombudsman's office is probably the right location in those circumstances. However, the problem of eligibility arises. How do you square that particular circle? If you are going to exclude people with a legal background from the position of ombudsman, you have a problem, because you are narrowing the pool.

Mr Lavery: We should not narrow the pool. It is illusory to think that you can avoid a conflict of interest by excluding a particular professional group, such as lawyers. I made the point earlier that the person appointed would be the equivalent of the Judicial Appointments and Conduct Ombudsman in England and Wales, who is subject to the same eligibility restriction: you cannot be a lawyer and be the Judicial Appointments and Conduct Ombudsman. However, in nine cases, Mr Singh has had to be sent for because a conflict of interest was perceived to exist, even though the ombudsman was not a lawyer. Frankly, in Northern Ireland, you are as likely to know somebody from a social setting, such as church or a golf club. You need a general backstop conflict-of-interest test, irrespective of the eligibility rules that you write in.

The Chairperson: I thank you very much for coming along. It is much appreciated.