



Northern Ireland
Assembly

**COMMITTEE
FOR THE OFFICE OF THE
FIRST MINISTER AND DEPUTY
FIRST MINISTER**

**OFFICIAL REPORT
(Hansard)**

**Assembly Ombudsman for Northern
Ireland and Northern Ireland
Commissioner for Complaints**

2 June 2010

NORTHERN IRELAND ASSEMBLY

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FOR THE OFFICE OF THE FIRST MINISTER AND
DEPUTY FIRST MINISTER**

**Assembly Ombudsman for Northern Ireland and Northern
Ireland Commissioner for Complaints**

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Members present for all or part of the proceedings:

Mr Danny Kennedy (Chairperson)
Ms Martina Anderson
Mr Tom Elliott
Mrs Dolores Kelly
Mr Francie Molloy
Mr Stephen Moutray
Mr George Robinson
Mr Jim Shannon
Mr Jimmy Spratt

Witnesses:

Mr Tom Frawley) Assembly Ombudsman for Northern Ireland and Northern
Ireland Commissioner for Complaints

Mrs Marie Anderson) Office of the Assembly Ombudsman for Northern Ireland and
Northern Ireland Commissioner for Complaints

The Chairperson (Mr Kennedy):

Good afternoon. We apologise for the delay. Thank you for your briefing paper on the proposal for a public services ombudsman for Northern Ireland, which you helpfully provided for us in advance. You may wish to briefly speak about it, and we will then take questions. The session is

being recorded by Hansard.

Mr Tom Frawley (Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints):

My deputy, Marie Anderson, is with me today. Thank you for the opportunity to address the Committee again. You have asked me to speak about the legislation that I would like to see introduced to create a legislative framework to update and underpin the future work of the office of the ombudsman and to implement the recommendations of the 2004 Deloitte review.

First, I will speak to the single office issue. That would involve merging the two separate offices. Most people do not fully appreciate that we have an office for the Assembly Ombudsman and we have an office for the Commissioner for Complaints. The Assembly Ombudsman looks at issues from Departments and their agencies and the Commissioner for Complaints takes complaints from public bodies, local authorities, and so on.

A single office would be very timely, particularly given the recent extension to my office's jurisdiction to include justice bodies, following on from the devolution of justice. The review took account of the role and legislation relating to ombudsmen in the United Kingdom and the Republic of Ireland. The review was particularly influenced by the Scottish Public Services Ombudsman's office, which was created in 2002 by the Scottish Public Services Ombudsman Act 2002. Following Scotland's lead, legislative and structural changes were introduced in Wales in 2005 by the Public Services Ombudsman (Wales) Act 2005. In Scotland and Wales a single office of the Public Services Ombudsman has been created. However, in suggesting a suitable model for any new legislation in Northern Ireland, my preference is for the Welsh model, because of our comparable size and jurisdiction and, importantly, the legislation on which the Welsh model is based constitutes a more current and, therefore, apposite legislative instrument.

Members will recall from my earlier briefing that the review recommended that the Assembly Ombudsman and the Commissioner for Complaints offices should be merged to create a single office of the Northern Ireland public services ombudsman. I strongly endorse that recommendation. The impact of a merger of the two offices is significant in respect of the legislative provision that would be required to effect such a change. For instance, the Assembly Ombudsman legislation permits me to accept a complaint only where it has MLA sponsorship. There is no such requirement in the Commissioner for Complaints legislation. In combining the

two offices, therefore, there is a need to remove the current MLA filter while still enabling complainants to involve an MLA in bringing a complaint. The removal of sponsorship will be addressed by the issue of the monthly digest to MLAs, which we suggested at our last meeting, and by a much higher level of engagement, which I hope that our office can achieve with the Assembly and its Committees.

The second legislative dimension that needs to be addressed is what is known as the employment jurisdiction. If the Committee is minded to sponsor new legislation for my office, I urge it to ensure that every effort is made to ensure that the public services ombudsman for Northern Ireland will operate in a way that is consistent with the position of all public sector ombudsmen in the UK and Ireland, by the removal of the jurisdiction to deal with employment matters in public bodies. I have already explained that that jurisdiction is inequitable because it allows public servants an avenue of redress not available to employees in other sectors of the economy. The review recommended that change, subject to an equality impact assessment.

The next theme that would be part of a legislative framework is administrative justice. The administrative justice system is defined as the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including the procedures for making such decisions; the law under which they are made; and the systems for resolving disputes and airing grievances in relation to them.

I am mindful that, since the publication of the review of the office in 2004, there has been significant change in the administrative justice landscape locally, with the developments in tribunal reform and the creation of the Northern Ireland Courts and Tribunal Service. I am also mindful of the issue that arose at Hillsborough, which is framed in the Hillsborough agreement of 5 February 2010; namely, the need to build on the existing tribunal reform.

The ombudsman has been described as the belt in the buckle of administrative justice. As the reform of tribunals and administrative justice landscape develops, there is a need to place the ombudsman in an important role to ensure redress for citizens who, for financial or other reasons, are unable to access courts or tribunals. Only the ombudsman can ensure that bodies look to get it right first time. The business of courts and tribunals is often to put things right after the event. Those complementary strands of administrative justice should, in my view, work more closely together to ensure that the user is not disadvantaged when he or she has pursued the wrong

redress mechanism. That will require more joined-up working to enable courts and tribunals to refer cases to the ombudsman and vice versa.

In my earlier paper of 21 April, I explained my existing role and the challenges facing my office. The Assembly now has the opportunity to innovate by creating a public services ombudsman that will put Northern Ireland in advance of other ombudsmen in these islands.

An ombudsman has two key functions: first, to resolve complaints; secondly, to improve public administration. My strategic plan for the next three years highlights two aspects of my work. However, without the required amendments to the legislation as identified in the paper, I will be severely limited in my ability to achieve systemic improvements in public administration.

The next area that I will focus on is own-initiative powers, which allow me to investigate a complaint without receiving a complaint from an individual. When adjudicating on individual complaints, I identify areas of improvement either in record keeping or in recommendations for organisation-wide training where a particular failure has been highlighted as a result of a specific complaint. If the proposed public services ombudsman for Northern Ireland were given own-initiative powers, I would be able to use the information that I have gleaned from one or more complaints to examine the wider organisational and sectoral implications of individual complaints.

The involvement of the Comptroller and Auditor General is important because the dual roles of auditor and ombudsman are essential mechanisms for ensuring trust between the citizen and the state. That constitutional dimension was recognised by Kirkham, Thompson and Buck in their seminal piece, 'Putting the Ombudsman into Constitutional Context':

"Just as audit provides assurance that public money is being spent appropriately, the complaints handling process adds to the citizen's confidence in the democratic system by actively encouraging good administration."

The own-initiative power is an authority that would be used sparingly and, as I said, in conjunction with the Comptroller and Auditor General to avoid overlap and duplication. I remind the Committee that such authority is enjoyed by the ombudsman in the Republic of Ireland as well as in international jurisdictions, such as New Zealand and Canada.

There is much to commend in the existing legislation with respect to the creation of an ombudsman with a personal jurisdiction who adjudicates on individual complaints of maladministration within a framework of wide discretion. I accept that, often, maladministration

is not clearly understood by the public or public bodies, but I believe that a legal definition is unnecessary as it has been described as a flexible tool that complements the formal legal tests in the courts. The need to, wherever possible, affect a settlement or resolution of a complaint is an important facet of my jurisdiction that must be preserved in any new legislation.

Those basic elements of my powers allow for flexibility in investigating and remedying complaints of maladministration, and they should be maintained. However, having examined other models of legislation, in particular the Welsh model, I consider that the relationship between my office and the Assembly is an important area that requires urgent reform. I am aware that there is a closer relationship between the ombudsman in Wales and the Welsh Assembly, with the latter body playing a central role in the appointment process for the Welsh ombudsman. I suggest that any appointment process for a new ombudsman should include significant involvement by the Assembly. In other words, the appointment process should mirror that for the Comptroller and Auditor General, and the Assembly should ratify the appointment of the public services ombudsman for Northern Ireland.

The review recommended the extension of the office jurisdiction to justice bodies and other public sector bodies, such as housing associations. That recommendation has been implemented. In making any additions to the jurisdiction, it is necessary, in my view, to recognise the principle of following the public pound, as applies to the Comptroller and Auditor General. Furthermore, that principle is essential to ensure that organisations that carry out public functions on behalf of a public body or that are in receipt of public funds are fully accountable for how they conduct their administrative functions and, particularly, for how those functions affect citizens. In any new legislation it should be made clear, for the avoidance of doubt, that the ombudsman's oversight must extend to services that are provided to the public by the voluntary, community and private sectors but are paid for from public funds. In such circumstances, the commissioning body, rather than the private organisation, will be held accountable.

The review recommended the introduction of a code of conduct for members of local authorities, with an oversight mechanism that reflects the Welsh model. I concur with that recommendation. The Department of the Environment proposes to include provisions in the local government (reorganisation) Bill to establish a new ethical framework for local government in Northern Ireland. I am advised that that may include a mandatory code of conduct covering the behaviour of all councillors. It may involve my office receiving all complaints about alleged

breaches of the code, and I will be asked to investigate and adjudicate on those cases. I welcome that potential addition to the jurisdiction as recommended by the review.

I am aware that, in the short term, decisions about the review of public administration timetable are to be made by the Executive. I understand that the policy proposals that I mentioned may be subject to further consultation. My staff have met the local government policy division team responsible for the proposals to discuss the draft legislation.

It is important that any ethical standards regime in local government and the Assembly should be comparable. Indeed, the review recommended that the role of interim Commissioner for Standards at the Assembly should be formalised. I am also aware of the proposals made by the Assembly Committee on Standards and Privileges to appoint an Assembly Commissioner for Standards. That proposal was introduced on the Floor of the Assembly yesterday. As far as I am aware, no decision has been made on whether the role could be filled by an existing office holder. However, given the progress on the proposal for a new ethical standards framework for local government, I believe that there is merit in achieving a circumstance where the regulation and oversight arrangements for the conduct of MLAs, appointed members to public and departmental boards, local councillors, civil and public servants are comparable, cost-effective, consistent and affordable.

From my experience as interim Commissioner for Standards, I can confirm that the current caseload of the Assembly Commissioner for Standards does not provide sufficient casework experience to maintain expertise and investigative skills. There has been a total of 32 cases over the four years in which I have performed the role. Ahead of final decisions on these matters, it is important that all potential models are considered, although I fully appreciate that any final decisions will be a matter for the Assembly alone.

Some of the issues that I have raised have a bearing on the work of other Committees, such as the Justice Committee and the Committee on Standards and Privileges. I also know that this Committee is already seized of some developments around tribunal reform. The Ministry of Justice spans the work of those Committees, but this is a unique opportunity for the Assembly to gain an insight into the work of the sector. By sponsoring a Bill to renew and refresh the ombudsman's role as an integral part of that sector, the Committee has an opportunity to innovate to ensure that the Northern Ireland citizen has the most up-to-date system of administrative justice

in these islands.

I appreciate that mine is not the only voice that the Committee may wish to hear on these matters, and I acknowledge the time and interest taken by the Committee on the subject. In highlighting areas that need reform in the new legislation, I have been mindful to set aside the more straightforward aspects for attention, which would also form part of any explicit instruction to the legislative draftsmen in order to focus on the overarching legal framework. The proposed legislation will, in my view, provide for an effective and modern public services ombudsman for Northern Ireland.

Thank you, Chairman. I am sorry I took so long.

The Chairperson:

Thank you very much, Mr Frawley. On your visits to the Committee on 21 April and today, you have certainly put forward a compelling case for a change in the legislation. The question for this Committee is who should carry that out. To be up front and honest, the Committee has very considerable work ahead in scrutinising legislation referred to it by the Office of the First Minister and deputy First Minister (OFMDFM), including the victims and survivors service Bill, the parades Bill and the Commissioner for Older People Bill, to name but a few. Given that legislation normally requires an 18-month journey, timescale may well be another factor.

Do you have a sense of why the Department appears reluctant to sponsor legislative changes? That would appear to be route one.

Mr Frawley:

I have been knocking on that door for four years and, to be fair, other, much more significant political matters have, inevitably, preoccupied that office, rather than this matter, which might be perceived as an administrative issue. I have often pointed out that this review was completed in 2004. At all times, we have sought to engage with the relevant parties to see whether they would take the matter forward, but it has always been indicated to me that there is a huge arena of business to be addressed by them, which brings us back to your point, Chairperson. We are in a good place. The review — some refinements of which have emerged since — gives us a very good platform.

The role of the Assembly Committees is to focus on the experience of individual citizens and how public bodies impact on the lives of those citizens. In a way there is some symmetry in the Committee sponsoring the Bill, because OFMDFM is the executive that leads the Executive, whereas my interest is in how the Executive are engaging with the public and delivering services to the public. There is coherence in a model that has the Assembly at the centre of sponsoring that part of the legislative agenda, whereas the Executive have other areas of responsibility, such as parades and the older person's commissioner, as you highlighted.

My view is that if this opportunity is lost we will go further back down the line. Remember that the legislation was originally passed in 1969. It was updated in 1996 because of changes in health, as I explained at my last meeting with the Committee, and so it is no longer fit for purpose. I find it disappointing that Northern Ireland, which led in the area of ombudsmen back in 1969, has now fallen behind others. I recognise the challenge faced in relation to workload, but I am absolutely committed to providing whatever assistance or support I can, recognising that you must be independent to facilitate the work that will hopefully address the core of the work and move it forward as quickly as we can.

I do not in any way underestimate the workload of your staff in taking the materials forward. However, we have a good grasp of what we need to do and there are some very good benchmarks elsewhere, which may not be available in relation to some of the other issues that you spoke about. I recommend that the Committee takes it on, if it would consider that.

The Chairperson:

OK, thank you.

Mr Shannon:

I have a couple of wee questions, for information as much as anything. You say that the monthly digest will be sent out to all MLAs. Can it be sent to all MPs as well? Obviously, the MPs over here have a vested interest in that and it is important for us to be aware of what is happening in relation to that.

Mr Frawley:

I had a rather enjoyable moment then, because I could exclude you from the circulation.
[Laughter.]

The Chairperson:

You may not be the only one to enjoy that.

Mr Frawley:

We are very happy to circulate it to anyone, but the core group is the membership of the Assembly. However, we would happily take on board others who may have an interest.

Mr Shannon:

If, in following up on a complaint, you find that there is negligence or that a particular type of complaint is upheld, do you ever refer such matters to the Public Accounts Committee?

Mr Frawley:

There are two things to say there. We have the right to refer to another authority if we consider the negligence, as you describe it, to be of such a nature that it is undermining the public interest. In that sense we could refer the matter elsewhere. I will ask Marie to take that question, because I know that one of the difficult areas is referring professionals, such as doctors, to their supervising councils. That is a judgement that we sometimes have to make.

Mrs Marie Anderson (Office of the Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints):

Under current legislation, if the ombudsman considers that he wants to highlight a significant issue of maladministration, he can make a special report to the Assembly. That report will be privileged. There are more difficult issues around referring individuals, such as consultants or health professionals, because there is a statutory bar in our legislation that prevents disclosure of information. However, there is a special provision in relation to Health Service cases, so that if the ombudsman considered that a health professional, in their conduct or treatment of patients, is a risk to the health or safety of their patients, he could refer the matter to the General Medical Council (GMC) or another regulatory body. That is a very limited gateway in our statutory bar to disclose information. Nevertheless, the ombudsman does take the issue seriously. Recently, he referred a health professional to the GMC, and it is up to the GMC to consider whether that is a fitness-to-practice issue.

Mr Shannon:

My final question is on the bar on disclosure of information, which is mentioned in the material that we have before us. At the conclusion of any investigation, is the information from that made available to the public? I understand the need for confidentiality, and you have asked for the bar on disclosure of information to be upheld. Due to the nature of the investigation, it may not be available during it. However, I wonder whether that information becomes available at the conclusion of an investigation.

Mrs Marie Anderson:

A complex set of rules are at work in ombudsmen's investigations. Under Northern Ireland statute, in common with other ombudsmen legislation, all investigations are conducted in private. Therefore, the parties involved — the complainant, the public body and the officers who are the subject of the complaint — have an expectation of confidentiality. That is recognised by virtue of the bar that prevents the ombudsman from disclosing information about the investigation other than for certain purposes.

One area in which a complaint can be disclosed — at least, in an anonymised form — is in a report to the Assembly. Therefore, there will always be an issue whereby the ombudsman's findings and any complaints of maladministration will come to the public's attention through an ombudsman's report. It is the ombudsman's intention not only to disclose those sorts of details annually but, with the digest, to report on cases to the Assembly more regularly so that information can enter the public domain.

Mr Elliott:

Thank you for your presentation. My first question relates to any legislative change itself. I do not know whether I should ask you or the Committee staff about that. I assume that that would be done through primary legislation. How big would the Bill be?

The Committee Clerk:

It is deemed to be exactly the same as Executive legislation. If the Committee introduces a Bill, it will be a public Bill. There are procedures to consult, and so on, throughout the process.

Mr Elliott:

I appreciate that. Going by the amount of material that it would contain, I assume that it would

be quite large: is that correct?

The Committee Clerk:

I have no idea.

Mrs Marie Anderson:

If we look at the equivalent Public Service Ombudsman (Wales) Act 2005, of which I have a copy here, and the Scottish Public Services Ombudsman Act 2002, we can see that the Bill would be quite large. Certainly, we have provided you with a framework of the Bill's highlights. However, schedules to the Bill would need to contain details on the ombudsman's appointment, pension, appointments of staff and so on.

Mr Elliott:

Could parts of it be put through other mechanisms, without going through a Bill, which, as Mr Frawley indicated, may change our role to almost that of a leader in the ombudsman process, or would a Bill be required to change that significantly?

Mr Frawley:

A Bill would be required to change the situation significantly and to put you on the right footing. I have explored short cuts and other ways to try to achieve the same outcome but, as the Clerk said, they all require the Committee to go through those formal arrangements. They are unavoidable. Although there are some new issues, there has already been a great deal of consultation, certainly with main stakeholders, on many of the core issues that I shared with you today. I know how important consultation is, particularly because the issue impacts on individuals. It is about citizens' rights, not about how a certain part of the public service is affected. It is about everybody having the right to come to this place to challenge their experience of a public service. In that sense, therefore, it is a central issue and for that reason it needs to be exposed to a fair level of scrutiny.

Mr Elliott:

Finally, your submission says that breaches of the local government statutory code of conduct by representatives in local authorities could be investigated. Does that go so far as to include the local authority itself?

Mr Frawley:

No; we would not look at the local authority itself. Clearly, there are possible ramifications whereby the actions or activity of an individual could impact on decisions that are taken by a local authority; for example, by not declaring an interest. It could have implications for local authorities, but it would not. One would not look at a local authority per se; one would be looking at the members of the council.

Mr Elliott:

Why would local authorities be excluded if you are investigating other agencies and Departments?

Mr Frawley:

The standards of conduct of members of local authorities are looked at in the same way as the standards of conduct of Members of the Assembly. In considering a complaint about a local authority that is received under Commissioner for Complaints legislation, one looks at the actions and decisions of the local authority; how those were reached; the processes that were followed; the governance arrangements; the nature of the engagement of different parts of the local authority structure; and so on. All of that is, and has been, part of the investigations that I have undertaken into local authorities in Northern Ireland. However, it is different to standards, which is about members' behaviour and conduct.

Ms Martina Anderson:

Thank you for your presentation. I am sorry that I was not here on 21 April; I feel that I am doing a lot of catching up today, in listening to you and reading the documentation.

I am keen for the Committee to at least consider what the proposal entails and what exactly we are being asked to take on. It is important that the Committee looks into the possibility of presenting such a Bill. We would need the help of Research Services, but there are templates, such as the Welsh model, so we may not have to reinvent the wheel. I support the exploration of the proposal.

I am trying to get a handle on what the proposal would mean for the composition of staff in your office. Would you have to increase the number of staff in your office, and would that be done on a legislative basis? Like you, I would welcome an opportunity for greater co-operation

between your office and the Committee and the Assembly in general. Since I became an MLA, that co-operation has almost been out in the ether and we have not really engaged with you constructively. Greater co-operation would inform our understanding and perhaps help us to garner more support for your request that we present a Bill to put your proposal on a legislative footing. Have you looked at the changes that resulted in Scotland and Wales? What are your feelings about the capacity and composition of your office?

Mr Frawley:

In fairness, our work is developing all the time. For example, we recently took on additional health staff because the health procedure changed with the elimination of the independent review phase. We are also looking at the implications of the justice legislation, which will bring the Department of Justice, the Police Ombudsman and the Prisoner Ombudsman within the remit of the Assembly Ombudsman, which will have resource implications.

The core staffing and resource structures that would be required by the legislation are in place. There may be a need for additional resource as the responsibility is refined. However, there are people in the Health Service who deal with complaints, so if we take on a significant part of that, it should not be new money. The money that the Health Service uses to do that work should be transferred to our office. I have always made the point that I do not see us becoming a black hole for funds. Rather, we should transfer workload and resources. Skill sets may change, and there are issues regarding the cost of expert advice, which can be expensive.

However, our budget is about £1.4 million, whereas the Police Ombudsman's budget is in excess of £11 million. I made that argument the last time that I was here, and you would have been disappointed if I had not made it again. Scrutinising the public services in their totality for issues of redress is not an expensive recourse for the public interest, which is what this office is all about.

Mrs Marie Anderson:

From discussions with our colleagues in Wales, we know that, when reorganisation took place there and the Public Services Ombudsman (Wales) Act 2005 was introduced, there was an increase in staff, particularly in the area of local government standards, in which approximately six additional investigating officers were appointed. If, as is proposed, local government standards come under the ombudsman's office, there will be a resource implication. If public

services ombudsman legislation for Northern Ireland were to reflect the own-initiative powers, as requested by the ombudsman, the office will change structurally and its focus will partially shift from individual complaints to larger systemic issues. Structurally, the office would probably put more emphasis on issues such as early resolution of individual complaints, wherever possible. Therefore, there may be a need to establish a systemic investigations team. However, that will be necessary only if the own-initiative powers are granted in any new legislation.

Mr Spratt:

Thank you for that presentation. I, too, welcome anything that we can do to progress this important issue. As Tom suggested, it would be a tragedy to see us move from the driving seat to the back seat when it comes to the initiative that has been taken on the work of the ombudsman's office. I have said it before and I say again that it is disgraceful that, since 2004, nothing has been done on many of the recommendations in the Deloitte report.

Legislative change is obviously needed. A lot of the necessary work is already in place and we have a basis from which to work in the form of the Welsh legislation, which we often tend to mirror. Although much of the legislation needs tinkered with, the draftsmen have probably less work to do than if they were starting from a clean sheet. The legislation may be different in the two places, but the Scottish legislation can also provide us with a basis.

I urge that we put our shoulders to the wheel and try to get this through, because it will be good for everybody. I would be delighted if there were legislation that would, at long last, give the ombudsman's office powers so that bodies such as the Northern Ireland Policing Board would no longer adjudicate on its own behalf. It would be good if there were somebody to whom people could make complaints that would be impartially and properly investigated.

We have difficult choices ahead, but we should say yes to this legislation. I urge that we move forward and progress this to put in place the legislative changes that the ombudsman and his staff need.

The Chairperson:

Presumably the witnesses are happy enough with that comment and do not need to respond. That completes members' questions. Thank you for your presentation and the information that you provided. You have heard members make their views clear. The Committee will consider its

response and we will attempt to inform you of that as quickly as possible.

Mr Frawley:

Thank you very much.