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Assembly

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The Northern Ireland Ombudsman

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This research paper looks at issues arising from a consultation on proposals to update and reform legislation relating to the office of the Northern Ireland Ombudsman.

This information is provided to Members in support of their Assembly duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as legal or professional advice, or as a substitute for it.

Executive summary

In October 2010 the Committee of the Office of First and deputy First Minister launched a consultation on proposals to update legislation to reform the office of the Northern Ireland Ombudsman. This followed a review of the two offices that make up the office of Ombudsman – Commissioner for Complaints and Northern Ireland Assembly Ombudsman – by OFMdFM in 2004. The review recommended a number of changes to the role and remit of the Ombudsman. However, resource constraints and competing Ministerial and Departmental priorities resulted in delays in progressing new legislation.

A number of issues were raised in the consultation responses. The key issue that emerged was around the accountability and potential overlap with existing bodies if the role and remit of the office was expanded. In this context it is useful to look at provisions in the equivalent Scottish and Welsh legislation which give those Ombudsmen the power to work with other Ombudsmen and Commissioners where an issue cuts across the remit of two offices. Since 2002 Scotland and Wales have taken the opportunity to update their respective Ombudsman offices.

Along with a statutory obligation to consult other Ombudsmen, the Scottish Public Services Ombudsman has entered into Memorandums of Understanding with a range of bodies aimed at clarifying the respective roles of the organisations and how they could work together.

The office of the Northern Ireland Ombudsman has advised that the office has in place mechanisms for minimising duplication of effort and overlap with other organisations.

There are a number of other organisations in Northern Ireland with investigatory/regulatory roles and some of these, such as the Regulation and Quality Improvement Authority, the Equality Commission and the Children's Commissioner, have entered into MOUs with each other or with other bodies.

Accountability and funding

The Northern Ireland Ombudsman is not currently term-limited, although he must leave office when he reaches the age of 65. In Scotland, the Ombudsman is appointed for a term not exceeding five years, and for no longer than two consecutive terms, unless a third term would be desirable in the public interest. However, a recent change in legislation means that in future the SPSO will be appointed for a one-off eight year term. In Wales, the Ombudsman is appointed for one seven year term which is not renewable.

The Ombudsman is currently appointed under section 36(1) of the Northern Ireland Constitution Act 1973, which states that he is appointed by the Queen. One possible method of appointment would be that applied to the Comptroller and Auditor General, who is appointed by the Queen on the nomination of the Assembly. Another alternative

would be to reflect the arrangements envisaged for the new Northern Ireland Assembly Standards Commissioner who will be appointed by a resolution of the Assembly.

For comparative purposes, the Northern Ireland Children's Commissioner and Commissioner for Older People are appointed for four years and may be reappointed once. The Police Ombudsman is appointed for one seven year term or until the person reaches the age of 70.

Funding for the Ombudsman's office is 'vote' funded by the Northern Ireland Assembly. This is similar to the arrangement for the Northern Ireland Comptroller and Auditor General (C&AG). However, unlike the C&AG, the Ombudsman is not accountable to an Assembly Committee. Any future legislation might wish to consider whether the Ombudsman should be directly accountable to a Committee for the performance, but not decisions, of the office. In Scotland, the Ombudsman has called for a more formal relationship with Parliament to allow MSPs and Committees to become more involved in the work of the office and to enhance its accountability.

OFMDFM determines the salary of the Ombudsman by way of the Salaries (Assembly Ombudsman and Commissioner for Complaints) Orders. However, the Department does not fund the office. Instead, the salary and pension of the Ombudsman is paid from the consolidated fund. Further legislation might consider removing any consideration of staff numbers or terms and conditions of service from OFMDFM to further emphasise the independence of the Ombudsman which is the hallmark of such offices.

Contents

Executive summary **Error! Bookmark not defined.**

1 Introduction 7

2 Addressing possible overlap with existing bodies 7

3 Appointment and accountability 11

4 Other issues 17

1 Introduction

This research paper has been prepared to explore issues relating to proposals to update and reform the office of the Northern Ireland Ombudsman. Specifically, the paper addresses a number of issues arising from a public consultation on the future of the office. The consultation took place from October-December 2010. In total, 35 responses were received from a range of organisations and individuals.

Where appropriate, this paper makes comparisons with the Scottish Public Services Ombudsman (SPSO), Public Service Ombudsman for Wales (PSOW) and Ombudsmen in other jurisdictions. The paper also highlights a number of issues for further consideration.

2 Addressing possible overlap with existing bodies

A key issue raised in the consultation process was the possible overlap with existing bodies that would result if the office of the Ombudsman was given enhanced powers. Within this the research was asked to examine the accountability of the office and how possible overlap could best be controlled.

Collaborative working- The Scottish Public Services Ombudsman

Section 21 of the Scottish Public Services Ombudsman Act 2002 places a duty on the Ombudsman 'where he or she considers that a complaint or request he or she has received relates partly to a matter which could be the subject of an investigation by other Commissioners and Ombudsmen, to consult those Commissioners and Ombudsmen'¹. The relevant Commissioners and Ombudsmen are:

- the Parliamentary Commissioner for Administration under the Parliamentary Commissioner Act 1967
- either of the Health Service Commissioners under the Health Service Commissioners Act 1993 (as that Act has effect in England and Wales),
- the Welsh Administration Ombudsman under the Government of Wales Act 1998
- a Local Commissioner under Part III of the Local Government Act 1974
- a housing ombudsman in accordance with a scheme approved under section 51 of the Housing Act 1996

The Public Services Ombudsman for Wales

Section 25 of the Public Services Ombudsman (Wales) Act 2005 contains similar provisions as the Scottish legislation in respect of consultation. The Commissioner for Older People (Wales) Act 2006 made specific provision for the Older People's Commissioner to work jointly with the Ombudsman where there is an overlap in their investigatory functions. In these circumstances, the Commissioner is required to

¹ Explanatory note to the Scottish Public Services Ombudsman Act 2002

inform and consult the Ombudsman about a particular case and they may conduct a joint examination and publish a joint report on the matter. An example of joint working was a recent report produced by the PSOW and the Health Service Ombudsman for England which spanned both jurisdictions².

The Act also provides the National Assembly for Wales with an order-making power to apply the joint working provisions in this section to other commissioners and ombudsmen with whom, in the future, there may be an overlap in functions. The Assembly must consult with the Commissioner (and any other appropriate persons, which it is anticipated would include the other commissioners or ombudsman) before making such an order³. Reference to the debates during the passage of the legislation reveals the rationale for a joined-up approach:

The Bill...enables the commissioner to work jointly with other commissioners and ombudsmen where they may both be entitled to examine individual cases. That will prevent duplication and ensure a joined-up approach to any examination. At present, the power extends to the public services ombudsman for Wales, and there is provision for the Assembly by order to apply it to other commissioners and ombudsmen in the future. For example, the Assembly might want to add the Commission for Equality and Human Rights. That would then clarify on the face of the Bill the powers of the commissioners to act together, to share information and to prepare joint reports. Furthermore, we envisage that the working relationship between the commissioner and those other commissioners and ombudsmen will be formalised by a memorandum of understanding⁴.

Section 8 of the Commissioner for Older People Act (Northern Ireland) 2011 states that the Commissioner may not investigate a complaint if it falls within an existing statutory complaints system.

Issues for consideration

- **possibility of updated legislation including provision for Ombudsman to consult other relevant organisations where an overlap may exist**
- **would existing legislation relating to, for example, the Children's Commissioner or Older People's Commissioner, need to be amended to place a duty on other Commissioners/Ombudsmen to consult with each other?**
- **Would the legislation need to make clear that the duty to consult only applied to the handling of complaints, and not in circumstances where the Ombudsman was required to report on another organisation?**

² 'Report by the Public Services Ombudsman for Wales and the Health Service Ombudsman for England', http://www.ombudsman.org.uk/_data/assets/pdf_file/0015/4281/HC858_report-low-res.pdf

³ Explanatory note to the Commissioner for Older People (Wales) Act 2006

⁴ HC Deb vol447 col929

Memorandums of Understanding

Along with the statutory requirement to consult other ombudsmen and commissioners, duplication of effort could be addressed through memorandums of understanding. The SPSO has agreed MOUs with the following organisations:

- Mental Welfare Commission for Scotland
- Protocol with the Standards Commission for Scotland
- NHS Quality Improvement Scotland
- General Dental Council
- Communities Scotland (superseded by 'Memorandum of Understanding with the Scottish Housing Regulator')
- HM Inspectorate of Education
- Ombudsman of the Republic of Malawi
- General Medical Council
- Office of the Scottish Charity Regulator
- Scottish Housing Regulator
- Scottish Legal Complaints Commission

The MOUs are broadly similar in format and outline how the SPSO and the relevant organisation will work together. Below is an extract from the MOU agreed with NHS Quality Improvement Scotland:

Table 1: Extract from Memorandum of Understanding between Scottish Public Services Ombudsman and NHS Quality Improvement Scotland

The purpose of this memorandum is to set out the arrangements for co-operation and communication between the Scottish Public Services Ombudsman and NHS Quality Improvement Scotland in relation to complaints about services provided by or on behalf of the National Health Service in Scotland and to clarify the responsibilities of the two bodies.

The SPSO and NHS QIS recognise that their respective roles are distinct and different but believe that both roles can be enhanced by effectively working together. This memorandum of understanding sets out how we propose to do this by:

- Setting out arrangements for co-operation
- Setting out arrangements for liaison and effective working in dealing with complaints related to serious service failures where there may be overlapping jurisdiction
- Setting out arrangements to help complainants who contact NHS QIS
- Setting out arrangements to work together to inform the public and other bodies of the respective roles of both organisations
- Setting out arrangements for monitoring and periodic review of the Memorandum

The SPSO and NHS QIS agree that where the functions and actions of one organisation affect the functions and

actions of the other, they will share appropriate information, maintain effective channels of communication, consult each other and generally co-operate together in order to inform and improve the work of the bodies and enable them to fulfil their respective responsibilities as fully, effectively and efficiently as possible.

Within available resources, NHS QIS and SPSO will invite representation from the other bodies to project teams, work groups etc. where both bodies believe there would be advantage in cross-representation.

The two bodies will encourage formal and informal contacts between their staff to raise awareness of the roles, responsibilities and methods of working of each.

The PSOW has entered into a MOU with the Children's Commissioner and the Older People's Commissioner and can be accessed at:

http://powysweb3.ruralwales.net/~cmsadmin/www.olderpeoplewales.com/uploads/media/MOU_CCW_OPCW_PSOW_Sept2010_eng.pdf

Northern Ireland Ombudsman

The Northern Ireland Ombudsman has in place mechanisms for minimising duplication of effort and overlap with other organisations, such as the Regulation and Quality Improvement Authority (RQIA) and the Northern Ireland Children's Commissioner (NICCY). When a complaint is received it goes through a process of validation and if appropriate the complainant is signposted to another organisation to deal with their complaint. There are a number of other organisations in Northern Ireland with investigatory/regulatory roles. Some of these have agreed MOUs with other organisations. Examples are outlined below:

| Organisation | Powers of investigation | MOUs/Protocols |
|--|-------------------------|--|
| RQIA | Yes | Criminal Justice Inspection NI National Clinical Assessment Service Postgraduate Medical Education and Training Board Education and Training Inspectorate Northern Ireland Social Care Council Social Care Institute for Excellence |
| Equality Commission | Yes | NICCY Community Relations Council Northern Ireland Human Rights Commission |
| Northern Ireland Human Rights Commission | Yes | Equality Commission Police Ombudsman NICCY Prisoner Ombudsman Northern Ireland Court Service |

Issues for consideration

- **To what extent could the use of MOUs address the issue of potential overlap with existing bodies?**
- **Could these be used instead of a legislative duty to consult?**

Disclosure of information and Health and safety provisions in the Welsh legislation

Section 26 of the PSOW 2005 Act prohibits the disclosure of information by the Ombudsman in relation to or in connection with complaints about a listed authority except in limited circumstances. Limited circumstances include consulting, co-operating, working and reporting jointly with other ombudsmen in accordance with section 25 of the Act. The Ombudsmen listed in section 25 include the Scottish Public Services Ombudsman.

A similar provision exists in the Scottish legislation to allow co-operation and consultation with other Commissioners and Ombudsmen.

One of the limited circumstances in which the PSOW may disclose information is in circumstances where the Ombudsman considers it is in the public interest, for the purposes of protection from or avoiding or minimising any threat to the health or safety of any person or persons. This power has not been used regularly by the PSOW, although there has been at least one case where a disclosure to the General Medical Council was made on these grounds following the completion of an investigation. There is no similar provision in the Scottish or Northern Ireland legislation. Section 30 of Health and Safety at Work (Northern Ireland) Order 1978 contains a statutory bar to disclosure of information without consent.

3 Appointment and accountability

Tenure

In Scotland, the Ombudsman is appointed for a term not exceeding five years, and for no longer than two consecutive terms, unless re-appointment for a third is desirable in the public interest. However, changes brought about by the Scottish Commissions, Commissioners etc. Act 2010 means that in future the Ombudsman will be appointed for one eight year, non-renewable term. In Wales, the Ombudsman is appointed for one seven year term and may not be reappointed. In Northern Ireland, the Ombudsman must leave office when he reaches the age of 65.

For comparative purposes, the Northern Ireland Children's Commissioner and the Northern Ireland Commissioner for Older People are appointed for a four year term and may be reappointed once. The Police Ombudsman is appointed for one seven year term or until the person reaches the age of 70. They may not be reappointed. The new

Northern Ireland Assembly Commissioner for Standards will be appointed for one five year term.

Issue for consideration

- **Should the Ombudsman be term-limited in line with practice in Scotland and Wales?**

Accountability of the Ombudsman

The accountability arrangements of the respective offices are set out below:

| | Northern Ireland | Wales | Scotland |
|--------------------------|--|--|--|
| Political accountability | Annual report to the Assembly | Annual report to the Assembly | Annual report to the Scottish Parliament Ombudsman appears before various committees of the Parliament but usually the Local Government and Communities Committee, given that just over half of all complaints received fall within this area. |
| Financial accountability | Transfer of Functions Order 1999 gave OFMdfM the power to determine, by statutory Order, the salary of the Ombudsman, approves staff numbers and conditions of service, approves the expenses of the Office and promotes subordinate legislation under the relevant Orders, for example amending the list of bodies covered by the Ombudsman or determining matters not subject to investigation. Salary and pension of the Ombudsman paid from the Consolidated Fund. Accounts audited by the Northern Ireland Audit Office | Accounts prepared by the Ombudsman must be submitted to the Auditor General for Wales The Standing Orders of the National Assembly require the Ombudsman to submit an estimate of income and expenses required under the Act to the Finance Committee. The Committee must then lay before the Assembly the estimate, with any modifications, that it considers appropriate. | Required to submit accounts to the Auditor General for Scotland SPSO submits an annual bid to the Scottish Parliamentary Corporate Body. This considered by the Parliament's Finance Committee and the Scottish Government (as part of the SPCB's expenditure plan). The SPCB's final expenditure proposals then appear in the Budget Bill which is voted on by Parliament. |

The Finance Committee in the National Assembly for Wales provides a platform to question the estimates put forward by the Ombudsman. Recently, it expressed frustration with the level of detail submitted by the office for its estimate of income and expenses for the year ending 31 March 2012:

The...Committee was disappointed by the way in which the Ombudsman's budget for 2011-12 has been presented...(he is not) exempt from the requirement, faced by all other public sector bodies, to carry out his functions as efficiently and effectively as possible...⁵

The SPSO has stated that he would like to see a more formal relationship with the Parliament established:

I am interested to explore with the Parliament a mechanism that would help MSPs and Committees reap the benefits of our work more fully than I believe is currently the case. There is more we could and should be doing to share the learning from complaints and drive improvements in public services. A stronger link with a Committee would also allow the Parliament to hold the Ombudsman to account more effectively⁶.

The Public Administration Select Committee in the UK Parliament is required, by Standing Order, to examine the work of the Parliamentary and Health Service Ombudsman, including a review of the annual report.

Funding the office

Funding for the Ombudsman's office is 'vote' funded by the Northern Ireland Assembly. This is similar to the arrangement for the Northern Ireland Comptroller and Auditor General (C&AG). However, unlike the C&AG, the Ombudsman is not accountable to an Assembly Committee. Further to Section 66 of the Northern Ireland Act 1998, the Assembly's Audit Committee agrees the annual estimate of the use of resources by the NIAO and lays that estimate before the Assembly. Each year the C&AG prepares an estimate of the use of resources by the NIAO for the next financial year. The Audit Committee considers this estimate and, subject to any modifications agreed between it and the C&AG, lays the estimate before the Assembly.

Any future legislation might wish to consider whether the Ombudsman should be directly accountable to a Committee for the performance, but not decisions, of the office. For example, in Wales the Ombudsman must submit the costs of running his office to the Finance Committee of the National Assembly for Wales for consideration on an annual basis. The Committee must then consider and lay before the Assembly the estimate, with any modifications which that Committee, having consulted and taken into account representations made by the Ombudsman, considers appropriate.

Staff, salary and pension

Section 5 of the Ombudsman (Northern Ireland Order) 1996 states:

⁵ National Assembly for Wales Finance Committee Report on the Public Services Ombudsman for Wales: Estimates for financial year 2011-12 <http://www.assemblywales.org/cr-ld8364-e.pdf>

⁶ 2009-10 Corporate Plan of the Scottish Public Services Ombudsman

There shall be paid to the holder of the office of Ombudsman such salary as the Department may by Order determine.

(6) Except in so far as Schedule 1 otherwise provides, any salary, pension or other benefit payable under this Article shall be charged on and issued out of the Consolidated Fund.

The Order also makes provisions in respect of the numbers of staff appointed by the Ombudsman and the terms and conditions of those staff. Similar provisions are contained in the Commissioner for Complaints Order 1996. The relevant Department at that time was the Department of Finance and Personnel. However, the Transfer of Functions (Northern Ireland) Order 1999 transferred these functions to OFMDFM.

The Department determines the salary of the Ombudsman by way of the Salaries (Assembly Ombudsman and Commissioner for Complaints) Orders. However, the Department does not fund the office. Instead, the salary and pension of the Ombudsman is paid from the consolidated fund. The Resource Accounts of OFMDFM for year ending March 31 2010, however, state that: 'The Department has policy oversight of the Offices of the Assembly Ombudsman and Commissioner for Complaints.' Further legislation might consider removing any consideration of staff numbers or terms and conditions of service from OFMDFM to further emphasise the independence of the Ombudsman which is the hallmark of such offices.

Republic of Ireland

In a document published to coincide with the recent election in the Republic of Ireland, the Ombudsman outlined how the role and remit of the office could be enhanced. One of the proposals outlined in the paper was the relationship of the office with the Oireachtas:

The work of the Ombudsman will be enhanced where there is a direct reporting relationship with a specific Oireachtas Committee which both monitors and supports the work of the Ombudsman...such a Committee would have regular constructive and critical interaction with (the office). In the event of a recommendation being rejected, it is to this Committee that the Ombudsman would report. The Ombudsman would expect to have her investigations and recommendations reviewed critically by this Committee which would make its own assessment of her work⁷.

Appointment

The Ombudsman is currently appointed under section 36(1) of the Northern Ireland Constitution Act 1973, which states that he is appointed by the Queen. Other Commissioners in Northern Ireland, such as the Children and Young People's

⁷ Developing and optimising the role of the Ombudsman:
<http://www.ombudsman.gov.ie/en/OtherPublications/StatementsandStrategyDocuments/February2011-DevelopingandOptimisingtheroleoftheOmbudsman/File.13559.en.pdf> retrieved 1 March 2011

Commissioner and Commissioner for Older People, are appointed by the First and deputy First Ministers acting jointly. However, applying this process to the appointment of the Ombudsman potentially undermines the independence of the office, given that the government departments fall under its remit. An important element of the UK Ombudsmen is their independence from Government.

One possible method of appointment for the Ombudsman would be that undertaken for the Comptroller and Auditor general (C&AG who is regarded as an Officer of the Assembly). The C&AG is appointed by the Queen on the nomination of the Assembly and may only be removed by the Queen following a resolution of the Assembly which is passed with the support of a number of members of the Assembly which equals or exceeds two thirds of the total number of seats in the Assembly⁸. Another alternative would be to reflect the arrangements envisaged for the proposed Northern Ireland Assembly Standards Commissioner, who will be appointed by resolution of the Assembly⁹. Furthermore, the C&AG is not, in the exercise of any of his functions, subject to the direction or control of any Minister or Northern Ireland department or of the Assembly (except for the purposes of preparing accounts). Although the term 'Officer of the House' or Assembly appears very rarely in statute and has never been subject to judicial review, previous research has identified the core characteristics as:

- parliamentary involvement in appointment and dismissal
- a statutory committee which is responsible for budget approval and oversight
- a specific select committee to which the Officer is bound to report
- staffing independent of the civil service

Issues for consideration

- **how should the Ombudsman be appointed?**
- **Should all aspects of the Ombudsman's office be removed from OFMdFM?**
- **would it be beneficial for a specific committee within the Assembly to have responsibility for oversight of the Ombudsman, as is the case with the C&AG? Which committee would be best placed to carry out this role?**

Reform of Public Services in Scotland

⁸ Northern Ireland Act 1998

⁹ Assembly Members (Independent Financial Review and Standards) Bill
http://www.niassembly.gov.uk/legislation/primary/2010/nia3_10.htm

In examining the issue of reform of the office of the Northern Ireland Ombudsman, it is useful to consider recent developments in Scotland around reform of public services and scrutiny bodies. In 2006 the Finance Committee of the Scottish Parliament held an inquiry into the accountability and governance of bodies supported by the Scottish Parliamentary Corporate Body. The inquiry was 'prompted by concerns about increasing costs, the perceived shortcomings of budgetary accountability, the lack of consistency in governance arrangements and other matters'¹⁰.

The offices examined as part of the review were:

- Scottish Public Services Ombudsman
- Scottish Parliamentary Standards Commissioner
- Commissioner for Children and Young People
- Commissioner for Public Appointments in Scotland
- Scottish Information Commissioner

The report explored the balance that needed to be struck between the independence of the offices and the need for financial accountability. The Committee sought the views of the various Commissioners and Ombudsmen regarding their accountability and found that there was a distinction made between wider public accountability and the formal accountability to Parliament.

Furthermore, the Committee noted that 'insufficient checks and balances have been put in place to reassure the Parliament that commissioners and ombudsmen represent value for money'. The task of financial monitoring of the offices was undertaken by the SCPB but it had to adapt to the role and was perhaps not best suited to financial scrutiny. The Committee's report referenced previous research that advocated an 'Officers of Parliament' Committee which would oversee the work of commissioners and ombudsmen. Ultimately, the Committee felt that establishing an entirely new body would complicate the scrutiny process.

The Committee recommended that:

Bodies with similar roles and responsibilities should be amalgamated wherever possible; the potential to pool the resources of existing bodies (such as sharing staff) should be considered wherever possible; unnecessary direct remit overlaps should be dealt with by removing responsibility from one of the bodies involved and adjusting budgets accordingly¹¹.

The Public Services Reform (Scotland) Act 2010

The Public Services Reform (Scotland) Act 2010 was intended to simplify and improve the landscape of public bodies in Scotland:

¹⁰ Finance Committee Inquiry on Accountability and Governance

¹¹ Finance Committee report

The current public bodies landscape in Scotland has evolved over time, in part because of decisions to establish individual bodies on a case by case basis without wider consideration as to the overall future shape and size of the landscape. This lack of strategic oversight has led to overlaps and duplication of effort in the roles and functions of some public bodies. At the heart of this lies a concern that the current landscape of public bodies presents, to the public and business, a confusing array of organisational roles, remits and functions¹².

The Act had direct implications for the SPSO – it extended the remit of the office to include complaints about the water service and provided it with new powers to oversee the development of standardised model complaints handling procedures in Scotland.

Republic of Ireland

In its Programme for Government, published prior to the recent election, Fine Gael published a list of quangos that it would either abolish or merge if it was returned to power. It proposed to amalgamate the Children's Ombudsman, Office of Data Protection Commissioner and Office of the Commission for Public Service Appointments into the Office of the Ombudsman¹³.

4 Other issues

Responses to the consultation raised a number of other issues and these are addressed below.

Systemic reviews

The ability to carry out systemic investigations has been cited as a significant power available to Ombudsmen in addressing maladministration:

Probably the best evidence of ombudsmen contributing to the provision of accountability occurs when an ombudsman conducts a systemic or joint investigation. With such investigations the ombudsman either brings together a number of similar complaints into a larger investigation, or identifies a systemic problem during the course of an investigation, and consequently chooses to deepen the investigation. The culmination of such an investigation is typically the production of a 'special report' which brings together a number of findings and makes recommendations that often go wider than the provision of redress for the individual complainants concerned¹⁴.

¹² Policy memorandum for the Reform of Public Services (Scotland) Bill

¹³ Reinventing Government: Protecting Government and Getting the Economy Back on Track, Fine Gael
<http://www.finegael2011.com/pdf/ReinventingGovernment.pdf>

¹⁴ Kirkham, Thompson and Buck, 'Putting the Ombudsman into Constitutional Context' *Parliamentary Affairs* (2009) 62: 600-617

Most Ombudsman offices in Europe¹⁵, including Ireland, have the power to carry out systemic investigations, but this is not a power enjoyed by the UK Ombudsmen. Therefore, including this power in updated legislation would bring him into line with established practice in other jurisdictions. Another viewpoint highlights the pros and cons of such an approach:

If the ombudsman is aware of the possibility of maladministration there would appear to be little justice in denying the ombudsman the opportunity to investigate. The contrary argument is that granting ombudsmen wide powers to initiate investigations could distract them from their primary purpose of providing redress and would trespass upon existing audit schemes. A further danger is that, if they possessed such powers, ombudsmen would be more exposed to media or political pressure aimed at encouraging them to intervene in the administration of government...interestingly the Northern Ireland Police Ombudsman possesses these powers¹⁶.

The decision to carry out a systemic review would probably be left to the discretion of the Ombudsman, rather than setting an arbitrary threshold to specify that a certain number of complaints would need to be received before embarking on a systemic review.

Issues to consider

- **The power to carry out a systemic review of public bodies would be a significant enhancement of the current powers of the office, but would be in line with established practice outside the UK**
- **Could this potentially overlap with the work of the Comptroller and Auditor General? How would this relationship be managed?**

Power to issue guidance and complaints handling

Under Section 31 of the PSOW Act 2005 the Ombudsman has the power to issue guidance to bodies within his jurisdiction about good administrative practice. The Ombudsman has previously issued guidance on good complaint handling for local authorities, principles of good administration and principles for redress. The Ombudsman collaborates with other public bodies in developing guidance under Section 31 of the Act. For example, the guidance to local authorities on complaints handling was developed in partnership with the Welsh Local Government Association, Citizens Advice Wales and SOLACE (Society of Local Authority Chief Executives) Wales.

Before issuing guidance, the Ombudsman must consult the listed authorities he deems appropriate. If guidance issued under Section 31 applies to a listed authority, that

¹⁵ The Ombudsmen in Europe and their legal bases http://www.omineurope.info/uk/index_e.html retrieved 2 September 2010

¹⁶ Richard Kirkham, 'The Ombudsmen of Northern Ireland, Scotland and Wales', *Journal of Social Welfare and Family Law* (2005) 27:79-90

authority must have regard to the guidance in the discharge of its functions. The legislation does not set out any particular sanction for failure to comply with the guidance. However, it does state that in the event that the Ombudsman finds it necessary to conduct an investigation into a listed authority, he may have regard to the extent to which that authority has complied with guidance issued under Section 31.

The Public Services Reform (Scotland) Act 2010 amended the Scottish Public Services Ombudsman Act 2002 to give the Ombudsman power to oversee the complaints handling procedures for public service providers. This followed the Crerar Review of how Scottish public services handled complaints which found that there were significant variations in how complaints were dealt with between public service sectors, within sectors and within single organisations and that there were over 20 external scrutiny bodies responsible for handling complaints. It stated that:

Complaints are usually made to the service provider, but in some sectors the complaint can be made direct to a scrutiny body, or to a separate complaints handling body (such as SPSO). Some scrutiny bodies only handle complaints (SPSO), while others are involved in regulation or inspection as well (such as the Care Commission). Some scrutiny bodies that inspect or regulate do not handle external complaints (such as Communities Scotland). The Scottish Consumer Council cites this inconsistency as adding an unnecessary level of complexity to the complaints handling framework¹⁷.

A key aspect of the report was the recommendation that the SPSO take on the role of 'design authority' in leading the development of standardised procedures to help simplify and improve complaints handling across the public sector:

A set of principles based on the present SPSO guidance (Valuing Complaints) founded on consumer focus and simplification should form the basis of all public service complaints handling processes, which will be developed in partnership between the SPSO and service providers. There should be a standardised complaints handling process for each public service sector based on these principles – so that, for example, all care homes have a process in common and all registered social landlords have their own common process. (The SPSO should)...develop and approve, for each sector, standardised public service complaints handling systems which include realistic but challenging timescales and processes to keep all parties informed of progress¹⁸.

The 2010 Reform Act placed two new duties on the SPSO. Firstly, the Act requires the Ombudsman to publish a statement of principles on which all public service complaints

¹⁷ The Crerar Review: The Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland, 2007

¹⁸ Consultation on a Statement of Complaints Handling Principles and Guidance on a Model Complaints Handling Procedure

handling procedures should be based. It also provided the Ombudsman with the power to publish model complaints handling procedures (CHPs). In undertaking these additional functions, the Ombudsman has established the Complaints Standards Authority within his office and has been required to consult on the proposed approach to complaints handling. A revised CHP will be published in the near future.

If a listed authority's CHP does not comply with the model CHP, the Ombudsman may make a declaration to this effect, giving his reasons in writing and specifying appropriate modifications to the authority's CHP which, if made, would result in the declaration of non-compliance being withdrawn. In the event of a declaration of non-compliance, the listed authority must submit a description of its CHP, having taken account of the Ombudsman's findings, within two months of the declaration.

Public sector employment and schools

In Scotland the Ombudsman has jurisdiction of institutions of further and higher education. If a student wishes to make a complaint to the SPSO regarding a particular institution they should firstly follow the complaints procedure of the college or university and if they are not satisfied by the outcome they can then submit a complaint to the SPSO. However there are areas within the institution that the SPSO does not have jurisdiction over. A student may submit a complaint about "the applications process for admissions (but not the admission decision itself); Services like accommodation, welfare and support; the process followed in academic or disciplinary appeals¹⁹". The ombudsman does not have jurisdiction to deal with cases involving "the exercise of academic judgement; personnel matters; contracts and other commercial transactions; the quality of teaching or assessment; grades or a final award²⁰".

In Wales the Ombudsman has jurisdiction over several aspects of education. However his jurisdiction does not cover the employees of the schools as the Ombudsman does not have the authority to investigate 'Complaints about the behaviour of individual employees of an authority'²¹. If the complainant feels that it was a particular individual's responsibility that they did not receive a satisfactory service they can still complain about the authority as a whole.

The Parliamentary Ombudsman in England has addressed the issue of contractual matters:

The exclusions that have attracted the most criticism are the exclusions of contractual and commercial matters, and public service personnel complaints. The need for these exclusions has been regularly questioned by, amongst others, Parliamentary select committees. They have been justified on the basis that the core role of the PO is 'to investigate the complaints against government

¹⁹ Thinking about complaining? A guide for Students leaflet, available online; http://www.spsos.org.uk/files/webfm/Leaflets/2010_08_16_Studentadviceleaflet2010-11.pdf

²⁰ As above

²¹ What the Ombudsman cannot investigate, available online; <http://www.ombudsman-wales.org.uk/en/what-the-ombudsman-cannot-investigate/>

by the governed and not against government in its role as employer or customer'. It is also arguable that in these areas alternatives, such as the courts, are usually more appropriate. Nevertheless, in an era when private sector provision has become an increasingly important feature of governance, the exclusion on contractual and commercial arrangements needs to be monitored to ensure that this governance technique is not used as a means by which to prevent accountability. Another issue here is the interpretation that the PO gives to the public/ private divide, as for example, where a public function is contracted out to a private supplier²².

Following the public pound

The Deloitte review was 'invited to consider whether the Ombudsman's jurisdiction, like that of the Comptroller and Auditor General, should follow public funds through to the relevant administration'²³. The subsequent report then recommended that "the Ombudsman should have jurisdiction over all organisations substantially funded from public monies unless they are explicitly excluded and OFMDFM should perform the gatekeeper role"²⁴. As part of the review, a mapping exercise was conducted of the bodies that were within and outside the scope of the Ombudsman. It highlighted a number of bodies which appeared to meet the criteria of being substantially funded from public money but were (and remain) outside the Ombudsman's remit. The bodies listed were:

- The Assembly Commission
- Northern Ireland Audit Office
- Schools
- Universities
- Colleges of Further Education
- General Teaching Council for Northern Ireland
- Northern Ireland Higher Education Council
- Northern Ireland Council for Integrated Education
- Integrated Education Fund
- Drainage Council
- Historic Buildings Council
- Historic Monuments Council
- Armagh Observatory and Planetarium

²² The Parliamentary Commissioner Act: an evaluation <http://www.ombudsman.org.uk/improving-public-service/reports-and-consultations/reports/parliamentary/withstanding-the-test-of-time/9#b79> retrieved 2 March 2011

²³ Review of the Offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints – Final Report, March 2004

²⁴ As above

The review did not define 'substantially funded' and there is no definition of what a possible minimum threshold would be. However, in 2005 Audit Scotland published a report on Scottish Councils' funding of arms-length bodies. Although the report was aimed at Scottish local authorities, it may provide a useful starting point for consideration of 'following the public pound' in the context of the Northern Ireland Ombudsman. The report contained a 'Code of Guidance on Funding External Bodies and Following the Public Pound' which stated:

It is important to ensure clear public accountability for public funds at the same time as supporting initiatives for securing quality local authority services in the most effective, efficient and economic manner...The guidance should apply to any new substantial funding relationships...What is substantial will vary according to circumstances. When interpreting 'substantial', councils should have regard to the significance of the funding in relation to their own budgets and to the budget of the external body. We do not, for example, intend this guidance to apply to the many small revenue grants which councils make to community groups annually²⁵.

An example of an organisation in receipt of public money but currently outside the remit of the Ombudsman is the Northern Ireland Hospice, which is contracted by the Department of Health, Social Services and Personal Safety to provide beds for people in need of palliative care. However, in extending the remit of the Ombudsman to include bodies in receipt of public funds, consideration needs to be given to where the line will be drawn regarding the inclusion and exclusion of organisations subject to investigation. Allowing the Ombudsman to investigate complaints of maladministration against any organisation in receipt of public funds could, in theory, extend his remit to include voluntary and community organisations. It could be argued that this would place an undue burden on relatively small organisations.

Issues to consider

- **What would the threshold be for including an organisation within the remit of the Ombudsman?**
- **Would this place an undue burden on smaller voluntary or community groups in receipt of public funds?**

Professional judgement in social care

The Ombudsman in Wales has a remit to investigate complaints about decisions made by both health and social care professionals. The rationale for including this was explained in the Second Reading of the Bill in the House of Commons:

²⁵ Audit Scotland 'Following the Public Pound' 2004
http://www.audit-scotland.gov.uk/docs/local/2003/nr_040311_following_public_pound.pdf

A particular provision that I should draw to the attention of the House is that concerning the ombudsman's jurisdiction in health and social care matters. Nowadays, we take a holistic approach to the provision of health and social care. The Bill as introduced in the other place provided, in line with existing ombudsmen legislation, that the new ombudsman could not generally question the merits of a decision taken without maladministration. However, the Bill did provide that the ombudsman could question the merits of any decision taken in consequence of the exercise of clinical judgement, irrespective of whether it was taken with maladministration. That reflected the existing provision of the Health Service Commissioners Act 1993. The Government reflected on whether it was right or appropriate that the ombudsman could question the merits of a decision taken only in the exercise of clinical judgement – that is, by a doctor – but not decisions, for example, of social care professionals who may be part of the same team delivering a health and social care package to an individual. We concluded that there was no reason to differentiate between (the two)²⁶.

The Scottish Ombudsman already has the power under the 2002 Act to look at issues of clinical judgement relating to health services. However, unlike his counterpart in Wales, he has no power to consider complaints in relation to professional judgement in social care. This was the subject of some debate during the passage of the legislation, with concerns raised over the Ombudsman's remit to investigate matters of clinical judgement in relation to Health Services, but could only examine maladministration against local authorities (which are largely responsible for the delivery of social services). At the time, the Parliament's Health Committee was told that this could create difficulties in 'relation to community care services, where the care judgements of health service professionals could be examined, but social work professionals could only be investigated for issues of maladministration:

We are thinking about somebody who lives in the community and receives mental health care from a community mental health team, which might have a manager who is appointed jointly by health and social work. In the future, the team might be funded jointly via health and social work. The care plan will be multidisciplinary and agreed by social workers and health people. If the person who receives the care complains about an aspect of their treatment...who is to say whether their complaint is a health complaint or a local authority complaint?...As a result, the public sector ombudsman will have difficulty. They will be able to look at clinical judgement, because that is a health service thing, but not social work judgement.

Therefore, clinical judgement in social care currently remains outside the remit of the SPSO. The Scottish Social Services Council (SSSC) provides the following guidance on making complaints about social workers:

²⁶ HC Deb 4 April 2005 col 1141

Complaints about social service workers are usually most appropriately dealt with at a local level by the employer of the registered worker or by a university in the case of a social work student. Employers of social service workers are responsible for governance of the practice of their staff and this includes managing the performance of their workers, supporting and monitoring their workers' professional judgement and investigating and resolving complaints about the work of their staff. Employers can decide that decisions about practice matters should be changed in appropriate circumstances or that more work is required in order that the needs and views of a user of the social services they provide are more fully understood and addressed²⁷.

Although complainants are advised to go to the employer of the social worker in question in the first instance, the SSSC will handle complaints that are about a social service worker who is registered with the SSSC or complaints that are about that registrant's conduct and that call into question their suitability to be on the Register.

In Northern Ireland, the Ombudsman can investigate complaints about organisations providing Health and Social Care services including hospitals, GPs, dentists, pharmacists, opticians and residential/nursing homes where the placement has been arranged by a HSC Trust. This includes complaints about clinical decisions taken by health care professionals such as doctors, dentists, pharmacists etc. The Social Care Council is responsible for investigating complaints about social workers.

Issue to consider

- **Given the 'joined-up' nature of health and social care, should the new legislation include professional judgement in social care?**
- **Will it be necessary to consult the Social Care Council before proposing such a change?**

Submission of complaints

Section 10(3) of the SPSO Act 2002 states that 'a complaint must be made in writing or electronically unless the Ombudsman is satisfied that there are special circumstances which make it appropriate to consider a complaint made orally'. The SPSO has produced an information leaflet on how to make a complaint which states that it preferable to submit a complaint in writing and directs people to an online complaints form.

Section 5(1) of the PSOW Act states that 'a complaint must be made in writing'. However, the 'Ombudsman may decide to accept a complaint otherwise than in writing if he/she thinks it is reasonable to do so'. For example, if the person aggrieved has a disability which makes it difficult for that person to make his or her complaint in writing, the Ombudsman has discretion to decide whether to accept an oral complaint instead'.

²⁷ Scottish Social Services Council: Making a Complaint <http://www.sssc.uk.com/sssc/protecting-the-public/making-a-complaint.html>

The Prisoner and Police Ombudsmen in Northern Ireland operate a flexible system that allows complaints to be submitted in written form or via telephone call. The Ombudsman in the Republic of Ireland accepts complaints made in writing, by telephone, by calling to the Ombudsman's Office, by email or by using an on-line complaint form.

Section 10(4) of the Commissioner for Complaints Order 1996 states that 'a complaint shall not be entertained under this Order unless made in such form and containing such particulars as may be prescribed by order made by the Department'. In practice, the Ombudsman already accepts complaints in various forms and given practice elsewhere it would appear restrictive and possibly discriminatory against people with learning difficulties or other forms of disability if they were required to submit written complaints.

Issue to consider

- **New legislation should make clear that the Ombudsman can accept complaints in a variety of formats**

Listed authority to refer a case to the Ombudsman

Section 2(2)(b) of the SPSO Act allows for organisations within the Ombudsman's remit to request that an investigation should be undertaken where there has been public criticism but no actual direct complaint to the Ombudsman. This was intended as an option of last resort for a listed authority and the listed authority in question must take all reasonable steps to deal with the matter to which the allegation relates. At the time, the Housing Association Ombudsman in Scotland stated that:

In terms of credibility, my view...is that the provision for authorities to request an investigation is unhelpful. The focus of the Ombudsman should be the individual with a grievance. I would fear that provision for authorities to ask for an investigation into its own behaviour would risk the public seeing the Ombudsman as being used by the authority in its own management of complaints²⁸.

In Wales, Section 2 of the PSOW Act allows a listed authority to refer a complaint.

Issue

- **Does this shift the focus away from the Ombudsman providing a service solely for individuals, rather than public bodies?**

Powers of enforcement - ability to seek compensation in a county court

²⁸ As above

Enhanced powers of enforcement were considered for the new office during the passage of the Ombudsman legislation in Wales, but it was decided to largely maintain the existing arrangements. Responding to a question on why the new ombudsman would not enjoy powers of enforcement, Lord Evans commented that: 'the only ombudsman's recommendations that have been legally enforceable are in Northern Ireland...your Lordships will be aware that legal enforcement of ombudsman's recommendations would be an extremely radical move'²⁹. This refers to the Northern Ireland Commissioner for Complaints, where complainants have the ultimate option of redress in a county court. The recourse to a county court has rarely been used³⁰ and the current Northern Ireland Ombudsman favours its removal in any future legislation. In addition, Section 7 of the Commissioner for Complaints Act 1969 also gives the NICC the power to ask the Attorney General to apply to the High Court for mandatory injunction or other relief in circumstances where he has concluded that a public body is likely to continue on a course of bad administrative conduct. (This power has never been used).

In her review of the Parliamentary Commissioner Act in 2007, the Parliamentary Commissioner commented on powers of enforcement for ombudsmen:

A second consideration is the principal reason why the PO lacks enforcement powers. Far from being an unusual flaw in ombudsman design, this is a common solution in ombudsman schemes and goes to the heart of the work that the institution is expected to perform. Ombudsmen are given almost total access to information and people within public bodies, and possess a very broad remit with which to investigate public sector activity. Given the potential depth of such investigations, the consequences of an ombudsman's report can have a huge impact on the design of future policy. Recognition of the potentially sensitive nature of the ombudsman's work is one of the reasons why ombudsman schemes tend to leave the power of implementation in the hands of the public authority concerned. Political accountability between the decision-maker and the electorate for the consequences of an ombudsman's report is thereby maintained. Arguably, another important benefit of this arrangement is that because public authorities know that they retain control of their decision-making, they are more likely to be encouraged to participate constructively in the investigation. It is this fear that powers of legal enforcement would radically alter the hitherto cooperative nature of the ombudsman's work that best explains why most ombudsmen are reluctant to go down this route.

Building on this understanding, a third point needs to be taken on board. As public authorities retain the final decision to provide redress, for the purposes of Article 6 of the European Convention of Human Rights, it is unlikely that the investigations and reports of the PO could be considered determinations of civil

²⁹ HL 16 December 2004 c1442

³⁰ Mary Seneviratne, 'Ombudsmen: Public Services and Administrative Justice' Butterworths, 2002

rights. Were the PO to possess powers of enforcement, this position could change. Such a development would almost certainly force the Office to reconsider its working practices. This could mean the increased use of formal hearings and more frequent legal representation. If this were the case, then the whole ethos and rationale of the ombudsman institution would be severely challenged and it is possible that many of the benefits would be lost³¹.

Issue to consider

- **How would the maintenance of legal remedies in updated legislation sit alongside other formal avenues of redress, such as the courts?**

Adverse comment about a person in a report

There is no 'right of reply' for persons subject to adverse comment in a report published by the Ombudsmen in Northern Ireland, Scotland or Wales. The Northern Ireland Ombudsman has said that he would like to see a provision included in any updated legislation mirrored on the Queensland Ombudsman Act 2001. Section 55 of that Act states:

The Ombudsman must not make the proposed adverse comment unless, before the report is prepared, the ombudsman gives the person an opportunity to make submissions about the proposed adverse comment.

If the person makes submissions and the ombudsman still proposes to make the adverse comment, the ombudsman must ensure the person's defence is fairly stated in the report³².

A 'right of reply mechanism' was not the subject of debate during the passage of the Scottish and Welsh legislation.

Issues to consider

- **Should updated legislation include a 'right of reply' for inclusion in the Ombudsman's reports?**
- **Could this be viewed as undermining the report/decision of the Ombudsman?**

³¹ The Parliamentary Commissioner Act: an evaluation <http://www.ombudsman.org.uk/improving-public-service/reports-and-consultations/reports/parliamentary/withstanding-the-test-of-time/9#b79> retrieved 2 March 2011

³² Section 55 Ombudsman Act 2001 (Queensland): <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/O/OmbudsA01.pdf> retrieved 1 March 2011