



Northern Ireland  
Assembly

## Research and Information Service Briefing Paper

Paper 80/15

10 January 2014

NIAR 930-13

**Ray McCaffrey**

# Own-motion investigations by Ombudsmen

## 1 Introduction

This briefing paper has been prepared for the Committee for the Office of the First Minister and deputy First Minister to inform its deliberations on a forthcoming Bill to reform and update the office of the Northern Ireland Ombudsman.

The Committee has asked for information on the following:

- The availability of powers of own initiative investigation to ombudsmen in other jurisdictions, to include examples of the use made of them and any significant differences in the own initiative powers granted
- The nature of any constraints, conditions or oversight mechanisms affecting the exercise of own initiative investigation powers by ombudsmen in those jurisdictions, and in particular constraints, conditions or oversight mechanisms:
  - Linked to the relevant legislature
  - Requiring the ombudsmen to evidence the need for the investigation proposed

The paper looks at the office of the Ombudsman in the Republic of Ireland and a number of international examples of Ombudsman offices and for each identifies the following:

- The legislative basis for the power of own motion investigation
- Other guidance (if any) on the purpose of own motion investigations and the processes to be followed
- Examples (if any) of the use of the power
- Any constraints that exist to limit the use of own motion investigations
- Any significant differences between offices in the powers granted

## 2 Key points

UK Ombudsmen are unusual in not having a power of own motion investigation. It is a common feature of many other Ombudsman offices.

The offices looked at for this paper place significant importance on their ability to carry out wider administrative reviews based on the power of own motion.

There do not appear to be any specific constraints placed on the use of own motion powers. However, Ombudsman offices evaluate the need for such wider reviews against potential improvements in public administration. In addition, those offices with a direct link to a parliamentary committee can be questioned on the effective use or otherwise of resources.

Small teams dedicated to own motion investigations exist within the Alberta and Western Australia Ombudsman offices.

An issue for consideration might be the extent to which the extension of own motion powers to the Northern Ireland Ombudsman would necessitate a review of the current structures for carrying out investigations based on complaints received. Would it be envisaged, for example, that a dedicated team within the office would focus on these wider reviews?

## 3 Prevalence of own-motion or own-initiative powers

The Ombudsmen in Northern Ireland, Scotland and Wales do not currently possess the power to initiate an inquiry without receipt of a complaint. However, the existence of an own motion or own initiative power is a feature of many Ombudsman offices in other parts of the world:

Such investigations could be prompted by the ombudsman's perception of public concern, or as a direct result of their own research on an issue.

A more characteristic trigger of the own-initiative power is information derived from the ombudsman's individual complaint work...

The difference between an own-initiative investigation and more conventional systemic investigations is the ability of the ombudsman to pursue the investigation in a more targeted and proactive manner and detached from any particular complaints. To facilitate such work, more than one ombudsman organisation has now established a dedicated team within their organisation to focus on the pursuit of systemic investigations<sup>1</sup>.

Furthermore, it has been noted that:

In all (Australian) jurisdictions "the ombudsman may, of his or her own motion, investigate any action, being action that relates to a matter of maladministration"<sup>2</sup>. This wide power is not used frequently by the ombudsmen for two main reasons. One is that of preservation of resources, the view being held that the limited resources of the office should more properly be directed to the resolution of complaints that have been brought to attention by members of the public. The second is that the ombudsmen have been cautious not to adopt a role of second-guessing the government...However, broad issues relating to systemic problems are often taken up by the ombudsmen of their own volition where the problems are revealed by a complaint or where the ombudsman has developed an expertise because of complaints made to it<sup>3</sup>.

In evidence to the House of Commons Public Administration Committee as part of its review of the Parliamentary and Health Service Ombudsman, one witness said:

One of the techniques they have in other countries, which we do not have here, is the idea of an 'own-initiative' investigation, which allows them to carry out an investigation into something which they think has systemic implications, but they have not actually received a complaint about it. I know that particular power is something that the UK Ombudsman would like to have. Certainly, when we were in Australia and we told them that UK Ombudsmen did not have that, they were flabbergasted; they could not conceive that you could be operating as efficiently as you might without that power<sup>4</sup>.

Another witness to the same inquiry (which is ongoing) made the point that:

---

<sup>1</sup> The Ombudsman Enterprise and Administrative Justice

<sup>2</sup> Commonwealth Act used as an example

<sup>3</sup> Matthew Groves (editor), Law and Government in Australia, Federation Press, 2005

<sup>4</sup> Evidence session, 29 October 2013, Q25: <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/3293>

It is worth saying...in virtually every other European country, all ombudsmen have own-initiative powers. The UK is virtually unique in requiring an Ombudsman only to investigate when there is a valid complaint<sup>5</sup>.

At a meeting of the Australia Pacific Ombudsman Region the point was made that:

Most offices increasingly give greater focus to own motion investigations, primarily because of the more developed system for handling complaints within agencies. This enables the Ombudsman to concentrate more strategically on problem areas in government<sup>6</sup>.

## 4 Ombudsman offices

### Republic of Ireland

#### *Legislative basis for the power*

Section 4 of the Ombudsman Act 1980 provides for the circumstances in which the Ombudsman can conduct an investigation:

4(3) The Ombudsman shall not investigate an action unless—

(a) a complaint has been made to him in relation to the action by a person (other than a Department of State or other person specified in the First or Second Schedule to this Act), or

(b) it appears to him, having regard to all the circumstances, that an investigation under this section into the action would be warranted<sup>7</sup>.

#### *Other guidance/commentary on the use of own motion investigations*

The report ‘*Who Cares?*’ contains a note giving more information on the purpose of own motion investigations:

An “own initiative” investigation, provided for at section 4(3) (b) of the Ombudsman Act 1980, is undertaken on the initiative of the Ombudsman herself rather than in response to a complaint from a specific complainant. The provision allows for an Ombudsman investigation of an “action”, in the absence of a specific complainant, where “it appears to [her], having regard to all the circumstances, that an investigation under this section into the action would be warranted”. While not dealing

<sup>5</sup> Evidence session, 10 December 2013, Q173:

<http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/4603>

<sup>6</sup> [http://www.ombudsman.gov.au/files/27\\_March\\_2008\\_The\\_expanding\\_Ombudsman\\_role\\_What\\_fits\\_What\\_doesnt.pdf](http://www.ombudsman.gov.au/files/27_March_2008_The_expanding_Ombudsman_role_What_fits_What_doesnt.pdf)

<sup>7</sup> <http://www.irishstatutebook.ie/1980/en/act/pub/0026/print.html#sec4>

with a specific complaint or complainant, “own initiative” investigations are informed generally by complaints received. This was the case in the present instance<sup>8</sup>.

Further advice is given on the website of the Ombudsman:

In the event that the informant is not acting as a complainant, and is simply bringing a concern to the attention of the Ombudsman, it is open to the Ombudsman to investigate on the "own initiative" basis. This is provided that, following preliminary examination, the Ombudsman is satisfied that the action in question "has or may have adversely affected a person".

In some cases information will be provided to the Ombudsman by a "whistleblower" from within a public body (or from within an agency acting for the public body) who may wish to remain anonymous. To pursue issues raised by a "whistleblower", any Ombudsman investigation would have to be on the basis of an "own initiative". Again, before proceeding to an investigation the Ombudsman would have to be satisfied, following preliminary examination, that the action in question "has or may have adversely affected a person".

In the absence of a specific informant, it is still open to the Ombudsman to take on an "own initiative" investigation provided she has become aware of an "action" which, on preliminary examination, warrants investigation. The Act is silent on how, in the absence of a complainant or an informant, the Ombudsman might become aware of an "action" which warrants investigation. Possible sources of such information could include media reports, Dáil and Seanad reports as well as the reports of other bodies including NGOs and professional associations.

### *Examples of own motion investigations*

‘Who cares?’ – a report into the role of the public health service in the provision of nursing home care for the elderly. This report was “prompted by a persistent stream of complaints to the Ombudsman in recent years in which it is alleged that the HSE ... and/or a public hospital acting on behalf of the HSE, failed to provide in-patient services to a person in need of such services on a long-term basis”<sup>9</sup>.

### *Challenges to the jurisdiction of the Ombudsman*

When carrying out its 2009 investigation into the right to nursing home care in Ireland, the Ombudsman was challenged by the Department of Health on her ability to carry out wider reviews unprompted by specific complaints. Responding to this challenge to her jurisdiction, the Ombudsman commented:

Taken at face value, the Department's vision of what the Ombudsman may do is limited to the investigation of individual complaints, or groups of complaints, but focused always on the narrow issues of the specific cases. Furthermore, the Department proposes an understanding of the term "taken in the performance of administrative functions" as a narrower rather than a wider category. (See note 5 below) In effect, the Department's vision of the Ombudsman's Office is that it is fine to deal with specific cases but that to look beyond these cases, and to ask why problems recur or why promised amelioration has not come about, is beyond the

<sup>8</sup> <https://www.ombudsman.gov.ie/en/Publications/Investigation-Reports/HSE-Nursing-Homes/Who-Cares/Who-Cares.pdf>

<sup>9</sup> As above

jurisdiction of the Ombudsman. This view of the Ombudsman role is at odds with the reality of what public sector Ombudsman Offices around the world actually do; it is at odds also with what the Irish Ombudsman has been doing for many years. It is implicit in the Ombudsman model adopted by the Oireachtas in 1980 that the role involves far more than the investigation of individual complaints; though dealing with these complaints remains the core business and provides the basis for looking also at wider systemic or governance issues. That this role is envisaged by the Oireachtas is made clear by the provision which allows the Ombudsman to conduct investigations on her own initiative<sup>10</sup>.

#### *Oversight and accountability*

The Ombudsman submits an Annual Report to the Houses of the Oireachtas. In addition, she appears before the Joint sub-Committee on the Ombudsman where Members have an opportunity to ask the Ombudsman about the work of her office and the use of resources<sup>11</sup>.

### **Commonwealth Ombudsman (Australia)**

Section 5(1) of the Ombudsman Act 1976 provides that the Ombudsman may of his or her own motion, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or a prescribed authority.<sup>12</sup>

#### *Examples of own motion investigations*

The Commonwealth Ombudsman has published a number of own motion reports:

- Department of Immigration and Citizenship (DIAC): Suicide and self-harm in the immigration detention network
- Department of Education, Employment and Workplace Relations and Department of Industry, Innovation, Science, Research and Tertiary Education: Administration of student refunds under the Education Services for Overseas Students Act 2000

The Commonwealth Ombudsman appears to place significant emphasis on the ability of the office to carry out own motion investigations. During 2009-10 the office released 19 own motion reports.

#### *Oversight and accountability*

---

<sup>10</sup> Report of the Republic of Ireland Ombudsman: <http://www.ombudsman.gov.ie/en/Publications/Investigation-Reports/HSE-Nursing-Homes/Who-Cares/Chapter-2-Challenge-to-jurisdiction.html>

<sup>11</sup> See for example: <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/NVJ2013092600007?opendocument>

<sup>12</sup> Ombudsman Act 1976: [http://www.comlaw.gov.au/Details/C2013C00332/Html/Text#\\_Toc360789411](http://www.comlaw.gov.au/Details/C2013C00332/Html/Text#_Toc360789411)

In May 2011 the previous Ombudsman, Allan Asher, commented on the lack of a direct link between his office and the Australian Parliament:

Unlike some other integrity agencies, there is no parliamentary accountability mechanism in place for the Office of the Commonwealth Ombudsman.

For example, unlike the Auditor-General, the Ombudsman is not an Officer of the Parliament. Nor does he have a parliamentary committee to whom he must report, as is the case for the Australian Commission for Law Enforcement Integrity.

I am accountable to the Parliament, yet I have only infrequent and limited opportunities to engage with the Parliament...I would welcome a discussion regarding the establishment of a parliamentary committee or some other accountability mechanism to specifically review my work and with whom I could raise issues of concern without compromise to the independence of my office.<sup>13</sup>

## **Alberta Ombudsman**

### *Legislative basis*

Section 12(2) of the Ombudsman Act 2000 gives the Ombudsman power to make an investigation either on a complaint made to the Ombudsman by any person or on the Ombudsman's own motion.

### *Other guidance/commentary*

The office of the Alberta Ombudsman has recently formed an 'Own motion team'. The 2012/13 annual report reveals the thinking behind this approach:

A systemic investigation looks into some of the issues that may be driving individual complaints. For example, a resident at a provincially funded facility may complain staff is treating her unfairly. But a number of similar complaints could reveal a pattern of unfair behaviour – and that's when an own motion investigation should be launched. As another example, an organization may adopt a number of recommendations from the Ombudsman following an investigation – but it may only be applying those recommendations to a certain group of clients, leaving another group out in the cold.

Of course, to determine what the systemic issue is, and to track the outcome of investigations, the Own Motion Team takes a proactive approach. It tracks trends, analyzes internal and external data, reviews previous complaints and investigations, and monitors news and other information sources<sup>14</sup>.

The office has launched 72 own motion investigations since its formation in 1967.

---

<sup>13</sup> Response to commentary about Ombudsman actions—May 2011 Budget Estimates: <http://www.ombudsman.gov.au/media-releases/show/196>

<sup>14</sup> Alberta Ombudsman Annual Report 2012-13: [https://www.ombudsman.ab.ca/wp-content/uploads/2013/11/46\\_Annual\\_Report.pdf](https://www.ombudsman.ab.ca/wp-content/uploads/2013/11/46_Annual_Report.pdf)

### *Oversight and accountability*

The office of the Ombudsman falls under the remit of the Assembly's Standing Committee on Legislative Offices. During a recent evidence session a Member questioned the Ombudsman on the establishment of the own motion team:

Mr. Eggen: I noticed on page 21 of your annual report that you've got this own-motion investigation program.

Mr. Hourihan: Correct.

Mr. Eggen: I just was curious to know how your office decides to launch one of these. What criteria do you use to proceed on your own-motion investigation?

Mr. Hourihan: Okay. Well, to just give a little bit of background really quickly, we did develop an own-motion team. We've always had the ability to do own-motion investigations, and we weren't comfortable – or I certainly wasn't comfortable – that we had sort of significant critical analysis going in to determine whether or not we should or shouldn't.

Probably it needs to be said, I think, that when we investigate any formal investigation, we are looking at all systemic issues that may be at play because that's the important piece of what we do, change the systems. So we do what I believe is a very thorough job of each individual investigation. There are some, however, when we get to a point where we know policies and processes and procedures are in place and things are going well and that sort of thing, but still we want to be able to look over at the broader picture.

It's because of the nature of our sophisticated investigations that we do on an individual basis that led us to not having probably as much structure in place as what we might otherwise have to determine an own-motion. So we put the team together. We wanted to dedicate a team. We knew that we wanted to do some more in-depth, systemic investigations where appropriate, and to do this, we had to dedicate some resources to that... They look at everything, they determine, and then they do an evaluation, which is not unlike sort of an action plan or business proposal, if you will, to us, senior management, and come forward with their recommendation as to whether or not. Then I make the decision, at the end of the day, whether or not we're going to do an own-motion.

## **Western Australia**

### *Legislative basis*

The Parliamentary Commissioner Act 1971 states:

#### 16. Initiation of investigations

(1) Without prejudice to the provisions of section 15 any investigation that the Commissioner is authorised to conduct under this Act may be so conducted, either on his own motion or on a complaint made in accordance with section 17<sup>15</sup>.

### *Other guidance/commentary*

<sup>15</sup>Western Australia Parliamentary Commissioner Act 1971:

[http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:25412P/\\$FILE/Parliamentary%20Commissioner%20Act%201971%20-%2009-c0-00\].pdf?OpenElement](http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:25412P/$FILE/Parliamentary%20Commissioner%20Act%201971%20-%2009-c0-00].pdf?OpenElement)

The office has an 'Administrative Improvement Team', which undertakes own-motion investigations. In selecting which areas to investigate, the Ombudsman applies the following criteria:

- The number of complaints received by the Ombudsman;
- The likely public interest in the identified issue of concern;
- The number of people likely to be affected;
- Whether other reviews of the issue have been done recently or are in progress;
- The potential for our investigation to improve administration across the public sector; and
- Whether investigation of the chosen topic is the best and most efficient use of our resources<sup>16</sup>.

Having identified a possible topic, the Ombudsman will:

- Carry out preliminary research to assist in planning the scope and objectives of the investigation
- Advise the agencies chosen about the project and consult regularly with staff at all levels to ensure that the facts and understanding of the issues are correct and any findings are evidence based
- Provide agencies with regular progress reports of findings together with the opportunity to comment on draft conclusions and any proposed recommendations.

Recommendations for administrative improvements are based on evidence gathered during investigations, and are designed to be a proportionate response to the number and type of administrative issues identified during these investigations<sup>17</sup>.

#### *Examples of own-motion investigations*

2012-13: Sleep-related Infant Deaths

2011-12: Planning for children in Care

2010-11: The Management of Personal Information – Good Practice and Opportunities for Improvement

## **New Zealand**

### *Legislative basis*

---

<sup>16</sup> Ombudsman Western Australia, Undertaking Own Motion Investigations:

[http://www.ombudsman.wa.gov.au/Improving\\_Admin/AI\\_Investigations.htm](http://www.ombudsman.wa.gov.au/Improving_Admin/AI_Investigations.htm)

<sup>17</sup> [As above](#)

Section 13 of the Ombudsman Act 1975 provides for the functions of the Ombudsman. Section 13(3) states:

Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission<sup>18</sup>.

#### *Guidance/commentary*

The website of the Ombudsman provides the following guidance on how it approaches own motion investigations:

A significant or systemic issue may come to our attention because we've received one or more complaints from the public. However, we also hear about significant and systemic issues in other ways, for instance, by referral from staff within an agency, or through media reporting.

A wider administrative improvement investigation might be suitable where:

- a pattern of similar complaints has been received
- a large number of people are directly affected by the issue raised
- there's significant public interest in the issue raised
- there's potential for the Ombudsman's investigation to improve good administration across the public sector or on a broad basis in a particular agency
- a practical and enduring outcome may be achievable for agencies and the public
- an investigation is the best and most efficient use of resources.

The office recognises the time and resources required for an own motion investigation:

These investigations require the commitment of significant time and staff resources and while they are not lightly undertaken, they can identify maladministration or lead to improved processes and practices thereby preventing many complaints arising<sup>19</sup>.

#### *Examples of own motion investigations*

2012: Prisoner Health Services

---

<sup>18</sup> New Zealand Ombudsmen Act 1975: <http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM4395423.html>

<sup>19</sup> Annual Report of the New Zealand Ombudsman, 2007-08:

[http://www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/370/original/ar\\_2007-08.pdf?1348524064](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/370/original/ar_2007-08.pdf?1348524064)

2011: Corrections Inmate Employment

2010: Department of Corrections' disposable safety razor policy

2010: Department of Corrections' use of strip gowns

*Oversight and accountability*

The New Zealand Parliament has an Officers of Parliament Committee which oversees officers of Parliament and recommends persons for appointment as officers of Parliament to the House. They include the Controller and Auditor General, the Ombudsman, and the Parliamentary Commissioner for the Environment<sup>20</sup>. The Committee also reports on the draft budgets of these offices.

---

<sup>20</sup> [http://www.parliament.nz/en-nz/pb/sc/details/officers-parliament/00DBHOH\\_BBSC\\_SCOP\\_1/business-before-the-officers-of-parliament-committee](http://www.parliament.nz/en-nz/pb/sc/details/officers-parliament/00DBHOH_BBSC_SCOP_1/business-before-the-officers-of-parliament-committee)