
FROM: Kathy O'Hanlon - Clerk to the Committee for the Office of the First Minister and deputy First Minister

DATE: 4 June 2015

TO: Clare McCanny – Senior Assistant Clerk – AdHoc Committee on Ombudsperson Bill

SUBJECT: Public Services Ombudsperson Bill

At its meeting on 3 June 2015 the OFMDFM Committee considered your letter of 2 June 2015 seeking clarification on a number of issues. The issues raised are repeated below for ease of reference followed by the Committee's response.

- a) The Ad Hoc Committee received a number of submissions which expressed concern about the use of the title 'Ombudsperson' as opposed to the existing title 'Ombudsman'. Representatives from the Ombudsman association and international ombudsman institute in addition to Ombudsmen from the UK and Ireland made the arguments that Ombudsman is gender neutral; it is an international recognised and trusted brand; and that changing the title will only cause confusion. The Ad Hoc Committee sought clarification on the rationale for changing the title from the 'Public Services Ombudsman Bill' to 'Public Services Ombudsperson Bill'.

The drafter's research suggested that 'Ombudsperson (or Ombud or Ombuds) would be a gender neutral term consistent with the general commitment that legislation should be gender neutral. The initial clauses were drafted using Ombudsperson for the Committee to consider. The Committee preferred a term which was clearly gender neutral to an ordinary English-speaking member of the public. The Committee was also mindful that 'Chairperson' is now commonly used. Accordingly, the Committee agreed that the Bill should be drafted as the Public Services Ombudsperson Bill.

- b) A number of stakeholders raised concern about the lack of definition of the term 'maladministration' in Clause 1 of the Bill. Can the Committee for OFMdfM provide clarity on why the term maladministration is not clearly defined in the Bill?

The Committee was aware that our existing legislation had not attempted to define maladministration, nor had the Scottish or Welsh Ombudsman legislation. The original Parliamentary Commissioner Act 1967 had not attempted a definition. The Committee noted the introduction to the Crossman catalogue (quoted in the EFM at paragraph 126-127) "A positive definition of maladministration is far more difficult to achieve." In the absence of evidence that the current approach had given rise to any problems the Committee was content that the Bill makes similar provision.

- c) In their submission to the Ad Hoc Committee, the Northern Ireland Local Government Association (NILGA) suggested that, for completeness, reference could be made in the Bill to the role of the NIPSO in investigating complaints against councillors as governed by the Local Government Act (NI) 2014. The Ad Hoc Committee sought clarification as to whether the Committee for OFMdfM had considered this matter in their deliberations on the proposals for the Bill.

This is not something which the OFMDFM Committee considered during its consideration of the draft Bill. The Committee is aware that authority for the NIPSO to investigate complaints against councillors arises under the Local Government Act (NI) 2014 (2014 Act) and not under the current Commissioner for Complaints Order or the NIPSO Bill. Clause 53 of the NIPSO Bill and Schedule 7 do refer to the 2014 Act and make the necessary amendments to it to ensure that it continues to give effect to the policy which the Assembly approved when it passed the 2014 Act. The Committee is not presently minded to include a reference to functions under another Act without a clear rationale for doing so.

- d) A number of stakeholders raised concerns about the powers provided in the Bill for the NIPSO to conduct own initiative investigations. **The Commissioner for Older People raised concern** that Clause 8, as drafted, has the potential to duplicate elements of the primary statutory duties of her office particularly given that the NIPSO is not obliged to consult with other investigatory bodies. Clarification was sought on what consultation the NIPSO will be required to undertake prior to publishing the criteria for the own initiative investigation.

Clause 42 of the Bill requires the NIPSO to consult the Commissioner for Older People for Northern Ireland if the NIPSO, at any stage in the course of considering a complaint or conducting an investigation, forms the opinion that the matter could be the subject of an investigation by the Commissioner for Older People. Given the requirement that the NIPSO prepare a specific proposal for an own initiative investigation it would seem unlikely that overlap with the Commissioner, or any of the other investigatory bodies listed in clause 42(4), would not have been identified and consultation have taken

place – particularly as the NIPSO is empowered to cooperate with those section 42 bodies in the conduct of any investigation.

[d) continued] - Further clarification was required on the criteria for the own initiative investigations. Para 118 of the Explanatory and Financial Memorandum states that the criteria are similar to the criteria for ordinary investigations, however clarification is sought whether this constitutes the criteria listed in paragraphs 109-111 of the Explanatory and Financial Memorandum and whether all or some of these criteria must be met before proceeding to undertake an own-initiative investigation?

The criteria for own-initiative investigations are set out at clause 8.

Clause 8(2) requires that the matter being investigated must relate to action taken by one or more listed authorities - as provided for in clauses 12 and 13.

Clause 8(3) requires that the matter is one which can be investigated.

Clauses 14-23 set out the types of matter which can be investigated and matters which are excluded from investigation.

Clauses 12-13 and 14-23 are the same requirements as for ordinary complaints made by a person aggrieved.

One difference for own initiative investigations is provided at clause 8(1) – this makes clear that the NIPSO may investigate a matter on the NIPSO's own initiative where no complaint has been made or one or more complaints have been made.

A further difference is the requirement in clause 8(4) that the NIPSO must have a reasonable suspicion that there is systemic maladministration or that systemic injustice has been sustained.

Each type of investigation - ordinary complaint, referred complaint and own initiative – has its own discreet set of procedural requirements. Those for own initiative are set out in clause 29 and require the preparation of an investigation proposal setting out the reasons for it and how the criteria for own initiative investigations (which are required to be published by the NIPSO under clause 9) have been met and the submission of the proposal to the relevant listed authority or authorities.

- e) In their written submission to the Ad Hoc Committee and in the oral evidence provided on 28 May 2015, the Chairperson of the Civil Service Commissioners sought clarification as to why this body was the only body from the Northern Ireland Office to be included under Schedule 3. The Civil Service Commissioners noted that the Commissioners and the Office of the Civil Service Commissioners are independent of the NI Assembly and the NI Executive. The Commissioners noted that the NIO is one of the listed organisations which the UK Parliamentary and Health Service Ombudsman can investigate. The Commissioners further noted that the Northern Ireland (Miscellaneous Provisions) Act 2014 paved the way for the functions related to the work of the Commissioners to be devolved in future without primary legislation. The Ad Hoc Committee agreed that it would write to the

Committee for OFMdfM to seek clarification as to why the Civil Service Commissioners was included under Schedule 3 of the Bill.

The Commissioners were included in Schedule 3 to the Bill because they are included in the schedule of bodies within the remit of the Assembly Ombudsman (schedule 2 to the Ombudsman (Northern Ireland) Order 1996). The Committee notes that there is an apparent anomaly in terms of the Commissioners being accommodated within the NIO yet being within the remit of the Ombudsman. The Committee notes that the Northern Ireland (Miscellaneous Provisions) Act 2014 paved the way for the functions related to the work of the Commissioners to be devolved in future without primary legislation. The Secretary of State raised no objection to their inclusion as a Schedule 3 listed authority in the NIPSO Bill. In the absence of any problems having arisen under the Ombudsman Order, the Committee is content for the Commissioners to be within the NIPSO's remit.

- f) The Ad Hoc Committee received a number of submissions relating to Clause 18: Matters which may be investigated: universities' from Universities, student union bodies and Colleges NI who represent further and higher education institutions. In light of these submissions, the Ad Hoc Committee sought clarification on the jurisdiction of the NIPSO in respect of universities and institutions of further and higher education. An extract of the concerns raised by stakeholders in relation to the jurisdiction of the NIPSO is attached (Queen's University Belfast, Ulster University and Colleges NI).

The OFMDFM Committee's response is provided beneath the comments in the Appendix.

- g) A number of stakeholders also raised concerns about the remit of the NIPSO in respect of universities and the decision not to include academic judgement. NILGA considered that the decision to exclude academic judgement was in direct contradiction to the provision to investigate matters that relate to clinical judgement and the approach by the OFMdfM Committee to "level up" in terms of the powers and remit of the NIPSO and the remedies available to a complainant" as noted in para 15 of the E&FM. The Committee sought clarification on the rationale for limiting the remit of NIPSO to 'investigate maladministration as it relates to university students.

The normal remit of all UK ombudsmen is limited to complaints of maladministration by listed authorities – the remit in relation to clinical/professional judgement is an exception to that rule. Accordingly the Committee did not consider it appropriate to consider 'levelling up' except in relation to the closely related area of social care – as health and social care in Northern Ireland are provided via the same bodies. It should be noted that reviewing actions taken on the basis of professional judgment does require the Commissioner to engage experts to advise him with the associated additional costs.

[g continued] The Committee also sought clarification on how the role of the NIPSO will differ from that of the Office of the Independent Adjudicator and the Board of Visitors.

The role of the NIPSO in relation to complaints of maladministration from students will be broadly similar to that of the Board of Visitors and the Office of the Independent Adjudicator (OIA) in that it will provide an independent review at the conclusion of a university's internal complaints procedure.

The Board of Visitors remit in relation to student complaints may be broader than maladministration and the Committee did not wish to limit students' right of redress in relation to matters other than maladministration. Thus if the NIPSO decides that a student's complaint is not about maladministration the student is free to appeal to the Visitor. The jurisdiction of the Visitor is only excluded where the complaint relates to a matter which the NIPSO can investigate. (Clause 18(5))

(Currently the Ombudsman's office as part of its initial assessment of a complaint will consider whether it falls within the Ombudsman's remit – for example a complainant might be referred to the Information Commissioner or to the Financial Services Ombudsman. In the same way a student contacting the NIPSO would be advised if their complaint could be investigated by the NIPSO as maladministration. If not then the student would be free to raise the matter with the Visitor as at present.)

The OIA will not investigate matters of academic judgement or decisions on admissions or complaints about employment issues where a student is also an employee. It will look at decisions about the fairness of the procedures of the university, whether they have been correctly interpreted, what the facts are, how the university has communicated with the student, the way evidence has been considered or whether there is evidence of bias.

- h) In respect of Clause 26, the NI Human Rights Commission expressed concern that the reduction in the time for making complaints to the NIPSO from 12 to 6 months. The Ad Hoc Committee sought clarification on the rationale for making such a complaint. The Ad Hoc Committee will write separately to the Ombudsman to seek clarity on the number of complaints it currently receives during the 6-12month period to fully assess the impact of this Clause.

The rationale for the reduction in time limit from 12 to 6 months is to encourage the prompt resolution of complaints at a point when the parties' recollections are freshest.

It should be remembered that this reduction in the time limit goes alongside a requirement for the listed authority to give written notice to the person aggrieved that

- the internal complaints process has been exhausted,*
- that they have the right to complain to the NIPSO*
- the time limit for complaining to the NIPSO*
- details of how to contact the NIPSO*

In addition the NIPSO will have discretion to accept a complaint outside the time limit if there are special circumstances which make it proper to do so.

- i) In respect of Clause 30, the Ad Hoc Committee sought clarification as to whether if a complaint is withdrawn would that end the investigative process.

Clause 30(2) provides that the NIPSO may begin or continue an investigation into a complaint even if the complaint is withdrawn. In most cases it may be difficult to continue the investigative process without continuing input from the Complainant.

However, there may be cases where the NIPSO considers that a complaint may still warrant investigation, should NIPSO consider that a complainant has withdrawn because they are in some way vulnerable (they may have a learning difficulty or face a language barrier) or felt it was too stressful.

- j) In respect of Clause 31, NILGA expressed concern that that the Bill does not enable the NIPSO to request information from the aggrieved person. NILGA requested an explanation for the rationale for omitting this from Clause 31. The Ad Hoc Committee agreed to seek clarification on this matter.

In most cases it is likely that the cooperation of the person aggrieved in providing information and documents will be forthcoming.

However, the Clause 31 provides a power for the NIPSO to require information and documents not just from a listed authority but from "any other person, who in the Ombudsperson's opinion is able to supply this information or produce these documents."

- k) The Ad Hoc Committee received a number of submissions in respect of the publication of reports by the NIPSO. The NI Human Rights Commission expressed concern about the provision to set a fee for the provision of reports (clause 35 (5)). Can the Committee for OFMdfM clarify whether this proposal is in line with the other ombudsmen and investigatory bodies?

It is likely that all reports which are being published will be made available on-line. In relation to special reports the Scottish Ombudsman is permitted charge a fee.

Section 16(5) - Scottish Public Services Ombudsman Act 2002

The Ombudsman may make arrangements for the special report to be available to the public in such manner (whether or not on payment of a reasonable fee) as the Ombudsman thinks fit.

The Welsh Ombudsman is also permitted to charge a “reasonable fee” for supplying a copy of a Special Report and other reports.

- l) In his written submission and oral evidence to the Committee, the Comptroller and Auditor General noted that in September 2012 in evidence to the Committee for OFMdfM, the current Ombudsman had requested that the power to co-operate with other Ombudsmen should be extended to the C&AG. The C&AG has requested that in line with this, the name of the C&AG and the Local Government Auditor should be added to the list of persons at Clause 42(4). The C&AG also request that the Bill be amended to add a provision to exempt the Ombudsperson from Article 27 of the Local Government (NI) Order 2005 which currently prevents the Local Government Auditor from sharing information gained in the course of a local government audit. The Ad Hoc Committee sought clarity on whether the Committee for OFMdfM considered and had any objections to these proposals.

The OFMDFM Committee did not consider adding the C&AG or the Local Government Auditor to the Clause 42 bodies. Subject to the view of the drafter the Committee is happy to consider doing so and will also consider an amendment to enable the Local Government Auditor to share information with the NIPSO.

- m) The Ad Hoc Committee also received evidence from ombudsmen in the UK and Ireland about the merits of setting up a Complaints Standards Authority similar to the body which currently operates in the Scottish Public Services Authority. In particular, the Scottish Ombudsman judged that this “small team [1.5 members of staff] working collaboratively with many others across the public services in Scotland have arguably had greater impact on the day to day relationship between the public and public services than any other initiative undertaken by this office” The Ad Hoc Committee sought clarity as to whether the Committee for OFMdfM had considered granting the NIPSO the power to set up a similar body to the Complaints Standards Authority?

The previous OFMDFM Committee's consultation in 2010 sought views on whether the NIPSO should play a design authority role in public sector complaints processes. While a majority of respondents (13) favoured such a role a number were opposed (5). However, the Committee decided at a fairly early stage not to pursue this policy area, taking the view that the improvement of public administration would be addressed through the investigation of complaints and recommendations to the listed authorities involved. The Committee notes the impact claimed for this measure in the Scottish Ombudsman's submission and will liaise with the Assembly Ombudsman regarding his current views. The Committee is mindful of the resource required to deliver this policy in the current financial climate.

- n) Finally, the NI Human Rights Commission stressed the need for the NIPSO to comply with human rights law and to follow the principles of a human rights approach in carrying out its investigation and publishing its reports on the same. What assurance can the Committee for OFMdfM provide that due regard has been paid to the human rights of both the complainants and the listed authorities in the development of this Bill?

The Committee's consideration of Convention Rights in relation to the development of the Bill is set out at paragraphs 200-210 of the EFM. The Committee is mindful that the NIPSO will be a person certain of whose functions are of a public nature for the purpose of section 6 of the Human Rights Act and the corresponding obligation imposed on the NIPSO to exercise powers in a way compatible with the Convention rights. The Committee also considered that the powers conferred on the NIPSO by the Bill are powers which are capable of being exercised in a manner compatible with the Convention Rights.

I hope that this information is helpful. Where indicated, the Committee will seek clarification and write to you again.

Yours sincerely,

Kathy O'Hanlon
Clerk to the Committee

Appendix 1

Extract of University of Ulster Submission.

(p32) Schedule 3, Listed Authorities, the University of Ulster is listed under the heading Education and Training and that the footnote to the Schedule states the following;

(p35) References to a university include references to a constituent college, school or hall or other institution of a university.

9. The University has two branch campuses outside of Northern Ireland, in Birmingham and London. Branch campus students are students of Ulster University. The Bill does not make it clear if the Ombudsperson would have jurisdiction over students at Ulster's London and Birmingham campuses. These students can make complaints to the University Visitor (as enshrined within the Charter, Statutes, Ordinances and Regulations of the University) and may also make complaints to the Office of the Independent Adjudicator. The University does not support different approaches to handling complaints from students in different jurisdictions.

The Committee noted UU students at the London and Birmingham campuses appear to have the option of appealing to either the Visitor or the Office of the Independent Adjudicator. In relation to the Open University the OFMDFM Committee took the view that it was preferable for all OU students to have one complaints system, namely to the OIA after the internal OU complaints process, whether the OU student was based in NI or elsewhere.

Adopting a similar approach it would seem appropriate that all University of Ulster students access one complaints system – and therefore UU students at the London and Birmingham campuses would have a right of complaint to the NIPSO after exhausting their internal complaints procedure.

However this is a matter on which the Committee will take advice from the drafter.

Extract of Queen's University Belfast

(p7) Part 2, Section 18.—(1) This section applies where the listed authority is—

- (a) The Queen's University of Belfast,**
- (b) the University of Ulster.**

The University notes that Section 18 "universities" only refers to students of The Queen's University Belfast and the University of Ulster.

Although independent, St Mary's University College and Stranmillis University College are constituent Colleges of Queen's University and their students are academically integrated. This means that students of these two colleges can use, or be referred to, Queen's University's Central Student Appeals, Academic Offences and Fitness to Practise procedures and are notified of their right to Petition the Board of Visitors following completion of internal procedures. Clarification is required about whether the extension of the role of the Ombudsperson is intended to cover University College students, on completion of internal procedures, or are they to be referred to the Board of Visitors, as they are not listed in Section 18 of the Bill?

(p32) Schedule 3, Listed Authorities, Queen's University Belfast is listed under the heading Education and Training and that the footnote to the Schedule states the following;

(p35) References to a university include references to a constituent college, school or hall or other institution of a university.

As previously stated, St Mary's University College and Stranmillis University College are independent of the University both by Statute, governance and funding arrangements and do not fall within the definition of the Bill. This is also true of other Colleges for which Queen's validates some but not all of their teaching provision, including the four theological colleges in Northern Ireland.

It is not accepted that the Ombudsperson should have jurisdiction over the University. In the event, however, that the Bill becomes legislation, the wording should reflect that it covers all Further and Higher Education provision in Northern Ireland with the exception of the Open University. By extension, this should include other Higher Education courses taught in Northern Ireland but validated by institutions based in other devolved administrations and subject to the Office of the Independent Adjudicator or the Scottish Ombudsman.

QUB states that St Mary's University College and Stranmillis University College "are constituent Colleges of Queen's University". The note at the end of Schedule 3 to the Bill states that "References to a university include references to a constituent college..." and thus encompasses Stranmillis and St Mary's as the OFMDFM Committee intended.

The Committee noted the issue regarding the status of the four theological colleges will make further inquiries in relation to their status and will seek the advice of the drafter.

Extract of Colleges NI Submission

FE Comment – The Bill refers to the role of universities under sub clause 18 (1). What is the role of the six regional FE Colleges in respect of Clause 18?

Clause 18 does not refer to FE colleges. FE Colleges are brought within the NIPSO's remit by their inclusion in Schedule 3 to the Bill as "*An institution of further education*" (page 32, line 31)