

NI Public Services Ombudsperson Bill :

Submission On Behalf of the Bar Council Of Northern Ireland

Introduction

The Bar Council is the governing and representative body of the Bar of Northern Ireland. The Bar of Northern Ireland is the leading provider of advocacy, legal opinion and dispute resolution, supporting solicitors and clients in navigating through complex legal cases. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy and consistently deliver strong, effective representation both in and out of Court

The Bar Council submit for the consideration of the Committee the following points in relation to the draft Public Services Ombudsperson Bill.

Legal Professional Privilege

It has long been recognised that Legal Professional Privilege is a fundamental building block of the edifice that is the rule of law in a democratic society. One need only read the speech of Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 where he said at paragraph 7:

“LLP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice. The cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates’ Court, Ex p B* [1996] AC 487. It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (*Campbell v United Kingdom* (1992) 15 EHRR 137; *Foxley v United Kingdom* (2000) 31 EHRR 637) and held by the European Court of Justice to be a part of Community law: *A M & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878.”

The Bar Council has serious concerns about the impact of the Bill upon this fundamental right. Firstly, to remove this right from public authorities can be seen as the first step in the direction of removing this right in all cases. Secondly, the fundamental principles which justify the existence of this right namely the ability to provide full and frank information to one’s legal adviser and the ability to provide frank and fearless advice in return to one’s client are as important for public bodies as they are for private individuals. LLP allows for proper decision making and enhances good government and proper administration.

The draft Bill states at section 31(5) that: -

“Subject to section 32(1) and (2), no person is compelled, for the purposes of an investigation, to give any evidence or produce any document which that person could not be compelled to give or to produce in civil proceedings in the High Court.”

The above paragraph is included in the previous legislation, the Commissioner for Complaints (Northern Ireland) Order 1996 at Article 13(3).

However, the draft Bill introduces new sections which were included in the Ombudsman’s Order, but not the Commissioner for Complaints (Northern Ireland) Order 1996 which state as follows: `-

“32(1) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or supplied to persons in the service of the crown, whether imposed by any statutory provision or any rule of law, applies to the disclosure of information for the purposes of an investigation.

(2) A listed authority is not entitled in relation to any investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.”

The Bar Council have strong concerns in relation to this wording and consider that these paragraphs are inconsistent with the Official Secrets Act (section 32(1)) and the basic right against self-incrimination and the fundamental right of legal professional privilege (section 32(2)).

The Bar Council acknowledges that Bill suggests safeguards in relation to any privileged information obtained by the Northern Ireland Public Services Ombudsman- as detailed below-

- It is suggested that, whilst reference can be made in a Report to the fact that such information has been obtained (section 38(2)), these documents must not be disclosed.
- Section 40 of the draft Bill makes clear that any information obtained or used by the Ombudsperson in the course of an investigation, must not be disclosed except for deciding whether to commence an investigation, for the purposes of an investigation, for resolving a complaint (section 10), for the purposes of a statement or report into an investigation or when liaising with other Ombudspersons.
- Section 47 of the Bill makes clear that documents obtained by the Ombudsperson during an investigation, including privileged documents, are not admissible in respect of any Application to the County Court or the High Court.

The protection offered by these provisions is simply illusory and wholly ineffective. There is a stark contrast between the protection purportedly provided to privileged documentation by these provisions and the protection which ought to be afforded to legally privileged documentation as described in the recent judgment of the Investigatory Powers Tribunal in the case of Belhadj and Others [2015] UKIPTrib 13 132-H delivered on 29th April, 2015.

Impact Upon Proposed Legal Services Oversight Commissioner

The Bar Council has separately provided a response to the consultation on the Draft Legal Complaints and Regulation Bill 2013. As part of this consultation, consultees were invited to comment upon the powers available to the Legal Services Oversight Commissioner that is proposed to be introduced by means of that legislation.

The Bar Council has serious concerns that the proposed Legal Services Oversight Commissioner's role, duties and responsibilities would, in time, be subsumed by the Northern Ireland Public Services Ombudsman with the result that the impugned proposed provisions would apply in respect of any investigation carried out in relation to the Bar Council or the Law Society.

Right to Legal Representation

The Commissioner for Complaints (Northern Ireland) Order 1996 provides an automatic right to a hearing with Counsel and Solicitor, examination and cross examination of witnesses, where the Commissioner considers there are grounds for making a report or recommendation that may adversely affect any body or person.

The Public Services Ombudsperson Bill introduces legislation in relation to the conduct of an investigation procedure. Specifically, the draft Bill introduces the following paragraph at section 30: -

“(6) Subject to sub-sections (3) 2(5), the procedure for conducting an investigation is to be such as the Ombudsperson considers appropriate in the circumstances of the case.

(7) In particular the Ombudsperson may: -

(a) Make such inquiries as are appropriate; and

(b) Determine whether any person may be represented in the investigation by Counsel, Solicitor or otherwise.”

In this regard, the draft Bill would appear incompatible with the basic right to legal representation. Indeed, bearing in mind the above commentary regarding legal professional privilege, even if the Ombudsperson did agree to legal representation for a body subject to an investigation, the legislation would then permit the Ombudsperson to obtain any legal advice that that the public body received. This would be a fundamental breach of the due process.

Conclusion

For the reasons set out above, sections 32 (1) and 32 (2), should not be enacted in their present form or at all and the right to representation should be drafted in such a manner as to be consistent with the principles recently reiterated in the Northern Ireland Court of Appeal judgment in BP's Application [2015] NICA 20 delivered on 27th March, 2015.

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