

**Committee for the Office of the First Minister and deputy First Minister**

# **Report on the Committee's Proposals for a Northern Ireland Public Services Ombudsman Bill Volume Two**

**Together with the Minutes of Proceedings, Minutes of Evidence  
and Written Submissions relating to the Report**

**Ordered by the Committee for the Office of the First Minister  
and deputy First Minister to be printed 27 June 2013  
Report: NIA 120/11-15 (Committee for the Office of the First Minister  
and deputy First Minister)**

**REPORT EMBARGOED  
UNTIL COMMENCEMENT OF  
THE DEBATE IN PLENARY**



# Membership and Powers

## Powers

The Committee for the Office of the First Minister and deputy First Minister is a Statutory Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, Section 29 of the Northern Ireland Act 1998 and under Assembly Standing Order 48. The Committee has a scrutiny, policy development and consultation role with respect to the Office of the First Minister and deputy First Minister and has a role in the initiation of legislation.

The Committee has the power to;

- consider and advise on Departmental Budgets and Annual Plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee stage of primary legislation;
- call for persons and papers;
- initiate inquiries and make reports; and
- consider and advise on matters brought to the Committee by the First Minister and deputy First Minister.

## Membership

The Committee has eleven members, including a Chairperson and Deputy Chairperson, and a quorum of five members.

The membership of the Committee is as follows:

- Mr. Mike Nesbitt (Chairperson)
- Mr. Chris Lyttle (Deputy Chairperson)
- Mr. Leslie Cree<sup>1</sup>
- Mr. Colum Eastwood
- Miss Megan Fearon<sup>2</sup>
- Mrs. Brenda Hale<sup>3</sup>
- Mr. Alex Maskey
- Ms. Bronwyn McGahan<sup>4</sup>
- Mr. Stephen Moutray<sup>5</sup>
- Mr. George Robinson
- Mr Jimmy Spratt<sup>6</sup>

1 With effect from 11 March 2013 Mr Leslie Cree replaced Mr Robin Swann

2 With effect from 10 September 2012 Ms Megan Fearon replaced Mr Francie Molloy

3 With effect from 1 October 2012 Mrs Brenda Hale replaced Mr Trevor Clarke

4 With effect from 10 September 2012 Ms Bronwyn McGahan replaced Ms Caitríona Ruane

5 With effect from 1 October 2012 Mr Stephen Moutray replaced Mr William Humphrey

6 With effect from 15 April 2013 Mr Jimmy Spratt replaced Mr Paul Givan

## List of Abbreviations

C&AG	Comptroller and Auditor General
DEL	Department of Employment and Learning
DOE	Department of the Environment
DFP	Department of Finance and Personnel
DHSSPS	Department of Health, Social Security and Public Safety
DoJ	Department of Justice
DRD	Department of Regional Development
ECHR	European Convention on Human Rights
ECNI	Equality Commission for Northern Ireland
E&LBs	Education and Library Boards
FE	Further Education
HMRC	Her Majesty's Revenue and Customs
HSC	Health and Social Care
MEP	Member of the European Parliament
MLA	Member of the Northern Ireland Legislative Assembly
MoD	Ministry of Defence
MP	Member of Parliament
NI	Northern Ireland
NICS	Northern Ireland Civil Service
NIAO	Northern Ireland Audit Office
NICCY	Northern Ireland Commissioner for Children and Young People
NIJAO	Northern Ireland Judicial Appointments Ombudsman
NIPSO	Northern Ireland Public Services Ombudsman
OFMDFM	Office of the First Minister and the deputy First Minister
PAC	Public Accounts Committee of the Northern Ireland Assembly
RoI	Republic of Ireland
UK	United Kingdom



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Northern Ireland  
Assembly

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## Clerk to DALO re NI Ombudsman Review

Ms Gail McKibbin  
Departmental Assembly Liaison Officer  
Office of the First Minister and deputy First  
Minister  
Room G50  
Stormont Castle  
Belfast

**The Committee for the Office of the  
First Minister and deputy First Minister**  
Committee Office Room 404  
Parliament Buildings  
Stormont  
Belfast  
BT4 3XX  
Tel: (028) 9052 1448  
Fax: (028) 9052 1083  
Committee.ofmdfm@  
niassembly.gov.uk

Date: 3 June 2010

Dear Gail,

### Review of the Office of the Northern Ireland Ombudsman

At its meeting of 02 June 2010, the Committee received a briefing from the Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints on the legislative proposals for a Public Service Ombudsman for Northern Ireland.

The Committee agreed to write to the Department to request further information on the reasons why the Department has not brought forward legislation on this issue and to seek assurance that if the Committee brings forward a bill, the Department will assist the committee throughout the process.

A response by Thursday 24 June 2010 would be appreciated.

Yours sincerely

**Cathie White**  
**Clerk to the Committee**

## OFMDFM regarding taking forward Deloitte Review Recommendations

Cathie White  
Clerk  
Committee for OFMDFM  
Room 416  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

28 June 2010

Dear Cathie

### **Review of the Office of the Northern Ireland Ombudsman**

1. Thank you for your letter of 3 June 2010, which requested further information on the reasons why the Department has not brought forward legislation on this issue and to seek assurance that if the Committee brings forward a bill, the Department will assist the committee throughout the process.
2. The First Minister and deputy First Minister have reviewed the 2004 report, and consider that the recommendations of the Deloitte review are still soundly based and merit implementation. However, the Department is not in a position to progress the legislation necessary to implement the recommendations due to resource constraints and competing Ministerial and Departmental priorities.
3. The First Minister and deputy First Minister welcome the Committee's proposal that it will take forward a bill to implement the report's recommendations, and confirm that the Department will co-operate with the Committee throughout the process.

Yours sincerely

Signed Gail McKibbin

**Gail McKibbin**  
Departmental Assembly Liaison Officer



# Chairperson to University of Ulster

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw,  
Stormont, Belfast,  
BT4 3XX

Telephone: (028) 905 21904  
E-mail: [committee.ofmdfm@niassembly.gov.uk](mailto:committee.ofmdfm@niassembly.gov.uk)

**Tom Elliott MLA, Chairman**  
**Committee for the Office of the First Minister and deputy First Minister**

Professor Richard Barnett  
Vice-Chancellor  
University of Ulster  
Cromore Road  
Coleraine  
BT52 1SA

12th December 2011

Dear Richard,

## **Proposals to legislate to reform the Office of the Northern Ireland Ombudsman**

As you are aware, the Committee for the Office of the First Minister and deputy First Minister is looking at options for bringing forward legislation to reform the Office of the Northern Ireland Ombudsman. Part of this consideration has involved the Committee looking at the sectors which receive substantial public funding but where the Ombudsman does not have jurisdiction, or where there has previously been jurisdiction and this has lapsed. Two of the areas which the Committee is considering bringing under the Ombudsman's jurisdiction are Further Education and Higher Education. This potential extension to the Ombudsman's jurisdiction was included in the consultation on possible reform of the office that the Committee conducted last year. I understand that you did not respond to the consultation at that time.

The Committee has been briefed on this issue by representatives from the National Union of Students – Union of Students in Ireland, Queen's University Students' Union and the University of Ulster Students' Union. These representatives indicated that they are very supportive of the extension to the Ombudsman's jurisdiction to cover FE and HE. The Committee also received a submission from the University and College Union (UCU) to its consultation last year indicating UCU support for the extension of jurisdiction to FE and HE.

At its meeting on 7th December the Committee agreed that it would be useful to seek the views of both universities, the university colleges and Colleges NI, as well as the Employment and Learning Minister, on the possible extension to the Ombudsman's jurisdiction.

I would be grateful if you could consider this issue and respond with your views to the Committee by the close of play on Friday 13th January. I have attached a brief note explaining the role and function of the Ombudsman for your convenience.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Elliott', with a stylized, cursive script.

**Mr Tom Elliott MLA**

Chairperson

Encs.

# University of Ulster response



**Vice-Chancellor**  
Professor Richard Barnett

Cromore Road  
Coleraine  
County Londonderry  
BT52 1SA  
Northern Ireland

T: +44 (0)28 70324329/4349  
F: +44 (0)28 70324901  
www.ulster.ac.uk  
rr.barnett@ulster.ac.uk

Mr Tom Elliot MLA  
Chairman, Committee for the OFMDFM  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

12 January 2012

*Dear Tom,*

## **Proposals to legislate to reform the Office of the Northern Ireland Ombudsman**

Thank-you for the opportunity to comment on the Committee's consideration on whether the NI Ombudsman's jurisdiction might be extended to Higher Education institutions. For the avoidance of doubt it is assumed that the Committee's intention in this regard, should it proceed, would be to extend the jurisdiction of the Ombudsman's Office to consideration of student complaints in a manner similar to that exercised by the Office of the Independent Adjudicator (OIA) covering Higher Education Institutions (HEIs) in England and Wales, and the Scottish Public Services Ombudsman (SPSO)<sup>1</sup>.

In prefacing our response I would emphasise that the University of Ulster (Ulster) strongly supports and defends the right of students to have recourse to an independent and impartial complaints system where they believe there has been malpractice or irregularities in the exercise of the University's policies, procedures or services. In this context I would stress that such rights are already, and very effectively, in place in the Northern Ireland universities and I would strongly contend that there is no need or justification for changing the system at this time. In support of this opinion I would make the following points:

- 1 Student Complaints Procedure: Ulster has in place a robust, three stage student complaints procedure which complies fully with the requirements of the Quality Assurance Agency for Higher Education in the UK's *Code of Practice for Assurance of Quality and Standards in Higher Education*. This procedure seeks to provide an accessible, fair and straightforward system which enables students to raise concerns and which ensures an effective, timely and appropriate response and it is widely communicated and promoted to students. It comprises informal, formal and review/appeal mechanisms. It is the University's practice to try to have complaints resolve

<sup>1</sup> That is it would exclude matters relating to *inter alia*: student admission, academic judgement, personnel/employment related issues including equality and disability, quality of teaching and learning, qualification grades and awards and matters that are the subject of on-going court or tribunal proceedings.

informally and speedily at the local level and this has proved to be very successful (figures for the numbers of complaints proceeding to stages 2 and 3 are set out below in paragraph 3). The final stage provides an appeal mechanism to the student, or group of students, who consider that their complaint has not been adequately addressed in the previous stages. It is conducted by means of an oral hearing by a panel where the student can present their case supported, if they wish, by a Students' Union representative or another member of the University. The panel comprises: a lay member of the University's governing body, the Council, who chairs the panel; a Dean or Associate Dean of a Faculty not implicated in the complaint; a Head of an Administrative Department not implicated in the complaint; and the Students' Union President. Thus, this appeal stage gives the student recourse to an impartial panel uninvolved in the original complaint or the previous complaints procedure stages. The University's Quality Management and Audit Unit is responsible for co-ordinating the handling of complaints and ensuring that recommendations for changes or procedural enhancements to improve the quality of the student experience as a result of complaints are implemented across the institution.

- 2 The University Visitor: A student who remains dissatisfied after exhausting all internal complaints procedures may appeal to the University Visitor whose role is enshrined in the University's Royal Charter. The Visitor is commonly a legally qualified person of high standing appointed, on behalf of Her Majesty the Queen, by the Privy Council upon representation from the University's Council. The Visitor, who is wholly independent of the University, has the right to inspect the University and to enquire into the academic and general affairs of the University, ensuring that the Statutes, Ordinances and Regulations of the University have been properly observed and implemented and that natural justice is observed within the institution. Our current Visitor, recommended to us by the Lord Chief Justice and appointed by the Privy Council in 2004 and reappointed in 2009, is the Honourable Sir Ronald Weatherup, a High Court Judge of high standing and a member of the NI Judicial Appointments Panel amongst other things. His independence and integrity are beyond question and he gives his time *pro bono* as and when required.
- 3 Volume of activity, expertise, cost and sustainability: At Ulster only a small number of student complaints proceed to the Stage 3 formal appeal. To illustrate this, the figures for each year from 2008/09 to 2010/11 were:

	2008/09	2009/10	2010/11
Complaints resolved at the formal Stage 2 level	9	11	7
Complaints considered at Stage 3 appeal	0	1	1

Only one student complaint was considered by the Visitor over these three years. Colleagues at Queen's Belfast and in the University Colleges will be able to provide comparable figures. For comparative purposes, the OIA covers over 140 HEIs in England and Wales, and the SPSO in Scotland 16. It is likely that the volume of activity in these other regions enables the respective offices and officers to develop the specialist knowledge needed and is adequate to justify the provision of sufficient resources to deliver the quality and standard of judgements in timely manner and in an affordable way. For example, the OIA's Annual Report for 2010 records that the Office, with a turnover of some £2 million per annum and over 40 staff funded by subscriptions from the universities, received over 2,000 enquiries and 1,341 complaints (including 56 from Welsh HEIs) which, they add '*is still a very small proportion of the number of enrolled students at English and Welsh universities*'. Nonetheless, the average time taken by the OIA to conclude the cases was over 6 months which is not a particularly speedy response

Page 3

time and has led to complaints. In 2010/11, the SPSO handled 7 enquiries and 115 complaints relating to HEIs there.

It is contended that the small number of HEIs in Northern Ireland (two universities and two university colleges) together with the low volume of complaints progressing beyond the formal internal procedures could not justify the creation or the cost of a separate, specialist branch within the Ombudsman's Office capable of providing the quality, standard or speed of response currently provided *pro bono* by the Visitor. In a time of economic difficulties and cuts in public expenditure the creation of an alternative type of review is, in my opinion, unjustifiable, unaffordable and unsustainable.

- 4 Process: A final, but important consideration relates to the respective processes adopted in the two systems. The OIA and SPSO both adopt a largely paper-based approach to assessing complaints. At Ulster where cases proceed to the Visitor there is invariably a formal oral hearing where students are able to put their case in person before a High Court judge supported by a representative including a legal representative. This is, I would suggest, a fairer system in terms of natural justice.

In conclusion, while I welcome the OFMDFM's review of the current arrangements for handling student complaints in the NI HEIs, we, at Ulster, are strongly of the view that the current system is robust, fair, impartial and affordable and there is no case for reform at this time. I would, of course, be happy to meet in person to elaborate on any of the points set out above. Might I also suggest that you approach our Visitor directly to obtain his independent view of the current arrangements? Should you wish to do so my Office would be available to assist with the arrangements.

*Yours sincerely,*

Yours sincerely

*Richard Barnett*

Richard Barnett

BELFAST ■ COLERAINE ■ JORDANSTOWN ■ MAGEE

## Chairperson to Stranmillis College

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw, Stormont,  
Belfast, BT4 3XX

Telephone: (028) 905 21904  
E-mail: [committee.ofmdfm@niassembly.gov.uk](mailto:committee.ofmdfm@niassembly.gov.uk)

**Tom Elliott MLA, Chairman**  
**Committee for the Office of the First Minister and deputy First Minister**

Dr Anne Heaslett  
Principal  
Stranmillis University College  
Stranmillis Road  
Belfast  
BT9 5DY

12th December 2011

Dear Anne,

### **Proposals to legislate to reform the Office of the Northern Ireland Ombudsman**

As you may be aware, the Committee for the Office of the First Minister and deputy First Minister is looking at options for bringing forward legislation to reform the Office of the Northern Ireland Ombudsman. Part of this consideration has involved the Committee looking at the sectors which receive substantial public funding but where the Ombudsman does not have jurisdiction, or where there has previously been jurisdiction and this has lapsed. Two of the areas which the Committee is considering bringing under the Ombudsman's jurisdiction are Further Education and Higher Education. This potential extension to the Ombudsman's jurisdiction was included in the consultation on possible reform of the office that the Committee conducted last year. I understand that you did not respond to the consultation at that time.

The Committee has been briefed on this issue by representatives from the National Union of Students – Union of Students in Ireland, Queen's University Students' Union and the University of Ulster Students' Union. These representatives indicated that they are very supportive of the extension to the Ombudsman's jurisdiction to cover FE and HE. The Committee also received a submission from the University and College Union (UCU) to its consultation last year indicating UCU support for the extension of jurisdiction to FE and HE.

At its meeting on 7th December the Committee agreed that it would be useful to seek the views of both universities, the university colleges and Colleges NI, as well as the Employment and Learning Minister, on the possible extension to the Ombudsman's jurisdiction.

I would be grateful if you could consider this issue and respond with your views to the Committee by the close of play on Friday 13th January. I have attached a brief note explaining the role and function of the Ombudsman for your convenience.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Elliott', with a stylized, cursive script.

**Mr Tom Elliott MLA**

Chairperson

Encs.

## Chairperson to St Mary's College

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw, Stormont,  
Belfast,  
BT4 3XX

Telephone: (028) 905 21904  
E-mail: [committee.ofmdfm@niassembly.gov.uk](mailto:committee.ofmdfm@niassembly.gov.uk)

**Tom Elliott MLA, Chairman**  
**Committee for the Office of the First Minister and deputy First Minister**

Professor Peter Finn  
Principal  
St. Mary's University College  
191 Falls Road  
Belfast  
BT12 6FE

12th December 2011

Dear Peter,

### **Proposals to legislate to reform the Office of the Northern Ireland Ombudsman**

As you are aware, the Committee for the Office of the First Minister and deputy First Minister is looking at options for bringing forward legislation to reform the Office of the Northern Ireland Ombudsman. Part of this consideration has involved the Committee looking at the sectors which receive substantial public funding but where the Ombudsman does not have jurisdiction, or where there has previously been jurisdiction and this has lapsed. Two of the areas which the Committee is considering bringing under the Ombudsman's jurisdiction are Further Education and Higher Education. This potential extension to the Ombudsman's jurisdiction was included in the consultation on possible reform of the office that the Committee conducted last year. I understand that you did not respond to the consultation at that time.

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Yours sincerely,

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**Mr Tom Elliott MLA**

Chairperson

Encs.

## Chairperson to Queens University Belfast

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw, Stormont,  
Belfast,  
BT4 3XX

Telephone: (028) 905 21904  
E-mail: [committee.ofmdfm@niassembly.gov.uk](mailto:committee.ofmdfm@niassembly.gov.uk)

**Tom Elliott MLA, Chairman**  
**Committee for the Office of the First Minister and deputy First Minister**

Professor Sir Peter Gregson  
Vice-Chancellor  
The Queen's University of Belfast  
University Road  
Belfast  
BT7 1NN

12th December 2011

Dear Sir Peter,

### **Proposals to legislate to reform the Office of the Northern Ireland Ombudsman**

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Elliott', with a stylized, cursive script.

**Mr Tom Elliott MLA**

Chairperson

Encs.

# Queen's University Response



## Vice-Chancellor's Office

Queen's University Belfast  
Belfast  
BT7 1NN  
Northern Ireland  
Tel 028 9097 5134  
Fax 028 9097 5397  
vc.office@qub.ac.uk  
www.qub.ac.uk

13 January 2012

Mr T Elliott MLA  
Chairman  
Committee for the Office of the First Minister and deputy First Minister  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

Dear Mr Elliott

### **Proposals to Legislate to Reform the Office of the Northern Ireland Ombudsman**

Thank you for your letter, dated 12 December 2011, in relation to the above.

The University is aware that the Committee for the Office of the First Minister and deputy First Minister is considering options to bring forward legislation to reform the Office of the Northern Ireland Ombudsman. The University notes that, as part of this review, the Committee is considering bringing both further education and higher education within the Ombudsman's jurisdiction and welcomes the opportunity to comment on this proposal.

Having consulted with relevant colleagues, I can confirm that the University would be extremely concerned at any proposal to replace its existing Board of Visitors. In its response to the 2003 White Paper on the Future of Higher Education, the University confirmed that, in its Board of Visitors, it had in place a unique and effective independent mechanism for dealing with student complaints. This position remains unchanged.

Where there is clear evidence that a given process or service is not operating effectively, the University is more than willing to review existing provision to ensure our students continue to enjoy an outstanding student experience. We have not been provided with any evidence to indicate that the Board of Visitors is not independent, is not operating effectively and efficiently, or that it is failing to deal with student complaints in an acceptable manner.

For the Committee's benefit, I have detailed below some of the key features of the Board of Visitors:

#### 1. Ordinance

Queen's University Belfast was founded by Royal Charter in pursuance of the Irish Universities Act 1908. Provision for the Board of Visitors is detailed within Paragraph 3 of this Royal Charter, which states:

"We, Our Heirs and Successors shall be and remain the Visitor and Visitors of the University acting through such Board of Visitors as We or They may from time to time on the representation of the University by order in Council appoint for such period as We or They shall think fit."

#### 2. Independence

The Board of Visitors is independent of the University. The present Board was appointed by Her Majesty, on the advice of her Privy Council, on 9 July 2008, to serve for a period of five years. The Board is chaired by The Honorary Mr Justice Higgins (Northern Ireland Lord

Elliott T/MS

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13 January 2012

Justice of Appeal) and comprises Judge Gemma Loughran, Mrs Ann Shaw and Mr Denis Wilson (Convenor).

Each member is held within the highest esteem, both within their own profession, and more widely across Northern Ireland society.

The Committee may wish to seek evidence directly from the Board in respect of its independence from the University and, in so doing, you should contact Mr Denis Wilson – his contact details are set out below:

Mr. D. Wilson,  
Convenor,  
Board of Visitors,  
c/o Mrs. P. McKnight,  
Doorway Q,  
Lanyon South,  
Queen's University Belfast

Tel: 028 9097 3090

Email: deniswilson425@btinternet.com

### 3. Costs

The Board of Visitors represents excellent value for money to the University. Members of the Board are not remunerated. They are entitled to claim expenses for any expenditure properly incurred in carrying out their responsibilities - a breakdown of the total expenses claimed for the period 2008-11 is provided below:

Board of Visitors: Expenses Claimed		
2008-09	2009-10	2010-11
£212.72	£74.80	£0

The University also meets the costs of any Board of Visitors' meetings/hearings held on University premises, including refreshments.

These costs are substantially less than the subscriptions payable under other independent appeals bodies – for example, a subscription to the Office of the Independent Adjudicator (OIA) for Higher Education in England and Wales, would cost the University some £17,750 per annum.

### 4. Transparency

The Board of Visitors is effectively promoted to all new and returning students in a dedicated section "Information for Intending Appellants" within the University Calendar. The Calendar provides comprehensive detail on all Regulations, processes and procedures aimed at supporting and enhancing the student experience.

The Information for Intending Appellants clearly details how those wishing to raise a complaint may petition the Board and provides clarification on the procedures through which any appeal lodged with the Convenor of the Board will be heard. Each stage of the procedure is time bound to ensure that all complaints received by the Board are resolved in a timely and effective manner.

### 5. Student Access to Formal Hearing

Any student lodging an appeal to the Board of Visitors is entitled to have his/her case heard by the Board at an oral hearing – the purpose of this informal hearing is to enable the student and/or the representative(s) of the University, to explain any points which may require explanation, and to assist the Board's understanding of the student's grievance and the University's position on the matters being considered.

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A student may be accompanied at this hearing by a friend, representative, or legal representative.

The opportunity for students to meet directly with, and to have their case heard in person by, the Board of Visitors is critical. The consideration of a student complaint, by the Ombudsman, would be paper-based which is the model operated by the OIA and the Scottish Public Services Ombudsman (SPSO) – it is our view that this would be entirely detrimental to the transparency and effectiveness of this complaints process.

#### 6. Supporting Processes

A student is entitled to lodge an appeal with the Board of Visitors when all internal complaints procedures have been exhausted.

The University has, in place, a comprehensive suite of quality assurance mechanisms, to ensure that it achieves and maintains the highest possible standards in dealing with its student body. These are detailed in the University Calendar and comply fully with the requirements of the Quality Assurance Agency for Higher Education in the UK's "Code of Practice for Assurance of Quality and Standards in Higher Education".

Under the main Student Complaints Procedure, complaints are investigated under three specific stages, as set out below:

- (i) An informal stage – this allows complaints to be quickly and satisfactorily resolved, at a local level, using informal means.
- (ii) A first stage complaint – this applies where a student is dissatisfied with the outcome of the informal process, or has substantive reasons for not wishing a complaint to be handled at a local level.
- (iii) Appeal Stage – this enables a student to appeal the outcome of the first stage investigation to a panel comprising senior staff and student representatives.

All complaints are monitored centrally and, where substantiated, are used by the University as an opportunity to not only address the complainants' concerns but to apply lessons learned more widely to further improve the quality of the internal processes. In this context, the nature and outcome of all student complaints received is reported to the appropriate Head of School, Dean or Academic Support Director and to the Academic Affairs Directorate.

The Academic Affairs Directorate prepares a summary report of all student complaints and appeals, preserving anonymity, and this is presented to Academic Council on an annual basis.

The number of complaints, received by the University, over the past three years, is detailed below:

Student Complaints					
2008-09		2009-10		2010-11	
Heard	Upheld	Heard	Upheld	Heard	Upheld
3	1	7	1	10	3

In addition, there are other internal processes dealing with Student Appeals and Student Discipline – at the end of these processes, students also have the right of recourse to the Board of Visitors.

As detailed above, the Board of Visitors system provides students with the opportunity to present their cases to an independent body, both in writing and in person, and to receive timely and comprehensive responses. The University maintains its position that it has in place, in its Board of Visitors, a unique and effective mechanism for dealing with student complaints which is both independent and efficient.

Elliott T/MS

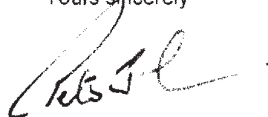
Mr T Elliott MLA

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12 January 2012

I trust this response is helpful and I am happy to clarify, or discuss further, any issues relating to the above.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Gregson', written in a cursive style.

Professor Sir Peter Gregson  
President and Vice-Chancellor

Elliott T/MS

## Chairperson to Colleges NI

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw, Stormont,  
Belfast,  
BT4 3XX

Telephone: (028) 905 21904  
E-mail: [committee.ofmdfm@niassembly.gov.uk](mailto:committee.ofmdfm@niassembly.gov.uk)

**Tom Elliott MLA, Chairman**  
**Committee for the Office of the First Minister and deputy First Minister**

Mr Gerry Campbell  
Chief Executive  
Colleges Northern Ireland  
First Floor  
Hawthorne Office Park  
39 Stockman's Way  
Belfast  
BT9 7ET

12th December 2011

Dear Gerry,

### **Proposals to legislate to reform the Office of the Northern Ireland Ombudsman**

As you may be aware, the Committee for the Office of the First Minister and deputy First Minister is looking at options for bringing forward legislation to reform the Office of the Northern Ireland Ombudsman. Part of this consideration has involved the Committee looking at the sectors which receive substantial public funding but where the Ombudsman does not have jurisdiction, or where there has previously been jurisdiction and this has lapsed. Two of the areas which the Committee is considering bringing under the Ombudsman's jurisdiction are Further Education and Higher Education. This potential extension to the Ombudsman's jurisdiction was included in the consultation on possible reform of the office that the Committee conducted last year. I understand that Colleges Northern Ireland replied to the consultation indicating that the colleges were not in agreement that the Ombudsman's jurisdiction should be extended to include Further Education.

The Committee has been briefed on this issue by representatives from the National Union of Students – Union of Students in Ireland, Queen's University Students' Union and the University of Ulster Students' Union. These representatives indicated that they are very supportive of the extension to the Ombudsman's jurisdiction to cover FE and HE. The Committee also received a submission from the University and College Union (UCU) to its consultation last year indicating UCU support for the extension of jurisdiction to FE and HE.

At its meeting on 7th December the Committee agreed that it would be useful to seek your views again, as well as the views of both universities and the university colleges and the Employment and Learning Minister, on the possible extension to the Ombudsman's jurisdiction.



I would be grateful if you could consider this issue and respond with your views to the Committee by the close of play on Friday 13th January. I have attached a brief note explaining the role and function of the Ombudsman for your convenience.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Elliott', with a stylized, cursive script.

**Mr Tom Elliott MLA**

Chairperson

Encs.

# Briefing note referred to in letters to Further and Higher Education Bodies

## Briefing Note on Role and Remit of the Northern Ireland Ombudsman

### Introduction

1. The office of the Northern Ireland Ombudsman has been in operation for 40 years and is the second oldest in the UK and Republic of Ireland (ROI). There are two statutory offices of the Ombudsman: the Assembly Ombudsman for Northern Ireland (AONI) and the Northern Ireland Commissioner for Complaints (NICC). The former office deals with complaints of maladministration about services provided by the departments of the Northern Ireland Executive and the latter with local government, health and social care and other public bodies including the Northern Ireland Housing Executive. The Ombudsman is independent of government and provides a free and impartial service to 'persons' aggrieved' (meaning those directly affected) by the actions of the bodies in his jurisdiction.
2. The DFP Committee has invited the Northern Ireland Ombudsman to provide a briefing note on his office and his current role and remit. The Ombudsman would also be willing to attend the Committee to provide a more detailed briefing on his role in the overall system of administrative justice and provide any further information and clarification the Committee would consider helpful.

### Maladministration

3. The findings an Ombudsman makes involve a judgement on whether the actions of a public body or an official acting on behalf of a public body involved 'maladministration'. The term 'maladministration' is not defined in the legislation but the sorts of administrative failings which it includes are:
  - Avoidable delay in the handling of individuals' applications, cases, etc;
  - Faulty procedures or failing to follow correct procedures;
  - Poor handling of complaints, or failure to inform the complainant about any rights of appeal;
  - Unfairness, bias or prejudice in dealing with individuals;
  - Providing misleading or inadequate advice;
  - Refusing to provide information without good reason, or answer reasonable questions;
  - Discourtesy, including failure to apologise properly for errors;
  - Mistakes in handling claims;
4. Every investigation is held in private. The Ombudsman's reports are confidential in nature although he does lay annually before the Assembly anonymised summaries of the complaints he has investigated in the form of an Annual Report. More recently he has published a periodic digest of cases to inform the Assembly, the public and bodies in jurisdiction of the learning that has been developed from completed investigations.

### History and Background

5. The first Ombudsman was introduced in Sweden in 1809. Its wider international development was initially limited to other Scandinavian countries, Finland in the early years of the 20th century, and Denmark in the 1950s. Indeed it was the Danish version of the institution which prompted the interest of the UK legal reform group Justice, who in a report in 1961 recommended the introduction of an Ombudsman in the UK. New Zealand was the first

common law country to adopt the institution in 1962 and it was first established in the UK with the title of Parliamentary Commissioner for Administration in 1967. In Swedish, the term 'ombudsman' means 'trusted official' or 'authorised representative' and the common core on which the concept of an ombudsman is based is:

*'An official appointed to investigate complaints against public bodies, government departments or their servants and employees, who acts as an independent referee, without power of sanction or appeal, between individual citizens and their governments and its administration'.*

6. The ombudsman institution as established in the UK and ROI falls into a category known as the 'classical ombudsman' which has the key characteristics of an independent officer who is invested with significant powers of investigation to examine complaints of maladministration which have caused injustice, and to make recommendations for redress where a complaint is upheld.
7. In Northern Ireland the office of the Ombudsman was introduced before it was developed beyond Westminster, in the rest of UK and ROI. The first Northern Ireland Ombudsman was established in 1969 and his jurisdiction only included the Departments of the then Stormont government. A second office, the Northern Ireland Commissioner for Complaints, was established to consider complaints about local councils, health services and other bodies soon afterwards. In ROI when the Ombudsman legislation came into effect in 1983 it included all government departments and a wide range but not all public bodies.

#### **Other Jurisdictions**

8. There can be some confusion about terminology surrounding the office of the Ombudsman in Northern Ireland as the initial formal title of the Ombudsman was in fact Commissioner. In ROI the institution was formally titled the Ombudsman from its inception, however, in Northern Ireland the former Parliamentary Commissioner for Administration for Northern Ireland was renamed the Assembly Ombudsman for Northern Ireland. In Scotland and Wales the title Public Services Ombudsman was the title used in the legislation passed in 2002 and 2005 respectively. The legislation that currently represents the most up to date legislation informing the appointment and jurisdiction of an Ombudsman was passed by the Welsh Assembly in 2005. In Northern Ireland however, the OFMDFM Committee of the Assembly is currently considering new legislation that would modernise the law that informs the role and jurisdiction of the NI Ombudsman.
9. In 2004 an independent review of the Office was commissioned by OFMDFM in response to the changes implemented after reviews in England and devolution in Scotland and Wales. A common key feature of these reviews was the creation of a single ombudsman office or 'one-stop shop' to address the new circumstances that had developed as a result of devolution. Importantly, a number of matters have not been devolved and so some complaints, for example those about defence and the HMRC, must still be referred to the UK Parliamentary Ombudsman at Westminster.
10. Alongside developments in organisation there has continued to be significant developments in ombudsman policy, practice and legislation in Great Britain, and in this jurisdiction. Significantly in Northern Ireland, the devolution of policing and justice on 12 April 2010 has led to the Northern Ireland Ombudsman taking over from the UK Parliamentary Ombudsman

the jurisdiction to deal with complaints in areas including complaints about the Department of Justice and its agencies such as the Northern Ireland Prison Service and the Northern Ireland Courts and Tribunals Service. The OFMDFM Committee in informing its decisions on how the legislation should be updated is also examining best international practice and the current position in other jurisdictions, particularly in Scotland and Wales.

A handwritten signature in black ink, appearing to read 'Tom Frawley', with a stylized, cursive script.

**Dr Tom Frawley**  
Northern Ireland Ombudsman

September 2011

# Chairperson to Minister for Employment and Learning

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw, Stormont,  
Belfast,  
BT4 3XX

Telephone: (028) 905 21904  
E-mail: committee.ofmdfm@niassembly.gov.uk

**Tom Elliott MLA, Chairman**  
**Committee for the Office of the First Minister and deputy First Minister**

Dr Stephen Farry MLA  
Minister for Employment and Learning  
Department for Employment and Learning  
39 – 49 Adelaide House  
Adelaide Street  
Belfast  
BT2 8FD

12th December 2011

Dear Stephen,

## **Proposals to legislate to reform the Office of the Northern Ireland Ombudsman**

As you may be aware, the Committee for the Office of the First Minister and deputy First Minister is looking at options for bringing forward legislation to reform the Office of the Northern Ireland Ombudsman. Part of this consideration has involved the Committee looking at the sectors which receive substantial public funding but where the Ombudsman does not have jurisdiction, or where there has previously been jurisdiction and this has lapsed. Two of the areas which the Committee is considering bringing under the Ombudsman's jurisdiction are Further Education and Higher Education. These sectors receive considerable funding from your department. This potential extension of the Ombudsman's jurisdiction was included in the consultation on possible reform of the office that the Committee conducted last year.

At its meeting on 7th December the Committee agreed that it would be important to seek your view on the possibility of Further Education and Higher Education (FE and HE) being under the jurisdiction of the Ombudsman. The Committee has been briefed on the issue by representatives from the Nation Union of Students – Union of Students in Ireland, Queen's University Students' Union and the University of Ulster Students' Union. These representatives indicated that they are very supportive of the extension of the Ombudsman's jurisdiction to cover FE and HE. The Committee also received a submission from the University and College Union (UCU) to its consultation indicating UCU support for the extension of jurisdiction to FE and HE.

Before the Committee goes further in considering this jurisdiction extension Members agreed that the Committee should ascertain your feelings on the issue. The Committee will also write to the vice-chancellors of both universities and to Colleges NI to seek their views.

I would be grateful if you could consider this issue and respond to the Committee by the close of play on Friday 13th January. I have attached a brief note explaining the role and function of the Ombudsman for your convenience.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Elliott', with a stylized, cursive script.

**Mr Tom Elliott MLA**

Chairperson

Encs.

# Employment and Learning Committee enclosing Minister's Response

Basil McCrea MLA, Chairperson  
Committee for Employment and Learning

Mr Tom Elliot  
Chairperson  
Committee for the Office of the  
First Minister and deputy First Minister  
Room 245  
Parliament Buildings  
Stormont  
BT4 3XX

19 January 2012

Dear Tom

**Extension of NI Ombudsman's remit to include Further and Higher Education sectors.**

At its meeting on 18 January 2012 the Committee for Employment and Learning considered correspondence from the Minister for Employment and Learning and agreed to forward it to the Committee for the Office of the First Minister and deputy First Minister for their information.

I would be grateful if you could refer this correspondence to your Committee for their consideration.

Yours sincerely,

A handwritten signature in black ink, reading 'Basil McCrea', with a long, sweeping underline.

**Basil McCrea MLA**  
Chairperson  
Enc.

# Minister for Employment and Learning Response

## FROM THE MINISTER

Mr Basil McCrea MLA  
Chairperson  
Committee for Employment and Learning  
Room 283  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX



Department for  
**Employment  
and Learning**  
[www.delni.gov.uk](http://www.delni.gov.uk)

Adelaide House  
39/49 Adelaide Street  
Belfast  
BT2 8FD  
Tel: 028 9025 7791  
email: [private.office@delni.gov.uk](mailto:private.office@delni.gov.uk)

**Our Ref: COR/1379/11**

11 January 2012

Dear *Basil*

Thank you for your letter of 14 December 2011, enclosing correspondence from Tom Elliott in his capacity as Chairperson of the Committee for the Office of the First Minister and deputy First Minister. In his letter, Mr Elliott asks for my views about the possible extension of the NI Ombudsman's remit to the Further and Higher Education sectors.

Further Education colleges were previously under the jurisdiction of the Ombudsman but this arrangement ceased in 1997, when the colleges acquired incorporated status. The Department considers that the removal of colleges from the Ombudsman's jurisdiction has denied complainants adequate means of redress, beyond the college's governing body or, in limited circumstances, the Department. In many cases, legal action may be the only possible recourse once the college's internal complaints procedures have been exhausted.

In terms of Higher Education too, the Department is supportive of the proposal to extend the Ombudsman's remit. This change would provide for a unified system for the adjudication of student complaints that is clearly more independent than the universities' existing arrangements. It would also align the complaints system in Northern Ireland with that which pertains in Higher Education in other UK jurisdictions

Yours sincerely,

**DR STEPHEN FARRY MLA**  
**Minister for Employment and Learning**



INVESTORS  
IN PEOPLE



# Correspondence with S King re Higher Education Ombudsman

Dear Mr King,

The Committee was briefed on this issue at its meeting last week by the President of the NUS-USI, a senior official from the NUS, the Vice President of the QUB Students' Union and the President of the UU Students' Union. The briefing included discussion on the work of the OIA. Members are now looking at the written evidence presented by the witnesses at last week's meeting. I understand that respondents to the Committee's consultation included CollegesNI and the University and Colleges Union.

As I indicated previously, the issue of extending the Ombudsman's jurisdiction to the FE and HE sectors is one of a range of issues that the Committee is considering as part of its proposals to legislate to reform the Office of the NI Ombudsman and therefore the legislation will only be complete when all the issues are resolved.

Perhaps it would be useful for us to meet and discuss this more fully. Let me know when would be convenient for you.

Regards,

Peter.

**Peter Hall:** Clerk to the Committee for the Office of the First Minister and deputy First Minister Northern Ireland Assembly | Room 245, Parliament Buildings, Ballymiscaw, Stormont, BT4 3XX  
email: [Peter.Hall@niassembly.gov.uk](mailto:Peter.Hall@niassembly.gov.uk) | tel: 028 905 20379 | mob: 07825141297

**From:** Sam King  
**Sent:** 15 November 2011 14:55  
**To:** Hall, Peter  
**Subject:** RE: Higher Education Ombudsman

Dear Mr Hall

I was wondering if there has been any progress regarding the Ombudsman. I would appreciate an answer to the questions I put in my last email:

"As to the consultation process, can you identify who the "umbrella stakeholder groups" are? Did they include the Student Unions at QUB and UU, for example?"  
Has any deadline been set to resolve this issue?

Yours sincerely

Sam King

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Subject: RE: Higher Education Ombudsman  
Date: Mon, 12 Sep 2011 14:49:20 +0100  
From: [Peter.Hall@niassembly.gov.uk](mailto:Peter.Hall@niassembly.gov.uk)  
To:

Dear Mr King,

I will put the correspondence below before the Committee and seek their views on the way forward.

Regards,

Peter.

**Peter Hall:** Clerk to the Committee for the Office of the First Minister and deputy First Minister  
Northern Ireland Assembly | Room 245, Parliament Buildings, Ballymiscaw, Stormont, BT4 3XX  
email: [Peter.Hall@niassembly.gov.uk](mailto:Peter.Hall@niassembly.gov.uk) | tel: 028 905 20379 | mob: 07825141297

**From:** Sam King  
**Sent:** 12 September 2011 14:07  
**To:** Hall, Peter  
**Subject:** RE: Higher Education Ombudsman

Dear Mr Hall

I do appreciate that the development of a Bill is not a straightforward process but it is nearly a year since the Assembly agreed to start the consultation process. It is also several years since DEL made the decision not to accept the offer of the Office of the Independent Adjudicator to extend its remit to NI. During that time higher education students in NI have not been afforded the same protection of independent oversight as all other students in the UK. Although it has not been handled as such this is a matter of urgency.

I am confused as to why there has never been a plan to create a specific HE Ombudsman. In Scotland, where the Office of the Independent Adjudicator does not operate, they have such an Ombudsman. The HE sector in NI encompasses thousands of students and both universities are multi-million pound businesses; it does not seem appropriate to fold oversight for this sector into what I can only imagine is already a busy office.

As to the consultation process, can you identify who the "umbrella stakeholder groups" are? Did they include the Student Unions at QUB and UU, for example? Given that there are serious consequences to a lack of governmental oversight, as I can attest to, it is extremely important that the position of students is taken into account.

I am aware that this issue has not received a great deal of attention as tuition fees have recently dominated the debate in the HE sector. However the problem of a lack of independent oversight will acquire a greater level of attention as more students are mistreated by universities which do not fear any challenge to their entrenched sense of authority.

Yours sincerely

Sam King

---

Subject: FW: Higher Education Ombudsman  
Date: Wed, 24 Aug 2011 18:04:23 +0100  
From: [Peter.Hall@niassembly.gov.uk](mailto:Peter.Hall@niassembly.gov.uk)  
To:  
CC: [Peter.Hall@niassembly.gov.uk](mailto:Peter.Hall@niassembly.gov.uk); [Keith.McBride@niassembly.gov.uk](mailto:Keith.McBride@niassembly.gov.uk)

Mr King,

As Sheila has indicated, I have replaced Cathie White as Clerk to the OFMdfM Committee.

Thank you for your email below regarding the consultation for the Reform of the Office of the NI Ombudsman Bill that the Committee is currently developing.

I am sure that you appreciate that the development of a Bill is not a straightforward process, nor one which would benefit from hasty decision-making. The Committee is currently considering whether the Ombudsman's jurisdiction would extend to the HE and FE sectors. I should highlight that there has never been a plan to create a specific HE Ombudsman; the Committee is instead looking at extending the current Assembly Ombudsman/Commissioner for Complaints jurisdiction to include HE, FE and a number of other sectors.

With regard to the Committee's consultation exercise for the Bill, I have indicated that the issues being considered by the Committee reach far beyond the HE sector and therefore it would not have been practical for the Committee to personally contact everyone to whom the consultation exercise would be relevant. Specific umbrella stakeholder groups were proactively contacted by the Committee and there is a possibility that further consultation will be undertaken on a variety of issues. Although the advertisement for the consultation in newspapers was for one day I should stress that this was due to the considerable costs involved. Details of the consultation were on the Committee's pages of the Assembly website for some time and were available for some time through popular social media channels.

However, I would be delighted to discuss the issues that you raise and bring them before the Committee.

I thank you again for your email and I look for to hearing from you.

Regards,

Peter.

**Peter Hall:** Clerk to the Committee for the Office of the First Minister and deputy First Minister  
Northern Ireland Assembly | Room 245, Parliament Buildings, Ballymiscaw, Stormont, BT4 3XX  
email: [Peter.Hall@niassembly.gov.uk](mailto:Peter.Hall@niassembly.gov.uk) | tel: 028 905 20379 | mob: 07825141297

**From:** Mawhinney, Sheila  
**Sent:** 24 August 2011 16:40  
**To:**  
**Cc:** White, Cathie; Hall, Peter; Devlin, Pauline  
**Subject:** FW: Higher Education Ombudsman

Sam

Your email has been automatically forwarded to me as Cathie is currently on annual leave.

Cathie has moved to the Committee for Employment and Learning, and Mr Peter Hall has taken over as the Clerk to the Committee for the First Minister and deputy First Minister. I have copied him into this email and he will respond to you in due course.

Regards

Sheila

**Sheila Mawhinney**  
Assistant Assembly Clerk  
Committee for Employment and Learning

**Northern Ireland Assembly**

**Tel:** (028) 9052 1653 Room 283 Parliament Buildings Ballymiscaw Stormont Belfast BT4 3XX

**From:** White, Cathie

**Sent:** 24 August 2011 15:18

**To:** Mawhinney, Sheila; Devlin, Pauline

**Subject:** FW: Higher Education Ombudsman

---

**From:** Sam King

**Sent:** Wednesday, August 24, 2011 3:17:17 PM

**To:** White, Cathie

**Subject:** RE: Higher Education Ombudsman

**Auto forwarded by a Rule**

Dear Cathie

It is very hard to believe that the Assembly regards one advert placed in 3 newspapers for just one day an adequate publication of any consultation exercise. Queen's issues every student with an email address and frequently emails every student at the university. I assume UU operates a similar system. It would have taken very little effort to email every student at Queen's to advertise the consultation exercise on this issue. This is an extremely important matter for every student in Northern Ireland and their input should have been regarded as vital to the consultation process.

Has the Assembly finally passed legislation to empower a Higher Education ombudsman? The 2011/12 university year is fast approaching and there is currently no independent oversight of university appeal/complaint procedures in Northern Ireland.

Yours sincerely

Sam King

---

**Subject:** Higher Education Ombudsman

**Date:** Thu, 10 Feb 2011 13:44:17 +0000

**From:** [Cathie.White@niassembly.gov.uk](mailto:Cathie.White@niassembly.gov.uk)

**To:**

Dear Sam,

Your query regarding a higher education ombudsman has been referred to me. The Committee for the Office of the First Minister and deputy First Minister discussed reviewing the ombudsman legislation at a number of meetings namely, 2 June, 23 June, 30 June, 27 July, 15 September and 22 September 2010. At the meeting of 22 September 2010 the Committee agreed to take forward a consultation on this matter and agreed a consultation document and to place a public notice in the Belfast Telegraph, the Irish News and the News letter, the notice appeared in these papers on 24 September 2010. The Committee agreed that the closing date for the consultation should be 17 December 2010. Details of the consultation and the consultation document were also placed on the Assembly website. The Committee has had a number of briefing sessions with the Ombudsman Dr Tom Frawley and are currently analysing the responses received to the consultation. If you look on the NI Assembly website you will be able to read the minutes of proceedings of these meetings and the record of discussion with the Ombudsman under the heading Minutes of Evidence. See link to Committee webpage

[http://www.niassembly.gov.uk/centre/2007mandate/centrehome\\_07.htm](http://www.niassembly.gov.uk/centre/2007mandate/centrehome_07.htm)

I hope this is helpful, if you require any further information please contact me.

Best Wishes

Cathie

---

# National Union of Students

National Union of Students Submission on NI Ombudsman

From: Adrienne Peltz [mailto:Adrienne.Peltz@nistudents.org]  
Sent: 07 October 2011 13:50  
To: Hall, Peter  
Subject: Northern Ireland Ombudsman

To whom it May Concern,

I am writing to you as the president of the National Union of Students for Northern Ireland on behalf of the students that I represent. In recent months during the consultation phase of the Northern Ireland Ombudsman reform, we have watched eagerly as the Committee has worked towards updating the legislation for the Northern Ireland Ombudsman's Office.

We feel that there is a shared agenda between Students Unions and the committee with regards to improving best practice in the complaints process for both Higher and Further Education in Northern Ireland.

NUS-USI recognises the outstanding quality of education that is on offer within our institutions in Northern Ireland and the world class learning opportunities students may avail of. However within this framework there exists a lack of standardised and independent complaints procedures that govern institutions. Our student body has passed policy to ensure that the establishment of an Independent adjudicating body is established, in order to represent students who have been failed by their institutions internal complaints mechanisms.

During the scoping phase of this review, I feel that it may perhaps be useful for the committee to hear the learner voice in relation to this very important area of academic quality control. I would therefore kindly ask if the committee would facilitate an evidence based presentation to be given by myself and other student representatives, on why a Northern Ireland Ombudsman for HE and FE is so vital for students today.

I look forward to hearing your response,

Best wishes,

Adrienne Peltz

Adrienne Peltz | President

NUS-USI

adrienne.peltz@nistudents.org | Tel: 07979 888289

Web: [www.nistudents.org](http://www.nistudents.org) | [www.nusconnect.org.uk](http://www.nusconnect.org.uk)

National Union of Students - Union of Students in Ireland (NUS-USI)

## University and College Union response



94 Malone Road  
Belfast BT9 5HP

**Telephone** 02890 665501  
**Fax** 02890 669225  
**Email** belfast@ucu.org.uk

95.11                      21 June 2011

Committee for the Office of First and Deputy First Minister  
Room 404  
Parliament Buildings  
Stormont  
Belfast BT4 3XX

Dear Sir/Madam

### **Proposals to update legislation to reform the office of the Northern Ireland Ombudsman**

I understand that the consultation period has ended however I request that this view on behalf of the University and College Union be considered by the Committee in taking forward any proposals for updating current legislation.

UCU has long campaigned for the role of the Northern Ireland Ombudsman to be extended to cover the further education sector. We seek that the legislation governing the role of the Ombudsman be modified to that effect.

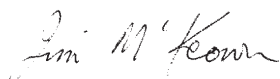
UCU has taken that position as a consequence of a number of serious situations involving what we believe to be mismanagement and mal-administration by senior management and Governing Bodies of a number of further education colleges since their incorporation in 1998. Reports into colleges such as the then Fermanagh College, the North Eastern Institute and others have convinced us that it is in the interests of transparency and good governance, that persons who have reasonable cause to believe that they have a complaint which falls under the category of mal-administration should have an opportunity to have their case referred for investigation by an independent external authority.

A previous Assembly had taken a decision that the role of the Ombudsman be extended to include the further education sector. UCU welcomed that decision and in subsequent years we have pressed for the extension of the Ombudsman's role to that effect with both direct rule ministers and with Sir Reg Empey when he was Minister for

Employment and Learning. Our position in those meetings had the support of both the Department of Employment and Learning and the then Association of Northern Ireland Colleges.

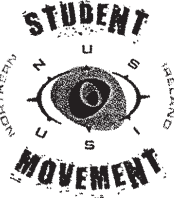
We believe there is a widespread consensus amongst stake-holders associated with the further education, that extending the role of the Ombudsman to cover the sector would be beneficial to those who use the sector as well and those who manage it and those who work within further education.

Yours sincerely

A handwritten signature in cursive script, reading "Jim McKeown".

Jim McKeown  
Regional Official

# Union of Students in Ireland National Union of Students Briefing Paper



Evidence presented to the Committee of the Office of the First Minister and Deputy First Minister: extension of the remit of the Northern Ireland Ombudsman to encompass institutions providing higher and further education

Adrianne Peltz, President, NUS-USI

Usman Ali, Vice-President (Higher Education), National Union of Students

Adam McGibbons, Queen's University Belfast Students' Union

Clair Flanagan, University of Ulster Students' Union

9 November 2011



### Executive summary

It is the view of student representatives that the extension of the remit of the Northern Ireland ombudsman to higher and further education would be highly desirable.

In order to evidence our position we discuss the following propositions:

- Students' right to recourse to independent judgement in educational complaints and appeals
- Prospective benefits to students, to higher and further education institutions and to the public
- Why the current system isn't working
- The student experience of complaints and appeals as evidenced by case studies
- Comparisons with the system in England, Wales and Scotland

We have taken the opportunity to make some recommendations about how we would hope to see the system developing in the future. The decisions of the ombudsman must be equally accountable to students and to institutions to ensure independence. Moreover the public must be assured that the ombudsman is carrying out his or remit effectively.

We therefore recommend the following:

1. The Northern Ireland ombudsman should report annually into cases of student complaints and appeals in higher and further education referred for adjudication.
2. The ombudsman should have the authority to make and enforce recommendations to institutions with respect to improvement of processes and redress for students, and to launch an investigation where there is evidence of significant failure process failure in the handling of student complaints.
3. Provision should be made within the system to ensure that students' unions and institutions are clear about the remit of the ombudsman and how s/he can support improvements to the advice and information offered to students.
4. The ombudsman should be properly resourced to carry out this work, particularly in the short term.

## **1. Introduction: representing the views of students in Northern Ireland**

a) NUS-USI is the representative body for over 200,000 students in further and higher education in Northern Ireland. NUS-USI was established in 1972 under a unique arrangement where both the British and Irish national students' unions – the National Union of Students and the Union of Students in Ireland respectively – jointly organised in Northern Ireland to promote unity across the sectarian divide.

It is the view of student representatives that the extension of the remit of the Northern Ireland Ombudsman to higher and further education would be highly desirable.

b) Policy currently held by NUS-USI:

*"Conference resolves: For NUS-USI to campaign against the Student Complaints' system here in NI & to lobby both the institutions & the assembly for parity with counterparts in England & Wales"*

Policy currently held by Queen's Students' Union Council:

*"This Council recognises the importance of reforming the current system of the Board of Visitors – the highest level of appeal open to students – and seeks to lobby the Department for Employment and Learning (DEL) to fundamentally review this system and bring parity with the rest of the United Kingdom to the students of Northern Ireland."*

## **2. The right of students to recourse to independent judgement**

NUS-USI believes that students in further and higher education have the right to independent adjudication in cases where they wish to bring a complaint against their institution or appeal a disciplinary decision.

Although institutions have their own – often effective – internal procedures, we believe that an independent ombudsman would provide that assurance to students and the public that on the one hand the systems are working as they should and on the other that where there is process failure or systemic failure, students have the right of recourse.

The current 'visitor' system is antiquated and any case does not apply in further education. We have reason to believe that in both higher and further education students cannot be fully assured of the independence from the institution of either visitors or boards of governors.

We note that under the incoming fees regime some students will pay more in fees. We also expect pressure to grow on existing places if Northern Irish students are deterred from study in the rest of the UK by the new higher education fee regime. These students have the right to expect an education of a similar quality to that delivered in the rest of the UK, with a similar level of assurance of their right to independent recourse in the case of an institutional failure.

We further note that the Office of the Independent Adjudicator for England and Wales (OIA) has observed that significant proportions of complaints referred to the OIA come from international student and postgraduate students (22 per cent and 32 per cent respectively in 2010). Given that these are the very students we would wish to attract and/or retain in the Northern Irish system it is important

that these students in particular are visibly well-served by the complaints and appeals systems.

If the Northern Ireland education system is to be internationally recognised as delivering a quality education and a fair, equal and positive student experience, extreme cases where students and institutions have been at loggerheads cannot be allowed to spiral out of control. Independent adjudication of complex complaints cases ensures that the system is perceived as transparent and fair, rather than a closed shop.

### 3. Benefits to students and to institutions

We further believe that if properly implemented an extension of the role of the Northern Ireland ombudsman to higher and further education would provide significant benefits to students and to institutions. We would sum up benefits as: good practice, efficiency, transparency and reputation.

**a) Good practice:** an independent ombudsman has the power to facilitate benchmarking within the sector of practices around complaints and appeals, identify and disseminate good practice and make recommendations for the elimination of bad practice. Visitors and boards of governors have only the knowledge of their own institutions, and are not in any case expert in complex academic matters.

**b) Efficiency:** complaints and appeals processes have the potential to drag on for months and years, seriously affecting not only the students' experience and wellbeing but tying up institutional resources in drawn-out negotiations. Having a mutually recognised point of independent adjudication can only benefit institutions obliged to tie up staff time and resources in handling complex cases.

**c) Transparency:** institutions whose complaints systems *and* the extent to which those system are implemented are open to scrutiny will automatically improve the level of transparency of the process or risk being investigated. In many cases this could lead to earlier and swifter resolution.

**d) Reputation:** institutions whose students do not feel they have had proper independent redress leave themselves open to highly public court cases or damning press commentary. This has a negative effect on the reputation of the institution and of the education system in Northern Ireland, as well as being prohibitively expensive for students and for institutions.

### 4. Why the current system is not working

#### a) Higher education

The visitor system in higher education does not deliver the level of assurance of independence that students would wish; in fact it has been scrapped in every other part of the UK.

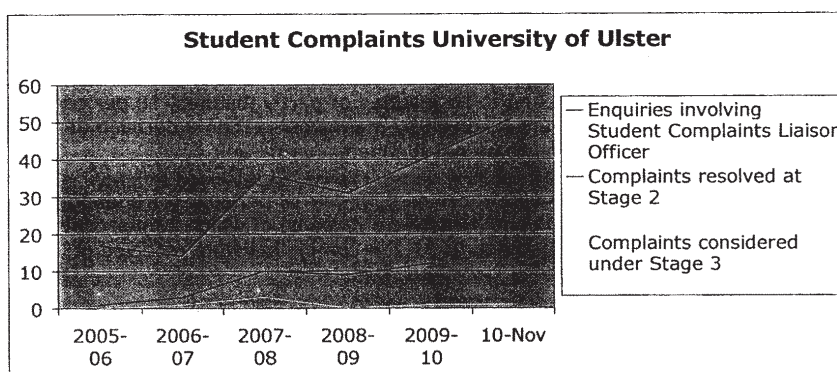
Evidence from student representatives in both the major higher education institutions in Northern Ireland suggest that while internal procedures are working adequately, the visitor system does not support this, and in some cases actively mitigates against proper transparency.

Queens Students' Union has found for example, that the university appears to maintain no single point of contact regarding the Board of Visitors and that there is very limited information available about how the Board of Visitors works. On a

practical level, cases cannot be heard until the whole Board is assembled, which is very difficult to achieve given the commitments of Board members. Decisions of the Board are not well-minuted and not easily accessible to the students' union.

Of most concern to us, of a mere 11 cases brought to the Board of Visitors in the last four years, not one was resolved in favour of the student.

There is some evidence to suggest that better information and a clear process leads to more student problems being uncovered. Data sourced by University of Ulster Students' Union suggests that complaints rise once students are made properly aware of the process. We would suggest that a well-publicised role for the Northern Ireland ombudsman could help to uncover problems or issues that are currently not being dealt with.



In 2006/07 a new complaints leaflet was introduced and publicised to students at the University of Ulster, which correlated with a more than 300 per cent rise in the numbers of complaints brought to the Student Complaints Liaison Officer.

Noticeably while the number of complaints brought to Stage 2 mirrors the Stage 1 trend, complaints brought to Stage 3 remain very low after an initial small spike. This suggests that the University of Ulster has been very successful in resolving complaints before these progress.

While what we appear to be seeing is evidence of good practice - and indeed, student officers observe that the system at University of Ulster is very responsive to the needs of students - without some independent investigation we cannot assured that good practice is occurring or indeed, learn from it.

#### b) Further education

We currently have the untenable situation where students studying A-levels in a school and those taking their A-levels in a college do not have equal recourse to an independent ombudsman.

This is particularly problematic given that students in further education are generally more likely to be vulnerable, disadvantaged or at risk of social exclusion than those in schools.

With the increasing numbers of students studying higher education qualifications in a further education college it is similarly important that these students have rights equal to that of their peers in higher education institutions.

In some cases the higher education course is accredited by a higher education institution outside Northern Ireland. In these cases there is a highly problematic lack of clarity about who is responsible for handling student complaints and appeals.

We will discuss specific cases in our oral presentation.

## **5. Comparisons with systems in England and Wales and in Scotland**

### **a) The Office of the Independent Adjudicator in England and Wales**

The OIA was created through the 2004 Higher Education Act in recognition of the increasing costs to students of undertaking higher education. In 2010 it received 2000 inquiries and 1341 complaints, a rise of 33 per cent since 2009. Of these complaints 20 per cent were found to be justified or partly justified, 18 per cent were not eligible, 9 per cent were resolved by means other than a decision of the OIA and 53 per cent were found to be not justified.

In 2009 over 1000 complaints were received of which 18 per cent were justified or partly justified. In 2008 900 complaints were received of which 23 per cent were justified or partly justified and in 2007 734 complaints were received of which 26 per cent were justified or partly justified.

These figures suggest that the existence of a well-publicised recourse for students leads to an increase in complaints, enabling issues to come to light where necessary. At the same time we see a slight decline in the numbers of justified or partially justified complaints, suggesting that internal institutional procedures have improved. Rob Behrens, the Independent Adjudicator has not been slow to point out the small number of cases where institutions are failing students by, for example, not following their own internal processes.

The OIA is well-thought-of by the higher education sector. In the Pathway Report published by the OIA in 2010 the following bodies supplied comments:

*'Our members feel that the OIA has an important role to play in safeguarding the student experience and protecting the reputation of the sector'*  
(Universities UK)

*'[The OIA] ensures a good level of fairness and transparency across the sector...there is little doubt that the sector-wide consistency and transparency of the OIA is a marked improvement, in most cases, on the Visitorial system'* (1994 Group)

*'The OIA is an outstanding model for dealing with complaint handling and safeguarding the individual students' rights vis-à-vis the HEIs within the European Higher Education Area.'* (Dr Josef Leidenfrost – Austrian Student Ombudsman and Convenor of the European Network of Ombudsmen in Higher Education)

In making our recommendations about the powers of the Northern Ireland ombudsman, we have sought to extract some of the best elements of the OIA system, in particular the scope to identify and disseminate best practice.



Currently there is no independent adjudication available to students studying in further education in England and Wales; this is something the National Union of Students would seek to see reversed in the near future.

#### b) The Scottish Public Services Ombudsman

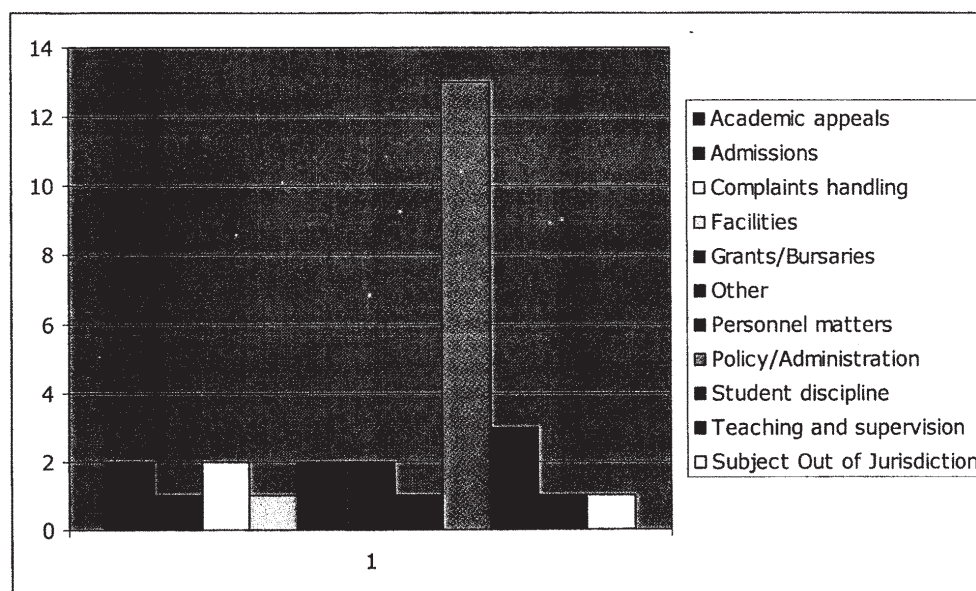
The Scottish Public Services Ombudsman's remit was extended to include both Further and Higher education, after a full consultation in the latter part of 2003 and was implemented in October 2005. The Scottish Ombudsman recognised that whilst student complaints were best resolved at a local level, this may not always be possible and easily achieved.

The Scottish Ombudsman also recognised the number of effective quality assurance mechanisms that were already in place within both Further and Higher Education institutions; however the new Ombudsman presented an opportunity for independent consideration of complaints which remained unresolved at local level when things had gone wrong for an individual student or other relevant person.

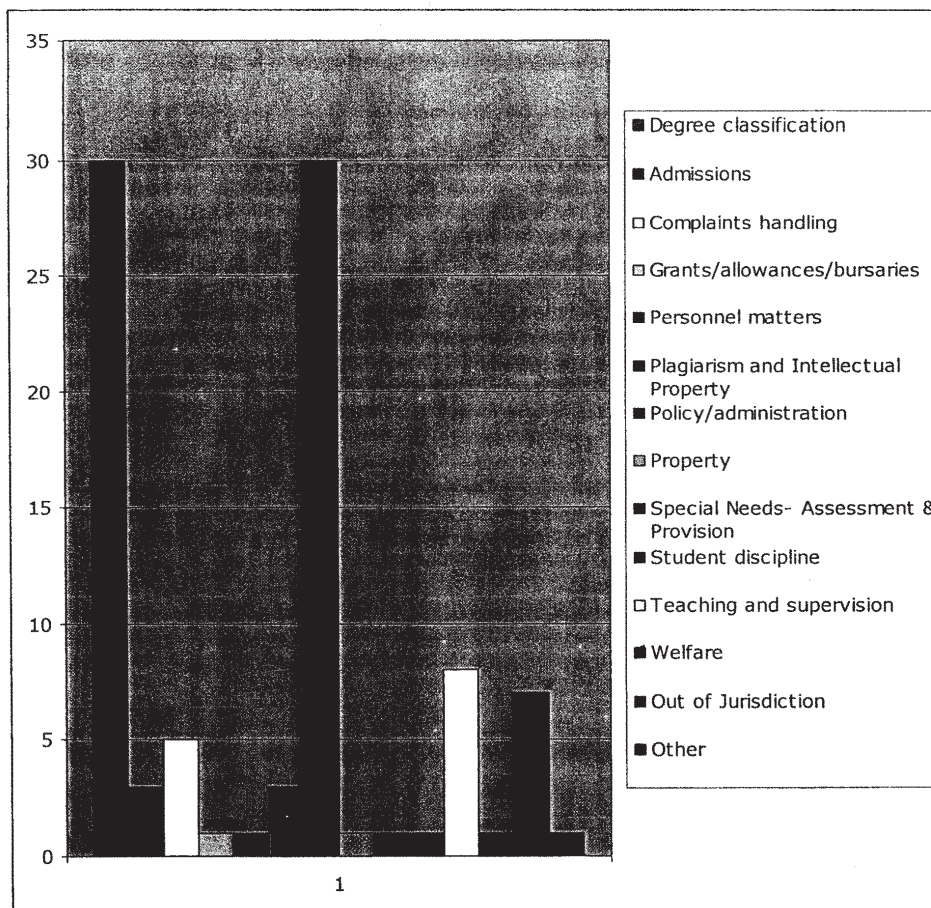
The changes to the Scottish Public Services Ombudsman has allowed for an independent, autonomous and publicly accountable adjudication system that offers a fair and reasonable process for all students, that is not biased by funding mechanisms, course level or institution.

The system has not only yielded successful outcomes for students, but has given institutions an extra dimension of trust and improved the learner experience. The scope and breadth of complaints dealt with by the Scottish Public Services Ombudsman in 2010-2011 can be seen in the tables below.

FE Complaints Handled by Scottish Ombudsman 2010-11



## HE Complaints Handled by Scottish Ombudsman 2010-11



## **6. Our recommendations for how the system should work**

### **a) The Northern Ireland ombudsman should report annually into cases of student complaints and appeals in higher and further education referred for adjudication**

The ombudsman should publish an annual report detailing the numbers of complaints handled in higher and further education. The report should detail any trends identified in type of complaints and note the composition of types of complaint and of student demographics bringing complaints. It should report on other activities of the ombudsman in relation to further and higher education such as advice given, recommendations made, and investigations launched, and the outcome of these.

Further to this, the report should comment on specific examples of good practice and make general recommendations for improvements to processes at institutional level, particularly in respect of the amount of time taken to process student complaints.

We further recommend that NUS-USI be invited to contribute a commentary to the annual report to include the student view of institutional and national complaints processes.

The report should be written in plain language and made available to the public.

Where the report generates questions from the public, from students, from institutions or from within government, the ombudsman should be required to answer questions from the committee of the Office of the First Minister and Deputy First Minister on the issue of complaints and appeals in higher and further education.

### **b) Powers of the ombudsman to make and enforce recommendations**

The ombudsman should be empowered to make enforceable recommendations to institutions that would enable the student to pick up where they left off before the complaint was made, such as allowing a student back on a specific course, or arranging for make-up exams and assessments.

The ombudsman should be able to indicate where both parties are at fault and work with the institution and the student(s) to resolve the problem in as mutually a satisfactory way as possible, rather than merely finding in favour of one party or the other.

Where the ombudsman takes the view that the student has suffered financially specifically due to a failure in the institutional process the ombudsman should be empowered to award financial compensation to the student.

The ombudsman should be empowered to make specific recommendations to institutions regarding improvements to their complaints processes and to set a reasonable timeframe for improvement. We would expect this in most cases to be no more than one year, except for the most extreme circumstances.

We recommend that, in order to ensure that institutions take the recommendations seriously, the ombudsman should be empowered to publish in his or her annual report instances where an institution has failed to comply with recommendations within the timescale specified.



Further to this the ombudsman should be empowered to launch an independent investigation where there is evidence of persistent and systemic institutional failure to handle student complaints and appeals in a transparent and timely manner, and to make recommendations as stated above.

**c) Processes that would support the ombudsman system to work effectively**

Students' unions should be enabled to initiate a visit by the ombudsman to their institution where there are specific concerns about procedures and processes for handling student complaints and appeals.

The limits of the remit of the ombudsman should be made clear, including a list of types of complaint s/he is and is not empowered to make judgement on.

Where a case falls outside the remit of the ombudsman but s/he believes there to be a public interest case for referral the ombudsman should be able to refer the case to other public bodies such as the Equality Commission Northern Ireland.

The ombudsman should be able to use his/her expertise to provide advice directly to institutions to enable them to improve their complaints and appeals procedures.

Where a complainant is no longer a student having left the course or graduated, and is thus ineligible to follow institutional complaints procedures, but seeks to bring a complaint, for example due to new information or other special circumstances, the ombudsman should be able to make an initial assessment of whether the complaint is potentially justified based on the circumstances of the case, the evidence presented and the amount of time elapsed, and to refer the case back to the institution if s/he feels that that the complaint has the potential to be justified if investigated.

The new system should come under review in three years from its initiation to ensure it is working as intended.

**d) Resourcing the ombudsman**

Due to systemic failure in the existing complaints resolution mechanism we anticipate that there could be an initial spike in casework for the ombudsman, which it will be important to resource in the short term.

We would also expect that a level of resource would be required to monitor the effectiveness of the new system and ensure it is well understood by students, institutions and the public.

We do, however, anticipate that in the longer term the system would represent excellent value by improving systems at institutional level to the extent that only the most complex cases would be referred to the ombudsman.

**7. Conclusions**

NUS-USI believes that the system of redress for students when they wish to complain about their institution or appeal against a disciplinary ruling is neither fair nor transparent. It does not support a high-quality student experience and it is not particularly in the best interests of institutions, who are vulnerable to

damaging litigation and/or trial by media as long as their systems appear to be closed.

We very much welcome initiatives to extend the role of the Northern Ireland ombudsman to higher and further education, and believe there are multiple benefits to be gained from such a move, including improved understanding and dissemination of good practice and the continued enhancement of practice in response to recommendations.

We have made a series of recommendations of how we feel the system could be made accessible to students. We look forward to continuing to work with the Office of the First Minister and Deputy First Minister to implement these in partnership with our institutions of higher and further education.

#### **8. Contacts**

Adrianne Peltz, President, NUS-USI | [Adrianne.Peltz@nistudents.org](mailto:Adrianne.Peltz@nistudents.org)

Mike Day, Director of Nations, NUS | [Mike.Day@nus-scotland.org.uk](mailto:Mike.Day@nus-scotland.org.uk)

## Committee to Ombudsman with further questions

The Committee for the Office of the First Minister  
and deputy First Minister

Committee Office Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

Tel: (028) 9052 1448

Fax: (028) 9052 1083

Committee.ofmdfm@niassembly.gov.uk

Date: 17 February 2011

Dr Tom Frawley CBE  
Office of the Northern Ireland Ombudsman  
33 Wellington Place  
Belfast  
BT1 6HN

Dear Tom,

At its meeting of 16 February 2011, the Committee considered a summary of the responses to the Committee's consultation on proposals to update legislation and reform the Office of the Northern Ireland Ombudsman. The Committee agreed to forward to you a number of questions. In order to further inform the Committee and progress this issue, the Committee would appreciate if you could respond to these questions by 24 February 2010. The list of questions is at Appendix 1.

The Committee would hope that you would be available to brief the Committee on the 2 or 9 March 2011, depending on the Committee's Work Programme.

Yours sincerely

A handwritten signature in black ink, appearing to read 'White', with a stylized flourish to the left.

Cathie White  
Clerk to the Committee

## Appendix 1

- A number of responses to the consultation highlighted the need for collaborative working and Memoranda's of Understanding. The Committee also had concerns (in relation to the Commissioner for Older People) on the possible overlap of investigatory bodies. How does the Ombudsman see this working in practice to ensure there is no duplication or overlap of investigations?
- In relation to systematic reviews, has there been an estimate as to how many of these would be undertaken? Have you made an estimation as to what, if any, additional resources would be required to undertake this work?
- What would be the triggers for systematic reviews and how will decisions on areas for investigation be taken?
- In relation to the power to provide guidance on good administrative practice, how would this work in real terms, would this advice be general to all bodies or made for specific bodies? Has there been estimation as to how often this would be used and of the resource implications? Would bodies be expected or required to take account of the guidance?
- In relation to the "design authority" role, what would the resource implications for this be? When would this role be taken on and used? In Scotland, what is a declaration of non-compliance and what are the penalties?
- In following the public pound, what are your views on the scope of this and what would be the resource implications of this power?
- In your response to Q12 and Q13, you mention that the Ombudsman should be able to have discretion in relation to the mode of submission and when to accept a complaint. How would this discretion work in practice?
- How would the Ombudsman clearly establish whether the "aggrieved representative" has the full consent of the complainant themselves to bring a complaint on their behalf?
- In your response to Q15 you state that this provision should not be included, could you expand on your reasons for this?
- In relation to Q19, give a definition/explanation of what "any action needed to resolve a complaint" means?
- Q27 sought views on compensation in County Court, could you expand on your thinking that this should not be included?
- The Committee received correspondence concerning comments you made during the briefing on 12 January 2011. You stated that "Scotland has had a review of all those offices and moved to a single ombudsman". Does this statement mean that the Children's Commissioner in Scotland has moved to the single ombudsman office?
- The Committee would also like you to respond to the Department's submission and specifically in relation to:
  - Statutory provisions to avoid duplication
  - Reviewing the effectiveness of legislation
  - Provision of conciliation services
  - Data collection and breakdown of complaints by category
  - Sharing of information with other investigatory bodies

# Ombudsman response to Committee's letter of 17 February 2011

## Proposed Responses to OFMDFM Committee Questions on Proposals to Update Legislation to Reform the Office of the Northern Ireland Ombudsman

### Introduction by the Northern Ireland Ombudsman

I have in this paper responded to the specific questions (numbered for ease of reference) raised by the OFMDFM Committee in their letter of the 17 February 2011. However, it may be helpful to their deliberations if I explain to the Committee the unique constitutional position of the ombudsman. Ombudsman is a Scandinavian word meaning an officer who has the duty of investigating and reporting on citizens complaints against government. He is not a court of appeal in that he cannot reverse a government decision. Along with the courts, the ombudsman can play a role in securing the accountability of all bodies in jurisdiction. In a number of countries the ombudsman's office is formally recognised in the constitution as an Officer of the Parliament. Indeed the party that will lead the next Dail in the Irish Oireachtas is committed to ensuring the role of the Ombudsman is formally written into the Irish constitution. In Northern Ireland the Ombudsman is one of three officers of the Assembly which also includes the Comptroller and Auditor General and the Examiner of Statutory Rules.

In other countries the ombudsman works with the legislature or Assembly to achieve Executive accountability but is independent of it in conducting investigations and in complaint resolutions. The central role of an ombudsman is to be independent in the investigation of complaints, and while the objective of the Office is to provide redress and, if appropriate, remedy where citizens feel aggrieved, he or she is not intended to be a citizen's advocate. The ombudsman's role is to ensure fair and impartial investigation of citizen's grievances thus ensuring good administration.

Administrative justice is concerned with the myriad of decisions and actions (or inactions) by public bodies that affect the daily lives of ordinary people. It is not simply about resolving complaints on the delivery of public services; it is also about seeking to promote good public administration. That latter role is not something that the courts or tribunals do, because they are concerned with determining whether the law has been broken. They do not seek to improve public administration but rather to rule on a particular case. The ombudsman determines whether or not maladministration has occurred and whether it has led to injustice. If injustice is established, the ombudsman can recommend a remedy that seeks to put the citizen back into the circumstance that would have existed if the injustice had not arisen.

The constitutional role of ombudsman differs from other oversight bodies such as a Commissioner whose purpose is to promote or protect fundamental rights. An ombudsman is autonomous and derives authority from statute. Moreover, an ombudsman reports to the legislative body, in this instance, the Northern Ireland Assembly. Given that his authority derives from the Assembly, he has been described as an 'agency of Parliament', helping to remedy grievances about administrative errors and as such is independent of Government (the Executive). The ombudsman through his relationship with the legislature demonstrates independence from all levels of publicly funded services and government departments. The need for independence and impartiality is fundamental. If those who investigate complaints are not independent of the organisations they investigate, a perception can arise that they are there to preserve the interests of the administration rather than establishing the facts of the case impartially. Independence thus promotes impartiality and provides a means of securing the trust and confidence of both those who complain and those who are complained against.

I welcome the continuing debate into the proposals to refresh the Ombudsman's legislation and am grateful to this Committee and all respondents and consultees for their input to date.

Signed:

A handwritten signature in black ink, appearing to read 'T Frawley', written in a cursive style.

**T Frawley**  
NI Ombudsman

## Formal Response to OFMDFM Committee Questions

- Q1. A number of responses to the consultation highlighted the need for collaborative working and Memoranda of Understanding. The Committee also had concerns (in relation to the Commissioner for Older People) on the possible overlap of investigatory bodies. How does the Ombudsman see this working in practice to ensure there is no duplication or overlap of investigations?**

The Northern Ireland Ombudsman (the Ombudsman) is committed to collaborative working practices with other bodies particularly where there are overlapping functions. Currently, the Ombudsman and Information Commissioner have power to share information in relation to cases falling within their respective jurisdictions. In addition under the legislation there is an express power for the Ombudsman to disclose information in the interests of the health or safety of any person. This power relates to the Ombudsman's jurisdiction in health and has already been exercised in relation to sharing information with the relevant regulatory body.

Should the Committee conclude that a more wide ranging power is appropriate then the Ombudsman considers that a provision equivalent to section 25 of the Public Services Ombudsman Act 2005 (PSOW Act) would allow the Ombudsman to enter into a wider range of collaborative working practices. This is for the purposes of deciding whether to begin, continue or discontinue an investigation but may also extend to anything relating to the subject of the complaint or investigation. Section 25 allows the Welsh Ombudsman to consult with a list of other Ombudsman and includes the Children's and Older Person's Commissioners in Wales as referred to by a number of the consultees.

In relation to the power to consult and collaborate with other bodies, the Ombudsman is aware of the existing working arrangements of the Welsh Ombudsman who operates under a Memorandum of Understanding with some of the listed bodies such as the Commissioner for Older People to ensure that this power operates effectively. The Ombudsman would also draw the Committee's attention to section 8(2) of the Commissioner for Older People Act (NI) 2011 which informs the investigatory powers of the Commissioner for Older people in relation to other statutory complaints systems in order to avoid duplication with the investigatory functions of bodies like the Ombudsman.

- Q2. In relation to Systemic Reviews, has there been an estimate as to how many of these would be undertaken? Have you made estimation as to what, if any, additional resources would be required to undertake this work?**

Like his counterpart Offices which already have this power, the Ombudsman if given this authority would intend to exercise it carefully and sparingly and only when the relevant indicators apply, for instance where a number of complaints have identified that some systemic weakness may exist. He would envisage between two and four such investigations a year.

The Ombudsman could decide as currently applies in any case as part of 'an investigation plan' the level of resources to be deployed in respect of a particular own initiative review. However, it is envisaged that no more than two officers would be deployed full time on the work at any time and this may firstly require some realignment of existing resources with the addition of one full time member of staff. Also, collaborative working with the Comptroller and Auditor General (C&AG) for example could allow staff from either office to be released to work on an agreed own initiative review. Where any such collaborative working was envisaged by the Assembly, then this would require a specific authority. Again, a power equivalent to section 25 of the PSOW Act would provide sufficient authority for any joint working. It is important to note that a power to collaborate on its own is not sufficient. That is because when gathering information it is essential that joint working is supported by an extra power to share information. There are a number of possible examples for this; for instance, section 25 of the PSOW Act and the Regulatory Reform Order 2007. The latter allows for collaboration between Parliamentary, Health Service, and Local Government Ombudsmen in relation to conducting an investigation jointly. The 2007 Order also allows specifically for information

sharing between these bodies. This is a further example of joint working which the Committee may wish to consider.

**Q3. What would be the triggers for systemic reviews and how will decisions on areas for investigation be taken?**

The Deloitte Review of the Ombudsman's office which informed the consultation process referred to 'a systemic review' power but there is some confusion over the use of this term as to what was envisaged by the Deloitte review. Was it in fact a power only to commence an investigation without first having a complaint about a particular action or practice of a public body? For clarification, the Ombudsman is seeking the power to conduct investigations on his own initiative and considers that as in section 4 of the Ombudsman (Ireland) Act 1980 any such power should be conferred on a discretionary basis. It is appropriate to take this approach, he believes, because 'maladministration' and 'injustice' are key terms in the Ombudsman legislation and are not defined so as to allow maximum flexibility in the interpretation and application of those terms. That is because standards in public service and citizen expectations of those standards change over time and importantly must be considered against the context of each individual complaint.

However the Ombudsman recognises that if an own initiative authority were conferred that he would need criteria or indicators in order to inform when to apply that power; recognising always that like any other body amenable to judicial review, the authority must be exercised reasonably. There may in his view be several possible triggers. Firstly, the Deloitte Review envisaged consultation between the Ombudsman and the C&AG in this regard so as to avoid duplication of effort and resources. It is also possible that the C&AG could as a result of an audit discover a systemic issue that could also result in the Ombudsman opening an own initiative investigation. If the Committee were to consider the adoption of the equivalent of section 25 power, the list of bodies to consult could include the C&AG for these purposes. A second possible trigger would be where concerns arise from a number of similar complaints disclosing poor administrative practice that is impacting citizens adversely. The Ombudsman could make a judgement that such a circumstance would warrant a wider systemic review. This could also arise where the weaknesses identified occur in day to day casework across a number of publicly funded bodies operating in the same sector of service provision. There may be other triggers such as a Committee of the Assembly asking the Ombudsman to consider using his discretion to conduct a systemic review where they have discovered a poor administrative practice through their work

In any event, it is important that any ombudsman report on a systemic investigation be laid before the Assembly so that the ombudsman is available to respond and report to the relevant committee both on the reasons for exercising his discretion to commence an own initiative investigation and on the outcome of the investigation.

**Q4. In relation to the power to provide guidance on good administrative practice, how would this work in real terms, would this advice be general to all bodies or made for specific bodies?**

From his experience in investigating complaints of maladministration involving the whole spectrum of public bodies the Ombudsman considers that a general power to issue statutory guidance on good administrative practice to 'one or more public bodies' as provided for in section 31 of the Public Services Ombudsman (Wales) Act 2005 would be appropriate and proportionate. This power is sufficiently flexible to allow the Ombudsman to issue guidance to a single body or a specific sector or indeed to all public bodies in jurisdiction. In Wales for instance, this power has been used to provide guidance to local authorities on complaints handling. This power should be discretionary to allow the Ombudsman to issue guidance as he thinks appropriate and should relate to administrative practice as it applies in a particular sector or at a particular time.



**Q4 contd.****Has there been estimation as to how often this would be used and of the resource implications?**

There are two possible cost categories, staff costs and non-staff costs. The question arises as to whether additional staff costs would be required for drafting and validation of any proposed guidance. The Ombudsman considers this process should be dealt with in-house without additional resource. For example in 2009 guidance on Effective Complaints Handling for all bodies in jurisdiction was issued by the Ombudsman without additional staff costs. That guidance was non-statutory but was proved to be useful to bodies developing new or revising existing complaints handling schemes. Currently the Ombudsman's staff are preparing 'A Guide to Making an Apology' again without additional staff resource. It is not anticipated that this power to issue guidance would be used more than once or twice annually. The Welsh experience of the section 31 power has been that no additional staff costs were incurred in the production of the local authority guidance.

The non-staff costs arising from this proposed power would also involve the communication, dissemination and publication costs of the guidance that is developed. For example, in 2009 the cost of publishing the Ombudsman's general guide on Effective Complaints Handling was £1176 for 500 copies. All graphics and design work were undertaken by the Ombudsman's staff at no extra cost. Ombudsman's staff have been invited on an ad hoc basis to give formal presentations to bodies in jurisdiction on this guide.

It may be useful for the Committee also to consider the Scottish approach which differs from our Welsh colleagues. The experience of communication and training in good complaints handling in Scotland has evidenced the need for a Corporate Services Director within the SPSO's office, with a broad communication and training brief including a responsibility for a single officer to operate as a training co-ordinator. In addition some investigating officers in the SPSO's Office have had presentational skills training to allow them to conduct training/outreach activities. If the Committee were to consider this to be the preferred approach to dissemination of good practice guidance, it is anticipated that Northern Ireland might require a similar arrangement funded from within existing resources at Director level but a need for one officer to act as a co-ordinator. This resource estimation is time sensitive as the Ombudsman is mindful of the extension of his jurisdiction as a result of the devolution of justice and the growing caseload in that area. Importantly, also as responsibilities are reorganised and realigned, staff with skills and expertise in communication and presentation from other areas could be redeployed.

**Q4 contd.****Would bodies be expected or required to take account of the guidance?**

To date the guidance issued by the Ombudsman is non-statutory and bodies are not required to follow the guidance or to have regard to it. In the Ombudsman's analysis of the responses to the consultation process, he has referred to the provisions of the Welsh legislation as in his view it offers an appropriate model for issuing guidance in Northern Ireland. By virtue of section 31(3) of the PSOW Act 2005 public bodies in Wales 'must have regard to' any statutory guidance issued under that provision which is applicable to them. Further by virtue of section 31(4) of the PSOW Act the Ombudsman in any investigation may have regard to the extent to which an authority has complied with any guidance. Failure to do so could be considered maladministration by the Welsh Ombudsman.

Some of the consultees referred to the need for Ombudsman guidance to be equivalent to the status of the Codes of Practice issued by the Equality Commission for Northern Ireland (ECNI). It should be remembered that ECNI Codes of Practice must be laid before the NI Assembly. They outline the legal responsibilities of employers and other bodies. The Codes also set standards of conduct based on equality legislation although they are not mandatory.

The ECNI Codes of Practice are not binding on employers or other bodies covered by equality legislation to the extent that a breach of their provisions amount to a breach of the law. However, when a complaint of discrimination is brought to an Industrial Tribunal, the Tribunal or an appellate court may take account of any recommendation contained in the Codes when determining whether discrimination has occurred. There are other models of statutory codes of practice that are admissible in legal proceedings and must be taken into account by a court or tribunal. One such example is the Labour Relations Agency Code of Practice on Disciplinary and Grievance Procedures which can be admitted in any evidence before an Industrial Tribunal or Industrial Court and if any of its provisions appear to be relevant it shall be taken into account.

A number of questions arise: should the Ombudsman guidance be laid before the NI Assembly; should guidance be admissible in evidence in any legal proceedings as is the case with LRA and ECNI Codes of Practice? The Ombudsman notes that the provisions of section 31 of the PSOW Act do not confer such status in respect of the Welsh Ombudsman guidance. The Ombudsman considers that the duty on bodies to 'have regard to' any guidance on good administrative practice is an important aspect of the proposed legislation and that this is sufficient to ensure good administrative practice is adopted where appropriate by public bodies. The Ombudsman would welcome a similar requirement and also a provision that he could consider any failure to follow that guidance when investigating a complaint as maladministration.

Ultimately, this is a matter for the Committee and there are competing views. That is because a finding of maladministration is not always equivalent to a breach of the law, unlike discrimination which is a statutory tort.

**Q5. In relation to the 'design authority' role, what would the resource implications for this be? When would this role be taken on and used? In Scotland, what is a declaration of non-compliance and what are the penalties?**

There are two possible approaches to the design authority role. The Welsh approach has been led by a Welsh Assembly Government group which was established in order to develop a single model complaints handling scheme for all sectors. This has now been agreed by the First Minister and will be implemented from 1 April 2011 (Appendix 1). By virtue of the reduction in the number of stages, the assumption is that costs to public sector bodies will be reduced over time. As regards resource implications this approach involved the Welsh Ombudsman and one of his Directors attending the group and required no additional resources. The status of the proposed model complaints handling scheme is yet to be decided.

The Scottish approach was based on the amendments by the Public Services Reform (Scotland) Act 2010 as recommended by the Crerar Review<sup>1</sup> (September 2007) to the Public Services Ombudsman (Scotland) Act 2002 and greatly differs from Wales. It will be implemented through a phased approach involving an action plan over a three year timescale. The SPSO was required to produce, after consultation, a Statement of Principles on Complaints Handling which was then approved in resolution of the Parliament. These principles underpin a sectoral based approach to a simplified two-stage complaints handling system. The headline non-staff costs of consultation on the Principles were approximately £50K. The staff costs of a Manager, Project Officer and Project Support Officer for a three year implementation period to support the implementation of the new system are estimated at £335 K.

It is difficult to estimate the resources that would be required in Northern Ireland as much depends on the model favoured by the Committee but an estimated figure of £50k for an equivalent of the Welsh model and £120k for an equivalent of the Scottish model offer a projected estimate for Northern Ireland. A decision to include a design authority role in

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1 ISBN: 978-0-7559-5362-2 (see chapter 11 para 11.20)

the legislation could provide for its implementation on a phased basis and introduced as resources permit.

One of the Committee's questions relate to the impact of declarations of non-compliance. The Scottish Ombudsman has power to issue a declaration of non-compliance when a listed body fails to put in place an SPSO approved model complaints handling scheme. There is no penalty in the SPSO legislation for failure to comply with such a declaration but it is envisaged that the Scottish Ombudsman could make a special report to the Parliament and also that he could make a finding of maladministration in relation to the body that has failed to comply with the model scheme.

**Q6. In following the public pound, what are your views on the scope of this and what would be the resource implications**

The Deloitte Review envisaged that the Ombudsman should have jurisdiction over all organisations substantially funded from public monies unless they are explicitly excluded and that OFMDFM should provide a gatekeeper role in relation to maintaining an up to date list of bodies in jurisdiction. This reflects the general principle that bodies in receipt of public monies should be accountable for their actions in other words 'following the public pound'. For instance, Housing Associations receive public funds to undertake their core purposes of meeting social housing functions. However these bodies are not entirely publicly funded, and have been within the jurisdiction of the Ombudsman since 1 April 2004 as recommended by the Deloitte Review.

The Assembly has two independent officers who examine the performance of government departments and public bodies which deliver services to the public and report to the Assembly. Those officers are the C&AG and the Ombudsman in the latter's dual role of Assembly Ombudsman and NI Commissioner for Complaints. The Deloitte Review identified that a divergence had developed between the range of bodies which can be scrutinised by the C&AG and those that can be examined by the Ombudsman. Deloitte therefore recommended that the bodies listed in paragraph 4.6 of the Committee's consultation document which are already in the jurisdiction of the C&AG should be brought within the Ombudsman's jurisdiction.

The Committee should note that currently the Ombudsman does have jurisdiction over some education authorities which include the Education and Library Boards as well as the Department of Education and the Department of Education and Learning. The list at paragraph 4.6 of the consultation document does include the additional education bodies such as Universities and Colleges of Further and Higher Education should come within the Ombudsman's jurisdiction. That is because currently they are not within the jurisdiction of the Office of Independent Adjudicator for Further and Higher Education. In Scotland, these establishments are in the jurisdiction of the Scottish Public Services Ombudsman (SPSO). In Northern Ireland, by contrast, educational institutions, although in receipt of public funds, are not accountable in respect of their administrative actions to an ombudsman or similar oversight authority.

Deloitte referred to 'substantial' public funding as the litmus test for inclusion in the Ombudsman's jurisdiction. The appropriate test is a matter for the Assembly and I note the Committee's concerns that a lower threshold might extend Ombudsman accountability to voluntary sector bodies in receipt of grants or minimal funding. One possible alternative, and more easily measured test, is that set out in section 29(3)(c) of the PSOW Act which states that a body falls within jurisdiction '*if at least half of its expenditure on the discharge of its functions*' is met from public funds.

The resource implications for the Ombudsman of such an adjustment cannot be quantified until real time insight is gained through the number of complaints received. However Deloitte also recommended removing access to the Ombudsman for public servants in relation to personnel matters, which is additional to the normal statutory rights of individuals outside

the public sector. If this recommendation (supported by the majority of consultees) was implemented, some capacity would be created within the Ombudsman's office to deal with cases which may arise from the 'following the public pound' recommendation until a detailed assessment of the revised workload can be completed.

**Q7. In your response to Q12 and Q13, you mention that the Ombudsman should be able to have discretion in relation to the mode of submission and when to accept a complaint. How would this discretion work in practice?**

From the experience of staff dealing with complaints, the Ombudsman considers there is a need to retain discretion in relation to the mode of submission because some people have literacy difficulties and many complainants have difficulties in expressing themselves in relation to their complaint. At present there is a requirement that a complaint be submitted in writing, however the Ombudsman is flexible and accepts telephone complaints that are followed up by face to face interviews with investigating officers to enable the facts of the complaint to be established. A written record of the specifics of the complaint can be agreed by the Ombudsman and the complainant but care needs to be taken to ensure that there is no 'leading' on the issues. Investigating officers are trained in relation to inquisitorial methods and therefore complaints can be recorded impartially.

There is a need to establish the principle of accessibility and to recognise the differing needs and literacy of complainants. The Ombudsman would always work (as he does now) to ensure maximum accessibility to the service his office offers and therefore to exercise discretion in relation to the manner in which a complainant may complain to the office.

**Q8. How would the Ombudsman clearly establish whether the 'aggrieved representative' has the full consent of the complainant themselves to bring a complaint on their behalf?**

This needs to be considered on a case by case basis having regard to the particular circumstances of the complaint. For instance, where a family member has died their personal representative can make a complaint on their behalf. The Ombudsman may seek proof of the representative's status before accepting a complaint. Existing Ombudsman legislation also allows persons to make a complaint on behalf of the person aggrieved if for any reason that person is 'unable to act' for himself. There are a wide range of circumstances where a person other than the person aggrieved may be 'unable' to make a complaint for example, arising from mental health or long term hospitalisation. In some cases the written proof from the 'person aggrieved' representative is sufficient to establish this criteria, particularly where that representative's status can be independently verified, for example, where the representative is the complainant's solicitor or guardian ad litem or acting under a power of attorney.

**Q9. In your response to Q15 you state that this provision should not be included, could you expand on your reasons for this?**

This provision allows for bodies in the health and social care jurisdiction to refer a complaint made to that body that a person has sustained an injustice as a result of maladministration<sup>2</sup>. This provision, introduced in 1997, has not been used by a health and social services body to date. Therefore the Ombudsman is content that it should be removed because it does not recognise the primary role of the Ombudsman which is to allow complainants who have exhausted the complaints procedures of the relevant bodies to have their complaints as service users investigated.

**Q10. In relation to Q19, give a definition/explanation of what 'any action needed to resolve a complaint' means?**

The Ombudsman recognises the essential need to have flexibility in relation to complaints resolution and therefore needs a wide range of options to ensure the optimum use of his

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2 Article 10(A) of the Commissioner for Complaints (Northern Ireland) Order 1996 as inserted by Article 5 of the Commissioner for Complaints (Amendment) (Northern Ireland) 1997

finite investigative resources. It is essential therefore that he has a discretion to decide in any case what an appropriate mode of resolution would be, such as, for example, mediation. The Ombudsman considers that the provisions of section 3 of PSOW Act best provide for this.

**Q11. Q27 sought views on compensation in County Court, could you expand on your thinking that this should not be included?**

This mechanism is only available to complainants who have had their complaint investigated under the Commissioner for Complaints (NI) Order 1996 which includes complaints about health, local government and housing bodies. It is not available to those complaining about departments or their agencies under the Ombudsman (NI) Order 1996. As noted in the consultation document, it has not been used in 26 years and when used was almost exclusively in respect of employment cases. There are now alternative means of dealing with such cases i.e. the Industrial and Fair Employment Tribunal. The appropriate way to secure compliance with an Ombudsman's recommendations for remedying injustice caused by maladministration should, in the Ombudsman's view, be the use of a special report to the Assembly as described by the former Ombudsman, Mrs Jill McIvor, in her submission to the Committee. It should be remembered that the Ombudsman's effectiveness derives *entirely from his power to focus public and parliamentary attention*<sup>3</sup> on citizens complaints and not on formal enforcement mechanisms.

The county court mechanism is not available in relation to complaints about government departments under the Ombudsman (NI) Order 1996. Therefore, in merging into a single office as proposed by the consultation document the question arises as to consistency of approach in relation to dealing with non compliance non-compliance with Ombudsman recommendations. Also there is an equality of arms issue because such a provision allows a complainant a legal mechanism that does not fit with the classical Ombudsman model and is only available to those who can afford to pursue litigation in the County Court.

**Q12. The Committee received correspondence concerning comments you made during the briefing on 12 January 2011. You stated that 'Scotland has had a review of all those offices and moved to a single Ombudsman'. Does this statement mean that the Children's Commissioner in Scotland has moved to the single Ombudsman office?**

It would be prudent here rather than to seek to repeat the changes in jurisdiction to the Scottish Public Services Ombudsman effected as a result of the Crerar Review to refer to the detailed written response to the OFMDFM Committee's consultation, helpfully provided by the Scottish Public Services Ombudsman on the extensions and proposed extensions to his jurisdiction. The Ombudsman's offices merged in Scotland dealt with departments and bodies of the Scottish government, local government, NHS (Scotland) and social housing. More recently, prisoner complaints have been transferred to SPSO. No reference is made there to the Children's Commissioner in Scotland who is not an Ombudsman.

**Q13. The Committee would also like you to respond to the Department's submission and specifically in relation to:**

- **Statutory provisions to avoid duplication** - The Ombudsman's response is outlined in his response to Q1 above.
- **Reviewing the effectiveness of legislation** - There is some confusion here between the role of an Ombudsman whose primary function is to impartially resolve complaints of maladministration and a Commissioner role which is broader and includes additional functions such as advocacy, regulatory and good practice in a particular area such as Equality or Human Rights. The legislation creating such bodies may properly include a specific provision to 'review the effectiveness of the relevant legislation. An ombudsman is not an advocate or promoter of fundamental rights, his role is that of an independent



officer of the Parliament who investigates citizens complaints against governmental bodies.

However the Ombudsman does consider it good practice for the Assembly to review the effectiveness of any new legislation and a five year period for the review of any new ombudsman legislation might be appropriate. The Ombudsman has no fixed views as to whether this review of his legislation by the Assembly should be provided for in any new legislation.

- **Provision of conciliation services** – Under the Commissioner for Complaints (NI) Order 1996, the Ombudsman is required to 'effect a settlement' of any complaint of maladministration alleged. The Notes on Clauses relating to this legislation refer to this provision as providing for 'conciliation'. There are other bodies whose primary function in specific areas is to provide conciliation services i.e. Labour Relations Agency in the employment field. Their existence should not inhibit an Ombudsman's ability to rely on a provision such as section 3 of the PSOW Act to seek to explore other methods for resolving a dispute between the citizen and a government department or public body, other than a full investigation (which is resource intensive).
- **Data collection and breakdown of complaints by category** - The Ombudsman provides a universal service to complainants regardless of circumstance and is not currently required or empowered by legislation [he is not a section 75 body] to collect sensitive and personal information such as gender, disability or age. It is his understanding that other Ombudsmen do collect such information. For instance, SPSO collect this information when a complaint is first made to that office. The Welsh Ombudsman collects the information in an anonymised form through a survey when the complaint is concluded. That Office uses the data solely to inform 'outreach' activity. This is currently not the Ombudsman's practice. The Ombudsman considers that unless 'required' to do so he would be acting unlawfully in collecting personal information which is not anonymised. However, the NI Ombudsman has, since 2009, utilised the Omnibus survey as an anonymised information service to inform his outreach strategy and does not consider it necessary to collect specific data on complainants directly for these purposes.
- **Sharing of information with other investigatory bodies** - The ability of the Ombudsman to share information has been dealt with at the response to Q2 above and in the paper presented to the Committee on 12 January 2011. The Ombudsman is happy to expand on this area in any questions but a power to share information must be based on a legitimate purpose and support other functions such as investigation, consultation and collaborative working as suggested above.

2 March 2011

# Appendix 1 Complaints System Wales

## Appendix 1

### A common complaints system for public services in Wales

#### 1. Background

- 1.1 The Welsh Assembly Government's vision for improving public services in Wales is well documented: in its Making the Connections (October 2004); and the subsequent Making the Connection - Delivering Beyond Boundaries (November 2006), and the Making the Connections – Building Customer Service (March 2007). This latter document in particular, sets out a policy framework for driving forward the improvements the Welsh Assembly Government wants to see in customer service. Amongst its core principles is one on Redress, which states:

*“Citizens will find it easy to complain and get things put right when the service they receive is not good enough.”*

- 1.2 The Living in Wales survey (2006) revealed that service users who reported making a formal complaint about public services were just the ‘tip of the iceberg’ of those who wanted to complain. Amongst the reasons people gave for not complaining were:

- they did not feel that it would do any good
- didn't know to whom or where to complain
- could not be bothered
- too bureaucratic/too time consuming
- complained before and it did not do any good.

Furthermore, amongst those who did complain, many stated that they were either fairly or very dissatisfied with the way their complaint was handled.

- 1.3 Whilst the Welsh Assembly Government had already recognised the importance of complaints systems and redress in the improvement of public services, Ministers expressed a wish to take further steps to make the process of complaining easier for people in Wales.

#### 2. Current Position

- 2.1 It is clear from the complaints received by the Public Services Ombudsman for Wales, that there is currently a plethora of complaints systems and procedures within and amongst public bodies in Wales – even within the same sectors. Even the statutory complaints procedures laid down by the Welsh Assembly Government (for the National Health Service and Social Services) vary.
- 2.2 One of the main frustrations for complainants is multi-stage complaints processes, where they are moved on from stage to stage to stage without achieving closure. Bureaucratic processes and procedures can mean a long drawn out complaints process, with delays in decisions; this in itself can be unfair to complainants. The act of complaining can be quite stressful enough without the complaints process itself adding to that stress (notwithstanding the fact that the complainant may have been experiencing distressing circumstances outside of the actual issue of the complaint itself).
- 2.3 The position is compounded for those who essentially have one complaint, but which spans more than one service. They invariably have to negotiate separate complaints systems, each with a variation in the number of stages, timescales and appeals procedures involved. This can be particularly confusing and exasperating for the complainant.

- 2.4 In part, these issues have been recognised by the Welsh Assembly Government in developing two initiatives, the proposed new redress process within the NHS and the complaints signposting project. Each of these is intended to target one shortcoming of the current process.
- 2.5 The NHS redress measure is designed to streamline the current NHS complaint process and make it more accessible to service users and their advocates. Although the proposals are not yet finalised, it is expected to move to a three stage process, involving local resolution, a formal internal process and a single external investigation, probably by the Ombudsman. This approach is one which would seem to offer a model for all devolved public services in Wales.
- 2.6 With regard to the complaints signposting project, following an options appraisal and feasibility study, the Assembly Government arrived at the view that the Public Services Ombudsman for Wales (PSOW) would be well placed to provide the type of signposting service sought. Following discussions with the Ombudsman it has now been agreed that the PSOW take this on board and develop such a service. It is envisaged that this will be an enhanced and expanded service of the first contact service that the Ombudsman intends introducing into his office in the autumn of 2009. However, this will be subject to the PSOW securing for next year the necessary additional public finance required to enable the set up and delivery of an efficient and effective signposting service.
- 2.7 Both of these initiatives could form part of the proposed comprehensive approach.

### **3. Advantages of a common, streamlined system**

- 3.1 The lack of uniformity among public service complaints procedures serves no-one's purpose. As confirmed by separate work undertaken by the Welsh Assembly Government's Citizens First Wales unit, public bodies acknowledge that complaints arrangements have built up over long periods, largely in separated way, often specific to one policy sector or service.
- 3.2 The fact that there are many types of public service providers – some being enormous institutions; others very small entities – should not be an obstacle to achieving a common complaints handling system.
- 3.3 Simplicity and a non bureaucratic approach is the key to successful complaint handling, with staff being suitably empowered to resolve complaints. Emphasis must be on achieving a satisfactory outcome for the complainant; focus should not be on the complaints procedure itself. Furthermore, the information that can be generated through common complaints handling processes can provide vital feedback and learning for service providers which can help inform service improvement.
- 3.4 A common, streamlined system should be to everyone's advantage for reasons which include:

#### **For the complainant:**

- It will make it clear at the outset how they can complain and what will happen to their complaint
- A streamlined process will be less frustrating and result in the complainant obtaining a quicker 'final' response to their complaint from the public body concerned
- It will make it easier for them to present a complaint about more than one service and have that complaint dealt with in a cohesive and synchronised manner

#### **For public bodies:**

- When complaints are handled badly, the public's confidence and trust in public services are eroded. It, therefore, follows that good complaints handling can enhance the image of a public body and may even turn critics into admirers
- If a complaint is not resolved by front line staff, a streamlined complaints process will enable a more focussed 'do it once, do it right' investigation.



- Such a streamlined process will also release staff resource, as a less bureaucratic approach will ultimately mean tying up less staff time (of those involved in the investigation of a complaint and those the subject of a complaint).
- A common system will enable public bodies to more easily deal with complaints that span more than one public service.

**For public service staff:**

- Front line staff and those involved in the consideration of complaints will themselves be clearer about the process and of what is expected of them.
- It will remove uncertainty about any differences in procedure when staff move from one area of the public service to another
- Being the subject of a complaint can be stressful for the staff concerned; quicker outcomes to investigations are invariably welcomed by such staff

**For the Welsh Assembly Government:**

- It would be consistent with the Welsh Assembly Government's aim of providing a citizen centred public service in Wales
- It would enable the Welsh Assembly Government to obtain an all-Wales picture of areas of complaint – and in certain circumstances identify lessons to be learnt that could be applied across all public services
- It would enable provision of training suitable for all complaints handlers within public bodies in Wales, developing greater expertise and reducing costs. (Public Services Management Wales could offer a suitable training course for public service complaints managers.).

#### **4. The proposal**

- 4.1 A standardised complaints form: This would gather basic data about the complainant, the service and the matter complained about. Variations would only be introduced where they can demonstrably add value. This would ensure that information is gathered once, and can be then used many times, for example when a complaint involves more than one public body, or when the complaint is escalated to the Ombudsman where a local resolution is not received. The standard form would also facilitate on-line solutions.
- 4.2 Local resolution: This is almost universally practiced now, albeit is currently understood differently in different service areas. In the context of this paper, local resolution describes an informal engagement at the point of service delivery to seek to resolve complaints either at the point at which concern arrives or very shortly thereafter. This definition is different to that currently used within the health service. With a standard process the number of complaints which are resolved at the point of service delivery should grow, with improved training, and enhanced delegation to enable frontline staff and their managers to deal effectively with concerns.
- 4.3 Internal investigation: The development of standard processes will enable consistent practice but also allow for a single investigation to manage multi-agency complaints. This happens currently when complaints come to the Ombudsman, but is atypical at the local investigation stage, where multiple complaints often progress in parallel. Standard systems will allow for better training and the more ready exchange of information between agencies.
- 4.4 External investigation: Currently, there are many complaints processes which include a further stage before referral to the Ombudsman. This rarely if ever adds value, can be bypassed as complainants can bring their case to the Ombudsman in any event, and can prolong the process by delaying, often considerably, the ultimate outcome. This can also make resolution more difficult as positions become entrenched and the facts become less well

remembered. A single, earlier process will reduce the overall cost, and streamline the system for complainants.

- 4.5 Alternative dispute resolution: In many instances, complaints are actually about policy or the legal position, and not about maladministration or service failure. In these , and in quite a few cases where there has been a failing, arbitration, mediation and other alternative dispute resolution mechanisms can help to find more acceptable outcomes, and should form an integral part of any new system. They can be invoked at any stage of the process, although clearly, an early involvement is more likely to prove effective.
- 4.6 Advocacy: Discussions on the new redress measures in the NHS have already identified advocacy as being central to ensuring a level playing field for all. Any new process should be accessible to disadvantaged and vulnerable service users who are far less likely to be able to use the legal system to resolve their concerns. Within the health service, the principle is well established with an important role being played by CHC's. Elsewhere, the situation is patchy at best and a more just system will need to ensure that advocacy arrangements for vulnerable individuals are consistently available across Wales
- 4.7 Variation: One size will not fit all, and this paper is not arguing for an approach which is so homogenised as to meet no-one's particular needs. Rather, variations should be included only where they add value.
- 4.8 Networks: One key advantage of a common system will be the increasing scope for networking amongst complaints handlers. A systematic approach to bringing people together will help to spread best practice both within service delivery and within complaints handling. The facilitation of this interaction is a role which might be allocated to the Ombudsman.

## **5. The Way Forward - Developing a Model**

- 5.1 Consideration needs to be given to the form that the common complaints process should take. It is suggested that this could be developed along the lines of a model code of practice analogous to the model Code of Conduct for Councillors which is adopted by every council in Wales. This would be compulsory and whilst there could be scope for variation, in practice this would be discouraged. In the complaints arena, only enhancements which represent substantial added value would be contemplated. In general, this could be introduced using the existing powers of the Welsh Assembly Government and the Public Services Ombudsman for Wales.

## Appendix 1a Wales Model Complaints

### **Complaints Wales Group**

#### **Proposals for**

- 1. Model Concerns and Complaints Policy for adoption by Public Services Providers in Wales**
- 2. Guidance for Public Service Providers on Implementing the Model Concerns and Complaints Policy**

## Preface

This document consists of two separate elements:

- The first is the element to be issued to members of the public. The only variation to the model concerns and complaints policy (and model form) should be at those areas indicated so that the document is tailored to reflect the nature of the service provided by the organisation in question. For the health service, the Welsh Assembly Government will be working with the NHS in Wales to produce specific, but similar, information leaflets for patients as part of the implementation of the proposed *NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2010*.<sup>1</sup>
- The second element is guidance to which public service providers should have regard when developing arrangements for the delivery of the concerns and complaints handling service within their organisations. This guidance will be suitable for most organisations and reflects the statutory guidance for health bodies. Variations can be introduced to take account of the size or operational requirements of organisations, but must not impact on people's experience of a common approach in complaint handling by public service providers. Thus, how complaints are managed internally is a matter for each organisation to determine, subject to statutory guidance e.g. on health and social care complaints. However, the requirements of the policy, e.g. regarding timescales, number of stages, information gathered on complaint forms should not be altered, unless the organisation chooses to work to shorter timescales.

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<sup>1</sup> The situation in relation to social services complaints is addressed at 1.2.4 of the Guidance document.

## Model Concerns and Complaints Policy

..... (**Organisation name**) ..... is committed to dealing effectively with any concerns or complaints you may have about our service. We aim to clarify any issues about which you are not sure. If possible, we'll put right any mistakes we may have made. We will provide any service you're entitled to which we have failed to deliver. If we got something wrong, we'll apologise and where possible we'll try to put things right. We also aim to learn from our mistakes and use the information we gain to improve our services.

### When to use this policy

When you express your concerns or complain to us, we will usually respond in the way we explain below. However, sometimes you may have a statutory right of appeal (local authorities may want to add e.g. against a refusal to grant you planning permission or the decision not to give your child a place in a particular school) so, rather than investigate your concern, we will explain to you how you can appeal. Sometimes, you might be concerned about matters that are not decided by us (***examples should be given here e.g. NICE guidance in the NHS, legal framework etc.***) and we will then advise you about how to make your concerns known.

Also, this policy does not apply if the matter relates to a Freedom of Information or Data Protection issue. In this circumstance, you should contact (**insert relevant contact details**)

### Have you asked us yet?

If you are approaching us for a service for the first time, (e.g. reporting a faulty street light, requesting an appointment etc) then this policy doesn't apply. You should first give us a chance to respond to your request. If you make a request for a service and then are not happy with our response, you will be able to make your concern known as we describe below.

### Informal resolution

If possible, we believe it's best to deal with things straight away rather than try to sort them out later. If you have a concern, raise it with the person you're dealing with. He or she will try to resolve it for you there and then. If there are any lessons to learn from addressing your concern then the member of staff will draw them to our attention. If the member of staff can't help, they will explain why and you can then ask for a formal investigation.

## How to express concern or complain formally

You can express your concern in any of the ways below.

- You can ask for a copy of our form from the person with whom you are already in contact. Tell them that you want us to deal with your concern formally.
- You can get in touch with our central complaint contact point on tel..... if you want to make your complaint over the phone.
- You can use the form on our website at www.....
- You can e-mail us at .....@.....
- You can write a letter to us at the following address .....

We aim to have concern and complaint forms available at all of our service outlets and public areas and also at appropriate locations in the community **(include examples as appropriate here e.g. libraries, GP surgeries etc.)**.

Copies of this policy and the complaint form are available in **(list of appropriate community languages)** and as audio, large print etc.

## Dealing with your concern

- We will formally acknowledge your concern within **(the maximum time to be inserted here is 5 working days. NHS bodies are required to acknowledge concerns within 2 working days)** and let you know how we intend to deal with it.
- We will ask you to tell us how you would like us to communicate with you and establish whether you have any particular requirements – for example, if you have a disability.
- We will deal with your concern in an open and honest way.
- We will make sure that your dealings with us in the future do not suffer just because you have expressed a concern or made a complaint.

Normally, we will only be able to look at your concerns if you tell us about them within \*\* months. **(The minimum time to be inserted here is six months (12 months for the NHS in Wales) but you may extend this should you need to consider complaints beyond this.)** This is because it's better to look into your concerns while the issues are still fresh in everyone's mind.

We may exceptionally be able to look at concerns which are brought to our attention later than this. However, you will have to give us strong reasons why you have not been able to bring it to our attention earlier and we will need to have sufficient information about the issue to allow us to consider it properly. (In any event, regardless of the circumstances, we will not consider any concerns about matters that took place more than three years ago.).

If you're expressing a concern on behalf of somebody else, we'll need their agreement to you acting on their behalf.

### What if there is more than one body involved?

If your complaint covers more than one body (*appropriate examples here e.g. Housing Association and Council re noise nuisance, Health Board and GP*) we will usually work with them to decide who should take a lead in dealing with your concerns. If your complaint is about a GP, you can ask the Health Board to look into it for you. You will then be given the name of the person responsible for communicating with you while we consider your complaint.

If the complaint is about a body working on our behalf (*appropriate examples here e.g. repair contractors, specialist health providers, private residential homes etc.*) you may wish to raise the matter informally with them first. However, if you want to express your concern or complaint formally, we will look into this ourselves and respond to you.

### Investigation

We will tell you who we have asked to look into your concern or complaint. If your concern is straightforward, we'll usually ask somebody from the service to look into it and get back to you. If it is more serious, we may use someone from elsewhere in the ..... (*type of body here e.g. Council, Health Board*) or in certain cases (*local authorities should add "including those concerning social services where a statutory procedure applies"*) we may appoint an independent investigator.

We will set out to you our understanding of your concerns and ask you to confirm that we've got it right. We'll also ask you to tell us what outcome you're hoping for. The person looking at your complaint will usually need to see the files we hold relevant to your complaint. If you don't want this to happen, it's important that you tell us.

If there is a simple solution to your problem, we may ask you if you're happy to accept this. For example, where you asked for a service and we see straight away that you should have had it, we will offer to provide the service rather than investigate and produce a report.

We will aim to resolve concerns as quickly as possible and expect to deal with the vast majority within 20 working days (**30 working days for NHS bodies**). (If appropriate, bodies may wish to insert a **shorter** timescale here.) If your complaint is more complex, we will:

- let you know within this time why we think it may take longer to investigate
- tell you how long we expect it to take.
- let you know where we have reached with the investigation, and
- give you regular updates, including telling you whether any developments might change our original estimate.



The person who is investigating your concerns will aim first to establish the facts. The extent of this investigation will depend on how complex and how serious the issues you have raised are. ***(If appropriate add "We use a grading system to help us to decide how best to deal with each case")*** In complex cases, we will draw up an investigation plan.

In some instances, we may ask to meet you to discuss your concerns. Occasionally, we might suggest mediation or another method to try to resolve disputes.

We'll look at relevant evidence. This could include files, notes of conversations, letters, e-mails or whatever may be relevant to your particular concern. If necessary, we'll talk to the staff or others involved and look at our policies and any legal entitlement and guidance.

## **Outcome**

If we formally investigate your complaint, we will let you know what we have found in keeping with your preferred form of communication. This could be by letter or e-mail, for example. If necessary, we will produce a longer report. We'll explain how and why we came to our conclusions.

If we find that we got it wrong, we'll tell you what and why it happened. We'll show how the mistake affected you.

If we find there is a fault in our systems or the way we do things, we'll tell you what it is and how we plan to change things to stop it happening again.

If we got it wrong, we will always apologise.

## **Putting Things Right**

If we didn't provide a service you should have had, we'll aim to provide it now if that's possible. If we didn't do something well, we'll aim to put it right. If you have lost out as a result of a mistake on our part we'll try to put you back in the position you would have been in if we'd got it right.

If you had to pay for a service yourself, when you should have had one from us, ***(bodies providing funding e.g. local authorities, health boards, grant making agencies should add "or if you were entitled to funding you did not receive")*** we will usually aim to make good what you have lost.



## Ombudsman

If we do not succeed in resolving your complaint, you may complain to the Public Services Ombudsman for Wales. The Ombudsman is independent of all government bodies and can look into your complaint if you believe that you personally, or the person on whose behalf you are complaining:

- have been treated unfairly or received a bad service through some failure on the part of the body providing it
- have been disadvantaged personally by a service failure or have been treated unfairly.

The Ombudsman expects you to bring your concerns to our attention first and to give us a chance to put things right. You can contact the Ombudsman by:

- phone: 0845 601 0987
- e-mail: [ask@ombudsman-wales.org.uk](mailto:ask@ombudsman-wales.org.uk)
- the website: [www.ombudsman-wales.org.uk](http://www.ombudsman-wales.org.uk)
- writing to: Public Services Ombudsman for Wales  
1 Ffordd yr Hen Gae, Pencoed CF35 5LJ

There are also other organisations that consider complaints. For example, the Welsh Language Board about services in Welsh. We can advise you about such organisations.

## Learning lessons

We take your concerns and complaints seriously and try to learn from any mistakes we've made. Our senior management team (***substitute if necessary***) considers a summary of all complaints quarterly as well as details of any serious complaints. Our Council/Cabinet/Committee/Board also considers our response to complaints at least twice a year.

Where there is a need for change, we will develop an action plan setting out what we will do, who will do it and when we plan to do it by. We will let you know when changes we've promised have been made.

## What if I need help

Our staff will aim to help you make your concerns known to us. If you need extra assistance, we will try to put you in touch with someone who can help. You may wish to contact (***examples appropriate to the service provider here e.g. CHC advocacy services, Age Concern, Shelter etc.***) who may be able to assist you.

You can also use this concerns and complaints policy if you are someone under the age of 18. If you need help, you can speak to someone on the Meic Helpline (phone 080880 23456, [www.meiccymru.org](http://www.meiccymru.org)) or contact the Children's Commissioner for Wales. Contact details are:

01792 765600 (South Wales)      01492 523333 (North Wales)  
[post@childcomwales.org.uk](mailto:post@childcomwales.org.uk)  
[www.childcom.org.uk](http://www.childcom.org.uk)

**South Wales Office:**

Oystermouth House  
Phoenix Way  
Llansamlet  
Swansea  
SA7 9FS

**North Wales Office:**

Penrhos Manor  
Oak Drive  
Colwyn Bay  
Conwy  
LL29 7YW

**What we expect from you**

In times of trouble or distress, some people may act out of character. There may have been upsetting or distressing circumstances leading up to a concern or a complaint. We do not view behaviour as unacceptable just because someone is forceful or determined.

We believe that all complainants have the right to be heard, understood and respected. However, we also consider that our staff have the same rights. We, therefore, expect you to be polite and courteous in your dealings with us. We will not tolerate aggressive or abusive behaviour, unreasonable demands or unreasonable persistence. We have a separate policy to manage situations where we find that someone's actions are unacceptable.

## Appendix A

### Model Concern/Complaint form

#### A: Your details

Surname	Forename(s):	Title: Mr/Mrs/Miss/Ms/if other please state:
Address and postcode:		
Your e-mail address:		
Daytime contact phone number		
Mobile number:		
Hospital number (if appropriate)		

Please state by which of the above methods you would prefer us to contact you

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**Your requirements:** if our usual way of dealing with complaints makes it difficult for you to use our service, for example if English or Welsh is not your first language or you need to engage with us in a particular way, please tell us so that we can discuss how we might help you.

The person who experienced the problem should normally fill in this form. If you are filling this in on behalf of someone else, please fill in section B. Please note that before taking forward the complaint we will need to satisfy ourselves that you have the authority to act on behalf of the person concerned.

#### B: Making a complaint on behalf of someone else: Their details

Their name in full:	
Address and postcode:	
Hospital number (if appropriate)	
What is your relationship to them?	
Why are you making a complaint on their behalf?	

**C: About your concern/complaint (Please continue your answers to the following questions on a separate sheet(s) if necessary)**

- C.1 Name of the department/section/service you are complaining about:
- C.2 What do you think they did wrong, or failed to do?
- C.3 Describe how you personally have suffered or have been affected.
- C.4 What do you think should be done to put things right?
- C.5 When did you first become aware of the problem?
- C.6 Have you already put your concern to the frontline staff responsible for delivering the service? If so, please give brief details of how and when you did so.
- C.7 If it is more than 6 months (12 months for health concerns) since you became first aware of the problem, please give the reason why you have not complained before now.

If you have any documents to support your concern/complaint, please attach them with this form.

Signature:

Date:

When you have completed this form, please send it to:

[Name (central complaints handler)

Address & Other Contact Details]

## A Model Concerns and Complaints Policy: Guidance to public service providers

### Section 1 - Introduction

#### 1.1 Purpose of the Model Concerns and Complaints Policy

1.1.1 The Welsh Assembly Government's vision for improving public services in Wales is well documented and it recognises that complaints systems and redress<sup>2</sup> can make an important contribution to the improvement of those services.

1.1.2 The purpose of the model policy for handling concerns and complaints (hereafter referred to as 'the policy') is to establish across the spectrum of public service providers:

- common principles for the effective handling of concerns and complaints
- a common model for dealing with concerns and complaints.

1.1.3 In addition, it is intended that this guidance will also enable:

- common data collection procedures
- common methods for learning from concerns and complaints.
- a common means to identify and disseminate good practice.

**Note: Hereafter whenever reference is made to a 'concern' or 'complaint' it refers to both 'concern and complaint'.**

**This guidance sets out a model for dealing with complaints based on the common complaints policy. It is recognised that organisations will need to interpret the guidance in a way which is appropriate to their own circumstances. However, the arrangements for managing complaints behind the scenes must not detract from the service user's perception of a common approach, so elements such as the form, the timescales and the number of stages should be consistent for all.**

#### 1.2 Statutory Basis and Scope of the Model Policy and Guidance

1.2.1 The policy and guidance comes into effect on **[?? Date to be established ??]**

1.2.2 They are issued under existing powers of the Welsh Assembly Government in respect of the various sectors of the public service devolved to Wales, and Section 31 of the Public Services Ombudsman (Wales) Act 2005.

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<sup>2</sup> Redress: appropriate redress can take many forms, this includes an explanation and an apology, remedial action, on occasion financial compensation, or a combination of these. Redress should seek to put the complainant back in the position they would have been in if nothing had gone wrong. Where this is not possible – as will often be the case – the remedy should fairly reflect the harm the complainant has suffered.

1.2.3 They are compatible with the health service statutory procedure set out in the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2010 which will be laid before the Assembly shortly. These Regulations will apply to complaints about NHS services, subject to their successful passage through the National Assembly for Wales and similar guidance to this document will be developed for the NHS in Wales to follow.

1.2.4 The statutory social services complaints procedure, "Listening and Learning", was introduced in April 2006. It is a three stage process, including independent panel consideration at Stage 3. Any potential changes to this process will need to be the subject of Ministerial consideration and public consultation. Any specific references to social services in this guidance document will only apply when and if the social services statutory complaints procedure is amended to align itself with the complaints procedure for the rest of the public sector in Wales.

Public service providers will need to ensure that their complaints policies are fully compatible with their Welsh Language Schemes and the requirements of the Welsh Language Act 1993. Complainants should not be disadvantaged where they complain through the medium of Welsh.

1.2.5 The model policy and guidance applies to the list of public service providers set out at Appendix A.

## Section 2 - Definition and Principles

### 2.1 What is a Complaint?

#### 2.1.1 A complaint is:

- an expression of dissatisfaction or concern
- either written or spoken or made by any other communication method
- made by one or more members of the public<sup>3</sup>
- about a public service provider's action or lack of action
- or about the standard of service provided
- which requires a response

whether about the public service provider itself, a person acting on its behalf, or a public service provider partnership.

#### 2.1.2 A complaint is not:

- an initial request for a service, such as reporting a faulty street light
- an appeal against a 'properly made' decision<sup>4</sup> by a public body
- a means to seek change to legislation or a 'properly made' policy decision
- a means for lobbying groups/organisations to seek to promote a cause.

### 2.2 Principles for dealing with complaints

2.2.1 When someone complains they inevitably have an issue about a service which has been received or not received. Complaints need to be handled in such a way that the complainant is the focus and not the process itself. It is within this context that the following principles should be applied.

#### (i) Accessible and Simple

- Well publicised.
- Easy to find, understand and use – both for public and staff.
- Simple and clear instructions for the public about how to make a complaint.
- Has flexibility to meet the different needs of different people, ensuring that those who face challenges in access are not excluded.
- Provides information on advocacy and support services.
- The stages in the complaint handling process are kept to a minimum.

<sup>3</sup> 'member of the public' is defined as anyone in receipt of a service by the public service provider in question or, indeed, denied a service to which they are entitled – this can be an individual or a group of people.

<sup>4</sup> A 'properly made' decision is one where the relevant laws, policies and procedures have been correctly followed in arriving at a decision e.g. setting the council rent.

(ii) **Fair and Impartial**

- Concerns are dealt with in an open-minded and impartial way.
- Complainants are assured that making a complaint will not adversely affect their future dealings and contacts with the body concerned.
- Ensures that complainants get a full response and that decisions are proportionate, appropriate and are fair.
- The staff complained about are treated as fairly as complainants

(iii) **Timely, Effective and Consistent**

- Within the parameters of what is appropriate and possible, frontline staff themselves should seek to resolve complaints
- 'Investigate Once, Investigate Well' – when a complaint requires formal investigation, this should be done thoroughly to establish the facts of the case.
- Dealt with as quickly as possible. It should normally take no longer than 20 working days (30 days for the NHS in Wales) from receipt at the Formal Stage<sup>5</sup> to resolution. Bodies may wish to establish **shorter** timescales than this. If a complaint is more complex, complainants should be told why it may take longer to investigate and how long it is expected to take. Complainants and staff involved should be kept informed of progress throughout.
- Consistent so that people in similar circumstances are treated in similar ways.
- Concerns involving more than one public service provider are dealt with in such a way that the complainant's experience is of one system.

(iv) **Accountable**

- Provides honest, evidence-based explanations and gives reasons for decisions.
- Information is provided in a clear and open way.
- When concerns are found to be justified, as appropriate, public bodies:
  - acknowledge mistakes
  - apologise in a meaningful way
  - put matters right
  - provide prompt, appropriate and proportionate redress.
- Follow up to ensure any decisions are properly and promptly implemented.
- Where appropriate, the complainant is told about the lessons learnt and changes made to the service, guidance or policy.
- Ensures that complainants are informed of their right to complain to the Public Services Ombudsman for Wales (or of other appropriate routes open to them, for example, Welsh Language Board in respect of complaints about compliance with Welsh Language Schemes, Equality and Human Rights Commission.).

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<sup>5</sup> The Model proposes three stages: an informal stage (where complaints are initially raised with frontline staff or department), a formal stage when a complaint is formally made in writing, and a third stage where the complaint is subject to independent external consideration.



(v) **Delivers Continuous Improvement**

- Lessons learnt from complaints are gathered and feedback is used to improve service design and delivery.
- Systems in place to record, analyse and report on the learning from concerns.
- The leadership of the public body:
  - takes ownership of the complaints process
  - regularly reviews and scrutinises its effectiveness
  - receives regular complaints monitoring reports, and
  - demonstrates what the organisation has done to improve service delivery as a result of complaints.
- Regulators have an important role in ensuring that lessons learnt from concerns are implemented satisfactorily and sustained.

### **Section 3 - Complaint Handling Arrangements**

3.1 The aim is to provide a common approach for handling complaints by replacing 'process heavy' systems with one that is simple, flexible and places emphasis on getting the most appropriate outcome for individuals and services. It requires public service providers to take a much more proactive approach to dealing with concerns by focusing on people's needs and not the complaints process itself.

3.2 By being widely adopted by key services it will help to streamline complaints arrangements across the public sector and make it easier to deal with concerns that relate to more than one service provider.

#### **3.3 A Commitment Statement**

3.3.1 The Welsh Assembly Government has published a principle on redress for public services (*Making the Connections – Building Customer services*, March 2007). This is the touchstone for the model complaints policy and every public service provider in Wales in adopting the model should in turn publish a commitment statement as follows:

"People will find it easy to complain and get things put right when the service they receive is not good enough."

[Note: The above statement also applies to circumstances where there has been a failure to deliver a service someone is entitled to receive. However, it does not apply in circumstances where people are making a request for an initial service.]

#### **3.4 The people who may put forward a concern**

3.4.1 Any member of the public, including a child, who has received, or was entitled to receive, a service from the public service provider may make a complaint. The same applies if they have suffered due to the inappropriate action or lack of action by the public service provider.

3.4.2 Where a concern is notified by a young person or child, the responsible body must provide them with such assistance that they may reasonably require in order to pursue the concern. This should include making the young person or child aware of the help that could be provided by the Children's Commissioner for Wales.

3.4.3 A concern can also be put forward by someone on behalf of another person, as follows:

- (a) someone who has died
- (b) a child

- (c) those who lack the capacity (as defined by the Mental Capacity Act 2005(1))
- (d) they have been asked to do so by the person affected.

In the case of (b), (c) and (d), public service providers must satisfy themselves, as far as the circumstances of the person affected allow for it, that the representative is acting with the authority of that person and if possible obtain their signature to confirm this.

- 3.4.4 This procedure is not however a means for a member of staff to raise employment issues. There are other internal mechanisms for these type of concerns, for example, whistleblowing, bullying, or grievance procedures.

### 3.5 Roles

- 3.5.1 **The Board/Cabinet** of the public service provider should ensure that the policy is adopted and in place. It is not appropriate for the Board/Cabinet to be involved in the investigation of individual complaints. However, it should receive reports on the number and type of complaints received, their outcomes and any remedial action taken as a consequence. It is for the Board/Cabinet to determine how frequently it should receive such reports, however, this should be at least twice a year. Organisations with such arrangements in place may, in addition, want to include the consideration of complaints reports to be included within the remit of a scrutiny or similar type committee.
- 3.5.2 **Responsible Officer** – Each organisation should appoint an officer (e.g. chief executive, director, clerk) with responsibility for ensuring the policy is adopted and the guidance is followed.
- 3.5.3 **The Person/Team co-ordinating complaint** – The public service provider should have an individual or team responsible for co-ordinating responses to all complaints which are not resolved at the informal stage. For example, in a small organisation such as a community council this is likely to be the clerk, whereas some large organisations may have a central complaints team for this purpose. For ease of reference throughout this document, this role is described as the 'central complaints handler'. Organisations may also use this individual or team to help to secure a consistent high quality response to complainants.

### 3.6 Resources

- 3.6.1 The public service provider should ensure that the necessary resources are made available to enable delivery of the policy, this includes:
- staffing (including administrative support, if necessary)
  - training
  - complaint handling administration systems.

### **3.7 Accessibility and publicising the complaints procedure**

3.7.1 Requirements in relation to methods of communication will vary depending on the nature of the service(s) provided by the organisation and its size. When considering this, the goal must be to ensure that the complaints system is accessible to everyone.

3.7.2 Nevertheless, the minimum requirements are:

- That the 'Complaints Commitment Statement' and complaints process are widely publicised. This should be done by:
  - promoting the existence of the procedure, together with appropriate contact details, on a regular basis in any newsletters that the organisation publishes for its service users
  - producing a bilingual complaints information leaflet (see 3.6 below)
  - the leaflet should be available at all public reception areas and 'common' areas where service users may frequent, and made widely available to the organisation's staff.
  - the leaflets should also be circulated to the local offices of relevant advice and advocacy organisations operating in the service provider's area
  - the complaints procedure should be published at a prominent and easily accessed area of the organisation's website (ideally via a link on the home page)

That in addressing issues of accessibility:

- the complaints procedure information is available in alternative formats such as on CD, in large print, Braille, etc
- those organisations operating in areas recognised as having the highest populations of minority ethnic communities in Wales have at the very least some basic literature available in the most common ethnic languages in their areas publicising the existence of the complaints procedure
- that all organisations have in place arrangements so that they can call upon translation/interpretation services (including British Sign Language).

Public service providers may wish to contact the Wales office of the Equality and Human Rights Commission for advice on accessibility matters.

For people who may need advice/support in making their complaint, public service providers should keep a comprehensive list of relevant advice and advocacy organisations in their locality. Advice should be provided to complainants who require/request such support as to which organisation(s) is likely to be the most suitable to help them. (A decision on which organisation would be best placed to assist could be based on the nature of the complaint, or on the nature of any disadvantage faced by the complainant – e.g. language, disability, etc). Community Councils and other very small service providers should use this section as a guide but will not normally implement it in full. They should however ensure that there is equality of access for all service users.

### 3.8 The complaints information leaflet/complaint form

- 3.8.1 The wording of the English and Welsh complaints information leaflet should be as per the model policy.
- 3.8.4 In raising a concern, ideally people should complete a complaint form either printed version or webform (see Appendix A of model complaints policy for model form)
- 3.8.5 However, people may prefer to present their complaint by telephone, e-mail, or in person (or other method). In doing so staff dealing with the complaint should ensure that they have gathered the same information as that being sought on the complaint form and ensure it is recorded appropriately.

### 3.9 The complaints procedure

#### Stage 1 - Informal Resolution<sup>6</sup>

This stage offers the opportunity for informal engagement at the point of service delivery to seek to resolve complaints either at the time the concern arises or very shortly thereafter. This stage should be part and parcel of front line service delivery and not viewed as separate from it. This first step will normally be an explanation or other appropriate remedial action by frontline staff.

- Staff should be empowered and trained to deal with complaints as they arise with the aim of resolving issues on the spot. This training can be provided during their induction period.
- Staff should be trained to recognise the seriousness of a complaint and understand when it should be referred to more senior member of staff.
- Staff may receive complaints that do not involve their own service, but that of another department. It may be difficult for those in large organisations to know to whom the complainant should be referred, but at the very least all staff should be able to direct the complainant to the organisation's central complaints handler, who will then be able to advise the complainant appropriately.
- In a similar vein, staff may receive a complaint that not only involves their own service but that of another section/department. It is recommended that in these instances – since it is unlikely that the staff member will have the necessary authority to resolve a complaint on behalf of another area of the organisation's service – the complainant should be referred directly to the central complaints handler.

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<sup>6</sup> Whilst not a separate stage within the NHS Complaints procedure the 'Putting Things Right: a better way of dealing with concerns about health services' document (Welsh Assembly Government: 11 January 2010) states: "if concerns are raised by patient or family member and resolved on the spot, frontline staff will report the issue to the central team ... so that lessons can be shared.". This process will be developed in further details as part of the implementation of the Regulations.

- Staff must advise complainants how to progress their complaint to the formal investigation stage, if they are not satisfied with the outcome of their complaint at the end of the informal stage.
- Complainants may wish their complaint to be 'fast tracked' straight through to internal investigation (Stage 2). This may particularly be so if there have been disagreements with staff directly responsible delivering the service. It is the complainant's prerogative to seek to take their complaint directly to Stage 2 of the procedure and frontline staff should advise how they may do so.
- Frontline staff should be trained and encouraged to provide appropriate information on advice and advocacy support at Stage 1 of the complaints process. However, it is recognised that they may not have (nor could they be expected to) have the breadth of knowledge of all organisations for all types of help available, particularly when operating in a specialist field themselves. Nevertheless, a housing officer, for example, should be sufficiently knowledgeable to advise a complainant with a housing complaint about the services of organisations such as Shelter Cymru.
- The central complaints handler should be a source of support for frontline staff in respect of local resolution.

The informal resolution stage should be done as quickly as possible and certainly take no longer than 10 working days. However, in the case of the NHS, informal resolution needs to be done immediately or within one working day. If it is not possible to resolve the concern within the relevant timescale, then the matter should be escalated to the formal investigation stage.

Examples of the type of concern that can be resolved at the local resolution stage are:

- an appointment was made for a boiler to be fixed and the tenant complains that no-one turned up on the appointed day
- someone complains that their bin hasn't been emptied by the refuse collection service when it should have been.

However, examples of the type of complaint that should not be resolved at the informal stage are:

- that the complaint relates to a failure to safeguard a child/children by social services
- the complainant believes that there has been a failure in health treatment which has led to serious consequences
- the concern involves issues where it appears a service failure has occurred due to an obvious systemic problem.



## Stage 2 Formal Internal Investigation

*'Investigate once, investigate well'* is the principle for this stage of the process. Emphasis is placed on one investigation to deal thoroughly with the concerns raised, rather than multiple investigations at different levels in the organisation which can result in protracted and sometimes open ended investigations. However, the Stage 2 element of the complaints process is intended to be flexible to respond appropriately to the complaint. 'Investigating well' also means conducting an investigation in a manner that is proportionate to the nature and degree of seriousness of the complaint. Proportionate means that for those complaints not so serious in their nature, the investigation may not need to be so detailed.

The following sets out how a complaint should be dealt with at Stage 2.

- Stage 2 complaints should be sent by the complainant to the central complaints handler of the organisation. Any staff member who is not a central complaints handler receiving a complaint form should forward it promptly.
- Having formally received a complaint at Stage 2, an acknowledgement should be sent by the central complaints handler as soon as is possible but within a maximum of five working days (this has to be within two days after the day the complaint has been received for NHS bodies).
- If the complaint is 'out of time' – i.e. the issue being complained about is older than six months – 12 months for health complaints - (from the time that the complainant first became aware of the problem), consideration should be given as to whether there are good reasons as to why it should nevertheless be accepted. For health complaints there is an absolute cut off time of three years and other bodies may wish to adopt this.
- The central complaints handler should offer to discuss the matter with the complainant, including:
  - helping the person who is complaining understand the process
  - confirming with them their preferred method of communication and what they want as an outcome to making the complaint
  - providing advice of relevant advocacy and support services if they need help in making their complaint.
 (The above is a duty for NHS bodies.).
- Depending on the nature of the complaint it may be necessary to obtain the complainant's permission to access their personal file. If the complainant refuses to give permission, then it should be explained to them that this will have an effect on the ability to conduct a thorough investigation.
- If the complainant is complaining on behalf of someone else, consideration will need to be given as to whether consent is needed to investigate the complaint.
- Having satisfied themselves that they sufficiently understand the details of the complaint, the central complaints handler should:

- grade the seriousness of the complaint to decide on the appropriate level of investigation (where the organisation has such an arrangement in place)
  - identify an officer within the organisation with sufficient seniority, credibility and independence from the source of the complaint to undertake the investigation:
    - depending on the nature of the complaint, this may still be someone within the service section/department, but it may require someone independent from the section/department, including possibly the complaint handler themselves.
    - in the case of community/town councils, who may only have one member of staff (the Clerk), it is accepted that the Clerk will often take the role of 'frontline, informal resolution' and that the Chair/Mayor or sub-committee of the Council could where necessary take the role of 'investigator'.
  - when deciding on an 'investigator', take account of whether the investigation will need to span across more than one service and the level of seniority required to investigate across all those areas
  - for social services complaints, consideration should be given as to whether an independent investigator outside the organisation should be engaged and also whether the investigation could benefit from the involvement of an independent lay person from the pool of people identified by the Welsh Assembly Government. However, this should all be contained within the Formal Stage 2 procedure, with an agreed 'single response' on the outcome of the investigation.
- Having recorded the complaint on the complaints handling system on receipt, the central complaints handler should keep track of (and record) progress and take responsibility for monitoring the smooth running of the investigation, ensuring that timescales are met. The stage 2 complaints process should normally be concluded within 20 working days – 30 days in the case of NHS complaints - (or such shorter timescale as determined by the public service provider). Where this is not possible complainants must be informed of the reasons and be agreeable to any extension. In any event, there should be regular contact with the complainant, updating them on progress on the case.
  - A complainant may withdraw their concern at any time, however, the public service provider may continue to investigate if it feels that it is necessary to do so.
  - It is recommended that the central complaints handler produces a portfolio of specimen documents/templates to assist those involved in the complaints process, these could include:
    - a form for frontline staff for logging relevant complaints at the informal stage (these will be germane for any complaints progressed to Stage 2)
    - an acknowledgement letter
    - a framework for 'update' letters to the complainant
    - interview request letters (e.g. for the investigator when requiring meetings with staff involved)
    - a template for investigation reports



## Complaints Investigations

- A complaint investigation should be a fact finding exercise which is impartial, open and transparent and proportionate to the seriousness of the complaint. For serious complaints, a plan needs to be drawn up enabling the complaint to be investigated systematically.
- However, even though the complaint has reached the Formal Internal Stage, there may still be potential for resolving the concern to the complainant's satisfaction through a '**quick fix**' and without having to undertake a full and lengthy investigation. Consideration should be given to the possibility of this.
- Consideration should also be given as to whether face to face meetings and/or mediation could be a means to resolving the complaint
- Evidence gathering can include:
  - correspondence (letters and e-mails)
  - notes of telephone conversations
  - organisational policies and procedures
  - good practice guidance
  - records (including those specifically in relating to complaint under consideration and training records of staff involved in the complaint)
  - legislation
  - interviews (including detailed notetaking)
  - site plans and visits
  - photographic evidence
  - recordings in various formats (e.g. phone, video, CCTV)
  - obtaining professional/expert advice
  - training records of relevant staff.
- Recommendations arising from investigations should be Specific, Measurable, Achievable, Realistic and Timed (SMART)
- At the end of an investigation a written outcome such as letter or e-mail should be produced, and in more serious cases a report. Where a report is produced this should include where appropriate:
  - the scope of the investigation
  - a summary of the investigation:
    - details of key issues, setting out a brief chronology of events leading to the complaint)
    - those who were interviewed (including setting out to what degree the complainant, and if appropriate, any affected relatives, advocates, etc were involved in the investigation)
  - conclusion
    - if the complaint is found to be justified/upheld
      - how it happened - i.e. what went wrong

- why it happened – i.e. the root cause of the problem (e.g. human error, a systemic failure )
    - what impact did it have on the complainant
    - if a systemic failing has been identified, an explanation of actions taken to put things right, with a view to ensuring the same problem does not occur again
    - if appropriate, an apology
    - if appropriate, an offer of redress
  - if the complaint has not been upheld, there should be an explanation of why this conclusion has been reached, demonstrating that it has been arrived at based on the evidence gathered.
- overall the report should demonstrate throughout that the complaint has been taken seriously, that the investigation undertaken has been fair and, in accord with the seriousness of the complaint, proportionately thorough.
- Even in cases where an investigation upholds the complaint and offers remedy/redress, it may be that the complainant remains dissatisfied for some reason. Therefore, in all cases, the report should inform the complainant that if they remain dissatisfied then they have the right to seek an independent external consideration of their complaint. Information about making a complaint to the Public Services Ombudsman for Wales and other appropriate complaint handlers including the Welsh Language Board should be provided.

### **The final steps**

The fact that complaints will vary in the degree of seriousness has already been referred to. The organisation should decide at what level decisions on recommendations in the report can be taken and who should sign off on the complaint (i.e. who should sign any report or letter).

There will be times when it would be appropriate for the central complaints handler to do so, other times the Executive Director responsible (larger organisations), and then other times the head of the organisation. The public service provider should establish the level of delegation in this regard. Further, the head of the organisation should ideally see a copy of all final correspondence sent out in respect of Stage 2 complaints. However, this will be impractical for the largest organisations and in these circumstances it is recommended that the central complaints handler provides the head of the organisation with frequent reports.

In cases where a complaint has been upheld and there is a clear systemic issue, the appropriate Director or Manager should ensure that an action plan is devised setting out how the recommendations will be implemented and identify who will be responsible for ensuring their implementation. When it affects them, frontline staff should be involved in this process. The plan should also include arrangements for confirming to the complainant that changes have been implemented and make provision for the monitoring and evaluation of new arrangements introduced to assess their impact.

On closing a complaint case, the central complaints handler should ensure that working documents used during the course of the investigation are retained in an orderly fashion and stored securely. If the complaint becomes the subject of further external investigation such as by the Public Services Ombudsman for Wales, these working documents may be needed as the public service provider's evidence. Complaint case records should be retained for at least one year following closure at the end of Stage 2.

### **An Independent Person**

It may be that for some investigations, it is considered appropriate to include the involvement of an independent person in the Stage 2 investigation. This is particularly the case in respect of social services complaints that concern children and adults in vulnerable circumstances. It will be the responsibility of the central complaints handler to ensure that the organisation has a pool of suitable people to call upon where necessary.

### **Complaints Involving Other Legal or Disciplinary Proceedings**

Occasionally, complaints received will involve legal or disciplinary proceedings. It may from time to time be necessary to put the investigation of a complaint 'on hold' until the conclusion of those other proceedings. However, it should not automatically be assumed that this is necessary in every case. An assessment should be made (with legal advice sought, if appropriate) to identify whether it is possible to address the subject of the complaint, without impacting unfairly on the other proceedings underway. It is important that if a complainant is in a continued state of disadvantage as a result of likely poor service delivery that every step is taken to conclude this part of their complaint. This will mean that, if the complaint is upheld, it has been demonstrated that the organisation is doing everything it can to return them as soon as possible to the position they would have been in if that failure had not occurred in the first place

### **Complaints involving more than one service provider**

There are occasions when a complaint received will involve more than one organisation. In this case the role of the central complaints handler will be slightly different. Having established the elements of the complaint and which organisations are involved, they should contact their counterpart(s) in the other organisation(s) involved. The complaints officers should then decide which of them should lead on co-ordinating the response to the complainant. It would seem sensible that this should be the organisation with the greatest involvement in the complaint. However, it may be appropriate for the organisation with the largest complaints handling resource to undertake this role.

The role of the complaints officer allocated to the complaint in question is to co-ordinate the investigations in each of the service areas involved. The ultimate aim, therefore, is to provide the complainant with a single comprehensive 'joint' response on behalf of all of the organisations involved.

There will be complaints where each element is sufficiently distinct and separate so that all that will be required is to set out the details and outcome of each investigation strand and then add an overall conclusion to the response.

However, it is recognised that there will be some cases where the resolution and remedy of a complaint will involve agreement by all involved and that this could lead to tensions and disagreement. Where such disagreements lead to an impasse, it may mean having to refer the problem to senior management within each of these organisations (depending on the seriousness possibly Chief Executives) in order to try to resolve the situation.

Where the impasse still cannot be resolved, it may be prudent to refer the matter at this point to the relevant external independent complaint handler at Stage 3 (e.g. the Public Services Ombudsman for Wales). However, the complainant should be told of this intention, together with the reason for it, and their agreement should be sought before such a referral takes place.

### **Partnership Services**

*[Note: Whilst not forming part of an individual organisation's complaints handling procedure, public service providers will need to have regard to the following when forming partnerships with similar and other types of organisations.]*

The situation in relation to complaints about partnership services is again different, particularly given that not all partners may be subject to this model procedure. Nevertheless, it is good governance practice for every partnership established to have in place at the outset a protocol for dealing with complaints. That protocol should make clear where accountability lies within the partnership for any services delivered – i.e. does responsibility rest with the partnership as an entity, is each partner accountable for specific aspects of the service delivery?

Given that in most public service provider partnerships many members will be subject to this model procedure, it is recommended that those providers endeavour to agree a protocol with their partners for dealing with complaints in a way that corresponds with this model.

In particular, it is recommended that:

- partnerships establish a complaints handling process for services that they as a partnership deliver
- they identify and publicise a single point of contact for complaints in respect of their activities/services

- the person/team identified, co-ordinates the investigation of the complaint on behalf of the partnership. Depending on the nature of the complaint, if the complaint concerns dissatisfaction with the service delivered by one particular partner, it may be more appropriate to refer the investigation on to that particular partner to deal with
- the partnership ensures that lessons are learnt from complaints received and considers whether there are any that should be shared more widely.

### **Complaints concerning services that have been contracted out**

Even though public service providers may contract out the provision of services to private/voluntary organisations, this does not absolve the public service provider of their responsibility for those functions. Central complaints handlers should, therefore, ensure that those responsible for drafting contracts are aware of the need to include as a matter of course a provision for complaints handling. This should include the requirement for organisations contracted to provide services to comply with similar complaint handling arrangements (i.e. the two stages), with the outcome report/letter being copied to the public service provider. Such organisations should also inform complainants of the third external stage and their right to complain to the Public Services Ombudsman for Wales.

## **Section 4 - Learning Lessons**

### **4.1 Learning from complaints/continual improvement**

4.1.1 Complaints information should be used to improve an organisation's service delivery and increase its effectiveness.

4.1.2 To support this, organisations should:

- Ensure that the central complaints handler, periodically reviews all complaint outcomes and their recommendations to identify whether there are any patterns to complaints/wider lessons to be learnt that may not be apparent from individual complaints alone. When considering the lessons that can be learnt from a complaint, an assessment should be made as to whether:
  - These are limited to the section/department in question
  - Whether they have an organisation wide implication
  - Or indeed whether they are ones that should be shared across the sector of the public service or indeed across the whole of the public service in Wales.
- Ensure that complaints reports are considered on a regular basis by senior management, including an analysis of the data gathered and information on recommendations that have been made for improving service delivery.
- Ensure that the information received by senior management is used to target any problem areas and consider if there is potential to improve policies, procedures and accordingly services.
- Ensure that the cabinet/executive board receives reports giving an overview of complaints received, setting out what changes have been made as a result of complaints information, and following monitoring of their implementation what results have been received.
- Ensure that an annual report on complaints is produced, drawing out lessons learnt over this period and demonstrating how they have contributed to improved service delivery.

### **4.2 Recording & monitoring complaints**

4.2.1 Effective approaches to complaints management collect specific data and identify recurring or system wide problems. All feedback and complaints received should be recorded to ensure that a comprehensive evaluation of data can be made.

4.2.2 To support this, organisations should:

- Have a system to collect organisation-wide complaints data
- Use the system to help track complaints and compliance with timescales



- Data recorded should enable the numbers, types, outcomes and trends of complaints to be captured, to facilitate comparisons with previous periods and identify system wide or recurring complaints
- The system should also enable points from lessons learned to be captured
- Write to the complainant detailing the findings of the investigation, providing an apology for any shortfalls and describing what action will be taken to prevent recurrence

[Note: Frontline staff should be encouraged to report all serious complaints or those with wider learning points that they have dealt with informally to the central complaints service so that these can be recorded on the central complaints handling database. This should be regardless of whether or not the complaint has been resolved on the spot. For those serious complaints not resolved, such action will mean that there will be a record of the incident should the complaint progress to Stage 2 of the complaints process.]

4.2.3 However, it is not intended that public service providers should have to implement a new IT system for these recording purposes. Furthermore, for small community councils, for example, manual recording may suffice.

4.2.4 To enable the identification of trends both within and across organisations in Wales, when categorising complaints, the following top level complaint subjects should be adopted by the types of public service providers listed below:

#### **County/County Borough Councils**

- Adult Social Services
- Benefits administration (Council Tax/Housing/Other)
- Children's Social Services
- Community facilities, recreation and leisure
- Education
- Environment and Environmental Health
- Finance and Council Tax
- Housing
- Planning and building control
- Roads and transport
- Various other

#### **Housing Associations**

- Applications, allocations, transfer and exchanges
- Estate management and environment/common areas/hedges and fences etc
- Repairs and maintenance (inc dampness/improvements and alterations eg central heating, double glazing)
- Neighbour disputes and anti-social behaviour
- Tenancy rights and conditions/abandonment and evictions
- Right to Buy
- Financial matters – rent arrears, former tenant arrears, service charges
- Other

### **Local Health Boards/NHS Trusts**

The appropriate health categories for these bodies will be in line with those developed and issued as part of the implementation of the National Health Service (Concerns, Complaints and Redress Arrangements ) (Wales) Regulations 2010

4.2.4 In order to also identify outcome trends of complaints, the following high level complaints outcome definitions should be used

- Complaint about service not provided by this body
- Referred to front line staff and resolved
- Investigation not merited
- Quick Fix/Voluntary Settlement
- Investigation Discontinued
- Upheld – Non systemic issue
- Upheld – Systemic - Action plan required
- Not Upheld
- Withdrawn

(In respect of the LHBs/NHS Trusts NHS, the comments at 4.2.3 apply.)



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## **Section 5 - Staff and Training**

### **5.1 Staff**

- 5.1.1 Whilst it is not uncommon for people to look for someone to blame when things go wrong, staff should be assured that this is not the aim of an investigation. It should be made clear that any interview that may take place is to establish facts as part of the investigation of a complaint, and that it does not form part of a disciplinary procedure. (However, a separate disciplinary process could take place if this appropriate.).
- 5.1.2 When requiring staff to attend for interview, they should be told the purpose of the interview, what to expect and what preparation they need to do. They should be advised that they can bring someone (such as a colleague) for support – although the position of confidentiality and their role should be made clear). They should also be advised as to what will happen after the interview.
- 5.1.3 Being the subject of a complaint is in any event a stressful situation and depending on the circumstances of the complaint and the issues involved, it may be prudent to inform the interviewee of staff support/counselling available.
- 5.1.4 In the same way that it is important to keep complainants informed on progress in the investigation and its outcome, the same is true in respect of staff.
- 5.1.5 As well as informing staff involved of the outcomes of complaints and any recommendations that arise, there should also be a means (staff newsletters, making the annual report available on the intranet) of disseminating to staff how the way they deal with complaints can contribute to better public services. The organisational culture should be that reporting a complaint and action taken is seen as a positive act in that it assists organisational learning. If many individuals (perhaps based in many different locations) deal with a similar type of problem without this information being shared with others, then what may be a deep-rooted systemic problem within the organisation may not emerge to the surface. If frontline staff inform the complainant of this (intended) action, it is likely to have a positive effect in terms of good customer relations.

### **5.2 Training**

- 5.2.1 The complaints function needs to be adequately resourced by appropriately trained staff.
- 5.2.2 The central complaints handler should undertake an assessment of the skills and competencies required by all those involved in the complaints process and ensure that there is an appropriate training strategy in place. (For the NHS in Wales, a skills and training needs assessment will be carried out as part of the implementation of the Regulations),

- 5.2.3 The central complaints handler should continually keep under review the number of skilled and trained officers within the organisation to conduct and prepare reports on investigations.
- 5.2.4 Those likely to be involved in conducting 'sensitive' investigations will in all probability need additional 'specialist' training.
- 5.2.5 Ultimately staff training is a matter for individual public service providers to determine. Public Services Management Wales (PSMW) is likely to provide training specifically targeted at public service provider complaint handlers. It is envisaged that the training will also include advice to central complaints handlers on how to train frontline staff on dealing with complaints/local resolution. However, public service providers may wish to arrange alternative suitable training.] [The Welsh Assembly Government will be making appropriate arrangements for training in the NHS in Wales as part of the implementation of the Regulations.].
- 5.2.6 However, general training should also be included in the induction programme of all in the organisation (this includes staff and Board/Cabinet members).

### **5.3 Unacceptable Actions by complainants**

- 5.3.1 The model policy recognises that some people may act out of character in times of trouble or distress. It should be borne in mind that there may have been upsetting or distressing circumstances leading up to a complaint. A complainant's behaviour should not be regarded as unacceptable just because they are forceful or determined. However, the actions of complainants who are angry, demanding or persistent may result in unreasonable demands on an organisation or unacceptable behaviour towards staff. It is these actions that are considered unacceptable. Organisations should therefore have in place an 'unacceptable actions by complainants' policy and ensure that staff receive appropriate associated training. Organisations currently without such a policy, are welcome to use the Public Services Ombudsman for Wales's policy (available at [www.ombudsman-wales.org.uk](http://www.ombudsman-wales.org.uk)) as a basis for their own procedure.

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## Appendix A

### List of organisations to whom the Model Concerns and Complaints Policy and Guidance Apply

#### Government of Wales

The Welsh Assembly Government  
The National Assembly for Wales Commission

#### Local government, fire and police

A local authority in Wales (this includes county/county borough councils\* and community councils)  
A joint board the constituent authorities of which are all local authorities in Wales  
A fire and rescue authority in Wales constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 (c. 21) or a scheme to which section 4 of that Act applies  
A police authority for a police area in Wales

#### Environment

A National Park Authority for a National Park in Wales  
The Countryside Council for Wales  
The Environment Agency  
The Forestry Commissioners  
A regional flood defence committee for an area wholly or partly in Wales  
An internal drainage board for an internal drainage district wholly or partly in Wales

#### Health and social care

The Care Council for Wales  
The Board of Community Health Councils in Wales  
A Local Health Board\*  
An NHS trust managing a hospital or other establishment or facility in Wales\*  
A Special Health Authority not discharging functions only or mainly in England  
A Community Health Council  
An independent provider in Wales\*  
A family health service provider in Wales\*  
A person with functions conferred by regulations made under section 113(2) of the Health and Social Care (Community Health and Standards) Act 2003 (c. 43)\*

#### Housing

A social landlord in Wales (this includes housing associations)

### **Education and training**

The Office of Her Majesty's Chief Inspector of Education and Training in Wales or Prif Arolygydd Ei Mawrhydi dros Addysg a Hyfforddiant yng Nghymru (ELWA)

The Higher Education Funding Council for Wales

An admission appeal panel constituted in accordance with regulations under section 94(5) or 95(3) of the School Standards and Framework Act 1998 (c. 31).

The governing body of any community, foundation or voluntary school so far as acting in connection with the admission of pupils to the school or otherwise discharging any of their functions under Chapter 1 of Part 3 of the School Standards and Framework Act 1998.

An exclusion appeal panel constituted in accordance with regulations under section 52 of the Education Act 2002 (c. 32).

### **Arts and leisure**

The Arts Council of Wales

The Sports Council for Wales

### **Miscellaneous**

The Welsh Language Board

[Notes:

1. Health and Social Care Providers: Those bodies above marked with an asterisk must also comply with the relevant statutory arrangements for health and social services complaints handling.
2. School Governing Bodies: Whilst these bodies do not come within the ambit of this model policy and guidance, it is recommended that when developing/reviewing their own complaints procedures they have regard to these two documents as 'good practice'.]

# Ombudsman Briefing Paper -Public Awareness and Electronic Media

## Public Awareness of the Northern Ireland Ombudsman's Office and Use of Electronic Media

### 1.0 Introduction and Background

- 1.1 The OFMDFM Committee has requested further information on how the Ombudsman currently promotes public awareness of the work of his office and the use of electronic media by that office. Part 2 of this paper explains the current outreach activity being undertaken by the Ombudsman and his staff to promote general and more specifically public awareness of his role in investigating complaints of 'maladministration' about public bodies in his jurisdiction. Part 3 of this paper explains the various electronic media which he currently uses to increase accessibility for the public to the service provided by his office, and also to support his investigations involving public bodies about whom a complaint of maladministration has been made.
- 1.2 A useful starting point when considering the Ombudsman's current approach to awareness-raising activity is to understand the unique role of the Ombudsman. The Ombudsman provides a free, independent and impartial investigation service to members of the public who complain to his office about the action or inaction of a public body within his remit. The Ombudsman may, as a result of this investigation, uncover poor administrative practice (maladministration) and in such cases he will uphold the complaint brought to him by members of the public. Where there is no evidence of maladministration and the Ombudsman does not uphold the individual's complaint, he will inform both parties of this decision. This is an important part of his work so that good administrative practice is recognised and maintained. An important part of his role therefore is to maintain an impartial approach to complaints. To that extent it would be inappropriate for the Ombudsman to 'canvass' or to be perceived as encouraging any member of the public to make a complaint.
- 1.3 The Ombudsman does however acknowledge the importance of the public being made aware of the important service that his office provides and ensuring that the service is relevant to an individual at the point of need. Therefore, one of the main principles underpinning the Ombudsman's current Outreach Strategy (see Appendix 1) is that when an individual is dissatisfied with the outcome of a body's internal complaints procedure, he is informed by that body of the right to complain to the Ombudsman. This 'signposting' to the Ombudsman at the completion of a complaint is not currently a requirement in Northern Ireland. There is a legal duty placed on bodies falling within the remit of the Welsh Ombudsman<sup>1</sup> to ensure he provides information to the public about their right to make a complaint to the relevant Ombudsman in respect of the authority; the right of the authority to refer a complaint to the Ombudsman; and the time limits and contact details. Similar provisions exist in respect of the Scottish Ombudsman<sup>2</sup>. Ensuring that this signposting occurs is an important outcome of the Ombudsman's Outreach Strategy but he does consider that public awareness would be enhanced if the Northern Ireland legislation had equivalent provisions to that in Scotland and Wales.
- 1.4 A background to the Ombudsman's approach to raising the public's awareness of his service is provided in the Deloitte Review (2004) document. At paragraph 8.6 of the Review document, it was noted that the Ombudsman had made 'admirable efforts' to promote the work of his office. The Deloitte Review recommended that this should be enhanced by the

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1 Section 22(1) Public Services Ombudsman (Wales) Act 2005

2 Section 22 Scottish Public Services Ombudsman Act 2002

procurement of professional advice to target promotional activity. Further, at paragraph 9, the Review recommends that in the longer term an outreach plan should be developed to 'extend the awareness of the office that would use all communication avenues'.

- 1.5 In the period 2008/09, in preparation for the office's 40th Anniversary event, the Ombudsman engaged professional assistance in developing a Communications Strategy, Outreach Plan and new website. The aim of the initiatives was to better inform the public and other key stakeholders of the services provided by the Ombudsman's office and to ensure increased accessibility to these services through raised awareness and use of an 'interactive' website. The Outreach Strategy and Action Plan are reviewed annually as part of the review of the Strategic and Business Planning process to ensure continuous improvement and development in this area. In 2010, an audit of MLAs awareness of the role of the Office (undertaken by the Communications provider) identified the need for an information event for MLAs and their constituency staff which was held in the Assembly on 23 November 2010. A further such event is planned for the Autumn of this year. The Outreach Strategy and Action Plan for 2011/12 is attached at Appendix 1. Its focus remains on informing key stakeholders such as the public and the Assembly on the work of the office. Experience has demonstrated the need for targeted information leaflets in areas such as planning and health and these leaflets have been developed.

## **2.0 Public Awareness of the Ombudsman's Office**

- 2.1 From September 2009, the Ombudsman has monitored general awareness of his office through the use of the Northern Ireland Omnibus Survey conducted by the NI Statistics and Research Agency (NISRA). That survey is conducted twice yearly and measures the level of awareness of the work of the Ombudsman's office amongst the general population and using specific variables such as age group, employment and marital status, gender and economic activity. The most recent survey (January 2011) evidenced a high awareness of the Ombudsman and his role (72% in all). This awareness level is high when compared with other Ombudsman offices (see attached analysis of date at Appendix 2 prepared for Ombudsman's Senior Management Team discussion on 9 March 2011), although there were certain categories of groups where awareness was low (younger people). The current Outreach Strategy 2011/12 and Action Plan have been adjusted to take account of these results.
- 2.2 The current methods for informing the public and bodies in jurisdiction of the services provided by the Ombudsman and his office are as follows:
- Annual Report (available on the website, and from the office in hard copy on request to members of the public);
  - Information Leaflets (available on the website, in the office and via advice /voluntary sector);
  - Outreach Events/Activities;
  - 'Signposting' Activity – (ensuring bodies have adequate signposting to the Ombudsman via websites and published leaflets and complaints correspondence (eg justice bodies project referred to in attached Outreach Strategy);
  - Periodic Digest of Cases – laid before Assembly and issued to all MLAs, bodies in jurisdiction, advice and voluntary sector and representative groups;
  - Public engagement forums and participation networks;
  - Identified target group activity (such as schools, citizens courses);
  - Communications/Media – ensuring adequate publicity for publications such as recent guidance on making an apology and lessons learned from key cases in periodic digest;
  - General events/presentations – attendance and presentations.

### **New Projects/Initiatives**

- 2.3 In conjunction with Queen's University Belfast, and the Law Centre, the Ombudsman has funded and provided editorial support for the production of a booklet to inform the wider public of alternative dispute resolution (ADR) mechanisms in Northern Ireland. In particular the role of the Northern Ireland Ombudsman and other Ombudsmen and regulatory bodies in resolving disputes is explained in detail in the booklet. This 'Alternative to the Courts' booklet is in final draft form and will be published and launched in July 2011. As it is a public information booklet, its language, content and structure has been designed to better inform the public about the role of the Ombudsman as part of the ADR landscape in providing redress to individuals in Northern Ireland.

### **3.0 Use of Electronic Media**

- 3.1 The Northern Ireland Ombudsman is required by his legislation to obtain/receive a complaint in writing. Section 46 (1) of the Interpretation Act (NI) 1954 defines 'writing' as including 'words typewritten, printed, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in a visible form'. The practice in the office is therefore to accept complaints via its online complaint mechanism or in writing by way of correspondence or alternatively an individual may complete a form which is publicly available on the website or in the office in order to make a complaint. In 2010, and early in 2011, work was completed on the Ombudsman's website to update and modernise it so as to provide easier access to individual citizens. Part of that development project was the ability for members of the public to submit complaints online and this has proved a useful adjunct to the website.

In general, the Northern Ireland Ombudsman communicates with complainants through electronic media as well as through written correspondence and does accept electronically submitted complaints.

- 3.2 The Ombudsman is currently developing a replacement for the case management computer system in his office. The development of the replacement is at an early stage. However, one proposal which is being considered is a proposal to develop a new online case tracking system which would allow individuals with computer access to track milestones in relation to their complaint online on a 24 hour basis without the necessity to contact the office. This development is one which has been found to be of value in other sectors.

### **4.0 Conclusion**

1. 4.1 The Ombudsman's unique role in investigating complaints about public bodies in his remit does require a balance between ensuring members of the public are informed both generally and at the point of need of the work of his office, while avoiding a perception that he is canvassing for complaints. It is encouraging to note the high levels of awareness of the Ombudsman and the work of his office but he recognises the need for more targeted outreach. Unlike other Ombudsman offices, the Ombudsman does not have an in-house communications team. Because of resource constraints however, he has engaged the assistance of an external communications expert to ensure his activity is targeted and relevant to the needs of the public and his stakeholders.

Marie Anderson

June 2011



## Ombudsman to Committee

Mr T Elliott  
Chairman  
OFMDFM Committee  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

17 August 2011

Dear Mr Elliott

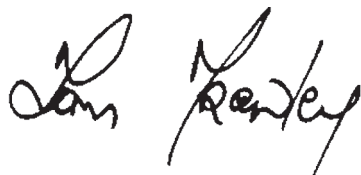
### **Ombudsman Bill**

I am grateful to you and the Committee for the continued sponsorship of the proposed Ombudsman Bill. You may recall that at the evidence session on 29 June I agreed to write to the Committee with my thoughts on some of the 'in principle' decisions discussed by it on 22 June.

Further, given the growing interest from other Committees in the work of my office, it may be helpful to draw to the Committee's attention some developments in relation to my jurisdiction that I believe may be of interest to the Committee and may require liaison with other Committee chairs.

I have therefore drafted a paper which I hope meets the commitments I made to the Committee. I will be happy to provide further information or clarification on any of the matters covered in the paper if the Committee or you as Chair would consider that helpful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'T Frawley', written in a cursive style.

**T Frawley**  
Ombudsman



# Ombudsman Briefing Paper re Law Commission Report on Public Services Ombudsmen

## **Law Commission of England and Wales Report on Public Services Ombudsmen<sup>1</sup>**

1. I would draw the Committee's attention to the following recommendations of the report which I consider of particular relevance to the Committee's current deliberations.

**Part 3 Recommendation 2** – that all formal statutory requirements that complaints submitted to the PSO be made in writing are repealed even when there is presently discretion to waive that requirement. Further, that PSO publish guidance as to how complaints can be made.

**Recommendation 3** – the current statutory bars in PSO legislation should be repealed and replaced with the discretion for the Ombudsman to take a claim unless they decide it is not appropriate. The PSO should publish guidance detailing where it is appropriate to have a complaint made to it, and where it is more appropriate to make use of a court or other mechanism for administrative justice.

**Recommendation 4** – the Administrative Court (Judicial Review Court) should have power to stay an action before repeal of MP filter.

**Recommendation 5** – repeal of the MP filter and introduction of a dual track approach so that an individual would be able to submit a complaint directly to the PCA involving the disclosure of personal details.

**Recommendation 6** – Ombudsmen should have the ability to release details of a complaint submitted to the Ombudsman concerned where, in their opinion, such release is necessary for the investigation of similar complaints.

Disclosure of the identity or personal details of an individual before the conclusion of an investigation should not be done except with specific consent.

### **Referral to the Court on a point of law**

**Recommendation 7** – Ombudsmen should be able to make a reference to the Administrative Court asking a question on a point of law.

Ombudsmen should meet their own costs in making a reference to the Court.

### **Alternative Dispute Resolution/Case Digest:**

**Recommendation 8** – LGO, HO and PHSO should have provisions similar to section 3 of the PSOW Act 2005 allowing them to dispose of complaints in other ways than by an investigation. PSO should adopt a publication policy whereby a digest of such complaints resolved by ADR should be published.

### **Reporting**

**Recommendation 9<sup>2</sup>** - Ombudsmen should publicise internal processes for instance where an Ombudsman allocates different complaints to internal tracks.

### **Reporting and Statement of Reasons**

**Recommendation 10** – given the proposed removal of the MP filter, a duty should be placed on PSO to send a copy of a report to the complainant who submitted the original complaint.

1 Published 14 July 2011

2 The Welsh model of reporting was not preferred as previously recommended based on three types of report – a short form report, report and special report and that a statement of reasons for not investigating be published.

A duty should also be imposed on PSO to give a statement of reasons for not opening an investigation to the complaint.

Discretion for LGO to publish reports and statements of reasons to whom they think fit.

**Recommendation 12** – recommendation of the PSO should continue to be part of the political process.

Findings (of fact and maladministration) of PSO should be binding unless successfully challenged by way of judicial review.

#### **Power to issue guidance**

**Recommendation 13** – PSO should have the power to publish such general reports and guidance and other documents as they think fit.

#### **Independence and accountability/appointment**

**Recommendation 15** – PCA be appointed by Her Majesty on the nomination of Parliament.

#### **Relationship with Select Committee**

**Recommendation 16** – Parliament and National Assembly for Wales should consider establishing formal relationships between Select Committees and PSO.

2. I commend to the Committee the report in its entirety and consider its publication to be timely and its recommendations to be supportive of the 'decisions' to date in respect of:

#### **Access to the PSO**

- recommended provisions in relation to complaints in writing to be repealed and complaints to be received both orally and in writing;
- repeal of MLA filter and dual track approach.

#### **Alternative Dispute Resolution/Case Digest**

- PSO discretion to dispose of complaints other than by investigation (equivalent to Section 3 of PSOW Act 2005);
- Case digest of complaints resolved by ADR to be published by PSO.

#### **Enforcement**

- PSO recommendations not to be binding or subject to formal enforcement mechanisms;
- PSO power to issue such reports and guidance as they think fit.

#### **Independence/Accountability**

As at 1 above.

# Ombudsman Submission to Committee

## Submission of Northern Ireland Ombudsman on Proposals for an Ombudsman Bill

August 2011

### 1.0 Social Care

- 1.1 I note that social work is a particular area covered by the 'in principle' discussion at the Committee on 22 June which if proceeded with could have implications for the NI Ombudsman's jurisdiction in health and social care in Northern Ireland. Within my current jurisdiction I have the authority to consider issues of clinical judgement without first finding maladministration. In relation to a social care judgement, however, my jurisdiction is more circumscribed in that while I can examine matters involving the professional judgement of social workers, I must first identify maladministration. This as indicated contrasts with my jurisdiction in cases that involve health professionals (doctors and nurses) as I can question their clinical judgement regardless of whether or not maladministration has first been established.

It is therefore important that I explain to members that while at present I am not precluded from investigating the judgement of social workers, I must first find maladministration in the process. Under existing legislation therefore I am required to apply a different process or test to the examination of a social care complaint than that for health care complaints. I find this additional caveat in social care cases both creates uncertainty and confusion for complainants and it fails to reflect the reality of the actual situation here in Northern Ireland, where we have an integrated health and social care system. I am routinely required to explain this different approach to social work to members of the public in terms which I know they consider to be unhelpful and bureaucratic. This situation is captured very well in the wording I am forced to currently use in my public information leaflets which is as follows:

*Clinical Complaints - 'Nothing in this Order authorises the Ombudsman to question the merits of a decision taken without maladministration by a body to which this Order applies in the exercise of a discretion vested in that body'. Social Care Complaints - 'This does not apply to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgement'.*

- 1.2 I would draw your attention specifically to Section 11 of the Public Services Ombudsman Wales (PSOW) Act 2005 which does, as the Committee heard from Peter Tyndall, the Welsh Ombudsman's evidence to the Committee on 15 June, give him an explicit power to question the decisions of health and social care professionals taken 'without maladministration'. The relevant legislation reads as follows:

### 11. Decisions taken without maladministration:

- (1) *The Ombudsman may not question the merits of a decision taken without maladministration by a listed authority in the exercise of a discretion.*
- (2) *Subsection (1) does not apply to the merits of a decision to the extent that the decision was taken in consequence of the exercise of professional judgement which appears to the Ombudsman to be exercisable in connection with the provision of health or social care.*

Mr Tyndall in his evidence explained to the Committee the policy reasoning behind the approach to this key area of his jurisdiction:

*'I have jurisdiction to consider the clinical judgement of doctors within the NHS in Wales as well as the professional judgement of social care workers. Most complaints engaging social care or the Health Service, or many of them, have an element of professional discretion. I use professional advice, clinical advice, or advice from experienced social care workers in forming opinions. However, in reality, people expect to be able to complain about those aspects of the service and, given the two are essentially integrated here, it would be sensible to have the same discretion in both fields and would give complainants a degree of consistency and reassurance that they can get an independent view on issues that are really important to them. Often, the decisions being taken by social care professionals are of fundamental importance to families'.*

- 1.3 I appreciate the Committee have discussed this issue already but I would ask them to give further consideration to the opportunity presented by the new legislation to create a consistent approach across our integrated health and social care system. This need for consistency and parity across medicine, nursing and social work is also supported by a number of respondents to the Committee's 2010 consultation paper. I would in particular draw the Committee's attention to the submission of Dr Maurice Hayes, former Northern Ireland Ombudsman, whose response to the consultation question on social care was:

*'It would be anomalous to include clinical judgement in medical fields and to exclude the exercise of judgement by social workers'.*

The issue of parity was also supported by the Patient and Client Council in their consultation response. As the Committee will be aware the Council are an advocacy body which was created to ensure that the voice of those who are health and social care users and their families is heard.

- 1.4 Some of the consultation responses on the issue did not however support the parity principle. Notably, RQIA which referred to professional judgement in social care as being a matter for the Northern Ireland Social Care Council (NISSC). In reality, the role of the NISSC is to register and regulate social services staff. It is primarily a regulatory and oversight body for social workers and other workers in the social care sector of the Health and Social Care system and has no direct role in investigating complaints about social workers from members of the public who perceive they have experienced an 'injustice' as a result of the alleged actions or decisions of social workers as they have affected the social care they have received or failed to receive. The Social Care Council on the other hand is primarily involved in the registration, training and competence of social work staff.

Again I would ask the Committee to give further consideration to this issue as treating social care staff on the same basis as health care staff is, in my strongly held view, very important as the two areas in Northern Ireland are integrated and can frequently overlap in the complaints that I investigate.

## **2.0 Contributing to Improvement in Public Administration**

- 2.1 In making my request for further consideration by the Committee on the statutory provisions relating to improving public administration and provision of guidance I am mindful of the words of Cecil Clothier (former Parliamentary Commissioner for Northern Ireland (1979-84)) *'an Ombudsman's mission has better and more far reaching consequences than the mere correction of other people's mistakes'*<sup>1</sup>.
- 2.2 The emerging view reflected in the note of the Committee's discussion as regards my role in improving public administration would have significant implications when taken together with the Committee's discussion on the issue of a 'design authority role' and powers to issue good practice guidance.
- 2.3 I do wish to emphasise to the Committee that I accept that the core business of an Ombudsman is to resolve complaints. However, alongside that primary purpose I would refer

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1 Paragraph 5.151 – 5.154 Law Commission Report Public Service Ombudsmen Law Commission No 329

the Committee to the findings of the research published in the Kirkham, Buck, Thompson book *'The Ombudsman Enterprise and Administrative Justice'* which records the unanimous views of Ombudsmen from 'two continents' on the complementary nature of the two key roles – complaints resolution and promoting good administration. In the proposed Ombudsman Bill, it is important therefore that this aspect of an Ombudsman's work is explicitly recognised and provided for.

- 2.4 I believe that the development of the Draft Bill offers an opportunity for the Northern Ireland Assembly to reflect this duality of role. It is important to recognise the contribution that an Ombudsman can make in identifying errors in the decision making processes of government while also ensuring that these lessons are learnt and disseminated across all public sector decision makers, not just the body involved in the complaint. To that extent, an explicit role in promoting 'good administration' would complete the Committee's ambition for a 'proactive' Ombudsman informing the legislature of the failures and successes of public administration in Northern Ireland through a closer working relationship. This proactivity, I believe, would be further underpinned by the Committee's proposals for the Ombudsman to have the power to conduct own initiative investigations which are covered in detail at section 4.

### 3.0 Power to Issue Guidance on Good Practice

- 3.1 I agree with the Committee's recorded view that my reports do identify good practice and that learning can be identified by me in the context of an individual complaint to the specific body complained of. In my experience, that alone is insufficient for the Ombudsman's criticisms or indeed commendation of a good practice or procedure to be disseminated more widely. I refer again to the evidence from the Welsh Ombudsman in relation to his powers to issue guidance which he indicated he uses sparingly. In Wales, for example, the Ombudsman has issued guidance on good practice in handling complaints for local government bodies.
- 3.2 Members of the predecessor OFMDFM Committee have considered in some depth what the 'status' of such guidance might be and whether such guidance would be the equivalent of the Equality Commission's Code of Practice which is statutory and any failure to follow such guidance can be considered by an industrial tribunal when deciding if there has been a breach of the law. The guidance issued by the Welsh Public Services Ombudsman on the other hand has a more 'advisory' status. Where Ombudsman's guidance is applicable, a body must 'have regard' to it in the discharge of its functions. That does not mean that the guidance is mandatory in every instance, but rather a body must consider the guidance when discharging its functions and have good reasons for departing from the guidance in particular cases. Further, the Welsh Ombudsman may have regard to the extent of a body's compliance with guidance when investigating a complaint. This is an important provision and one that I would welcome as it would allow me to further embed good administrative practice in the public sector while ensuring openness and transparency around my approach to 'maladministration'.
- 3.3 Mrs O'Reilly, the Ombudsman in the Republic of Ireland, gave evidence on how she approaches guidance to staff of public bodies and she also indicated her office holds training seminars to further disseminate good practice.
- 3.4 The importance of a statutory provision which would allow the Ombudsman to issue guidance is also supported by the recent recommendations of the Law Commission of England and Wales in respect of Public Services Ombudsmen<sup>2</sup>:

*'Recommendation 13 – we recommend that all Public Services Ombudsmen should have the power to publish such general reports, guidance or other documents as they see fit'.*

The Report of the Law Commission highlights a number of significant issues for consideration on how the role and remit of Public Service Ombudsmen (PSO) could be strengthened and

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2 Public Services Ombudsmen Law Com No 329

enhanced. The Report was issued following an extensive UK wide consultation. In this paper at section 9, I highlight some of the report recommendations which in my view have particular relevance to the Committee as it finalises the Ombudsman Bill and I would therefore commend the report to the Committee for further consideration.

#### 4.0 Own Initiative Powers

- 4.1 As the Committee has been advised, own initiative investigations are a common feature of an Ombudsman remit outside the UK. My colleagues in Wales and Scotland do not have such powers although in their evidence to the Committee they confirmed their ambition to have such powers. The Committee has heard at length from the Irish Ombudsman about her experiences of conducting own initiative investigations.

An own initiative investigation authority allows an Ombudsman to investigate the practices of a public body without first receiving a complaint. The Committee has agreed in principle that the Ombudsman Bill should provide for such a power with the caveat that some further detail would be required about how 'own initiative' would work in practice. The Irish Ombudsman emphasised that this power is 'of necessity' used 'sparingly' and I completely concur with such a measured approach. The main issue for the Committee is what could trigger an Ombudsman exercising his or her discretion to commence an 'own initiative investigation'. The Irish Ombudsman has a wide discretion in this regard and can investigate when *'it appears to him, having regard to all the circumstances, that an investigation under this section into the action would be warranted'*.<sup>3</sup>

- 4.2 Mrs O'Reilly in her evidence gave an example of an own initiative investigation prompted by a complaint by a public representative on behalf of a number of low income householders who were refused waivers of refuse collection charges by Waterford County Council. A second potential trigger for own initiative investigations could be a number of complaints about a particular practice or decision taken by a body or bodies which causes the Ombudsman concern and highlights the need for closer scrutiny of what may be a sector wide practice.
- 4.3 In addition to these potential triggers (complaints from public representatives or from members of the public), the Deloitte Review (2004) envisaged regular consultation with the Comptroller and Auditor General (C&AG) so as to avoid duplication of effort and commitment of resources. The Deloitte Review which informed the consultation process referred to a 'systemic review power' but this may have caused possible confusion over what was envisaged by including it within the scope of the NI Ombudsman. What the Deloitte review was referring to as 'systemic review' was in fact a power of own initiative investigation. It would in my view represent good practice that if I were to consider exercising an 'own initiative' authority that I consult with the C&AG. That form of proactive engagement with the C&AG would represent an example of 'joined up thinking' that would inform a more targeted and focussed approach to identifying poor administrative practices.
- 4.4 I could also be invited by any Committee of the Assembly to consider an 'own initiative' investigation arising from any evidence based on concerns that the Chair or any member of the Committee might raise with the Ombudsman. Given that investigative resources are finite, it would in my view be essential to overlay the criteria for commencing an own initiative investigation with a 'public interest test' so as to ensure best use of those resources and to avoid a de minimis threshold for such investigations. By 'public interest' I do not mean what interests the public or indeed the media. There is a risk for example that the media might use 'public interest' to call the Ombudsman to take action in relation to what it considers a newsworthy issue which has the potential to create the impression that the Ombudsman is an instrument of the media.
- 4.5 It may be helpful if I take this opportunity to offer further clarification for the Committee of my current role in relation to 'systemic issues'. The Welsh Ombudsman on 15 June 2011

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3 Section 4(3)(b) of Ombudsman Act 1981.



gave evidence to the Committee of a specific complaint which gave rise to a need to look at systems for recalling cancer patients for regular monitoring. I, currently like my Welsh colleague, do consider whether a complaint suggests systemic failure that has led the complainant to seek an investigation by my office. In a recent case involving North Down Borough Council (reported in the May case digest) I found maladministration on the part of the Council because it was charging for disposal of household waste when it was not lawful to do so. I have made recommendations with system wide implications in that case, which arose from a complaint from an individual about inconsistencies in charging practice. This case has implications for local Councils across Northern Ireland and is, in my view, an example of an Ombudsman's systemic review. I interpret my current legislation as permitting my intervention in such cases and frequently do recommend systemic changes arising from a finding of maladministration in a particular case.

## **5.0 Following the Public Pound**

- 5.1 The Committee, at their 22 June meeting, asked for further detail on the implications of following the public pound and both I and my Deputy responded to a specific question on this on 29 June when we gave evidence to the Committee.
- 5.2 I think it may be helpful if I provide some further background and context on this issue. Currently, in both the Commissioner for Complaints and Assembly Ombudsman legislation the bodies in the respective jurisdictions are listed. There is also a specific provision allowing OFMDFM to alter any entry or note on the list or to add or remove a body that is listed. Bodies can be added or removed but the nature of that body's function and its funding monies being defrayed from the public purse are important factors in informing a decision as to whether or not they are included in the schedules to the legislation. For instance, only a Department or Authority whose functions are exercised on behalf of the Crown can be added to the Assembly Ombudsman legislation. The position in relation to the Commissioner for Complaints legislation is more complex, the legislation provides as a double test (1) the body must exercise functions conferred on it by a statutory provision OR have its expenses substantially defrayed out of moneys appropriated by measure<sup>4</sup>.
- 5.3 The 1996 Order was amended to include general 'health service providers' as bodies subject to investigation which added GPs, dentists and pharmacists to my jurisdiction. The wording as 'substantially defrayed' was considered by the Deloitte Review

The Deloitte Review envisaged that the Ombudsman should have jurisdiction over all organisations substantially funded from public monies unless they are explicitly excluded and that OFMDFM should provide a gatekeeper role in relation to maintaining an up to date list of bodies in jurisdiction. This reflects the general principle that bodies in receipt of public monies should be accountable for their actions in other words 'following the public pound'. For instance, Housing Associations receive public funds to undertake their core purposes of meeting social housing functions. However while these bodies are not entirely funded from public funds, they have been within the jurisdiction of the Ombudsman since 1 April 2004 as recommended by the Deloitte Review.

- 5.4 The Assembly has two independent officers who examine the performance of government departments and public bodies which deliver services to the public. Those officers are the C&AG and the Ombudsman. The latter has the dual role of Assembly Ombudsman and NI Commissioner for Complaints. The Deloitte Review identified that a divergence had developed between the range of bodies which are scrutinised by the C&AG and those that the Ombudsman can accept complaints about. Deloitte therefore recommended that the bodies listed in paragraph 4.6 of the Committee's consultation document which are already in the jurisdiction of the C&AG should also be brought within the Ombudsman's jurisdiction.

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4 Article 8 of the Commissioner for Complaints (NI) Order 1996

- 5.5 The Committee should note that currently the Ombudsman does have jurisdiction over some education authorities which include the Education and Library Boards as well as the Department of Education and the Department of Education and Learning. The list at paragraph 4.6 of the consultation document does include some additional education bodies such as Universities and Colleges of Further and Higher Education which it proposes should come within the Ombudsman's jurisdiction. These institutions have been identified because currently they are not within the jurisdiction of the Office of Independent Adjudicator for Higher Education. In Scotland, these institutions are in the jurisdiction of the Scottish Public Services Ombudsman (SPSO). In Northern Ireland, in contrast, such educational institutions, although in receipt of public funds, are not within the jurisdiction of an Ombudsman or similar oversight authority in respect of their administrative actions.

Deloitte referred to 'substantial' public funding as the key criterion that would inform a decision on whether an organisation or body should be included in the Ombudsman's jurisdiction. The appropriate test is a matter for the Assembly and I note the Committee's concerns that a lower threshold might extend Ombudsman oversight to voluntary sector bodies in receipt of small grants or minimal funding. One possible alternative, and more easily measured test, is that set out in section 29(3)(c) of the PSOW Act which states that a body falls within jurisdiction 'if at least half of its expenditure on the discharge of its functions' is met from public funds.

- 5.6 I do consider that the Welsh formula of 'at least half' of the bodies expenditure being met from public funds is a prescriptive test and has limitations. As discussed by the Committee on 29 June, its inclusion in the Ombudsman Bill may not ensure that all bodies who provide services to the public and who are publicly funded to do so, are within an Ombudsman's jurisdiction. It is clear from the consultation responses that most respondent's consider 'following the public pound' to be an appropriate principle. However, the proposed legislation should if possible have specific criteria which will facilitate a judgement by OFMDFM as to whether a body should be 'subject to investigation'. Mr Tyndall suggested in his evidence (15 June) that an approach equivalent to the UK Parliament's equality legislation might provide a solution. He gave evidence to the Committee that a body may be in the Ombudsman's jurisdiction even if not specifically listed. I have examined the relevant provisions of the Equality Act 2010:

- The Equality Act 2010 (which applies generally to GB only) refers to the terms 'public authority' and 'public function'.
- Section 150(1) of the Equality Act refers to a public authority being specified in Schedule 19 of the Act. Schedule 19 is a list of bodies.
- Section 150(5) of the Equality Act refers to a public function as being a function that is a function of a public nature for the purposes of the Human Rights Act 1998.
- There is no 'litmus test' in the Equality Act 2010 for determining when a body should be classed as a public body. I have found no reference in the Act to any specific amount of public funding being the test to be applied.

This is a possible alternative to 'substantially defrayed out of monies appropriated by measure'.

- 5.7 There also continues to be some confusion around the ability of the Ombudsman to investigate a complaint made against a 'contracted out service' where a service is now delivered by a voluntary body or by a private sector provider. I am satisfied that I can, under my existing legislation, investigate the subject matter of such a complaint because the service delivery is 'on behalf of' a body in my jurisdiction such as publicly funded palliative care in a hospice or private bin collection on behalf of a Council. I can investigate maladministration in relation to any service which is conducted on behalf of a public body in my jurisdiction and there is no requirement for the private or voluntary sector body to come



within my jurisdiction. It may therefore be helpful to make this clarification explicit in the new legislation.

5.8 A more contentious issue however is where the work of voluntary or charitable bodies is purely a public service or function and is funded by the public purse. Housing Associations fall into this category and are bodies subject to my jurisdiction. OFMDFM when including such bodies in the list may require that a statutory formula is met.

5.9 I would suggest the following formula for consideration by the Committee which is based on the definition of a public authority for the purposes of the NIPSO:

*'A body subject to investigation is one to which the following conditions must apply:*

- (i) the first condition is that the body is a body providing a service to the public or is exercising functions of a public nature or is providing under a contract made with a public body any service whose provision is a function of that body;*
- (ii) the second condition is that the body is wholly or substantially in receipt of monies appropriated by measure of the Northern Ireland Assembly for the purposes of carrying out functions of a public nature or providing a service as referred to at (i) above.*

5.10 Finally, on this issue, the Committee should be aware of the implications of OFMDFM designating a body for the purposes of the Ombudsman legislation that is by virtue of Section 75(3) of the Northern Ireland Act 1998 – a public authority so designated will be a body designated for the purposes of Section 75 of the 1998 Act. Given the Northern Ireland Ombudsman's gatekeeper role in relation to Section 75 designation, it will be necessary for OFMDFM to communicate any changes in bodies subject to Ombudsman jurisdiction to the NI Ombudsman.

## **6.0 Adverse Comment in Ombudsman Reports**

6.1 The Committee indicated at the 22 June meeting that they would consider the Welsh approach to this. This was explained by Mr Tyndall in his evidence as providing both the complainant and the body with an opportunity to consider draft reports and that their comments are considered in finalising the reports. This practice of sharing a draft is not specifically provided for in the PSOW Act 2005 which requires the Ombudsman after 'conducting an investigation' [conclusion of an investigation] to prepare a report on his findings and to send a copy of the report (final report) to all appropriate persons. These include the complainant and the body complained of as well as other persons at the discretion of the Welsh Ombudsman.

6.2 The practice of sending a draft report is followed in this office but only to the body complained of and any other persons about whom an adverse comment is made are given the opportunity to comment on the draft. In the Commissioner for Complaints legislation there is an additional step that allows any of the evidence<sup>5</sup> to be tested by way of examination in chief and cross examination. This right in Northern Ireland is unique in Ombudsman legislation and there was wide support from respondents to the consultation that it should be removed as it introduces an adversarial element into what is otherwise an inquisitorial model of investigation and inquiry by the Ombudsman. I do favour the removal of the 'right to a formal hearing' with it being replaced with the explicit right to make written representation as detailed in the state of Queensland legislation<sup>6</sup> referred to in the Committee's consultation document<sup>7</sup>.

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5 Article 12(7)

6 Section 55 Ombudsman Act 2001

7 Paragraph 6.3

## **7.0 Provision of a Facility**

- 7.1 The Committee's consultation paper invited comments on the specific provision of 'a facility' to the Ombudsman. I would welcome a provision that permitted bodies to facilitate the expedition of my investigation by providing photocopying and other facilities to assist my information gathering function in particular, which can be time consuming. This would serve to emphasise along with the existing legislative provisions for obtaining information, documentation, obstruction and contempt; the requirement on the part of a body to cooperate by providing information expeditiously and comprehensively as requested by the Ombudsman.

## **8.0 Co-operation with the Ombudsman**

- 8.1 The Committee has helpfully indicated that in principle the Ombudsman should seek to co-operate with other Ombudsmen in UK and ROI in matters which overlap their jurisdictions. This is linked to consultation questions 24 and 25 and in practice mainly refers to discrete areas of overlap:
- (i) Overlapping investigatory roles in relation to 'bodies' such as the joint jurisdiction of the Irish Ombudsman and my office in relation to North/South Implementation bodies. I currently work under a Memorandum of Understanding (MOU) with the Irish Ombudsman in this respect;
  - (ii) Overlapping investigatory roles in relation to the 'subject matter' of an investigation. For instance, in relation to confidentiality and health records or complaints about records management practice of public bodies I can currently refer a complainant to the ICO and the ICO can refer a case to my office.
- 8.2 Given the in principle decision to provide own initiative powers, co-operation with other UK and ROI Ombudsmen and the C&AG is important and I welcome the Committee's positive response to this issue.
- 8.3 The Committee did however raise an issue about data protection legislation. The Data Protection Act 1998 (1998 Act) does not prohibit the sharing of personal information, rather it sets out eight data protection principles which provide a framework for the collection, sharing (disclosure), correction, security and retention/disposal of personal information.
- 8.4 The first data protection principle is the most relevant in this context which requires the processing of personal data to be 'lawful' and 'fair'. It is important that in the Ombudsman Bill there is a specific provision for collaborative working between the Ombudsman and the persons specified at para 8.2 so as to meet the criteria of 'lawfulness'. In addition, like other Ombudsmen, the NI Ombudsman and ROI Ombudsman have a statutory bar on disclosure of information obtained for the purpose of an investigation. It is anticipated this bar would be amended to allow for information sharing and the complainant's consent being obtained before a joint investigation commenced to ensure the 'fairness' requirement is met. One possible statutory model is that provided for in the Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007. A copy of that legislation is attached.
- 8.5 In addition to complying with the data protection principles, the 'collaborating' Ombudsman must also now comply with Information Commissioner's Code of Practice on Data Sharing which was launched in June 2011. The Code (available at [www.ico.gov.uk](http://www.ico.gov.uk)) emphasises the need to obtain clear and informed 'consent' from individuals when seeking to share their personal information. The Information Commissioner when considering enforcement action will consider whether the provisions of the statutory code have been met.
- 8.6 It should be noted that the 1998 Act does not relate to deceased persons' information or records and that such information is subject to the law of confidence and article 8 of ECHR. It is important that the Ombudsman Bill recognises the need for privacy/confidentiality.

**9.0 Other Developments**

- 9.1 The Committee will be aware of the consultation on local government reforms which included a question relating to the introduction of a mandatory code of practice for the conduct of locally elected representatives. This has now concluded and I am aware that the DOE Committee will be considering the role of the Ombudsman's office in investigating complaints under that Code. I look forward to working with the DOE Committee on examining the implications of this proposal.
- 9.2 The Committee will also be aware of a recent extension to my jurisdiction arising from the Assembly Members (Independent Financial Review and Standards) Act (NI) 2011. The Independent Review Panel (the Panel) is now a body within the Commissioner for Complaints jurisdiction. The Panel was established at the beginning of July 2011 and my office is working with their corporate services staff to ensure adequate signposting by the Panel to my office where individuals consider they have sustained injustice in consequence of maladministration on the part of the Panel.

A handwritten signature in black ink, appearing to read 'T F Frawley', with a stylized, cursive script.

T F Frawley

August 2011

# Ombudsman Briefing Paper for Committee meeting on 23 May 2012

## **BRIEFING NOTE FOR OFMDFM COMMITTEE ON OMBUDSMAN'S VIEWS ON ISSUES FOR DISCUSSION ON WEDNESDAY 23 MAY 2012**

Chairman and members of the Committee, I am grateful for the invitation to discuss some of the issues around the consolidation of my two jurisdictions as Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints.

The Clerk has written to my Deputy outlining two main issues but I am content to take questions on any other issues you wish to seek my view on.

### **1. County Court Mechanism**

The Ombudsman notes the options open to the Committee as follows:

- (i) To extend the enforcement provisions of article 16 of the Commissioner for Complaints (NI) Order 1996 to the bodies within the jurisdiction of the Assembly Ombudsman;
- (ii) To remove the enforcement provisions for bodies currently within the Commissioner for Complaints jurisdiction;
- (iii) To retain the enforcement provisions in respect of bodies within the Commissioner for Complaints jurisdiction.

There is one further possible issue which relates to a proposal to extend the County Court mechanism to all bodies in the Commissioner for Complaints jurisdiction. It should be noted that general health service providers are not currently covered by this mechanism under Commissioner for Complaints legislation. I will speak to this issue at a later stage.

To assist the Committee in its deliberation I would remind the members of the historical origins of the County Court enforcement mechanism, which is a unique feature of the Northern Ireland Ombudsman's jurisdiction. The

rationale for the inclusion of this enforcement mechanism can be traced to section 7 of the original Commissioner for Complaints (Northern Ireland) Act 1969. The Notes on Clauses in respect of the relevant provision indicate that the purpose of this provision was to encompass acts of maladministration by public authorities that involved political and religious bias. The Notes on Clauses specifically refer to acts of discrimination in the allocation of housing, benefits or employment.

The original creation of the office of Commissioner for Complaints was directed mainly at the actions of local Councils. Today the number of bodies in my jurisdiction as Commissioner for Complaints is much expanded and includes registered Housing Associations, a number of arms length justice bodies as well as regulatory bodies such as the Equality Commission and the NI Children's Commissioner. The 1969 Act predated the Fair Employment legislation and the expansion of protection against discrimination that exists today (which now includes section 75 of the Northern Ireland Act 1998).

In my own experience as Commissioner for Complaints since 2000 I am aware of no reported cases heard in the County Court where complainants have invoked the procedure under article 16 of the Commissioner for Complaints (NI) Order 1996 to seek damages for 'loss of opportunity' where I have found injustice arising from maladministration. The last significant case brought pursuant to the County Court enforcement mechanism was the case brought against the members of Craigavon Borough Council who refused to enter into a lease with a GAA club in 1980. The case was initially heard in the County Court and the Court of Appeal gave its judgement in 1986. Since that time, there has been no reported case on the article 16 jurisdiction of the County Court. My office has been unable to obtain further data from the Northern Ireland Court Service on the number of applications brought under this procedure which did not proceed to hearing.

A possible reason for this enforcement mechanism not being invoked, in my view, is the degree of compliance with my recommendations generally. I attach as an appendix to this paper relevant statistics in this regard. As you

will note in the period 2009 to 2012 there has been almost 100% compliance with the recommendations in my jurisdiction as Commissioner. I am excluding general health service practitioners' compliance with my recommendations from the general picture as there is currently a High Court challenge to my ability to make a recommendation for financial redress in relation to a complaint involving a general practitioner. Judgement on this issue is awaited and confidentiality does not allow me to comment further.

Further I would draw the Committee's attention to the fact that in the case of general health service providers, these bodies are not covered by the County Court mechanism. You will note from the statistical analysis provided that in my jurisdiction in health under the Commissioner for Complaints legislation that in only 4 cases where I have recommended a financial payment has this not been complied with. These cases all involve general practitioners as the judgement of the High Court is awaited.

In my role as Assembly Ombudsman, I am pleased to advise the Committee that there has, to date, never been an instance in respect of this jurisdiction over Northern Ireland Departments and their agencies of non-compliance with my recommendations. The Committee will note that the former Northern Ireland Ombudsman, Mrs Jill McIvor in her consultation response, does refer to one instance where the Child Support Agency had not initially accepted her recommendations and the threat of a special report to 'Parliament' had ensured that the matter was 'satisfactorily settled'.

In relation to the recommendations of the Welsh and Scottish Ombudsmen, as far as I am aware there has been full compliance by all public bodies in jurisdiction. There are however a number of instances where the Parliamentary Ombudsman's recommendations have not been met by government departments and she has used her 'special report power' under section 10(3) of the Parliamentary Commissioner Act 1967 on these occasions to achieve compliance. The Committee may be aware for instance of the Equitable Life Report in which she found ten instances of maladministration by DTI, GAD and FSA and recommended an apology and

the introduction of a compensation scheme for those who had suffered as a result of poor regulation. In all of these special report cases, the government departments did eventually comply.

I would respectfully suggest therefore that if there were an issue of non-compliance then the appropriate forum to deal with this is a Committee of the Northern Ireland Assembly using the procedure for a 'special report' which currently exists in both Commissioner for Complaints and Assembly Ombudsman legislation. I note that it is anticipated the 'special report power' will be provided for in the proposed Ombudsman Bill.

The classic Public Services Ombudsman relies on this 'political pressure' to achieve compliance with his non-binding recommendations and not on the courts as an enforcement mechanism. In merging the two legislative models of Assembly Ombudsman and Commissioner for Complaints, this should be at the forefront of the Committee's consideration, namely the partnership between the Ombudsman and the Assembly to ensure his recommendations are met.

## **2. Schools**

I have been asked to speak to the issue of the local management of schools being included in the proposed extension of jurisdiction of the Northern Ireland Public Services Ombudsman. This was a proposal arising from the Deloitte Review (2004) and I would remind the Committee that complaints of maladministration arising in this sector were previously in the Ombudsman's jurisdiction. The removal of this aspect of the Ombudsman's remit occurred in the late 1980s when there was a policy decision to expand the autonomy of Boards of Governors. My current jurisdiction in the education sector extends only to the Department of Education, including the Education and Training Inspectorate, Education and Library Boards and education bodies such as CCEA and CCMS. The Committee will be aware that there already exists a number of statutory tribunals that deal with admissions and expulsions to schools as well as a Special Educational Needs and also a Special



Circumstances Body (responsible for dealing with claims made by parents regarding the special circumstances which prevented their child from achieving admission to their preferred school).

In the existing statutory instruments, there is a statutory bar on my accepting a complaint where there is a right of reference or appeal to a 'tribunal'. 'Tribunal' is defined broadly as any determining body. Therefore, if this statutory bar remains in the proposed legislation, the Northern Ireland Public Service Ombudsman would not be initially empowered to investigate a complaint where the issue could be ruled on by any existing tribunal or determining body (i.e. a special circumstances body). I would point out that under my existing role where a complainant has pursued a right of appeal or review to a tribunal or other determining body and considers that the injustice remains, I do have a discretion to investigate where there are reasonable grounds for that complaint. To that extent I would urge the Committee to replicate this 'last resort' remedy in the new legislation.

I am aware of the complexity of the schools sector in Northern Ireland and in particular the multiplicity of post primary schools under current education legislation. These include independent as well as grant aided schools which in turn have controlled, voluntary or integrated status. Consideration needs to be given as to whether the proposed extension in the jurisdiction of the Ombudsman would be to all schools or simply those that are publicly funded. It is my view that the principle to be adopted here is that recommended by the Deloitte Review namely, 'following the public pound' and therefore all schools receiving grant aid should be included in the proposed extension of the Ombudsman's jurisdiction. I appreciate that there has been much debate previously by the members of this Committee as to how to make decisions on inclusion in the Ombudsman's jurisdiction on the basis of this broad principle and I have given evidence of my views on this previously. In addition the Welsh Ombudsman, Mr Peter Tyndall, on 5 June 2011 provided a possible mechanism for such a decision to be made by the gate keeper under the Ombudsman legislation – OFMdfM.



Should the Committee, and on further debate the Assembly, agree to extend the Ombudsman's jurisdiction to local management of schools as proposed by the Deloitte Review, I envisage such complaints may be complex and emotive. They could in my view arise around issues such as maladministration in the decision making process of Boards of Governors relating to the application of school policies such as bullying or child protection. I do not wish to speculate but experience in other jurisdictions (Local Government Ombudsman) demonstrates they can also relate to school transport and tuition at home.

Since one of the proposals before this Committee is to remove the employment jurisdiction of the Ombudsman, I consider that if this is removed, complaints to the Ombudsman from individual staff members of schools concerning employment related grievances would not form part of the extended remit.

In terms of investigation resources, the removal of the employment jurisdiction would in my view free up some of this resource which could be utilised for complaints in the schools sector.

I have not specifically dealt with the issue of the proposed extension to HE and FE colleges and universities but would be happy to answer any questions in this regard.

My thanks again to the Chair, the members of the Committee and the Clerk for your continued support of the proposals to refresh and reform the legislation underpinning my office which is such an important scrutiny mechanism in the overall accountability landscape.

## Chairperson to Minister for Education

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw, Stormont,  
Belfast,  
BT4 3XX

Telephone: (028) 905 21904  
E-mail: [committee.ofmdfm@niassembly.gov.uk](mailto:committee.ofmdfm@niassembly.gov.uk)

**Tom Elliott MLA, Chairman**  
**Committee for the Office of the First Minister and deputy First Minister**

Mr John O'Dowd MLA  
Minister for Education  
Department of Education  
Rathgael House  
Balloo Road  
Bangor  
BT19 7PR

12th December 2011

Dear John,

### **Proposals to legislate to reform the Office of the Northern Ireland Ombudsman**

As you may be aware, the Committee for the Office of the First Minister and deputy First Minister is looking at options for bringing forward legislation to reform the Office of the Northern Ireland Ombudsman. Part of this consideration has involved the Committee looking at the areas of the public sector where the Ombudsman does not have jurisdiction, or where there has previously been jurisdiction and this has lapsed. One of the areas which the Committee has considered bringing under the Ombudsman's jurisdiction is schools. This potential extension of the Ombudsman's jurisdiction was included in the consultation on possible reform of the office that the Committee conducted last year.

At its meeting on 7th December the Committee agreed that it would be important to seek your view on the possibility of schools being under the jurisdiction of the Ombudsman. The Committee understands that schools have been included in the Ombudsman's jurisdiction in the past and is currently investigating why schools ceased to be part of the jurisdiction. Before the Committee goes further in considering this possibility around schools Members agreed that the Committee should let you know of its consideration of this issue and ascertain your feelings on Members proceeding with this expansion of the Ombudsman's jurisdiction.

I would be grateful if you could consider this issue and respond to the Committee by the close of play on Friday 13th January. I have attached a brief note explaining the role and function of the Ombudsman for your convenience.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Elliott', with a stylized, cursive script.

**Mr Tom Elliott MLA**

Chairperson

Encs.

## Department of Education Holding Response

From: McKee, Suzanne [mailto:Suzanne.McKee@deni.gov.uk]  
Sent: 16 January 2012 13:51  
To: Hall, Peter  
Cc: Fleetham, Roisin; Hicks, Alyn; Best, Paula; Young, Sharon; Ingram, Joanna  
Subject: Proposals to Legislate to Reform the Office of the Northern Ireland Ombudsman

Dear Peter

I refer to your memo of 12 December to Roisin Fleetham, Clerk to the Education Committee and Tom Elliott's letter to John O'Dowd.

Please accept our apologies for not meeting your deadline of Friday 13th January. The Department is currently working on a response and we will reply to you as soon as possible.

Thank you

Suzanne

**Suzanne McKee**

Central Support & Co-ordination Team

Department of Education

Tel: 59376

Email: [suzanne.mckee@deni.gov.uk](mailto:suzanne.mckee@deni.gov.uk)

# Minister for Education Response

FROM THE MINISTER/ÓN AIRE



AN ROINN

**Oideachais**

Department of  
**Education**

MÄNNYSTRIE O  
**Lear**

COR 1551/2011

Tom Elliott MLA  
Chairman of the Committee for OFMdFM  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
BELFAST  
BT4 3XX

Tel: 9127 9306

Fax: 9127 9779

Dialling codes: 028 from north of Ireland  
048 from south of Ireland

21 March 2012

Tom a chara

Thank you for your letter of 12 December about the reform of the Office of the NI Ombudsman and in particular seeking my views with regard to the possibility of including schools under the jurisdiction of the Ombudsman.

I have considered your proposal with interest in the context of the role and responsibilities of school Boards of Governors (BoGs), and the limited scope which presently exists for independent review of their decisions in the event of complaints of maladministration.

I agree that there is a good case for establishing a role for the NI Ombudsman in investigating complaints of maladministration against the decisions of school BoGs. I should make it clear, however, that this role would exclude the complaints for which there are alternative independent mechanisms for review as described in the paper enclosed.

In order to facilitate this proposal, I am prepared to formalise the existing arrangements for dealing with school complaints by making it a statutory requirement for BoGs to have written complaints procedures and for them to have regard to guidance on best practice when drawing up or reviewing their procedures.

A copy of this letter goes for information to the Committee for Education.

**JOHN O'DOWD**  
Minister for Education



An Roinn Oideachais, Teach Ráth Giall, 43 Bóthar Bhaile Aodha, Ráth Giall, Beannchar, Co an Dúin BT19 7PR  
Department of Education, Rathgael House, 43 Balloo Road, Rathgill, Bangor, Co Down BT19 7PR  
Männystrie o Lear, Rathgael Hoose, 43 Balloo Róad, Rathgill, Bang'r, Coontie Doon BT19 7PR



## **Annex C**

### **STATUTORY PROVISIONS RELATING TO APPEALS**

#### **APPEALS AGAINST SCHOOL ADMISSION DECISIONS**

1. Article 15 of the Education (NI) Order 1997 and Article 31 of the Education (NI) Order 1998, as amended and supplemented by Articles 27 to 30 of the Education (NI) Order 2006, enables parents to appeal against certain admissions decisions made by the Board of Governors (BoG) of a grant-aided school.

#### **Appeals to an Independent Tribunal**

2. Parents may appeal to an independent tribunal against the decision of a BoG to refuse their child admission to the school, on the grounds that the school's admissions criteria were either not applied, or were not applied correctly, and if they had been correctly applied the child would have been admitted to the school.
3. If the tribunal finds in the parents' favour, it will allow the appeal and direct the BoG to admit the child to the school. The BoG has a statutory duty to comply with the direction given by the tribunal.

#### **Appeals to the Exceptional Circumstances Body**

4. Parents may also submit an application to the Exceptional Circumstances Body (ECB) in situations where their child has not been admitted to the school and they consider that, for exceptional reasons, he/she must attend. This facility is available only in respect of admissions to post primary schools (Years 8-12). The BoG of the school specified in the application form is afforded the opportunity to provide written or oral representation to the panel hearing a case, but it is not obliged to do so.
5. The ECB is a free standing body with a legally qualified chairperson and a three person panel. It considers exceptional circumstances regarding the admission to a child's choice of school. The circumstances must be specific to the child and the school. Hearings may proceed regardless of whether or not the BoG comments on an application.
6. In respect of all of the applications that it hears, the ECB will decide either:
  - that the child who is the subject of an application, does have exceptional circumstances that require his/her admission to the post primary school that his/her parents have specified. If this is the case, the panel will direct the specified school to admit the child; or

- that the child who is the subject of an application, does not have exceptional circumstances that require his/her admission to the post primary school that his/her parents have specified. If this is the case, the panel will not direct the specified school to admit the child.

#### **APPEALS AGAINST PUPIL EXPLUSIONS**

7. Article 49 of the Education and Libraries (NI) Order 1986 (as substituted by Article 39 of the Education and Libraries (NI) Order 1993) provides for school authorities to expel their Libraries (NI) Order 1993) provides for child from school (if the child is under 18). Article 32 of the Education (NI) Order 2006 will replace these provisions when commenced.
8. The education and library board is required to make arrangements for the parent of a pupil or the pupil if they are aged 18, to appeal against any decision of the expelling authority to expel the pupil from the school. a pupil may be expelled only by the expelling authority. The expelling authority is the education and library board for controlled schools and the Board of Governors for all other grant-aided schools. The BoG is legally bound to comply with any direction given by an expulsion appeals tribunal.

#### **General**

9. Appeals tribunals regarding pupil admissions to and expulsions from schools are independent but are appointed and sponsored by DE. Appeals often relate to failure of process or failure to follow criteria. Appeals are lodged with the Northern Ireland Courts and Tribunals Service.

#### **APPEALS AGAINST DECISIONS ON CURRICULUM COMPLAINTS**

10. Article 25 of the Education (NI) Order 2006 enables parents and other interested parties to make a complaint if they consider that a school is failing to meet its statutory duties in relation to the revised curriculum.
11. BoGs are initially responsible for dealing with complaints about the school's curricular provision but where a complainant is not satisfied with the school's decision, the BoG must provide him/her with information about the statutory appeal procedures. Also, reference to the complaints tribunal machinery and procedures and advice on how to make a complaint must be included in school prospectuses.
12. The education and library boards have a duty to appoint complaints tribunals, to hear and determine a complaint. That complaint must be to the effect that the BoG has acted or is proposing to act unreasonably in the exercise of any power conferred or in the performance of any duty imposed on it by or under the 2006 Order in relation to its duties with regard to the curriculum. This tribunal has a narrow jurisdiction regarding curriculum choice issues.

### **CHILDREN WITH SPECIAL EDUCATIONAL NEEDS and DISABILITIES**

13. The law governing children with special educational needs is contained in Part II of the Education (NI) Order 1996 and Parts II and III of the Special Educational Needs and Disability (NI) Order 2005 (SENDO). SENDO strengthens the right of children with SEN to a mainstream education as well as introducing further services for parents and, for the first time permitting claims of disability discrimination in schools to be heard before the Special Educational Needs and Disability Tribunal.
14. Parents may now make a claim of disability discrimination and further information on this, 'Disability Discrimination in Schools' may be obtained by application to the Tribunal Secretary at 9032 2894 or in writing to the Special Educational Needs and Disability Tribunal Secretariat, 2nd Floor Albany House, 73-75 Great Victoria Street, Belfast, BT2 7AF..

### **EMPLOYMENT PROCEDURES**

15. In accordance with Article 123 of and Schedule 4 to the Education Reform (NI) Order 1989, the schemes of management approved for grant- aided schools provide for the regulation of staff conduct and discipline and staff grievances procedures to be under the control of the BoG.
16. BoGs have to comply with a large body of law that prohibits unlawful discrimination and harassment and which promotes equality of opportunity in employment. A case of alleged discrimination against a member of staff is heard by an Employment Tribunal which may change the decision made by the BoG and award compensation.



# Chairperson to Minister for Education

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw, Stormont,  
Belfast,  
BT4 3XX

Telephone: (028) 905 21904  
E-mail: committee.ofmdfm@niassembly.gov.uk

**Mike Nesbitt MLA, Chairperson  
Committee for the Office of the First Minister and deputy First Minister**

Mr John O'Dowd MLA  
Minister for Education  
Department of Education  
Rathgael House  
Balloo Road  
Bangor  
BT19 7PR

11 May 2012

Dear John,

## **Clarification on Proposed Jurisdiction of the Northern Ireland Public Services Ombudsman**

At its meeting on May 9th, the Committee further considered your letter of March 21st containing your response to the proposed reforms of the Office of the NI Ombudsman, specifically the inclusion of schools within the Ombudsman's jurisdiction.

The Committee noted your proposal to make it a statutory requirement for Boards of Governors to have written complaints procedures and your comment

*"I should make it clear, however, that this role would exclude the complaints for which there are alternative independent mechanisms for review"*

The Committee agreed to write to seek clarification on your view in the context of the Ombudsman's role as an overarching body of final recourse after all other complaints mechanisms have been exhausted.

This is currently reflected in Section 9, Paragraph 3 of the Commissioner for Complaints ("C for C") (NI) Order 1996 which states that;

*"Subject to paragraph (4) and to section 78 of the Northern Ireland Act 1998 the Commissioner shall not conduct an investigation under this Order in respect of—*

- (a) any action in respect of which the person aggrieved has or had a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise;
- (b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law."

In the normal course the Ombudsman/C for C would expect a complainant to use the appeal mechanisms identified in the paper attached to your letter. However, where a complainant had exercised those appeal processes and the Ombudsman/C for C was nevertheless satisfied that injustice sustained by the complainant “remained unremedied” then he or she would have jurisdiction to consider the complaint.

In addition the Ombudsman/C for C has a discretion to accept a complaint of maladministration without requiring the complainant to have exercised any other right of complaint or appeal, but only where the Ombudsman/C for C considers that it would not be reasonable to expect the complainant “to resort to or to have resorted to it”.

In any legislation combining the current offices of Commissioner for Complaints and Ombudsman, the Committee would propose to retain the overarching role (following other appeal/complaint processes) and the discretion for the Ombudsman to consider complaints without requiring other rights of appeal/complaint to be exhausted.

In this context, the Committee would welcome clarification on whether your support for the extension of the Ombudsman’s jurisdiction to include schools is premised on

- (a) a total exclusion from the Ombudsman’s jurisdiction of the issues which would be determined by the appeals processes referred to in your letter,

or

- (b) on the understanding that, following recourse to the appeals/complaints processes you identify there would still be a residual right for the Ombudsman to consider a complaint if he or she were satisfied that injustice sustained by the complainant “remained unremedied” , and, in limited circumstances, a discretion for the Ombudsman to not to require other appeals/complaints procedures to be exhausted.

Should any point require further clarification the Committee Clerk will be happy to provide this if your officials contact him.

Yours sincerely,

A handwritten signature in black ink that reads "Mike Nesbitt". The signature is written in a cursive, slightly slanted style. Below the signature is a short, horizontal black line.

**Mike Nesbitt MLA**  
Committee Chairperson

# Minister for Education Response

FROM THE MINISTER/ÓN AIRE



AN ROINN

**Oideachais**

Department of

**Education**

Máinnstríe o

**Lear**

[www.deni.gov.uk](http://www.deni.gov.uk)

Tel: 9127 9306

Fax: 9127 9779

Dialling codes: 028 from north of Ireland  
048 from south of Ireland

COR 367/2012

Mike Nesbitt MLA  
Chairman of the Committee for OFMDFM  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
BELFAST  
BT4 3XX

18 July 2012

Mike a chara,

Thank you for your letter of 11 May seeking clarification of my views with regard to the proposed future role of the Ombudsman in relation to complaints of maladministration.

I have reviewed the proposal carefully as it will apply to schools having regard to the information in your letter about the Ombudsman's residual powers and overarching role. In doing so, I have taken account of the existing arrangements for dealing with appeals against school decisions; education policy developments which could affect these arrangements; and the Department of Education's own power of direction over a school Board of Governors that might unusually refuse to comply with the outcome of a statutory appeal process.

While your proposal in relation to the Ombudsman's residual powers and overarching role seems reasonable, it has the potential to raise complications in the education sector. I therefore hold to the position expressed in my letter of 21 March. Also, there are policy developments which may require further consideration of the Ombudsman's powers over complaints about the special educational needs provision made by schools. I would, therefore, be content for the relevant officials to discuss the implications of this for any future legislation if this would be helpful.

A copy of this letter goes for information to the Committee for Education.

**JOHN O'DOWD MLA**  
**Minister for Education**



An Roinn Oideachais, Teach Ráth Giall, 43 Bóthar Bhaile Aodha, Ráth Giall, Beannchar, Co an Dúin BT19 7PR  
Department of Education, Rathgael House, 43 Balloo Road, Rathgill, Bangor, Co Down BT19 7PR  
Máinnstríe o Lear, Rathgael Hoose, 43 Balloo Róad, Rathgill, Band'r, Coontie Doon BT19 7PR

## Chair to Minister for Education

Committee for the Office of the  
First Minister and deputy First Minister  
Room 435,  
Parliament Buildings,  
Ballymiscaw, Stormont,  
Belfast,  
BT4 3XX

Telephone: (028) 905 21904  
E-mail: [committee.ofmdfm@niassembly.gov.uk](mailto:committee.ofmdfm@niassembly.gov.uk)

**Mike Nesbitt MLA, Chairperson**  
**Committee for the Office of the First Minister and deputy First Minister**

Mr John O'Dowd MLA  
Minister for Education  
Department of Education  
Rathgael House  
Balloo Road  
Bangor  
BT19 7PR

22 November 2012

Dear John,

### **OFMDFM Committee legislative proposals regarding the Ombudsman**

I refer to your letters of 18 July and 21 March 2012 informing the Committee of your support for establishing a role for the Ombudsman in investigating complaints of maladministration in relation to the decisions of school boards of governors and your concern regarding potential impact on the alternative independent mechanisms for review set out in the paper attached to your letter of 21 March 2012.

In light of your concerns the Committee sought a view from the Ombudsman on the outworkings of bringing schools within the jurisdiction of the proposed NI Public Services Ombudsman and any impact on the alternative independent mechanisms for review you identified.

At its meeting on 21 November 2012, the Committee considered the attached response from the Ombudsman.

The Committee felt that the Ombudsman's letter provided a useful analysis of the remit of the Ombudsman in relation to complaints of maladministration and the limitations on that remit, particularly in relation to the merits of decisions reached by tribunals and other review mechanisms such as those you identify.

Accordingly, the Committee agreed to forward the Ombudsman's letter for your consideration and I look forward to receiving your comments in due course.

Should any point require further clarification the Committee Clerk will be happy to liaise with your officials.

Yours sincerely,

A handwritten signature in black ink that reads "Mike Nesbitt". The signature is written in a cursive style with a horizontal line underneath the name.

**Mike Nesbitt MLA**  
Committee Chairperson

Enclosures:  
Ombudsman's letter dated 14 November 2012  
(Supporting papers by email)

# Ombudsman Comments on Minister for Education's Concerns

Mr Mike Nesbitt MLA  
Chairperson  
Committee for the Office of the First Minister  
and deputy First Minister  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

14 November 2012

Dear Mr Nesbitt

## **Proposals to Extend the Jurisdiction of the NIPSO to Board of Governors of Schools**

Thank you for your letter of 7 September 2012 to the Ombudsman with enclosures. I note that you seek the views of the Ombudsman on the correspondence with the Minister of Education attached to your letter. I consider that it would be helpful for me to explain the Ombudsman's current role in relation to examining the decision making of bodies in his jurisdiction and the limits on that role. You will be aware that the Ombudsman also has a responsibility in dealing with complaints relating to the administrative functions of a number of statutory tribunals within his jurisdiction. Please see list attached at Appendix 1. I have clarified below the limits of this jurisdiction generally and the extent to which the Ombudsman has had occasion to investigate complaints about tribunals in recent years. In relation to the education sector, the administration of the Special Educational Needs and Disability Tribunal (SENDIST) falls within the Ombudsman's jurisdiction because it is 'administered' by the Northern Ireland Courts and Tribunals Service (NICTS) which is a statutory agency of the Department of Justice. In relation to the list of education tribunals and bodies referred to in Appendix 2, given the Ombudsman's jurisdiction over the Department of Education and educational and library boards (ELBs), he can investigate complaints about the administrative functions in this regard. I refer to article 8 of the Ombudsman (Northern Ireland) Order 1996 and article 7(5) of the Commissioner for Complaints (Northern Ireland) Order 1996 attached at Appendix 3.

## **Discretionary Decisions – The Ombudsman's Role**

By virtue of article 10(5) of the Ombudsman (Northern Ireland) Order 1996 and article 7(9) of the Commissioner for Complaints (Northern Ireland) Order 1996, the Ombudsman is statutorily barred from questioning the merits of a discretionary decision unless 'taken without maladministration'. With the exception of complaints about healthcare bodies where he can investigate complaints about clinical judgement without first finding maladministration, he cannot challenge the merits of a decision of a body in jurisdiction simply because a claimant is unhappy with that decision. In order to examine the merits of a discretionary decision, he must first find maladministration. In practice, he would require evidence of substantial failings in the decision making process, before he would be prepared to examine the merits of that decision. The Ombudsman has been in Office for some twelve years and (issues of clinical judgement apart) he has on relatively few occasions found evidence of sufficient maladministration which would allow him to question the merits of a discretionary decision.

### **Administrative Functions of Tribunals in the Ombudsman's Jurisdiction**

Specifically, in relation to the statutory tribunals currently in the Ombudsman's jurisdiction, the legislation makes it clear (article 9(4) of the Ombudsman (Northern Ireland) Order 1996) that he can examine only the 'administrative functions' of tribunals. The Ombudsman is not empowered to consider the merits of a tribunal decision – there are rights of appeal to the Court of Appeal and there is the option of judicial review. Those tribunals within the Ombudsman's jurisdiction include those listed at schedule 3 of the Ombudsman (Northern Ireland) Order 1996 and all tribunals that are administered by the Department of Education or ELBs. In addition to that list, as a result of the devolution of powers to the Northern Ireland Assembly in respect of policing and justice in 2010, the Ombudsman's jurisdiction was extended to all tribunals falling within the remit of the Department of Justice (DOJ). The phrase 'administrative functions' is not clearly defined in the 1996 Order but by virtue of article 9(3A) (see further information in Appendix 1) it is clear that it covers administrative functions exercisable by any person appointed or assigned by the DOJ to serve as a member of the administrative staff of any court or tribunal. Administrative functions do not cover judicial decisions. I am not aware that there has been any occasion on which the Ombudsman has challenged the decision of a tribunal or judge as he is not empowered to do so. Further, in practice in approaching complaints of maladministration in relation to tribunals, the Ombudsman will consider whether there has been unavoidable delay, or an administrative procedure or policy criteria has been applied properly or whether there has been a failure by the tribunal staff to communicate with the relevant witnesses/parties or alternatively the parties have been misinformed about dates or process. Any action taken by a member of a tribunal panel at the direction of the Chair cannot be investigated by the Ombudsman. The Ombudsman takes the view for instance that a decision to adjourn an appeal hearing is a judicial act and not one which he can investigate.

I would refer you to article 10(3) of the Ombudsman (Northern Ireland) Order 1996 which bars the Ombudsman from considering any complaint where the complainant has a right of appeal, complaint or reference or review to or before a tribunal constituted under any statutory provision. Tribunal is defined broadly as any determining body. To reassure the Minister for Education that the Ombudsman would not be placing himself as a second layer of appeal in relation to the any complaint about a school's actions in admissions, suspensions, expulsion or in any case where an existing right of appeal to a statutory tribunal existed, I attach data at Appendix 4 from 2009 to date on the status of cases involving tribunals and you will note that these have all been cleared at validation stage. That may be for a variety of reasons but mainly it is because there is a statutory appeal to another court such as the Court of Appeal.

You will be aware however of the provision allowing a complainant to revert to the Ombudsman's Office where having exhausted appeal rights (article 10(4)(b) of the Ombudsman (Northern Ireland) Order 1996 and article 9(4)(b) of the Commissioner for Complaints (Northern Ireland) Order 1996) – injustice remains unremedied and he considers the complaint to be a reasonable one. Again this discretion to consider a complaint has been exercised by the Ombudsman only rarely.

There is a clear distinction between the two roles of the Ombudsman and of the SENDIST, in that, the SENDIST considers parents' appeals against decisions taken by ELBs with regard to children's special educational needs, for example, the decision not to undertake a statutory assessment of a child's special educational needs; the decision not to make a statement of special educational needs; or the decision as to what special educational provision should be made for the child, while the Ombudsman will consider complaints concerning the administrative actions of ELBs in relation to those matters.

Consequently, some matters relating to special educational needs (for example, a decision on the school to be named in a statement of special educational needs) will not be within the jurisdiction of the Ombudsman, while other matters (for example, unreasonable delay in completing a formal assessment of special educational needs) will fall outside the remit

of the SENDIST. There is therefore a need for the distinct and separate roles of both the Ombudsman and the SENDIST.

The distinction between the two roles can be illustrated in a recent case against an ELB investigated by the Ombudsman. That complaint concerned the administrative actions of the ELB in the handling of the complainants' children's statements of special educational needs. The issues about which the complainants were aggrieved were not matters about which they could have appealed to the SENDIST. The complaint related to allegations of unreasonable delay and a number of administrative errors on the part of the ELB in relation to the amending of the children's statements and the handling of the subsequent formal complaint by the ELB. The Ombudsman upheld the complaint having found numerous instances of maladministration on the part of the ELB. He recommended that the ELB provide a written apology and financial payments to the children concerned and their parents for the injustice caused to them by the failings identified. Further information regarding this case will be included in the Ombudsman's forthcoming Case Digest.

Given that the five Northern Ireland ELBs and the Department of Education are already within the Ombudsman's jurisdiction, the need to recognise and manage this distinction already exists when a complaint concerning special educational needs is received – the inclusion of schools in the Ombudsman's jurisdiction will not introduce any new requirements in this regard.

In the event that the COFMDFM decide to extend the Ombudsman's jurisdiction to cover decisions of the Board of Governors in schools (which were until 1989 bodies within his jurisdiction), this would ensure the consistency of oversight in the education sector as the Department of Education, DEL, CCMS and ELB's are currently in the Ombudsman's jurisdiction and it is proposed that HE and FE colleges would also be in jurisdiction. This extension would help ensure a consistency of approach to poor administration across the sector. Please see attached an overview of the complaints regarding the education sector submitted to the Northern Ireland Commissioner for Complaints during the period 1969-1982 in accordance with the Commissioner for Complaints Act (Northern Ireland) 1969 at Appendix 5 to assist in the Committee's deliberations.

It might be helpful to consider the attached guidance produced by the Local Government Ombudsman (LGO) which illustrates the type of complaints that the LGO has received in relation to schools at Appendix 6.

I would be happy to give further evidence on these matters at your convenience.

Yours sincerely



**Marie Anderson**  
Deputy Ombudsman



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# Ombudsman - List of Appendices

## Appendices

- Appendix 1:** Tribunals within the jurisdiction of the Assembly Ombudsman for Northern Ireland
- Appendix 2:** Routes of appeal in the schools sector in Northern Ireland in relation to: admissions, suspensions, expulsions, special educational needs, Exceptional Circumstances Body and curriculum complaints
- Appendix 3:** The Ombudsman (Northern Ireland) Order 1996  
The Commissioner for Complaints (Northern Ireland) Order 1996
- Appendix 4:** Tribunal trends noted in the Assembly Ombudsman for Northern Ireland's annual reports
- Appendix 5:** Complaints regarding the education sector submitted to the Northern Ireland Commissioner for Complaints during the period 1969-1982 in accordance with the Commissioner for Complaints Act (Northern Ireland) 1969
- Appendix 6:** Information extracted from the Local Government Ombudsman's website, [www.lgo.org.uk](http://www.lgo.org.uk)
- Appendix 7:** Education legislation and education regulations

## Appendix 1 -Tribunals within the jurisdiction of the Assembly Ombudsman for Northern Ireland

### Tribunals Within the Jurisdiction of the Assembly Ombudsman for Northern Ireland

Article 9 of the Ombudsman (Northern Ireland) Order 1996

Matters subject to investigation

9. (1) Subject to the provisions of this Order, the Ombudsman may investigate any action taken—
- (a) by or on behalf of a department or other authority to which this Order applies; and
  - (b) in the exercise of administrative functions of that department or authority.
- (2) The Ombudsman may investigate any action taken as mentioned in paragraph (1) only if—
- (a) a written complaint is duly made to a member of the Assembly by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken; and
  - (b) the complaint is referred to the Ombudsman, with the consent of the person who made it, by a member of the Assembly with a request to conduct an investigation into it.
- (3) In this Order “person aggrieved” means the person who claims or is alleged to have sustained such injustice as is mentioned in paragraph (2)(a).
- (4) For the purposes of this Article, administrative functions exercisable by any person appointed or assigned to serve as a member of the administrative staff of a tribunal listed in Schedule 3 —
- (a) by a department or authority to which this Order applies; or
  - (b) with the consent (whether as to remuneration and other terms and conditions of service or otherwise) of such a department or authority, shall be taken to be administrative functions of that department or authority.
- (5) The Department may by order amend Schedule 3 by the alteration or removal of any entry or the insertion of any additional entry.

Article 6 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010

6. (1) Amend the Ombudsman (Northern Ireland) Order 1996 as follows.
- (2) In Article 9 (matters subject to investigation) after paragraph (3) insert—
- “(3A) For the purposes of this Article, administrative functions exercisable by any person appointed or assigned by the Department of Justice to serve as a member of the administrative staff of any court or tribunal shall be taken to be administrative functions of that Department.”
- (3) In Schedule 3 (tribunals referred to in Article 9(4)) at the appropriate places insert—

*“The Northern Ireland Valuation Tribunal established under Article 36A of the Rates (Northern Ireland) Order 1977.”*

*“Adjudicators appointed under Article 7(1)(b) of the Criminal Injuries Compensation (Northern Ireland) Order 2002.”*

*“Adjudicators appointed under Article 29(1) of the Traffic Management (Northern Ireland) Order 2005.”*

*“The Charity Tribunal for Northern Ireland established under section 12 of the Charities Act (Northern Ireland) 2008.”*

(4) In Schedule 4 (matters not to be investigated) after paragraph 2 insert—

“2A. Action taken by a member of the administrative staff of any court or tribunal who was appointed or assigned to serve as a member of that staff by the Department of Justice, so far as the action is taken at the direction, or on the authority (whether express or implied), of any person acting in a judicial capacity or in his capacity as a member of the tribunal.”

**Schedule 3 tribunals referred to in article 9(4) of the Ombudsman (Northern Ireland) Order 1996**

The Lands Tribunal for Northern Ireland established under section 1 of the [1964 c. 29 (N.I.).] Lands Tribunal and Compensation Act (Northern Ireland) 1964.

A tribunal constituted under Schedule 11 of the [1972 NI 14.] Health and Personal Social Services (Northern Ireland) Order 1972.

The Water Appeals Commission under Article 292 of the Water and Sewerage Services (Northern Ireland) Order 2006.

Industrial tribunals established by regulations made under Article 3 of the Industrial Tribunals (Northern Ireland) Order 1996.

The Mental Health Review Tribunal for Northern Ireland constituted under Article 70 of the [1986 NI 4.] Mental Health (Northern Ireland) Order 1986.

The Fair Employment Tribunal for Northern Ireland established under regulations under Article 81 of the Fair Employment and Treatment (Northern Ireland) Order 1998.

The Planning Appeals Commission constituted under Article 110 of the [1991 NI 11.] Planning (Northern Ireland) Order 1991.

The Industrial Court constituted under Article 91 of the [1992 NI 5.] Industrial Relations (Northern Ireland) Order 1992.

Social security appeal tribunals constituted under section 39 of the [1992 c. 8.] Social Security Administration (Northern Ireland) Act 1992.

Disability appeal tribunals constituted under section 41 of that Act.

Medical appeal tribunals constituted under section 48 of that Act.

Registered Homes Tribunals constituted under Part V of the [1992 NI 20.] Registered Homes (Northern Ireland) Order 1992.

Appeal tribunals constituted under Chapter I of Part II of the Social Security (Northern Ireland) Order 1998.

The tribunal established to adjudicate on claims under the scheme for compensation for loss of employment through civil unrest.

**Tribunals to be added to the Ombudsman (Northern Ireland) Order 1996 by Article 6 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010:**

The Northern Ireland Valuation Tribunal established under Article 36A of the Rates (Northern Ireland) Order 1977.

Adjudicators appointed under Article 7(1)(b) of the Criminal Injuries Compensation (Northern Ireland) Order 2002.

Adjudicators appointed under Article 29(1) of the Traffic Management (Northern Ireland) Order 2005.

The Charity Tribunal for Northern Ireland established under section 12 of the Charities Act (Northern Ireland) 2008.

The tribunals listed above are administered by the Northern Ireland Courts and Tribunals Service (NICTS) and are listed on their website. The full list of tribunals administered by the NICTS is noted below. Article 6(2) of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 amends the Ombudsman (Northern Ireland) Order 1996 to include administrative functions exercisable by any person appointed or assigned by the Department of Justice to serve as a member of the administrative staff of any court or tribunal shall be taken to be administrative functions of that Department. As a result all of the tribunals administered by the NICTS are within the Ombudsman's jurisdiction:

**Tribunals administered by the NICTS:**

The Appeals Service

The Care Tribunal

The Charity Tribunal

Criminal Injuries Compensation Appeals Panel NI

The Lands Tribunal

Mental Health Review Tribunal

NI Health and Safety Tribunal

Northern Ireland Traffic Penalty Tribunal

Northern Ireland Valuation Tribunal

Office of Social Security Commissioners and Child Support Commissioners

Pensions Appeal Commissioners

Rent Assessment Panel

Pensions Appeal Tribunals

Special Educational Needs and Disability Tribunal

## Appendix 2 - Routes of Appeal in the Schools Sector of Northern Ireland

Routes of Appeal in The Schools Sector in Northern Ireland in Relation To:

**Admissions, suspensions, expulsions, special educational needs, Exceptional Circumstances Body and curriculum complaints**

### 1. Admissions Appeals – The School Admissions Tribunal

The legislation: Article 15 of the Education (Northern Ireland) Order 1997

The School Admissions Tribunal is provided for as per article 15 of the 1997 Order. Article 15 states that every education and library board (board/ELB) must make arrangements for an appeal to be made by a parent or child against any decision by a Board of Governors of a grant aided school situated in the area of the board refusing the child admission to the school. Article 15 (8) of the 1997 Order states that the Department of Education (the Department) will make provision for the constitution and procedure of the tribunal by way of regulations.

The regulations: Schools Admissions (Appeals Tribunals) Regulations (Northern Ireland) SI 1998/115

Schedule 1 of the 1998 regulations state that the tribunal will consist of three panel members selected by the board (ELB) and will be appointed according to specified criteria set out in the Schedule. The Tribunal appears to be administered by the respective boards (ELBs).

### 2. Suspensions

The legislation: Article 49 of the Education and Libraries (Northern Ireland) Order 1986 – article 49 of the 1986 Order has been repealed by Education (Northern Ireland) Order 2006

Article 49 of the above Order refers to the suspension and expulsion of pupils but appears to have been repealed by article 33 of the 2006 Order. Article 33 of the 2006 Order states that the Department may by regulation provide for appeals against decisions to suspend a pupil from a grant aided school.

[It should be noted that article 31 of the 2006 Order makes provision for a scheme to be prepared by the Department in relation to the suspension and expulsion of pupils which must be followed by the boards (ELBs) and also the Boards of Governors in certain instances.]

The regulations: Schools (Suspensions and Expulsions of Pupils) Regulations (Northern Ireland) 1985 revoked by Schools (Suspensions and Expulsions of Pupils) Regulations (Northern Ireland) 1995

Notwithstanding the Department's power to provide for appeals against decisions to suspend a pupil from a grant aided school, as set out in article 33 of the 2006 Order, there is currently no independent appeals system against a suspension. There is however the option of

submitting a complaint to the Department under article 101 of the 1986 Order<sup>1</sup>. However this redress mechanism has its limitations:

‘this [Article 101 of the 1986 Order] is restricted to complaints about ELBs and Boards of Governors acting unreasonably in the exercise of their statutory functions and does not extend to the actions of principals.’<sup>2</sup>

### 3. **Expulsions – The Appeals Tribunal**

The legislation: Article 49 of the Education and Libraries (Northern Ireland) Order 1986 – article 49 of the 1986 Order appears to be awaiting repeal by article 32 the Education (Northern Ireland) Order 2006 when commenced

Article 49 of the above Order makes provision for the Expulsion Tribunal. However this provision appears to have been repealed by the Education (Northern Ireland) Order 2006. Article 32 of the 2006 Order states that the Department must make provision for the constitution and procedure of an appeal tribunal to hear and determine appeals by way of regulations where the relevant board has decided to expel a pupil from a grant aided school.

[It should be noted that article 31 of the 2006 Order makes provision for a scheme to be prepared by the Department in relation to the suspension and expulsion of pupils which must be followed by the boards (ELBs) and also the Boards of Governors in certain instances.]

The regulations: Schools (Expulsion of Pupils) (Appeal Tribunals) Regulations (Northern Ireland) SR 1994/13 Schools (Expulsion of Pupils) (Appeal Tribunals) (Amendment) Regulations (Northern Ireland) SR 1998/256

Schedule 1 of the 1994 regulations state that the tribunal will consist of three or five panel members selected by the board (ELB) and will be appointed according to specified criteria set out in the Schedule. The Tribunal appears to be administered by the respective boards (ELBs).

### 4. **Special Educational Needs and Disability matters – The Special Educational Needs and Disability Tribunal**

The legislation: Article 22 of the Education (Northern Ireland) Order 1996 Article 21 and article 22 of the Special Educational Needs and Disability (Northern Ireland) Order 2005

Article 22 of the 1996 Order noted above established the Special Educational Needs Tribunal for Northern Ireland (SENT). The 2005 Order amended the 1996 Order to make further provision against discrimination, on grounds of disability, in schools, and other educational institutions and by other educational and qualification bodies. Article 21 of the 2005 Order amended the title of the SENT to the Special Educational Needs and Disability Tribunal (SENDIST) and article 22 of the 2005 Order accordingly extended the jurisdiction of the Tribunal to hear claims that a responsible body has discriminated against a person in a way which is made unlawful under the Order.

The President of the Tribunal is appointed by the Lord Chancellor while the other two panel members are appointed by the Department. The SENDIST is administered by the Northern Ireland Courts and Tribunals Service (NICTS) and is listed on their website. It should be noted that the NICTS is an agency of the Department of Justice (DOJ).

1 L. Lundy. Education Law, Policy and Practice in Northern Ireland, 2000 SLS Publications (NI) p. 58: ‘Article 101 of the 1986 Order contains a procedure whereby individuals or bodies can complain to the Department about the unreasonable exercise of powers under the Education Orders. The power to complain and the Department’s powers to remedy the action complained of are both wide ranging yet appear to be used infrequently.’

2 Ibid at footnote 2, p. 223

The regulations: The Special Educational Needs and Disability Tribunal Regulations (Northern Ireland) 2005 [Mark Finegan who is the Tribunal Secretary may be able to provide further information in relation to SENDIST.]

## 5. The Exceptional Circumstances body

The legislation: Article 29 of the Education (Northern Ireland) Order 2006

The Exceptional Circumstances Body (ECB) is provided for under article 29 of the above Order. Article 29 states that the parent of a child of compulsory school age may apply to the body established by regulations for a direction that on the grounds of exceptional circumstances specified in the application the child is to be admitted to a grant-aided secondary school so specified. Article 29 also sets out that the Department will provide for the constitution and procedure of the ECB to determine these applications. The ECB is solely administered by the Department.

The regulations: Schools Admissions (Exceptional Circumstances) Regulations (Northern Ireland) 2010

The regulations state that appointments to the ECB will be made by the Department.

## 6. Curriculum Complaints – The Curriculum Complaints Tribunal

The legislation: Article 33 of the Education Reform (Northern Ireland) Order 1989 – article 33 of the 1989 Order has been repealed by article 25 of the Education (Northern Ireland) Order 2006.

Article 33 of the 2006 Order sets out that each ELB shall appoint a tribunal to hear and determine any complaint made to the effect that an ELB or Board of Governors of a relevant<sup>3</sup> has or is proposing to act unreasonably with respect to any power conferred or the performance of any duty imposed on it by or under the statutory provisions set out in article 33(1) of the 1989 Order or any statutory provision relating to the curriculum of a grant aided school or has failed to discharge any such duty. This article relates to controlled, maintained and any other voluntary or grant aided schools.

The regulations: Curriculum (Complaints Tribunal) Regulations (Northern Ireland) SR 1992/457

Curriculum (Complaints Tribunal) (Amendment) Regulations (Northern Ireland) 1997

Article 25 of the 2006 Order states that the Department will provide for the constitution and procedure of the tribunal by way of regulations. Schedule 1 of the 1992 regulations which incorporate the 1997 amendments, state that the tribunal will be constituted of three panel members established by the ELB and will be selected according to specified criteria set out in the Schedule.

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3 Ibid at footnote 2, p. 223

## Appendix 4 - Tribunal trends noted in the Assembly Ombudsman Annual Reports 2009-2013

### Tribunal Trends Noted in the Assembly Ombudsman for Northern Ireland's Annual Reports

#### **Written complaints received against tribunals**

##### **Overview**

2012 – 2013: One  
(to date)

2011 – 2012: None

2010 – 2011: Four (cleared at validation stage)

2009 –2010: Two (cleared at validation stage)

##### **Breakdown**

2012 – 2013 (to date) Outcome of tribunal related complaint:

The Appeals Service – complaint upheld

##### **2010 – 2011 Outcomes of tribunal related complaints:**

Industrial Tribunal – complainant had already undertaken the independent tribunal and therefore was referred to the President of the Tribunal to make a complaint about how the tribunal was conducted.

Industrial Tribunal – complainant had already undertaken the independent tribunal and therefore was referred to the President of the Tribunal to make a complaint about how the tribunal was conducted.

Industrial Tribunal – complainant did not provide enough information and the case was closed pending receipt of further documentation.

Industrial Tribunal – complainant was advised to undertake their option for a judicial review and seek a legal remedy.

##### **2009 – 2010 Outcomes of tribunal related complaints:**

Planning Appeals Commission – complainant had already undertaken the independent tribunal therefore recommendation made to seek a legal remedy.

Fair Employment Tribunal – complainant was advised to undertake their option for a judicial review and seek a legal remedy.



## Appendix 5 - Ombudsman Response

### Complaints Regarding The Education Sector Submitted to the Northern Ireland Commissioner for Complaints During the Period 1969-1982 in Accordance With:

#### The Commissioner for Complaints Act (Northern Ireland) 1969

#### 1. Introduction

- (i) This paper records a research project undertaken by the Office of the Northern Ireland Commissioner for Complaints regarding the Commissioner's investigation of complaints of maladministration relating to the education sector in Northern Ireland during the period 1969-1982. Complaints arising from this sector cover a range of issues which include educational and employment issues. An analysis of complaints relating to both issues is provided for at section 4 of this paper. The education jurisdiction afforded to the Commissioner was conferred by Schedule 1 Part II of the above Act and related to complaints about Education and Library Boards<sup>1</sup> (ELBs), the Northern Ireland General Certificate of Education Examinations Board, the Northern Ireland Schools Examination Council, and the Northern Ireland Certificate of Secondary Education Examinations Board and are listed as bodies in the Commissioner's jurisdiction.
- (ii) An examination of the Commissioner's annual reports for the period 1969-1982<sup>2</sup> held in the Public Records Office (PRONI) was undertaken with a view to researching the number of complaints submitted to the Commissioner under the 1969 Act regarding the education sector. The Commissioner's investigations in this regard included issues arising from complaints about primary, secondary and further education. In 1989 as a result of the Education Reform (Northern Ireland) Order 1989 (the 1989 Order), there was a shift in statutory responsibility away from the ELBs to the Boards of Governors (the Boards). The 1989 Order provided grant aided schools with increased authority in terms of the management of schools in Northern Ireland by way of new statutory functions in relation to the curriculum, the publication of information, discipline and admissions.<sup>3</sup> It is our understanding that the Commissioner ceased to have jurisdiction over schools when the Conservative Government in 1989 granted more autonomy to Boards.

#### 2. Complaints submitted to the Commissioner

- (i) The research has shown that complaints received by the Commissioner during the 13 year period in question were against the ELBs and schools – there does not appear to be any evidence to suggest that complaints were made against the other education bodies noted in the introductory paragraph above. Furthermore, the researcher did not detect the emergence of a trend or pattern in the complaints submitted to the Commissioner. Complaints of alleged maladministration by ELBs and schools varied from a high of 73 in 1978 to a low of 19 in 1971, 1972 and 1974 with the average number of complaints during this 13 year period being 33.85 per year (a graph illustrating these trends is attached at Appendix 1 of this note).
- (ii) On closer examination of the relevant data, the majority of complaints received against ELBs and schools related to education matters as opposed to employment matters

1 Established under the Education and Libraries (NI) Order 1972

2 The period 1969-1982 was taken as a representative sample of annual reports.

3 L. Lundy, *Education Law, Policy and Practice in Northern Ireland* 2000 SLS Publications (NI) p.65

within the education sector and these figures varied from a high of 51 in 1978 to a low of 6 in 1974 and 1982. The average number of complaints received which related to education matters over this 13 year period was 17.85 per year (please see Appendix 1 of this note).

- (iii) The years with the highest number of complaints of maladministration against ELBs and schools received by the Commissioner were 1970 and 1978. It is unclear as to the reason for the high number of complaints received in 1970. However it should be noted that 1970 saw the first year of operation of the Commissioner's Office following the enactment of his governing legislation in 1969 and so it is arguable that the establishment of his Office prompted the receipt of the high number of complaints at this time. The increase in complaints received in 1978 is accounted for by the Commissioner in his annual report for that year by reference to the provision of a new procedure for pupils transferring from primary to secondary school. The annual report also noted that this procedure was subsequently revised due to the level of complaints received by the Commissioner about this issue. In the Commissioner's annual report for 1979, he indicated that the success of this revised procedure is illustrated by the drop in complaints received overall that year.
- (iv) As noted above, the majority of complaints received concerning the education sector related to education matters. These figures varied from 24% to 71.43% during the 13 year period (a graph illustrating these trends is attached at Appendix 2 of this note). However it is interesting to note that the average percentage of education related complaints is just a little over half of all complaints about ELBs and schools received during this time (52.73%).

### **3. Findings of maladministration by the Commissioner**

- (i) Where the Commissioner recorded maladministration against the ELBs and schools, his findings did not indicate whether the maladministration related to educational issues alone or if his findings related to other areas of the education sector. The figures illustrate a high of 8 complaints in 1971 where maladministration was found compared to 0 in 1975 and 1982 (a graph illustrating these trends is attached at Appendix 3 of this note). On average there were approximately 3 cases each year where maladministration was found against the ELBs and schools (this figure includes all complaints relation to employment and education matters).
- (ii) The researcher compared the number of complaints received regarding the education sector to the average number of complaints received each year by the Commissioner with respect to all bodies in jurisdiction and found this to be approximately 34 complaints (per year). This is a low figure in terms of the total number of complaints received during the thirteen year period against the education sector. The Commissioner made a finding of maladministration in approximately 8% of the complaints received against the education sector during this timeframe (please see Appendix 3 of this note).

### **4. Types of education related complaints**

- (i) The researcher analysed all case summaries in the Commissioner's annual reports between 1969 -1982 and noted that 71 of these related to complaints against ELBs and schools out of a total of 440 complaints received by the Commissioner during that 13 year period with respect to all bodies in jurisdiction.
- (ii) In terms of the case summaries which related to education complaints, 42 of these related to education matters, 24 related to employment matters in ELBs and schools while 5 case summaries related to a wider range of miscellaneous topics concerning the education sector. For example, one case summary recorded a complaint from a house owner about a fence situated on school grounds and owned by the school. The

fence had fallen into disrepair and school children were escaping through the fence and trespassing on the complainant's property, causing destruction. The Commissioner held that this was not the fault of the school and advised the home owner to report the matter to the police in order to investigate any claims of criminal damage.

The subject matters of the 42 case summaries regarding education related complaints can be categorised as follows:

Grants for Study: 16 complaints

School Transport: 12 complaints

School Placements/Transfers: 7 complaints

Administration action taken by the Board: 5 complaints

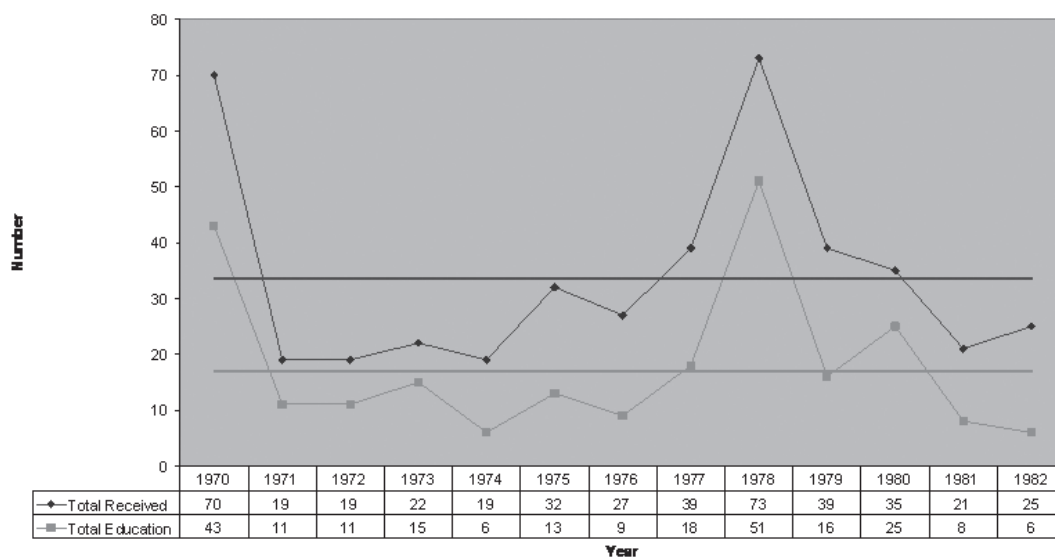
Expulsion/Suspension from schools: 2 complaints

(A graph illustrating these trends is attached at Appendix 4 of this note).

Alan Barbour (Researcher)  
Administrative Officer  
Northern Ireland Ombudsman's Office  
November 2012

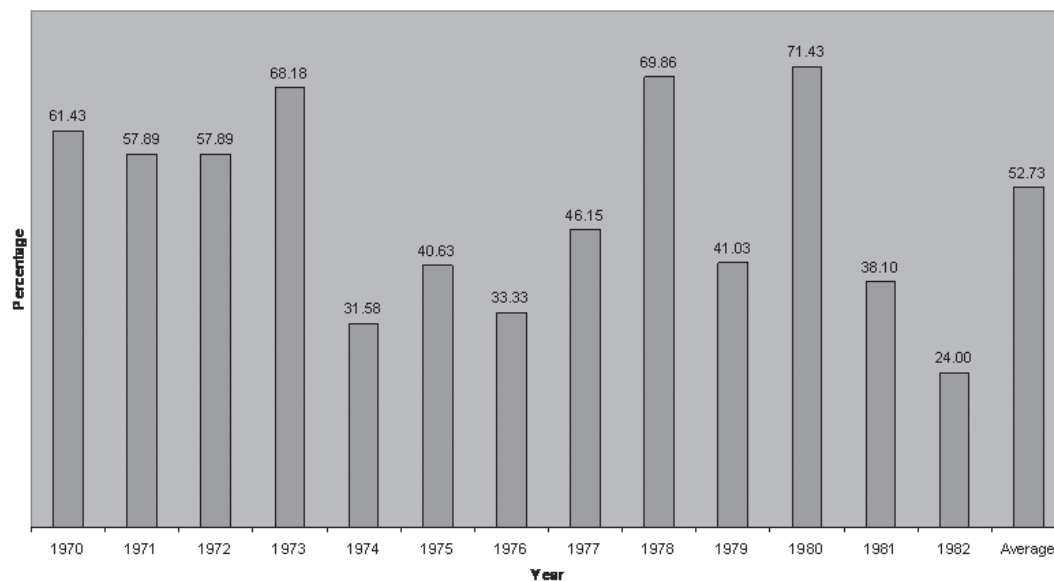
## Appendix 1

**Appendix 1 - Total number of complaints received regarding the education sector compared with those relating to educational matters alone**



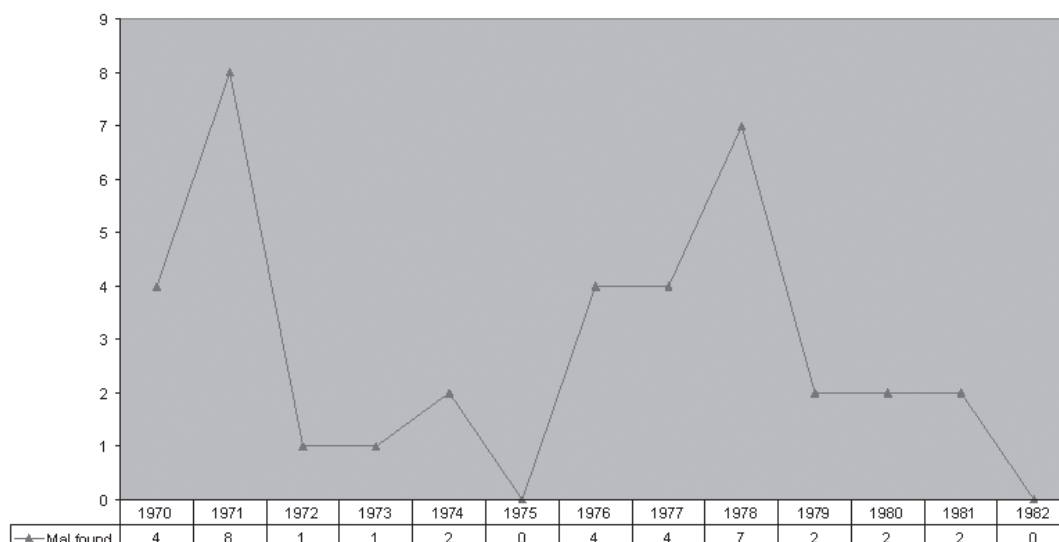
## Appendix 2

**Appendix 2 - Percentage of complaints received regarding educational matters**



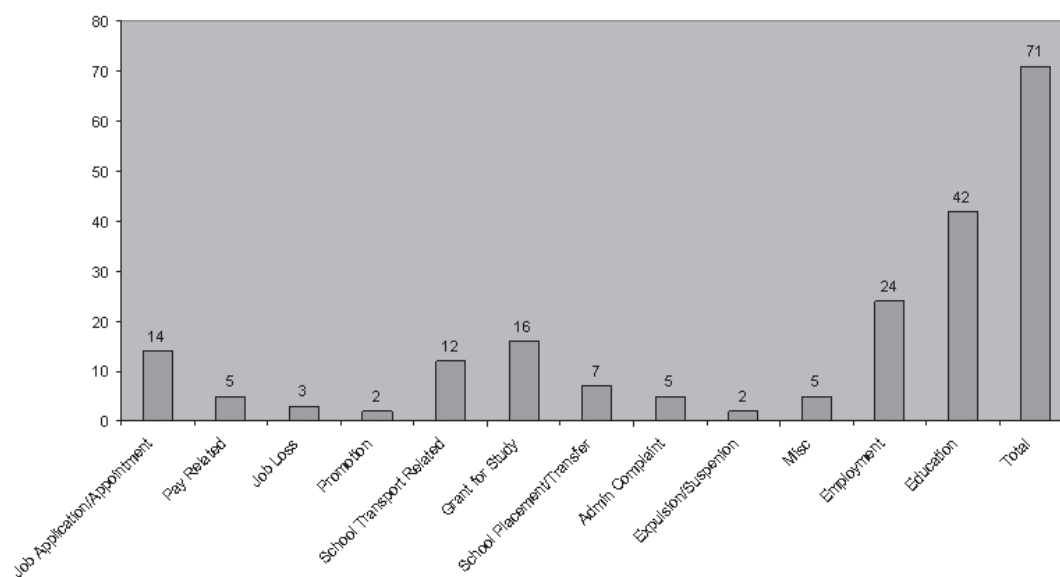
### Appendix 3

**Appendix 3 - Total number of complaints received regarding the education sector where maladministration was found**



### Appendix 4

**Appendix 4 - Case summary reports relating to the education sector**



## Appendix 7 - List of education legislation and regulations

### **Education Legislation**

- The Education and Libraries (Northern Ireland) Order 1986
- The Education Reform (Northern Ireland) Order 1989
- The Education (Northern Ireland) Order 1996
- The Education (Northern Ireland) Order 1997
- The Special Educational Needs and Disability (Northern Ireland) Order 2005
- Education (Northern Ireland) Order 2006

### **Education Regulations**

- Schools (Expulsion of Pupils) (Appeal Tribunals) Regulations (Northern Ireland) SR 1994/13
- Schools (Suspensions and Expulsions of Pupils) Regulations (Northern Ireland) 1995
- Curriculum (Complaints Tribunal) Regulations (Northern Ireland) SR 1992/457 – incorporating the Curriculum (Complaints Tribunal) (Amendment)
- Regulations (Northern Ireland) 1997
- Schools Admissions (Appeals Tribunals) Regulations (Northern Ireland) SI 1998/115
- Schools (Expulsion of Pupils) (Appeal Tribunals) (Amendment) Regulations (Northern Ireland) SR 1998/256
- The Special Educational Needs and Disability Tribunal Regulations (Northern Ireland) 2005
- Schools Admissions (Exceptional Circumstances) Regulations (Northern Ireland) 2010

# Minister for Education to Chairperson

FROM THE MINISTER/ÓN AIRE

RESTRICTED - POLICY



AN ROINN

Oideachais

Department of

Education

MÁNNYSTRIE O

Lear

www.deni.gov.uk

COR 768/2012

Tel: 9127 9306

Fax: 9127 9779

Dialling codes: 028 from north of Ireland  
048 from south of Ireland

Mike Nesbitt MLA  
Chairperson  
Committee for the Office of the First Minister  
and deputy First Minister  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
BELFAST  
BT4 3XX

December 2012

Thank you for your letter of 22 November 2012, enclosing an analysis of the role of the Ombudsman in light of the matters raised in my earlier letters.

The analysis is extremely helpful, and addresses fully the issues raised by me in previous correspondence. I am satisfied that the extension of the Ombudsman's role to include schools would be a very positive step. Whilst the vast majority of complaints are resolved by Boards of Governors, it is important that learners and parents have recourse to an effective, accessible means of redress on those relatively few occasions when matters cannot be resolved within the school.

I support the proposed extension of the Ombudsman's role. I recommend that the Committee should consider extension to all schools as defined in Article 2 of the Education and Libraries (NI) Order 1986. This would include grant-aided and independent schools. The latter sit largely outside the Education Orders. However, I consider it important that pupils of those schools and their parents have the same access to justice as those in grant-aided schools.

JOHN O'DOWD MLA  
Minister for Education



An Roinn Oideachais, Teach Ráth Giall, 43 Bóthar Bhaile Aodha, Ráth Giall, Beannchar, Co an Dúin BT19 7PR  
Department of Education, Rathgael House, 43 Balloo Road, Rathgill, Bangor, Co Down BT19 7PR  
Mánnystrie o Lear, Rathgael Hoose, 43 Balloo Róad, Rathgill, Bang'r, Coontie Doon BT19 7PR

## NI Council for Ethnic Minorities to Chairperson

From: Patrick Yu [mailto:patrick@nicem.org.uk]  
Sent: 22 December 2011 15:42  
To: Tom Elliot MLA; Lyttle, Chris  
Cc: +Comm. Employment & Learning Public Email  
Subject: Reform the Office of the Northern Ireland Ombudsman

Dear Tom

In our recent meeting with the Deputy Ombudsman regarding our frustration and concerns on cases complaint against school on racial bullying and not providing English as Additional Language support to new migrant's children. The Deputy Ombudsman informed us about the current consultation and evidence giving on legislative reform of the Ombudsman Office. Therefore we would like to submit our view in this issue.

Before the current system run by an independent School Board of Governor, education complaints were directly dealt with by the local Education and Library Board. After the introduction of Common Funding Formula (copy and paste the policy from England and Wales), individual school decouple with the local Education and Library Board, including previously the local Education and Library Board is the legal entity of individual school. In effect, individual school is now an independent legal entity. As majority of the school are 100% relied on public funding, they are one of the very few systems that is outside the current oversight mechanism, including the Ombudsman Office.

When we have complaint cases against individual school on bullying and/or not providing English as Additional Language support in which each ethnic minority child or young people will attract a special funding for disadvantage group, these include Irish Traveller, Roma and Gypsy, and ethnic minorities (around £1,000 per person per year). But these funding are not ringfence. As the current budget cuts across all schools, these special funding for disadvantage groups (including disadvantage local areas, disabled and ethnic minority group) will be used for general revenue and remove some of the services that previously provided.

In our experiences in dealing with school bullying, the investigation report used to blame the victim and the parent. In most case they denied there is an issue even though we had independent witnesses, including police statement from witness. Some school suggested to ask the victim to adjust times to arrive and leave from school to avoid bullies. In some extreme case the school threatened to sue the parent for libel. Some school agreed to meet with the parents but unable to offer any solutions to the issue and in most case delaying the issue until the student is due to leave the school or the term is finished.

After the complaint, if you are not happy on the result of the school investigation (in our view most of them are not objective or professional), the only remedy is to sue the school under race relations and other law. But there is no other independent complaint mechanism. In our



view litigation is the only last resort. Therefore we would like to ask the OMFDFM Committee to support to extend the power of the Ombudsman Office, including school system.

best

Patrick

Patrick Yu  
Executive Director  
Northern Ireland Council for Ethnic Minorities  
Ascot House, 3/F  
24-31 Shaftesbury Square  
Belfast, BT2 7DB

Tel: +44 (0)28 9023 8645  
Fax: +44 (0)28 9031 9485  
Mobile: +44 (0)7710 767235  
Email: [patrick@nicem.org.uk](mailto:patrick@nicem.org.uk)

## Environment Committee - query re Ombudsman's powers in planning issues

Committee for the Environment  
Room 245  
Parliament Buildings

Tel: +44 (0)28 9052 1347

Fax: +44 (0)28 9052 1795

To: Cathie White  
Clerk to the OFMDFM Committee

From: Alex McGarel  
Clerk to the Committee for the Environment

Date: 10 November 2010

Subject: NI Ombudsman – Introduction of Greater Powers

1. The Committee for the Environment, at its meeting on 4 November, considered correspondence in relation to the Dundonald Green Belt Association complaint to the NI Ombudsman regarding the Planning Services handling of planning application Z/2006/0599/0 – Knock Golf Course.
2. Members were concerned about the limited actions available to the Ombudsman to address planning issues and would like more information on proposals to increase those powers. Members also noted the apparent lack of progression in the introduction of recommendations raised in the 2004 review of the NI Ombudsman.
3. It is understood that the OFMDFM Committee is currently considering legislation to bring the NI Ombudsman in line with Scotland and Wales, and has recently issued a consultation paper on Proposed Legislation for a Public Services Ombudsman for Northern Ireland, the closing date of which is the 17 December 2010.
4. The Committee agreed to write to OFMDFM Committee to ask if this consultation includes consideration of increased powers for the Ombudsman in relation to planning issues and if so, when it might be anticipated that such legislation will be in place.
5. I look forward to your response.

**Alex McGarel**  
Clerk  
Committee for the Environment

## Environment Committee memo regarding planning issues

Committee for the Environment  
Room 245  
Parliament Buildings

Tel: +44 (0)28 9052 1347  
Fax: +44 (0)28 9052 1795

To: Peter Hall  
Clerk to the OFMDFM Committee

From: Alex McGarel  
Clerk to the Committee for the Environment

Date: 03 June 2011

Subject: NI Ombudsman

1. The Committee for the Environment, at its meeting on 23 March 2011, considered correspondence in relation to a planning issue in Waringstown.
2. During discussions members raised concerns about the lack of powers available to the NI Ombudsman and wrote to OFMdFM on 24 March 2011 asking when the Department would be reviewing this issue. I understand that this communication did not reach the OFMdFM Committee in time to be addressed prior to dissolution.
3. The new Committee discussed this issue at its meeting on 2 June 2011 and agreed to write to OFMdFM to seek an update on the timing of a review of the role of the NI Ombudsman and to request that the review addresses the limited powers, as identified in relation to the Waringstown case.
4. I would be grateful if you could, pending approval from your Committee, forward the attached letter to OFMdFM for comment.

**Alex McGarel**  
Clerk  
Committee for the Environment

## Environment Committee to OFMDFM regarding planning issues

Environment Committee Office  
Room 245  
Parliament Buildings  
Ballymiscaw  
Belfast  
BT4 3XX

Tel: 90 521347

Fax: 90 521795

E-mail: alex.mcgarrel@niassembly.gov.uk  
ENV13

Gail McKibbin  
DALO  
Office of the First Minister and deputy First Minister

3 June 2011

### **NI Ombudsman**

The Committee for the Environment, at its meeting on 23 March 2011, considered correspondence in relation to a planning issue in Waringstown where errors were made and acknowledged by the Department of the Environment.

During discussions members raised the issue of the lack of powers available to the NI Ombudsman in relation to this case. The Committee wrote to OFMDFM on 25 March 2011 to ask if the Department could consider and address this aspect of the Ombudsman's powers in its forthcoming review. However its correspondence could not be dealt with prior to dissolution.

The new Committee discussed this issue at its meeting on 2 June 2011 and agreed to write to OFMDFM to seek an update on the review in relation to the powers of the NI Ombudsman. In particular it would like to request that the limited power of the Ombudsman, as referred to by the Ombudsman in the Waringstown case, are taken into consideration and addressed during the review.

I would appreciate if you could respond to us on this matter. If you require any additional papers please do not hesitate to contact me.

Yours sincerely

**Alex McGarel**  
Committee Clerk  
Committee for the Environment

## OFMDFM Committee to Environment Committee regarding review of powers

Committee for the Office of  
First Minister and Deputy First Minister  
Room 435  
Parliament Buildings  
Tel: +44 (0)28 9052 1903

From: Peter Hall  
Clerk to the Committee for the  
Office of the First Minister and Deputy First Minister

Date: 20th June 2011

To: Alex McGarel  
Clerk to the Committee for the Environment

Subject: NI Ombudsman

Dear Alex,

At its meeting of 15th June 2011, the Committee for the Office of the First Minister and deputy First Minister agreed to forward your letter and supporting documents to the OFMDFM DALO. At the same meeting the Committee agreed to include the papers you forwarded regarding the powers of the NI Ombudsman in the Committee's consideration of possible reform of the Office of the NI Ombudsman, subject to your Committee's agreement.

With regard to your request to the OFMDFM DALO for an update on the Department's plans to review the powers available to the NI Ombudsman, the DALO has indicated that the Department has no plans to review the powers of the NI Ombudsman as the issue is already the subject of an OFMDFM Committee investigation and planned Bill.

I hope this is useful.

Regards,

**Peter Hall**  
Committee Clerk

## Environment Committee to OFMDFM Committee regarding planning issue

Committee for the Environment  
Room 245  
Parliament Buildings  
Tel: +44 (0)28 9052 1347  
Fax: +44 (0)28 9052 1795

To: Peter Hall  
Clerk to the OFMDFM Committee

From: Alex McGarel  
Clerk to the Committee for the Environment

Date: 01 July 2011

Subject: NI Ombudsman

1. The Committee for the Environment, at its meeting on 30 June 2011, considered your reply in relation to the review of the office of the NI Ombudsman.
2. Members would welcome that the information they provided in relation to a Warringstown planning issue could be incorporated into this review and addressed in the forthcoming Bill if appropriate.
3. I look forward to the outcome of the investigation.

**Alex McGarel**  
Clerk  
Committee for the Environment

## OFMDFM Committee to Environment Committee regarding planning issue

Committee for the Office of  
First Minister and deputy First Minister  
Room 435  
Parliament Buildings  
Tel: +44 (0)28 9052 1903

From: Peter Hall  
Clerk to the Committee for the  
Office of the First Minister and Deputy First Minister

Date: 15 September 2011

To: Alex McGarel  
Clerk to the Committee for the Environment

Subject: Northern Ireland Ombudsman

Dear Alex,

At its meeting of 14 September 2011, the Committee considered correspondence from the Committee for the Environment regarding a Warringstown planning issue.

The Committee agreed that it would consider this issue during its proposal to update and reform the Office of the Northern Ireland Ombudsman.

Regards,

**Peter Hall**  
Committee Clerk

# Environment Committee memo regarding Planning Service

Committee for the Environment  
Room 245  
Parliament Buildings

Tel: +44 (0)28 9052 1347

To: Peter Hall  
Clerk to the Committee for the Office of the First and deputy First Minister

From: Alex McGarel  
Clerk to the Committee for the Environment

Date: 30 September 2011

Subject: Committee briefing by the Ombudsman

1. At its meeting on 29 September 2011 the Environment Committee considered the Ombudsman's Report 2010-2011. Members were concerned about several aspects of his report in relation to Planning Service and agreed to invite him to give evidence at a future meeting.
2. Key areas of discussion are likely to include
  - Ongoing shortcomings in what the Ombudsman considers basic requirements of customer service within the Planning Service.
  - The future role of the Ombudsman in relation to planning after planning functions have been devolved to local councils.
  - The role of the Ombudsman in relation to the council decision making process once councils have responsibility for planning functions.
3. The Environment Committee will be inviting him to give oral evidence on Thursday 15 December 2011 and I would appreciate if you could, out of courtesy, inform your Committee of this briefing.

**Alex McGarel**

Clerk to the Committee for the Environment



# NICCY comment on Ombudsman's evidence

# NICCY

northern ireland commissioner  
for children and young people

Cathie White  
Committee for the Office of the  
First Minister and deputy First Minister  
Room 416 Parliament Buildings,  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

patricia lewsley  
commissioner

gerard campbell  
chief executive

20 January 2011

Our ref: 11/PD/PL/006

Dear Ms White

At a recent evidence session (12<sup>th</sup> January) the Northern Ireland Commissioner for Complaints made comments that I believe are factually inaccurate.

He said:

**"Scotland has had a review of all those offices and moved to having a single ombudsman..."** in reference to the Children's Commissioner and Commissioner for Older People.

I would draw your attention to the text below from the OFMDFM Review of NICCY.

**7.35 In planning for the Bill the possibility of placing the SCCYP under the Scottish Human Rights Commission was considered but this was not included in the Bill as it was considered important to have an independent view on children's rights.**

I request that this factual inaccuracy be drawn to the attention of members, as I am sure that, in considering matters concerning Ombudsmen and Commissioners, they would wish to have the correct information.

I ask them to note that in addition to the information above the Dunford Review of the English Children's Commissioner also supported the need for an independent Commissioner.



Millennium House    Belfast    T 028 9031 1616    E info@niccy.org  
17-25 Great Victoria Street    BT2 7BA    F 028 9031 4545    [www.niccy.org](http://www.niccy.org)

Also it may be helpful for members to note that the 'Ombuds' role of NICCY is only one part of the work of the office and that I have considerably more extensive powers and duties.

Yours sincerely

A handwritten signature in cursive script, reading "Patricia Lewsley".

Patricia Lewsley  
Commissioner

# Older People's Advocate - Re Ombudsman Analysis of 2010 Consultation Responses



Mr Tom Elliott MLA  
Chair Committee of OFMDFM  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast, BT4 3XX

24 January 2011

Dear Mr Elliott,

At the meeting of the Committee on Wednesday 12th January the Northern Ireland Ombudsman, Commissioner for Complaints and Commissioner for Standards and Privileges in the Assembly indicated that he commended *'the paper that I have come to the Committee to speak on this afternoon. It seeks to analyse the consultation responses in a first-cut empirical manner. It also includes my perspective and comments on the consultation responses that have been submitted to the Committee'*. He later claimed that *'the consultation document is therefore completely focused on the issues that we looked at during the mid-point of last year'*. This statement seemed to suggest that the consultation paper which was being considered by the members might be one prepared by the Ombudsman's office. I should like clarification as to the ownership of the consultation document, process and analysis.

I would be pleased if you could clarify the position for me and also the rules governing Committee consultations and analysis for future reference.

Yours sincerely

**Dame Joan Harbison**  
**Older People's Advocate**

Cc Mr Gerry Kelly MLA, Junior Minister OFMDFM  
Mr Robin Newton MBE, MLA, Junior Minister OFMDFM  
Cathie White, Committee Clerk OFMDFM

COMMITTEE  
21 JAN 2011  
FOR THE OFMDFM

Dame Joan Harbison

## Committee to Lord Chief Justice

**The Committee for the Office of the First Minister  
and deputy First Minister**

Committee Office Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

Tel: (028) 9052 1448

FaxL (028) 9052 1083

Committee.ofmdfm@niassembly.gov.uk

Date: 18 February 2011

The Right Honourable Sir Declan Morgan  
Lord Chief Justice  
Royal Courts of Justice  
Chichester St  
Belfast  
BT1 3JF

Dear Lord Chief Justice,

The Committee for the Office of the First Minister and deputy First Minister has recently conducted a public consultation in relation to possibly bringing forward legislation to update and reform the Office of the Northern Ireland Ombudsman.

At its meeting of 16 February 2011, the Committee considered a summary of the responses to the Committee's consultation on the proposals. The Committee agreed that I should write to you to seek your views in relation to the "statutory bar".

The Law Commission for England and Wales have proposed a reform, that there should be a presumption that the Ombudsman may accept a case (or as they term it, open an investigation) coupled with a broad discretion to decline to accept a case. The Law Commission made this proposal in a Consultation paper issued in September 2010 (Public Services Ombudsmen LC CP 196) and it goes further than their previous proposal in 2008 in Administrative Redress: Public Bodies and the Citizen (2008) LC CP187). The Ombudsmen in England and Wales have welcomed this proposal.

The Northern Ireland Ombudsman agrees with the Law Commission's proposal and suggests that the Committee include such a provision in the Bill. The Welsh Ombudsman also supports the Law Commission's proposal that the courts be given a power to stay a case and refer it to an ombudsman, for the ombudsman to decide if the case should be accepted.

The Committee is keen to seek your views on this proposal in order to further inform it as it continues its consideration of these proposals. The Committee would be grateful if you could respond by 4 March 2011. If you need any further information please contact me on 02890 521448.

Yours sincerely

A handwritten signature in black ink, consisting of a stylized 'C' followed by the word 'White' in a cursive script.

**Cathie White**

Clerk to the Committee for the Office of the First Minister and deputy First Minister

## Lord Chief Justice response



LORD CHIEF JUSTICE'S OFFICE,  
ROYAL COURTS OF JUSTICE  
CHICHESTER STREET,  
BELFAST, BT1 3JF  
TELEPHONE: (028) 9072 4615/4616  
FAX: (028) 9023 6838

*Dear Ms White,*

21 March 2011

### UPDATE AND REFORM OF THE OFFICE OF THE NORTHERN IRELAND OMBUDSMAN

Thank you for your letter to the Lord Chief Justice of 18 February 2011 seeking his views in relation to the proposed legislation to update and reform the Office of the Northern Ireland Ombudsman. The Lord Chief Justice has consulted his colleagues and has asked me to reply.

The Lord Chief Justice considers that it would not be appropriate for him to express a view on the proposal to remove the statutory bar as this is a matter of policy. He would, however, hope that consideration would be given to the process to ensure that it does not result in duplication between the courts and the Ombudsman.

The Lord Chief Justice would be content in principle for the courts to have the power to stay and transfer judicial review proceedings to the Ombudsman. This of course would only be where the matter is within the potential jurisdiction of the Ombudsman. The Lord Chief Justice considers it would be of assistance if the parties were to be required to make submissions to the court in cases where the exercise of this power is being sought.

*Yours sincerely,*  
*Alison Houston*  
Alison Houston

Ms Cathie White  
Clerk to the Committee for the Office of the FM and DFM  
Committee Office  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
BELFAST  
BT4 3XX

## Committee to Law Society seeking further information

**The Committee for the Office of the First Minister  
and deputy First Minister**

Committee Office Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

Tel: (028) 9052 1448

Fax: (028) 9052 1083

Committee.ofmdfm@niassembly.gov.uk

Date: 18 February 2011

The Law Society of Northern Ireland  
96 Victoria Street  
Belfast  
BT1 3GN

Dear Sir/Madam,

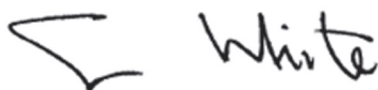
At its meeting of 16 February 2011, the Committee considered a summary of the responses to the Committee's consultation on proposals to update legislation and reform the Office of the Northern Ireland Ombudsman. The Committee agreed that I should write to you to seek further information on an answer you gave to the Committee's consultation.

Question 17 – Should the existing powers in relation to the conduct of an investigation by an Ombudsman be continued? Should additional power enabling the Ombudsman to require the provision of any facility from a person who may be able to provide information or produce a document be included in the legislation?

Your response to this question stated "Enforceability would be problematic and the application of this power could potentially be oppressive".

The Committee would be grateful if you could expand on this response as to why it would be problematic and potentially be oppressive. I would be grateful if you could respond by 4 March 2011.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Cathie White'. The signature is stylized, with a large 'C' and a long, sweeping underline.

**Cathie White**

Clerk to the Committee

## Law Society response

THE LAW SOCIETY  
OF NORTHERN IRELAND



Our Ref: AH/CC.07

From: The Chief Executive

Your Ref:

7 March 2011

Ms. Cathie White  
Clerk, Committee OFMDFM  
Committee Office  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
BELFAST  
BT4 3XX

Dear *Cathie*

**RE: CONSULTATION ON PROPOSALS TO UPDATE LEGISLATION AND REFORM OF THE OFFICE OF THE NORTHERN IRELAND OMBUDSMAN**

I refer to your letter of 18th February 2011 relating to the above. In your letter you asked the Society to expand on our response to question 17 of the consultation.

Our response to this question is reflective of a concern within the Society relating to the investigative procedures of the Ombudsman generally. It is important to note that an Ombudsman may make a determination relating to an individual's rights and responsibilities. Therefore an individual's right to a fair trial, as guaranteed by Article 6 of the European Convention of Human Rights, is engaged.

It is not necessarily the case that where an individual's right to a fair trial is engaged that the matter must be dealt with by the courts. However, where alternative procedures are put in place these must be subjected to rigorous scrutiny to ensure they provide sufficient checks, balances and safeguards. The checks, balances and safeguards built in to the court system are not necessarily present in every aspect of an Ombudsman's investigation. Such safeguards are intended to protect not only the parties to a complaint but also those providing evidence and information to assist in the investigation of a complaint.

The starkest contrast between the role performed by the Ombudsman and that performed by a judge is that the Ombudsman performs an investigatory function. To enhance the Ombudsman's investigatory powers will further exacerbate this position perhaps beyond what was contemplated when the office of the Ombudsman was created. Proportionality therefore becomes an issue.

The Law Society of Northern Ireland, 96 Victoria Street, Belfast BT1 3GN T.028 9023 1614 F.028 9023 2606 Library Fax: 028 9031 1323

[www.lawsoc-ni.org](http://www.lawsoc-ni.org) [info@lawsoc-ni.org](mailto:info@lawsoc-ni.org)



Our point is that given the dual role of an Ombudsman as an investigator and adjudicator, there is the potential for Article 6 rights to be diluted. The decisions of Ombudsmen are important and significant in the lives of citizens where they may have suffered from maladministration, which is of itself a widely defined term. As a general observation in considering the powers of the Ombudsman to require information, issues are opened up such as the rights of the witnesses or those who would be witnesses if the matter was conducted by way of a trial. These are serious issues which require consideration. We signalled our view that the application of the powers could potentially be oppressive. In such circumstances, who would advise or protect the witness or indeed advise the respondent, given the option of the Ombudsman to refer to his powers to refer an individual for contempt of court? If there is such a referral then the Court will do so but that will be in the extreme cases. Most cases will be dealt with on a voluntary basis, as parties will wish to avoid a referral. Our concern relates to third party individuals rather than Government Departments.

In addition the accountability arrangements need to be robust. An aggrieved individual may seek a judicial review of a decision of the Ombudsman. However a judicial review is both a lengthy and costly process.

Our conclusion is that any further extension of the powers of the Ombudsman must be considered carefully with reference to the rights of all parties who may be subject to the powers or procedures of the office of Ombudsman.

We enclose a text of a lecture delivered by Lightman J which highlights the issues along with the case Regina v Local Commissioner Ex parte Eastleigh Borough Council [1998] 1 QB 855.

If the Committee require any further information please do not hesitate to contact me.

Yours sincerely,



Alan Hunter  
CHIEF EXECUTIVE

Enc.

## Law Society additional response

THE LAW SOCIETY  
OF NORTHERN IRELAND



Our Ref : AH/NM/Let/Misc/PHall

19<sup>th</sup> October 2011

From: The Chief Executive

Mr Peter Hall  
Room 245, Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

Dear 

**RE: NORTHERN IRELAND OMBUDSMAN**

I refer to the Committee's inquiry into reform of the NI Ombudsman. At an earlier stage in the inquiry the Society provided comments to the Committee to assist in its consideration of this topic, which I enclose. The Society understands that the Committee is in the process of developing legislation and considered that it might be helpful to provide some further views at this stage.

The NI Ombudsman performs an important role in society generally. The Society has enjoyed a good working relationship with the Office and its officers, the President of the Law Society recently endorsed a booklet produced by the Ombudsman's office entitled 'Alternatives to Court in Northern Ireland'.

Solicitors have experience of advising complainants, both public authorities responding to a complaint and individual employees of public authorities who are the subject, or one of the subjects, of a complaint. In preparing this submission the Society has taken the views of such experienced practitioners. We have also had regard for the fundamental principles which underpin a democratic society, most significantly the rule of law. The below comments, which are taken from the Franks Report of 1957, which was recently considered by the Administrative Justice & Tribunals Council in England & Wales, may be of interest to the Committee;

*"The rule of law stands for the view that decisions should be made by the application of known principles of law. In general such decisions will be predictable, and the citizen will know where he is. On the other hand, there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law."*

The Committee will recall that the Society's earlier correspondence raised the issue of the relevance of the right to a fair trial, as protected by Article 6 of the ECHR which has been incorporated into UK law by the Human Rights Act 1998. The Office of the Ombudsman is clearly of the view that Article 6 does not apply to its investigative and decision making procedures. On a matter of strict interpretation the Ombudsman maybe correct, on the basis that it does not make "determinations". It is disappointing to note the narrow interpretation the

The Law Society of Northern Ireland, 96 Victoria Street, Belfast BT1 3GN T: 028 9023 1614 F: 028 9023 2606 Library Fax: 028 9031 1323

[www.lawsoc-ni.org](http://www.lawsoc-ni.org) [info@lawsoc-ni.org](mailto:info@lawsoc-ni.org)

Ombudsman's office is taking. However given the power of the Ombudsman to enforce its decisions in the County Court the reality is that determinations are in fact being made.

I would refer the Committee to its evidence session of 21<sup>st</sup> April 2010 in which the Ombudsman stated:

*"...we are the only jurisdiction in these islands where, if a public body refuses to implement my recommendation, we have the right to take it to the County Court.*

*In the most recent case in which that happened, a consolatory payment of £80,000 had been identified for the affected group, but the judge increased the sum to £200,000. Therefore, we find that many public bodies have no desire to go to the County Court to challenge my judgement against them."*

This statement appears to suggest that whilst the Ombudsman may not have the same powers in law as the Pensions Ombudsman, in practice a decision of the Ombudsman has the same effect.

The Ombudsman's decision making process is inquisitorial. The Ombudsman is actively involved in finding the facts of the case and ultimately reaches a decision relating to the complaint. This contrasts with the adversarial system, which is the traditional approach to law in this jurisdiction. In all decision making processes which are adjudicative in their nature it is important that the process is open and transparent and acknowledge the principles of the Human Rights Act.

Our object in raising the relevance of the right to a fair trial is to highlight the importance of procedural fairness. It is important for example, that there is an appreciation for the fact that whilst an adverse decision is made against a public authority, it has implications for the individuals employed by the public authority. The impact on the professional reputation of the officers of the public authority may have implications for their career. It may also have implications for subsequent litigation brought by a complainant.

The Ombudsman's website includes a helpful section on dealing with complaints which provides guidance to prospective complainants. In addition to this, the Ombudsman's staff will regularly provide assistance to prospective complainants over the telephone. The Society considers that it would be helpful guidance could be produced for both complainants and respondents setting out how the Ombudsman goes about investigating a complaint and the procedure etc to be applied.

It is understood that the Committee are currently considering the jurisdiction of the Ombudsman. The Society is of the view that to ensure a focused approach, it is important that the bodies included within the Ombudsman's jurisdiction are listed in legislation.

If there is any further way in which the Society can be of assistance please do not hesitate to contact me.

Yours sincerely

  
Alan Hunter  
Chief Executive

# Committee to Equality Commission

**The Committee for the Office of the First Minister  
and deputy First Minister**

Committee Office Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

Tel: (028) 9052 1448

Fax: (028) 9052 1083

Committee.ofmdfm@niassembly.gov.uk

Date: 17 February 2011

Equality Commission for Northern Ireland  
Equality House  
7 – 9 Shaftesbury Square  
Belfast  
BT2 7DP

Dear Sir/Madam

At the meeting of 16 February 2011 the Committee considered the responses received to its consultation on the Reform of the Office of the Northern Ireland Ombudsman.

The Committee agreed to write to the Commission to seek any advice they may have on the resource and cost implications of implementing a number of the suggested powers in the consultation document, namely

Should the Ombudsman have a power to conduct and investigation or systemic review on his/her own initiative given the overlap with other bodies? (Q4)

Do you want the Ombudsman to have the power to provide guidance? (Q5)

The Committee would appreciate a response by 1 March 2011.

Yours sincerely



**Cathie White**

Clerk to the Committee

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## Equality Commission response

1 March 2011

Ms Cathie White  
Clerk to the Committee  
The Committee for the Office of the First Minister  
and deputy First Minister  
Committee Office, Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast BT4 3XX

Dear Cathie

Thank you for your letter of 17 February 2011 seeking the Commission's advice on the resource and cost implications of implementing a number of the suggested powers contained in the Committee's consultation document on the Reform of the Office of the Northern Ireland Ombudsman.

As indicated in our earlier response, the Commission does not consider that a power to conduct investigations without complaint would be useful or necessary for the Commissioner for Complaints, given the potential overlap with existing statutory powers of other Public Bodies. However, we do recognise there may be cases where, in the course of investigation of a complaint, the Ombudsman forms the belief that an issue of wider dimension exists. In such circumstances, the Commission would suggest that a better route would be that the Ombudsman be authorised to bring the matter to the attention of the Comptroller and Auditor General who seems best placed to investigate further. The Comptroller and Auditor General would require additional statutory powers for such a purpose.

The Commission also made the point in its earlier response that the character of the Ombudsman Office has historically been that of an office that arbitrates between those who govern and the governed rather than that of an Inspector General and conferring a general investigation power may defer resources from dealing with complaints from members of the public.

In respect to your most recent query regarding the resource and cost implications were the Ombudsman to be given powers of investigation, the resource and cost implications would clearly be dependent on the nature of the powers given and the frequency and scale of any investigation.

The Equality Commission's investigation powers are quite wide-ranging, formulated differently in the various anti-discrimination statutes and, indeed, in respect of investigations of potential breaches of the statutory duties under Schedule 9 of the Northern Ireland Act. On an annual basis we may conduct on average twelve investigations under Schedule 9 and usually one or two investigations are ongoing under the anti-discrimination legislation. By way of example, we most recently completed a review of the role of employment agencies in the recruitment of migrant workers. This was a staff intensive exercise, involving the deployment of a Staff Officer and part of a Deputy Principal for approximately 18 months, there was also a small amount of expenditure on focus groups and printing costs.

In respect of the provision of guidance, the Commission believes that this could form part of a role for the Ombudsman in improving public administration generally. We have found the production of guidance material and Codes of Practice under the equality and anti-discrimination legislation to be a very valuable means of promoting good practice, as well as explaining clearly the standards that are applicable. The Commission's work on guidance

material is informed by information gathered through complaints raised by individuals as well as queries from employers and service providers. Again, the resource and cost implications of this work is variable as it depends very much on the nature of the guidance, its length, quantity to be printed although this is increasingly done through the website.

I trust you find this information helpful and we can provide you with a breakdown of costs from one of our investigations, as way of example, if you would find that useful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Evelyn Collins', with a long horizontal line drawn underneath it.

Evelyn Collins CBE  
Chief Executive

Direct line: 028 90 500 622 (PA)

Textphone: 028 90 500 589

Fax: 028 90 329 227

E mail: [ecollins@equalityni.org](mailto:ecollins@equalityni.org)

# Probation Board for Northern Ireland

The Clerk to the Committee  
Room 404  
Parliament Buildings  
Ballymiscaw  
Belfast BT4 3XX

By e-mail

25 February 2011

Dear Ms White,

**Re: Proposal to Update Legislation to Reform the Office of the Northern Ireland Ombudsman**

Further to your correspondence of 17 February 2011, please find enclosed a response from the Probation Board for Northern Ireland with respect to the above consultation.

As you will appreciate, not all of the questions posed in the consultation document are of direct relevance to PBNI, and therefore in providing this feedback I have focused primarily on those issues of direct import to my organisation.

The Probation Board is acutely aware of its responsibility to the Northern Ireland public to carry out its role effectively, and therefore welcomes any steps to deal efficiently with complaints and how we may learn from these to better meet public expectations.

Hoping you find this response of assistance,

Kind Regards,

**Brian McCaughey**  
Director of Probation

Cc  
Louise Cooper, PBNI



**PBNI Response: Proposals to Update Legislation to Reform the Office of the Northern Ireland Ombudsman**

- Q1: PBNI are of the view that the people of Northern Ireland would be more effectively served in the future with the establishment of a single Ombudsman's Office.
- Q2: PBNI has no particular view with regard to the naming of a merged office.
- Q3: One of the natural consequences of resolving complaints should be the improvement of public services. However, it may be the case that learning from individual cases may be limited to a particular organisation, and therefore the ability to seek the improvement of public administration more generally would also be helpful.
- Q4: Following the response to the previous question, this power may be useful for the Ombudsman. It will, however, be important, especially in an environment of constrained public resources, that such work is conducted in a co-ordinated fashion with other regulatory bodies, and that the value of such exercises be apparent.
- Q5 and 6:  
Having only come under the auspices of the Northern Ireland Ombudsman's Office from April 2010 (with the devolution of policing and justice), contact that PBNI has had with the office has been helpful. Responsibility given to the Ombudsman's Office in respect of providing guidance on good administrative practices and 'a design authority' role would be a very positive development, giving the opportunity for all relevant organisations to avail of 'best practice' guidance.
- Q7: The broad principle of 'following the public pound' would be a helpful consideration with regard to the range of bodies to be included within the Ombudsman's jurisdiction. This may be of particular relevance should the powers of the office extend, as proposed in Questions 4 and 5, to systemic reviews and guidance on good administrative practices. There may be particular benefit, for example, if the working practices of voluntary or community sector organisations could benefit from such advice.
- Q8: PBNI would be of the view that listing of the bodies subject to the jurisdiction of the Ombudsman's Office could be contained within guidance documentation or secondary legislation, which may allow for increased flexibility compared to inclusion in primary legislation. It would seem reasonable for the Office of the First Minister and deputy First Minister to maintain an up to date list.
- Q9: Every public sector organisation is required to have in place an appropriate range of policies and procedures relating to employment issues. Furthermore, there are a range of bodies, such as the Fair Employment Tribunal and Office of Industrial Tribunals, to which application can be made to deal with any unsatisfactory matters. In light of the above and also taking cognisance of developments in other jurisdictions, this may be the opportunity to exclude public sector employment issues from the Ombudsman's jurisdiction.
- Q11: PBNI agree with this proposal, this would helpfully open up the mechanism of submission of complaints, and make the office more accessible to the public.
- Q12: Allowing submission of both oral and written complaints would be helpful.
- Q13: Would the inclusion of such a definition in the legislation be enabling or limiting in nature? In line with the response to Q8, would further explanation be better placed in guidance documentation to allow for updating and to reflect changes in technology?
- Q15 and 16:  
Giving the Ombudsman's Office the ability to look into matters that have not otherwise been resolved may be helpful. PBNI does not feel sufficiently qualified to comment on the criteria for acceptance of such cases, this should be a matter for the Ombudsman.



Q17-20:

Given the evidence presented with regard to case handling, it would seem reasonable to update the powers of the Ombudsman as proposed.

Q21-25:

PBNI are of the view that the arrangements for reporting are sufficient.

# British Medical Association

## British Medical Association

bma.org.uk

16 Cromac Place, Cromac Wood, Ormeau Road, Belfast, BT7 2JB

S 028 9026 9666

E bmanorthernireland@bma.org.uk



Peter Hall  
OFMdfM Committee Clerk  
Room 245  
parliament Buildings  
Ballymiscaw  
Stormont  
Belfast BT4 3XX

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21 July 2011

Dear Mr Hall

BMA Northern Ireland General Practitioners Committee (NIGPC) appreciates the opportunity to share our views on the Northern Ireland Ombudsman at this stage of the OFMdfM committee's examination of proposals to enhance the role of the Northern Ireland Ombudsman.

NIGPC recognises the Northern Ireland Ombudsman as an avenue for members of the public who claim to have suffered injustice because of 'maladministration' by public bodies.

However, some cases have been brought to the attention of BMA NIGPC and we are not satisfied with the outcome of investigations and the decisions concerning the level of consolatory payments issued to general practices.

General practices are small (for example in rural areas a practice may have 1 GP and 2 clerical staff) and a consolatory payment of, for example, £10,000 to an individual practice would have a damaging effect, decreasing the ability of GPs and staff to maintain the services patients expect. In the commercial sector, this would be like fining a small local shop the same amount as a large supermarket.

There is also no right of appeal against the Ombudsman's decision, if it is made in a report after an investigation, and against the level of award determined. Whilst the Ombudsman cannot enforce any of his recommendations, in the majority of cases where a complaint is upheld, the body normally accepts and implements the Ombudsman's recommendations. Any disagreement over findings or decisions can only be challenged by way of a Judicial Review application to the high court.

Health is the most complex area in the Ombudsman's jurisdiction and sufficient checks and balances need to be in place to instil confidence that the right outcome and resolution has been reached. BMA NIGPC therefore believes there should be a stronger link between the Ombudsman and the Northern Ireland Assembly. Currently the Ombudsman is required to lay an annual report before the Assembly; however there is no statutory link relationship with an Assembly Committee that could oversee the Ombudsman's performance and scrutinise its investigations and recommendations.

In addition (and as well as practice complaints procedures) there are a number of organisations in Northern Ireland with investigatory/regulatory roles such as the Regulation and Quality Improvement Authority (RQIA), the General Medical Council (GMC) and the Regional Performance Panel of the Health and Social Care Board (RPP). The GMC is responsible for maintaining standards of medical care and performs a disciplinary and complaint handling role. The RPP is made up of Board Officers, professionals and representatives of the Patient Client Council. It deals with underperformance issues in GPs.

**Chief Executive/Secretary:** Tony Bourne

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**STANDING UP  
FOR DOCTORS**

**British Medical Association**  
bma.org.uk

BMA NIGPC therefore believes it is necessary to set out arrangements for co-operation, how complaints will be handled, information sharing and consultation with other organisations to clarify the respective roles of organisations and set out how they could work together. We also believe there should be transparency on how the consolatory payment is calculated by the Ombudsman.

Along with the statutory obligation to consult, both the Scottish and Welsh Ombudsmen have entered into Memorandums of Understanding (MOUs) with other organisations and we believe Northern Ireland should follow this example.

BMA NIGPC wants fair outcomes for all parties. GPs are genuinely committed to improving the service they deliver to patients.

If you would like to discuss any of the issues in this letter, please do not hesitate to contact Public Affairs Officer Sara McCracken at the address above in the first instance.

Yours Sincerely

Dr Brian Dunn  
Northern Ireland General Practitioners Committee Chairman

# Secretary of State for Wales to Chairperson



Wales Office | Swyddfa Cymru

Discovery House  
Scott Harbour  
Cardiff CF10 4PJ

Tŷ Discovery  
Harbwr Scott  
Caerdydd CF10 4PJ

Email/Ebost: [wales.office@walesoffice.gsi.gov.uk](mailto:wales.office@walesoffice.gsi.gov.uk)  
Phone/Ffôn: 020 7270 0538

Mr Tom Elliot MLA  
Chairman  
Committee for the Office of the First Minister and deputy First Minister  
Northern Ireland Assembly  
Room 435  
Parliament Buildings  
Ballymiscaw  
Stormont  
Belfast  
BT4 3XX

Ref: 142SoS11

22 September 2011

## **Public Services Ombudsman (Wales) Act 2005**

Dear Tom,

Thank you for your letter of 11 July about the Public Services Ombudsman (Wales) Act 2005 (the '2005 Act'). I apologise for the delay in replying but it appears the original letter did not reach the Wales Office.

I was interested to hear of your plans to create a single office of the Northern Ireland Public Services Ombudsman and that you wished to explore some elements of the Welsh Ombudsman's work as part of your considerations. In that regard you requested a copy of the drafting instructions for the 2005 Act.

I regret that it is not government practice to share internal drafting instructions. These instructions are communications between Government and its legal advisers which are subject to legal professional privilege.

However, taken in tandem with the information provided to you by the Welsh Ombudsman, I hope that the information already in the public domain about the 2005 Act will be very useful. You will be aware that the Act, the accompanying explanatory notes and the Hansard references are publicly available online at [legislation.gov.uk](http://legislation.gov.uk).



## Wales Office | Swyddfa Cymru

The Hansard references listing the dates of the various Parliamentary stages and including parliamentary debate on the Bill should be particularly helpful in signalling the policy intentions underpinning the Bill.

*Ys sincerely*

A handwritten signature in black ink, appearing to read 'Cheryl Gillan'.

**Rt Hon/Y Gwir Anrh. Cheryl Gillan MP/AS**  
**Secretary of State for Wales**  
**Ysgrifennydd Gwladol Cymru**

## Nursing and Midwifery Council

### Committee for the Office of the First Minister and deputy First Minister inquiry into proposals to reform and update the Office of the Northern Ireland Ombudsman: NMC submission

#### **The Nursing and Midwifery Council (NMC)**

- 1 The NMC is the regulator of nurses and midwives in the UK and the Islands. We were established by the Parliament of the United Kingdom of Great Britain and Northern Ireland under the Nursing and Midwifery Order 2001 (the Order).
- 2 Our purpose is to safeguard the health and well-being of people using or needing the services of nurses and midwives. We do this by:
  - 2.1 Registering all nurses and midwives and ensuring that they are properly qualified and competent to work in the UK. There are currently around 660,000 registered nurses and midwives on the register;
  - 2.2 Setting standards of education, training, conduct and performance for nurses and midwives;
  - 2.3 Ensuring that nurses and midwives maintain those standards;
  - 2.4 Ensuring that midwives are safe to practice by setting rules for their practice and supervision and;
  - 2.5 Maintaining fair processes for investigation of allegations made against registered nurses and midwives.
- 3 We are independent from government and are funded by the fees paid by the nurses and midwives on our register.

#### **Fitness to Practise (FtP)**

- 4 When the conduct or competence of a nurse or midwife is called into question, we are the only authority with the power to prevent them from practising.
- 5 We receive initial complaints and referrals from a wide variety of sources, and with different amounts of information. We use a screening process at the point of referral to make sure we gather the information needed to form an allegation and these cases are then referred to the Investigating Committee.
- 6 The Investigating Committee will then decide if, based on the evidence, there is a case to answer. If they believe there is, they will refer them on to the Conduct and Competence Committee or the Health Committee for adjudication.
- 7 Where the Investigating Committee believes it is warranted, they are able to refer cases to interim orders hearings where the nurse or midwife in question can be suspended from practising for a set period of time while the investigation into their practise continues.
- 8 Once complete, investigations reach the adjudication stage and are heard by either the Conduct and Competence Committee or the Health Committee. Where a panel finds that a nurse or a midwife's fitness to practise is impaired, they can choose from a range of actions or sanctions depending on the severity of the case using the Council's indicative sanctions guidance. Actions range from taking no action to striking the person under investigation off the register.

- 
- 9 Just over 21,000 of the 666,000 nurses and midwives on our register are registered in Northern Ireland.
  - 10 In the period 2010-2011 the NMC received 4,211 referrals, of these 114 were made regarding nurses and midwives registered in Northern Ireland.
  - 11 During this period, there were 19 appeals lodged against sanctions imposed by the NMC, one of which came from Northern Ireland.

**Contact with the Northern Ireland Ombudsman**

- 12 In January 2011 the NMC appointed an Assistant Director for Scotland and Northern Ireland Affairs. She met with Dr Frawley in February and with the Director of Healthcare Investigations in May.
- 13 In October, the Head of External Liaison within the NMC's Fitness to Practise Directorate and the Assistant Director for Scotland and Northern Ireland Affairs are to lead a discussion with staff within the Ombudsman's office on the NMC's Fitness to Practise processes and thresholds for referral.

# Northern Ireland Social Care Council - Briefing Paper

## An Introduction to the NISCC

The Northern Ireland Social Care Council (NISCC) is the regulatory body for the social care workforce in Northern Ireland. It was established on 1st October 2001 under the Health and Personal Social Services Act (NI) 2001 as part of the government's quality agenda to raise standards in social care.

The primary function of the NISCC is to protect the public by maintaining a Register of social workers and social care workers as prescribed by the Department of Health, Social Services and Public Safety (DHSSPS).

The Policy objectives for workforce regulation are to:

1. Protect the people who use the services
2. Raise standards of practice; and
3. Strengthen and support the professionalism of the workforce.

The Council advances these policy objectives through its three main functions:

### **1. Workforce Registration & Regulation**

The NISCC Social Care Register was opened in April 2003. Eventually all social care workers will be registered with the NISCC. Because of the scale of the task, government has taken a phased approach to the introduction of registration.

The first staff groups to be registered included:

- Social Workers
- Team leaders in residential child care
- Residential child care staff
- Head of residential homes and day centres

The Register was further extended in 2004 to include students undertaking the degree in social work.

In June 2005, with the introduction of the 'Protection of the Title of Social Worker' registration for Social Workers became compulsory.

In June 2006, the DHSSPS brought forward Regulations to register voluntarily all other categories of social care workers identified in the Act.

The current phase of registration includes:

- Domiciliary care managers
- Adult residential care staff

There are currently approximately 14,500 people registered with the NISCC and this is expected to rise to 20,000 by the end of 2012, when registration of the current groups becomes compulsory.

Following this, it is proposed that the final phase of registration will be taken forward to include social care staff in Day Care, social work assistants and domiciliary care workers.



## 2. **Regulation of Social Work Education & Training**

The NISCC has a statutory duty to quality assure and regulate social work education and training at qualifying and post-qualifying levels to ensure they meet NISCC standards.

This work includes setting and reviewing standards, approving and monitoring training courses, promoting social work education and training at qualifying and post-qualifying levels, and promoting best practice through the development of training guidance.

## 3. **Workforce Development & Training**

The NISCC is a partner in Skills for Care and Development (SfCD), a sector skills council responsible for social care and children's services. SfCD is an alliance of five existing organisations: Care Council for Wales, Children's Workforce Development Council, Northern Ireland Social Care Council, Scottish Social Services Council and Skills for Care (England).

We need a skilled and flexible workforce to help deliver high quality social care and children's services, now and for the future. This means improving the availability and quality of training for the sector by working with employers, government bodies and training providers. We are working with our partners in Northern Ireland and across the UK, to reduce skills gaps and shortages to help improve standards across the social care and children's services workforce.

### **Working with Other Regulators**

NISCC works closely with other Professional Regulators throughout the UK and the Republic of Ireland, in particular:

- The Scottish Social Services Council;
- The Care Council for Wales;
- The General Social Care Council (England);
- The Health Professions Council;
- The Social Work Regulation Board (Republic of Ireland);
- CORU (Health and Social Care Professionals Council, Republic of Ireland)

NISCC also works very closely with the service regulator in N Ireland, RQIA, with whom it has a Memorandum of Understanding.

## **The Office of the Northern Ireland Ombudsman**

The Northern Ireland Social Care Council as a Public Sector Organisation, falls within the remit of the Office of the Northern Ireland Ombudsman. The Council has worked very effectively with the Office on a number of occasions.

### **Proposals to Update Legislation to Reform Office of the Northern Ireland Ombudsman**

NISCC is aware of and has given consideration to the work the Committee for the Office of the First Minister and Deputy First Minister is undertaking to bring forward legislation to update and reform the Office of the Northern Ireland Ombudsman.

The proposals contained in the Committee's Consultation are wide-ranging. The issue of most relevance to the NISCC relates to the role and remit of the Ombudsman in relation to health and social care judgement, in particular that the Ombudsman has a remit to investigate clinical judgement and complaints in the health sector, but does not have the same level of powers in relation to Social Care.

**The Ombudsman's remit in relation to social care:** On this particular issue, it is the view of NISCC that the provision of health and social care in Northern Ireland are so entwined that

it would be important that the same principles are applied in both sectors and that therefore the Ombudsman should have the same role and remit in relation to social care as he has in relation to health care.

There are, however some significant differences between health and social care which will need to be taken into account. In particular it is important to recognise that while the bulk of health care is provided by the statutory sector, the major part of social care provision is provided by the private and voluntary sectors.

While much of this care is commissioned by HSC Trusts and could be addressed to some extent by the proposals relating to “following the public pound,” there is also a considerable market in social care for people who purchase their own care. This can be very complicated where people pay top up fees on top of fees paid directly by Trusts, which is common in a number of Nursing Homes.

**Professional Judgement:** in relation to the exercise of professional judgement, we note that the Ombudsman has a panel of clinical advisers who assist with complaints relating to their particular areas of professional expertise. It would be important that, as is the case in Wales, similar arrangements should be put in place to cover social care. It is essential that any panel recruited to assist the Ombudsman has current and relevant expertise in the specialist area under investigation, whether that is for example in mental health or child protection, two quite distinct areas of expertise. There would be considerable merit in the Ombudsman’s Office working closely with NISCC in establishing a panel of social care advisers.

**Co-operation and Sharing Information:** The Complaints and Regulatory Landscape often appears more complex and confusing to the general public than it needs to. The roles and responsibilities of each of the various bodies are distinctive.

- Service Regulation ensures that services are fit for purpose and meet the required standards.
- Professional regulation does the same for individual professionals, irrespective of where they work within and across the various services.

At the same time, people need a system to address complaints that may not necessarily be confined to one professional or service provider.

However, in order to minimise confusion and any consequent lack of confidence in the system, there is a need for the various bodies to collaborate to ensure that the public are helped to access the proper authority.

There should also be a framework of principles that guides collaboration and information sharing.

The NISCC has would be of a view that any proposals reforming the Office of the Ombudsman would contain clear requirements as to how co-operation between that Office and Regulatory authorities should be addressed.

# Committee for Finance and Personnel to OFMDFM Committee

Committee for Finance and Personnel  
Room 419  
Parliament Buildings

Tel: 028 9052 1843

From: Shane McAteer  
Clerk to the Committee for Finance and Personnel

Date: 6 February 2012

To: Alyn Hicks, Clerk to the Committee for the Office of the First Minister and deputy  
First Minister

## **Reform of the Office of the NI Ombudsman**

The Committee for Finance and Personnel, at its meeting on 1 February 2012, heard evidence from the NI Ombudsman in relation to his role in public procurement disputes.

The Committee noted that your Committee is currently involved in a review of the legislation to reform the Office of the NI Ombudsman and requested that it be kept updated in terms of the progress of this review. In particular, the Committee would wish to be consulted in relation to proposals to update and align the legislation governing the Ombudsman's role in dealing with public procurement disputes.

I look forward to your response in due course.

Shane McAteer

21843

# Finance and Personnel Committee - Minutes of Evidence with the Ombudsman



**Committee for Finance and Personnel**

## **OFFICIAL REPORT (Hansard)**

**Role of the Northern Ireland Ombudsman**

**1 February 2012**

## NORTHERN IRELAND ASSEMBLY

## Committee for Finance and Personnel

## Role of the Northern Ireland Ombudsman

1 February 2012

**Members present for all or part of the proceedings:**

Mr Conor Murphy (Chairperson)  
Mr Dominic Bradley (Deputy Chairperson)  
Mr Leslie Cree  
Mr Paul Girvan  
Mr David Hilditch  
Mr Paul Maskey  
Mr Mitchel McLaughlin  
Mr Adrian McQuillan

**Witnesses:**

Ms Marie Anderson	Northern Ireland Ombudsman's Office
Dr Tom Frawley	Northern Ireland Ombudsman's Office

**The Chairperson:** Our next evidence session is on the role of the ombudsman in public procurement disputes. The ombudsman has submitted an updated briefing paper. I welcome Tom Frawley, the ombudsman, and Marie Anderson, the deputy ombudsman. I will ask you to make an opening statement. The Committee for Finance and Personnel has been concerned about the issue at hand, because there appears to be, if not confusion, some divergence between your role and those of other bodies in dealing with disputes over public procurement. The Committee is keen to get some clarity on the issue. We hope that today's evidence session can help us with that.

**Dr Tom Frawley (Northern Ireland Ombudsman's Office):** I am grateful for the opportunity to explain to the Committee the unique role of my office in examining complaints from individuals who believe that they have experienced injustice as a result of the actions of Departments and public bodies in Northern Ireland. In particular, I note the Committee's interest in that role for public procurement processes.

This is a complex area of my jurisdiction. Therefore, I should acknowledge that, in many instances, procurement and contractual issues are properly matters for a court to decide by way of a judicial review through the submission of a legal claim for breach of contract. I emphasise that it is not my role to interpret the clauses of a particular contract that may be the subject of a dispute.

As you said, Chairperson, I have already provided a detailed briefing note to the Committee, which outlines the background to some of the issues. I hope that that may also assist the Committee in having a more complete understanding of my role. Today, however, I will address the Committee on a

certain more high-level aspect of that role, which is that of Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints, which is part of the problem. People use the title "ombudsman" but — I do not plead for any recognition of this — there are two roles: the original ombudsman role, which was created, as some of you may remember, in 1969 as a direct response to civil rights unrest, as it was described at that time, by the Stormont Government. That was followed by the creation of another office a short time afterwards, which is separate and is called the Commissioner for Complaints. The distinction is that the ombudsman looks after Departments and their agencies. For example, agencies such as Roads Service or the Planning Service would be covered by the ombudsman's office, but that is separate from the second office that was created, that of the Commissioner for Complaints, which looks at public bodies such as local government, the Housing Executive, the health trusts, the former health boards and a whole raft of other public bodies such as the Arts Council, the Tourist Board, and so on. All those are part of the jurisdiction of the Commissioner for Complaints.

Let me focus on that. The Northern Ireland Ombudsman is the popular name given to two offices: the Assembly Ombudsman for Northern Ireland, which was formerly known as the Northern Ireland Parliamentary Commissioner for Administration, and the second office, the Northern Ireland Commissioner for Complaints. In my role as Assembly Ombudsman for Northern Ireland, I investigate complaints of maladministration relating to the administrative actions of all 12 Northern Ireland Departments and their agencies — for example, the Planning Service, Roads Service, and so on. The legislation that underpins my investigation of complaints concerning that type of body is the Ombudsman (Northern Ireland) Order 1996. In my separate role as Northern Ireland Commissioner for Complaints, I deal with complaints of maladministration by bodies such as local councils, health and social care trusts and general health service providers such as GPs and dentists, as well as the Housing Executive and registered housing associations. The relevant legislation for that jurisdiction is detailed in the Commissioner for Complaints (Northern Ireland) Order 1996.

I will give a little more detail on general background. The Committee may be aware that the word "ombudsman" is Swedish and is translated as a "trusted official". Interestingly, Sweden was the first country to establish an ombudsman's office, the primary role of which was impartially to investigate complaints against public bodies on behalf of individual citizens. In Northern Ireland, both those offices were first established, as I said, in 1969, and the legislation that created the offices was closely based on the Parliamentary Commissioner Act 1967, which established the first UK ombudsman. You may be interested to note that the first Northern Ireland Parliamentary Commissioner for Administration — now the Assembly Ombudsman — was the UK Parliamentary Commissioner, Sir Edmund Compton. Since 1972, the offices of both the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints has been held by a single person. So there is one person and two offices, which partly contributes to the complexity of the issue.

Although I hold both statutory offices, I do so, as I explained, under two separate pieces of legislation that, although broadly similar, have some significant differences. With complaints about procurement, for instance, I can investigate such issues under the Commissioner for Complaints legislation, but I have particular limitations on my ability to investigate procurement issues in my role as Assembly Ombudsman. The Ombudsman (Northern Ireland) Order 1996 contains a statutory bar excluding the ombudsman from investigating complaints about procurement issues involving Departments and their agencies. That bar prevents me from investigating any matter that relates to "contractual or other commercial transactions" to which a Department is a party. That provision is to be found in paragraph 5 of schedule 4 to the 1996 Order.

As I explained, I have a statutory remit to examine complaints of maladministration. The word "maladministration" is not defined in either piece of legislation. In introducing the legislation to the House of Commons, Richard Crossman gave a list of what could be constituted as maladministration. It covers the following forms of administrative failings: avoidable delay; faulty procedures; failure to follow correct procedures; taking into account irrelevant factors or ignoring relevant factors in decision-making; unfairness or bias; and providing misleading or inadequate information or advice. I have a wide discretion to decide whether a particular action or omission constitutes maladministration, but I am empowered to investigate matters relating to administrative actions only. Therefore, my primary concern is often to do with the policy, process and procedure that inform decision-making. In general



terms, I cannot challenge the merits of any decision taken without maladministration. Therefore, if the administrative process and procedure is right, I cannot say that I did not think that someone was the right person to whom to award a contract. I am not able to make that judgement.

I will return to the Assembly Ombudsman jurisdiction. As I explained, my role as Assembly Ombudsman does not permit me to investigate matters that are properly "justiciable" by a court. I will deal with that word later. The accepted interpretation that has been adopted around the statutory bar in relation to commercial and contractual issues contained in schedule 4 to the ombudsman legislation is in itself somewhat restrictive. It is the accepted interpretation that that bar does not allow the ombudsman to investigate matters relating to the actual merits of a decision to award a public procurement contract. Neither does it permit me to investigate complaints about the performance by any party in a public procurement contract. The bar also prevents me from investigating any issue regarding the actual terms or conditions of a contract.

However, as I explained in my briefing note to the Committee, I consider that, in my Assembly Ombudsman role, when investigating complaints about public procurement issues, I can investigate the administrative actions of Departments and their agencies up to the point when a contract is awarded. In other words, I can investigate failings in the procurement process. It may be helpful if I give the Committee an example of that. When, for example, a Department or agency provides inaccurate information in an information pack relating to a tender exercise, I would consider that to be a failure in process, and that failure may constitute maladministration. Further examples in a procurement process could include a Department or agency failing to notify a party that a suspended tender competition was being readvertised, or when a late tenderer is permitted to participate in a procurement exercise without good reason.

I reiterate that, in my role as Assembly Ombudsman, I am allowed to examine only the administrative processes relating to a procurement exercise. I do not challenge a decision regarding the awarding of a contract, which is a judgement more appropriate to the courts.

I will now focus on the role of the Northern Ireland Commissioner for Complaints, whereby I have a broader remit in respect of procurement issues within the jurisdiction of the Commissioner for Complaints (Northern Ireland) Order 1996. Although I have drawn to the Committee's attention the statutory bar in schedule 4 to the ombudsman legislation, there is no similar provision in the Commissioner for Complaints legislation. I therefore have the statutory authority under that office to investigate complaints of maladministration relating to commercial or contractual transactions, subject to the limits imposed on my role where a complainant may have a legal remedy.

In the area of legal remedy, the role of the ombudsman, as originally conceived, was established to deal with grievances in which no remedy was available in court because the subject that was the basis of the complaint was not justiciable, as no legal right had been infringed. Therefore, in both the Assembly Ombudsman and the Commissioner for Complaints legislation, I am unable to investigate complaints where an individual has a legal remedy or may bring a reference or appeal to a tribunal. That statutory restriction on my ability to investigate, where a legal remedy exists, would cover procurement decisions where a remedy by way of judicial review exists. For example, the Committee may be aware of a recent judicial review application heard by Mr Justice McCloskey, in which he criticised the relevant selection criteria for a tender for contracts that had been initiated by the Department for Employment and Learning (DEL). In that instance, the High Court's oversight jurisdiction by way of judicial review provided a remedy that allowed a challenge to DEL's decision at that time.

In practice, when considering whether or not to investigate any complaint about procurement, I must consider, for instance, whether the individual or company concerned may have a legal remedy. That issue is complex, because, as I said, the restriction is not absolute. I have a residual discretion to consider complaints where it is not reasonable for an individual to resort or have resorted to the courts to obtain a remedy. I will give an example: such circumstances might include an unsuccessful tenderer in a procurement exercise not having sufficient financial means to bring judicial review proceedings.

Despite the complexity of the legislation, I have investigated complaints from unsuccessful parties to a tender under Commissioner for Complaints legislation. A case that illustrates that aspect of my jurisdiction involved Belfast City Council, which was found to have been guilty of maladministration in the handling of a tender process when a contract was awarded to the wrong tenderer. The council had also failed to meet its statutory obligations to publish the results of the tendering exercise. That deprived the other tenderers of their right to be properly informed of the outcome of the procurement exercise that would have enabled them to make a decision about whether they wanted to challenge the decision. The council accepted my predecessor's recommendation and agreed to pay £50,000 in respect of the loss suffered by the complainant and £10,000 for the loss of professional fees that were expended. I am happy to take any further questions on that complex area. However, I ask members to recognise the fact that the legal complexities of public procurement law make it difficult to deal with individual cases of which people may be aware in a forum such as this.

Before I finish, I remind the Committee that the legislation was passed in 1969. It was of a different time and dealt with a very different set of circumstances. The world has moved on significantly since then. Members may be aware that the Committee for the Office of the First Minister and deputy First Minister (OFMDFM) is looking at the legislation that informs my office. Therefore, I think that it is timely for this Committee to take its mind, in a sense, on the issue. The Committee may be concerned about aspects of the legislation and feel that the Committee for the Office of the First Minister and deputy First Minister should consider those in modernising the legislation and reshaping the jurisdiction to today's circumstances.

**The Chairperson:** Thank you very much. You said that the Committee for the Office of the First Minister and deputy First Minister is looking at the legislation that governs you. Is that for both the offices that you hold?

**Dr Frawley:** Yes. In fact, for your information, the Committee is minded to create a single office, as it feels that the presence of the two offices is confusing for ordinary members of the public. Some of you will be aware that if someone wants to complain about a Department or an agency, he or she must have MLA sponsorship. It is proposed that that sponsorship would not be required. However, if someone wants to go to an MLA and ask him or her to look at an issue, that would be perfectly reasonable. People would be encouraged to do that, but it would not be a prerequisite to making a complaint. The same model would apply to a single office. Under current Commissioner for Complaints legislation, people do not need sponsorship. The proposed changes would harmonise the two offices into a single office. A single-office model applies in the devolved Parliament in Scotland and in the Assembly in Wales.

**The Chairperson:** You have addressed some of the Committee's issues. There was certainly a sense that there were gaps and confusion. You outlined how you have more power to investigate some of those issues under one set of statutes than you do under the other. For the Committee, the gaps were in your ability to treat with Departments and other public bodies that spend a substantial amount of public funding and the differences in your ability to approach them. Your explanation was useful in that regard. We are heartened by the fact that the Committee for the Office of the First Minister and deputy First Minister is looking into that issue. This Committee will want to communicate its experiences to that Committee.

You answered quite a few of the questions that I had considered asking you. I was struck by your saying that you cannot normally take cases in situations in which people had a remedy to go through the courts. The obvious issue that arises — you referred to it — is people's financial ability to take cases through the courts, particularly small contractors who feel that they have been badly done by. I am conscious of the health warning that you gave, and I do not want you to give specific examples. However, has your office looked into people's financial ability to take a case through the courts, decided that they did not have the wherewithal to do so and pursued the case for them?

**Dr Frawley:** With your permission, I will allow Marie to answer that.

**Ms Marie Anderson (Northern Ireland Ombudsman's Office):** Although our investigations are conducted in private, I can quote a case on which Tom reported in his annual report. That case involved Coleraine



Borough Council and a failed tenderer, who indicated to us that they could have challenged the decision to award a tender to another person and could have gone to a judicial review.

They had sought legal advice and had been advised that they would not be successful. Also, for a small business such as theirs, the stress, the impact on the business of being in court for several weeks, the possible reputational damage and the legal costs involved made going to court prohibitive. Therefore, we took the case on, investigated it and found maladministration, although there was no injustice in that instance.

**The Chairperson:** Is that a frequent experience for your office?

**Ms Marie Anderson:** It would be, but probably more on the health side. Tom, do you want to talk about that?

**Dr Frawley:** It would be. We get many people for whom the prospect of a court and the law is intimidating and hard to access. Increasingly, the issue of free legal aid will be redefined and restructured; Assembly Members are working on that issue. Increasingly, the opportunity to go to court will be reduced for people in particular circumstances, and it will be much harder to secure any type of public funding for those issues. My office will increasingly come into play.

I will come back to your point. It is timely that one begins to make the process much more accessible and straightforward to allow people to come and judgements to be made without a sense of barriers being in place.

It might be helpful — I am not doing this to read it into the record, Chairman — to look at some of the notes and clauses that inform this legislation, and remember that they were written in 1969 by a classical civil servant. Nevertheless, they give a sense of a language that is now very alien to us. The following quotation concerns the statutory bar to challenging Departments:

*"Briefly, the thinking behind this is that commercial judgements, whether made by public or private interests, are, by nature, discriminatory. To allow the commercial judgements of Departments to be examined for fairness to private interests, assuming this to be practicable, while leaving those interests themselves free from investigation, would amount to putting Departments and, with them, the taxpayer, at a general disadvantage."*

The whole thing is written in a way that protects a Department from that sort of challenge and scrutiny, which is perfectly understandable if the legislation is in your gift and you are writing it in that way. Of its time, that was the way in which legislation would have been written. We are now looking at a very different set of circumstances, which is why the Committee for the Office of the First Minister and deputy First Minister, in re-examining the issue, needs the advice of Committees such as this one to look at specific aspects in which you have a direct interest to see that those alternatives and options are properly developed within the framework of the office's jurisdiction.

**The Chairperson:** My assumption is that you welcome the fact that there may be a change and that an examination of two offices with different statutes is timely. If that were corrected, it would result in being able to work on a more straightforward basis.

**Dr Frawley:** Absolutely.

**Ms Marie Anderson:** We have recommended to the Committee for the Office of the First Minister and deputy First Minister that one possible model is the Public Services Ombudsman (Wales) Act 2005. In that legislation, there is no statutory bar in relation to commercial or contractual matters. When the offices are merged, we recommend that there be no such bar. The only bar will be when there is a potential for a legal remedy. As Dr Frawley said, increasingly, people do not have access to legal aid, so access to justice in this arena will be narrower in the future, and the significance of having a free and impartial investigation service in this office becomes more significant.

**Mr McLaughlin:** Hello. It is good to see you again, Tom. I am delighted to meet you, Marie.

In my roles as a councillor in Derry and as an MLA, I have engaged with your office on a number of occasions. I have always found it to be very fair and helpful, particularly when dealing at a local level with individuals coming up against public authorities. Generally, people have a very positive perspective on the ombudsman's role and office, and rightly so.

I came across a case that perplexed me. I will not go into all the details, but it involved an Executive Department and a tendering process. The Central Procurement Directorate (CPD) guidance on grievance procedures explained how CPD would work its way through a process. CPD said that, if at the end of it, individuals are still dissatisfied, they can, through their MLA, contact the ombudsman's office. That is how this case ended up, but the individual then received a letter from you stating that you did not have the jurisdiction. A public body was referring people to your office, whom you were then referring back, saying that the issue was outwith your authority. You gave us some detail of the statutory basis for that.

In this instance, the broad circumstances were that a tender process involving two separate tenders was initiated for freight services to one of the Departments. The individual concerned — a small operator applying for the first time — pointed out that contracts were merged into one within 24 hours of the deadline, which he argued put him at a severe disadvantage. That person runs a small operation and, therefore, had to work at home on weekends to prepare some of the documents. He does not run a big organisation and does not have staff. He believed, therefore, that he was disadvantaged, in the first instance, by that sudden change of direction.

He also requested details on volumes and weights — reasonably so, I thought. He said that he did not know whether he needed to buy a motorbike, a closed van or a three-ton lorry. CPD came back and said that the Department had not given it that information. Given the fact that the only person who had that information was, in fact, the individual who won the previous five-year contract with a two-year extension, is it the case that there is a fault with the procedures? That person knew exactly what he needed. However, someone who wanted to bid for the contract needed that information to be able to inform his tender bid.

On a procedural basis, it seems to me that there is a reasonable case for somebody to take a look at that. I have to say that I eventually made some progress on it, by working with Des Armstrong and his colleagues. On the face of it, the advice on CPD's grievance procedures is that we can go to you, but almost as a court of last resort. I do not understand why that did not apply in these circumstances. It seems to me that the procedures are wrong. I do not even know why the contact was allowed to go to tender if the information was not there.

**Ms Marie Anderson:** The procedures are not wrong. What we have attempted to do is to explain that, even though there is a statutory bar, Dr Fawley interprets that statutory bar narrowly in order to allow some cases in which the tender process itself has failed. The legislation can be interpreted in two ways. It can be interpreted quite broadly, so that anything to do with a procurement exercise is not looked at by the ombudsman. However, the purpose of the office is to provide remedies to citizens and redress for injustice. Dr Fawley interprets the bar quite narrowly and, therefore, investigates complaints about the tender process. Strictly speaking, CPD is right to refer complaints to us. We then decide whether or not to accept them. Dr Fawley, do you want to say anything about that individual case?

**Dr Fawley:** Part of the problem with such cases is that they go to different directors in my office, and it is difficult to get a standard response. I do not see every complaint that comes past my desk. At times, other people decide whether a complaint is in or out of jurisdiction, and this is probably one such case. When you describe it in that wonderfully effective, eloquent way of yours, Mr McLaughlin, it sounds like an open-and-shut case. I would, of course, like to hear the other side of the argument. Far be it from me —

**The Chairperson:** You have missed your vocation.

**Dr Frawley:** I would not say that, Chairman; you could say that. Your putting the circumstances to me in that way is beginning to make me feel failed in front of you. I would, however, like to see the case in the round. I would have thought that that is the sort of case that we should be looking at, particularly given the fact that the contracts were, as you put it, merged 24 hours before the submission deadline. Secondly, the detail that you clearly describe, and the way in which you describe it, hugely advantaged the existing provider and made it a huge disadvantage for anyone else who was trying to judge how they were required to respond meaningfully to the contract. Those are two issues. I would not, as you put it, have allowed the bar to apply in that circumstance.

**Mr McLaughlin:** In that case, the individual accepted that they had taken the case as far as they could. I do not know what they are doing about it. Anyway, they have left me: they are not coming back to me for any more advice. I have actually engaged with CPD. It accepts that the tender process should, perhaps, not have started unless it was able to answer certain reasonable questions.

**Dr Frawley:** Correct.

**Mr McLaughlin:** Therefore, it will amend its process.

**Dr Frawley:** It is interesting that, increasingly, CPD acts as the expert adviser in procurement circumstances. That brings in another complexity. Therefore, whether Departments like it or not, they are accountable for decisions, even though CPD takes a firm view about the standards and requirements of a tender. I do not know how long ago that case happened. Certainly, it surprises me that CPD would have failed to recognise the issue of volumes.

**Mr McLaughlin:** It happened in 2011.

**Dr Frawley:** Well, then, real issues need to be answered. If it would facilitate you and you want to go back to those people, I would certainly look at the case again with regard to the advice that I have discussed with you today, rather than take up more of the Committee's time, Chairman.

**The Chairperson:** Fair enough. You have the door open. You can now follow through.

**Mr McLaughlin:** In that wonderfully eloquent way that you have, Tom. *[Laughter.]*

**Mr Girvan:** The foot is well stuck in. *[Laughter.]*

**Mr D Bradley:** Good morning. Thank you for your presentation. In some cases, procurement is carried out on a combined basis for Northern Ireland, Scotland and Wales. I believe that that is practised in the medical field in particular. If a complaint is made about a procurement process by a Northern Ireland business that competes for a tender, are you empowered to deal with that complaint, or would it be dealt with by the ombudsman in the location of the procurement, be it Scotland or Wales?

**Dr Frawley:** What happens in those major health tenders is that individual jurisdictions subordinate their primary interest to the big contract, if you like, which is then operated by one of the individual Departments. As ombudsmen, we tend to take the view that, in that situation, a complaint would be dealt with in the jurisdiction in which that particular Department is located. It is similar with regard to the North/South bodies in Northern Ireland. I have an agreement with the Republic's ombudsman that if a person who resides in Northern Ireland makes a complaint about a North/South body, I will look at the complaint. If the person who makes the complaint resides in the Republic of Ireland, she will look at it. Therefore, in that instance, it would be the primary tender supervisor, even though people from Northern Ireland sit on their advice panel to make the final decision.

**Mr D Bradley:** Even though they are acting on behalf of Northern Ireland.

**Dr Frawley:** Absolutely, because they have chosen to subordinate their primacy to the greater good. You make a very powerful point, Mr Bradley. Sometimes, you worry whether it is the right solution for Northern Ireland or its business. It may be the right solution for an individual hospital that gets a very expensive piece of technology. However, what price will we pay for that in the wider scheme of things?

**Ms Marie Anderson:** I would like to add to that, Chair, if I may. One proposal in the new legislation is that ombudsmen in the jurisdictions of Northern Ireland, Scotland and Wales could initiate a joint investigation. That provision currently does not exist. Perhaps, therefore, you could see that, if it were a multifaceted tender, there would be merit in its being approached from a Northern Ireland perspective and a Scottish perspective and resources used effectively for a joint investigation. That proposal is before the Committee for the First Minister and deputy First Minister at present. It may resolve some of your concerns.

**Mr McQuillan:** Tom, can you tell me about the size of your office? How many staff do you have, and what sort of budget are we talking about? Secondly, do you see your workload increasing because of changes in the justice system?

**Dr Frawley:** The office is made up of 29 people including me. The budget is currently £1.5 million, which is not a small sum of money — I do not claim that it is — but it is commensurate with the task in considering the scale of our oversight. As you said, Mr McQuillan, the new jurisdiction for justice, which has brought the Prison Service, the Department of Justice and the Legal Services Commission into our jurisdiction, means that the scale is broadening.

Members will be aware that one part of the jurisdiction that has hugely expanded in recent years is health. We get a tremendous number of challenges on health and on social care. Increasingly, those challenges — in the area of childcare, for example — are incredibly complex with a whole range of different perspectives wanting to be heard. All of that produces a level of complexity that we would not have seen 10 years ago, but, as I said, it is an integral part of the architecture of accountability of the ombudsman's office.

One issue that interests me is that, up until very recently, the appointment of the ombudsman was seen as the business of OFMDFM. What is important about the Committee sponsoring this legislation is that it is an Assembly office, because the legislature is examining the performance of the Executive Departments by ascertaining whether citizens are getting what we expect them to get from the public services that our Executive is delivering. It is an important independent office, but part of the architecture, alongside, I would say, the Comptroller and Auditor General (C&AG), is that one looks at the volume of money and investment, while the other — my office — looks at the individual experiences of citizens and whether they are getting what everyone claims they should be getting. It is crucial to a modern democracy to have an office such as that. Therefore, I do not believe that we need more money.

I get frustrated by another aspect. It is absolutely right that confidentiality informs everything that we do. This is the business of ordinary people; it is not the business of the media. If ordinary people want to go to the media, that is their choice; I do not do that. However, on the other hand, I think that I need to publicise the office more. I need to explain its role, and removing the complexity will make that much easier for me. I think that we need to engage in outreach and to explain our role. I know that this will appeal to my articulate and eloquent colleague from the north-west: I am thinking of going out to local councils, setting up there for a day, taking advice and presenting to the wider public in those arenas. There is a perception that the office is Belfast-centric because it is located in Wellington Place, and it is hard for people in Newry, Enniskillen, Derry or Tyrone to access it. Although we are getting into new technology in a different way, we have a lot of work to do to heighten the profile of the office. That would be much easier under the auspices of the Assembly than within OFMDFM.

It is not my business to go out and canvas for complaints. That would be wrong, and it would put the office in the wrong place. My office is independent. I will look at an issue not only from the view of the complainant or the body complained of; I look at the issue independently and objectively in order to come to a conclusion about whether someone has had fairness and has been treated reasonably.

**Mr McQuillan:** Our previous evidence session was about home working. How many, if any, of your employees could work from home?

**Dr Frawley:** It would be very hard for any of them to work from home, primarily because complainants, when they reach us, need an answer. They need to be able to be told where their complaint is. It is not helpful to tell them that no one is in the office today and that they will have to ring back for an answer tomorrow. There are issues about home working. We get a lot of external advice from professional advisers, particularly on clinical matters in health, professional social work matters or if we needed expertise in contracting, for example, but that would be off site. However, our core workforce is office-based.

**Mr P Maskey:** Thank you, Tom and Marie. We all look forward to the new legislation. I am concerned that the current legislation is outdated; it is the same age as me —

**Dr Frawley:** It is very old then.

**Mr P Maskey:** Yes, it is quite old all right. You said that even the wording of the legislation is outdated. I surmise that bodies such as CPD will tell people who complain that it has taken their cases as far as it can and that they should now go to the ombudsman. CPD will do that in the knowledge that you can do nothing about it. It is an excuse for those bodies to tell those people that they can complain if they want, but that the decision was right. The decision may not be right, and it may not have been taken in their best interests. However, the fact that your response is that you cannot look into a case gives a Department an excuse to say that its decision was right. Departments have not changed their systems over many years. Have you found instances such as that?

**Dr Frawley:** No. I think that it would be unfair to presume that. When there are increasing challenges, part of the problem is that CPD does not understand the legislation particularly well.

**Mr P Maskey:** I think that it understands it very well.

**Dr Frawley:** You may attribute that motive. I am merely saying that what happens — I see this in public bodies — is that people are told that, if they are not happy, they should go to the ombudsman. That is not done with the motive that, if they send people there, Frawley will be unable to judge it and the problem will go away; rather, they do that to get complainants off their case and onto someone else's. That is my sense of it, Mr Maskey, but you may have a different view.

In the main, we have very positive relationships with Departments. They do not come back to me and tell me that I have no jurisdiction and should mind my own business. That is not the way that they deal with me. They are very open to debate, and it tends to be me who says that I do not want to get involved.

We increasingly find ourselves involved in judicial reviews. It may be a personal thing, but I have a huge issue with, and feel strongly about, two public bodies, in the form of my office and a Department or a local authority, spending fortunes of public money contesting space together in the High Court. Who benefits from that? If people take me to a judicial review, I have no choice but to respond. However, there is always a judgement to be made. If we do go to a judicial review, which is the ultimate test, I ask Marie whether we should go for it, and I am told that, if I am challenged, a court could look at the law as it is written and tell me that I have no right to be there. There are real issues, but natural justice demands that I become involved, and sometimes we will move and push things, as Marie said, to the limit. As the accounting officer, I have to make a judgement about whether to expose the office and the public purse to significant costs that we will ultimately lose. It is easy to be defensive and draw back because it is not worth it. However, people will then ask whether there is any point in coming to me. They would view me as another man in a suit — a bureaucrat who will not push where they need me to go. It is a fine judgement, and it is not always easy.

**Ms Marie Anderson:** Paul, you raised a valid point in that bodies should deal with complaints first and should not pass the parcel automatically. That applies across the board. Our approach is to ask whether bodies have exhausted their internal complaints procedures and genuinely to look at the issue again, rather than simply passing the parcel to the ombudsman. That is an important message. We have issued guidance on effective complaints handling. We tell bodies that they are the first port of



call for complaints and that they should deal with them rather than passing the buck. Sorry, I interjected there.

**Mr P Maskey:** No, that was a valid point. The complaint that most of us will have dealt with is the fact that people cannot even start to tender. Will the legislation deal with that?

**Dr Frawley:** That will be part of the administrative process. One thing that understandably worries me about the modern delivery system is the select list. It is not the case now, but how people got onto the Irish rugby team used to be a huge mystery, and then they could never get off it. Sometimes, select lists are a little like that. We are continually saying that we must have new businesses and entrepreneurs, and they suddenly look around and say that they would love to get involved in that, but they do not even know how to start. There are real issues and challenges.

An interesting aspect of the new legislation is that my colleague in Dublin, Emily O'Reilly, has a right to do an own-initiative investigation. Currently, I cannot do an investigation unless I receive a complaint, whereas in Dublin, she can do an own-initiative investigation if she sees a pattern or a trend. She can say that she thinks that there is a systemic problem in a particular area. For example, there is no point in simply looking at a select list. It would be better to look at how the whole process works and whether it is working in favour of the taxpayer, the public or a vested interest. Those would be really good judgements. In your own arena, Mr Maskey, I can see a very powerful joint examination by the ombudsman and the Comptroller and Auditor General of how select lists work and whether they deliver what you as members want them to deliver for the public, the bodies and the business community. Looking at one-off select lists would not help you to do that. You would need to look at the whole issue in a major review. That idea of own-initiative investigations is very important.

Westminster is very uncomfortable with own-initiative investigations because it thinks that they would politicise the office because newspaper editorials would say that there should be an ombudsman's investigation of this matter or that matter. I believe in own-initiative investigations, but they should be used very sparingly, carefully and discriminatingly. They should be targeted and focused, and it should not be the case that an own-initiative investigation is undertaken every couple of weeks. It promotes a level of accountability on a scale that allows those big issues that concern members.

I should also say, finally — not that I am finished; you will tell me when I am finished — that my understanding of the process is that the Bill will come before the Committee for Finance and Personnel. Given that the Committee for the Office of the First Minister and deputy First Minister is not a Statutory Committee, as I understand it, this Committee may be running the Bill.

**The Chairperson:** That Committee now has statutory powers. It changed from being the Committee of the Centre to the Committee for the Office of the First Minister and deputy First Minister, but this Committee obviously has an interest, particularly in relation to procurement. At the end of this evidence session, I will suggest to my colleagues that we liaise very closely with the Committee for the Office of the First Minister and deputy First Minister to get sight of some of its propositions. If need be, we can have some input into that.

**Dr Frawley:** If we can help in any way to support your staff in developing your thinking, we would be happy to do so.

**The Chairperson:** I will bring in Leslie, and then we will finish this session, because I am conscious that we are overrunning.

**Mr Cree:** I am glad that you mentioned the Coleraine case, because, to my mind, that was a watershed. Your briefing note states that you are unable to investigate complaints when there is a legal remedy. It goes on to say that you have a "residual 'discretion'" where it is not reasonable. I think that there is a tension there. I have two questions. Were there any cases in the past that you decided were not reasonable? Do you intend to try to clarify the legislation so that it is a clear-cut issue?

**Dr Frawley:** The answer to your second question is yes. Drafting the legislation will be difficult, but because of the dynamic to which we referred about it becoming more difficult for people to acquire the means to put in a judicial challenge, the expense of that challenge and, indeed, in smaller communities, the reputational risk, businesses do not want to transact those challenges in public because they will find themselves trying to do business with the people whom they are challenging. That is the nature of small communities. If a council does a lot of business, a particular sector cannot afford to say that it will not deal with that council again, so people want to try to protect relationships. I hope that the process with which the office and I are engaged does not destroy relationships. That is a protection. We would like the legislation to be remade to become much more clearly in favour of our becoming involved, as distinct from a bar from getting involved in those situations. We would like the legislation to be written in that permissive way rather than in a restrictive way. We have become involved in other cases relating to local authorities and contracting. We took another big case with a local authority. Again, a contract failed to deliver, despite our being told that it was the right tenderer. We looked at the issue in detail. Without our even reaching a conclusion, the council decided that it would revisit the case and reopen the problem.

I will go back to Marie's point. Sometimes our intervention will allow issues to be resolved without a major investigation; that is our preference. We prefer it if people reopen the debate and discussion, and the issues that have been identified by the challenge are addressed in that new approach that is adopted. We would like to think that, increasingly, and without going to the full force of an investigation, we will be able to mediate with parties to encourage them to co-operate rather than going off in different directions. That is a better outcome for us.

**Mr Cree:** It is also easier, because there is no question of dodging the issue.

**Dr Frawley:** That is correct.

**Ms Marie Anderson:** The position with the statutory bar is that virtually every complaint for which there is a potential legal remedy could be refused. The ombudsman's approach is to interpret that bar narrowly, so that although there may be a legal remedy in theory, we invite people to give us some information about why it would not be reasonable for them to pursue that legal remedy. I just want to reassure you that we do not immediately shut down a case because there is a potential legal remedy.

**Mr Cree:** You did that in the past, I can assure you.

**Dr Frawley:** We have done that in past. We lived in a particular time, and we have a particular corporate memory. I am not judging how others would have done this job or how they lived in a particular set of circumstances. We came to this with an approach of "let's keep people out". It is much easier to deal with the issues when we say that we have no jurisdiction rather than to become involved and have the complexity of unravelling some fairly difficult issues.

As we tried to explain in our briefing note, it is a very complex area for us. We also have to build up our expertise. That is happening; I think that we are getting there. In the past, perhaps we have taken a more restrictive view than has been the case in the past three or four years.

**The Chairperson:** Thank you for that; it was very useful for us.

I suggest that the Committee liaise with the Committee for the Office of the First Minister and deputy First Minister on the powers of the ombudsman regarding procurement disputes. That will give us the flexibility to consider the detail of any new provisions and take further evidence as necessary. We have an interest in an area that another Committee is dealing with, but if we liaise with that Committee, we will take it forward from there.

Are members content with that approach?

*Members indicated assent.*

## Justice Committee to OFMDFM Committee re NIJO



**Northern Ireland  
Assembly**

**Committee for Justice  
Room 242**

**Parliament Buildings**

**Tel: +44 (0)28 9052 1629**

E-mail: [committee.justice@niassembly.gov.uk](mailto:committee.justice@niassembly.gov.uk)

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**From:** Christine Darrah  
Clerk to the Committee for Justice

**Date:** 25 March 2013

**To:** Alyn Hicks  
Clerk to the Committee for the Office of the First Minister and deputy  
First Minister

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### **Department of Justice proposals for the Rationalisation of the Functions of the Office of the Northern Ireland Judicial Appointments Ombudsman**

At its meetings on 21 and 28 February 2013 the Committee for Justice took evidence on and considered proposals by the Department of Justice to rationalise the functions of the Office of the Northern Ireland Judicial Appointments Ombudsman.

The Committee agreed that it is content with the proposal to retain the current duties and powers of the NI Judicial Appointments Ombudsman but combine the role with the proposed Public Services Ombudsman. The Committee also agreed that, rather than extend the current restrictions in relation to the legal profession and judicial office on eligibility for appointment as NI Judicial Appointments Ombudsman to the holder of the Public Services Ombudsman post, the effect of the current restrictions should be retained by requiring that in the event that the Public Services Ombudsman is or has been a member of the legal profession or holder of judicial office, the Deputy Ombudsman would carry out an investigation relating to a judicial appointment. If the Deputy is also similarly disqualified, a Director of Investigations would investigate; and if all Directors are disqualified, a third party (such as an Ombudsman from another jurisdiction) would carry out the investigation.

The Justice Committee agreed to advise the Committee for the Office of the First Minister and deputy First Minister of its views on this matter given the relevance to the Bill that it is currently developing to create a Public Services Ombudsman.

The Justice Committee has also asked that OFMDFM Committee keep it advised of developments in relation to the Bill.

**Christine Darrah  
Committee Clerk**



# Department of Justice letter re NI JAO

**Geraldine Fee**  
**Deputy Director**  
**Jurisdictional Redesign Division**

Massey House  
Stormont Estate  
Belfast  
BT4 3SX

Tel: 028 9016 9571

Email: [Geraldine.Fee@dojni.x.gsi.gov.uk](mailto:Geraldine.Fee@dojni.x.gsi.gov.uk)

Alyn Hicks Esq  
Clerk to the Committee for the Office  
of the First Minister and deputy First Minister  
Northern Ireland Assembly  
Parliament Buildings  
Stormont  
Belfast  
BT4 3XX

19 April 2013

Dear Alyn

## **Northern Ireland Judicial Appointments Ombudsman: Proposal for Legislation**

You are aware from previous discussions that, in the context of the Executive review of arms-length bodies, we have been considering alternative options for the delivery of the functions of the Northern Ireland Judicial Appointments Ombudsman (NIJAO).

This is to advise that the Minister of Justice has now decided that he wishes to ask the Executive to agree that the NIJAO should remain as a separate statutory office but that the functions should be carried out by the proposed new Northern Ireland Public Services Ombudsman. He also wishes to retain specific disqualifications that currently apply to the NIJAO, but only in relation to investigations of judicial appointments complaints. This would be achieved by providing that, should the Public Services Ombudsman be so disqualified, he or she should delegate such investigations to an appropriate person (eg. the Deputy Ombudsman or another ombudsman from a different jurisdiction) who is not disqualified. As far as possible, we do not wish to disturb the NIJAO's existing powers, duties and responsibilities, which are provided for in the Justice (Northern Ireland) Act 2002.

This will require primary legislation and, as you know, we had identified your Committee's proposed Ombudsman Bill (which will create the Public Services Ombudsman) as an appropriate vehicle. I understand that you are already aware that the Justice Committee is supportive of the proposals and that it has already written to your Committee to make this suggestion.

Before Minister Ford writes to the Executive, I would be very grateful if you could ascertain your Committee's willingness to carry provisions relating to the NIJAO in its Bill.

I understand that you have raised some questions about the drafting of our provisions and that it has been suggested that the Assembly's draftsman should draft our provisions along with the rest of the Bill. This is to confirm that we would be content with this arrangement. We do not expect that the number of clauses will be particularly numerous or complex. I would be grateful if you could advise in relation to this.

If the Executive agrees to our proposals, the Minister will write to the Chair of your Committee formally to request carriage of our provisions in its Bill.

I attach for your Committee's information a copy of the briefing paper that we provided for the Justice Committee, which explains the policy background to our proposal.

I look forward to hearing from you.

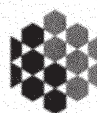
Yours sincerely

A handwritten signature in black ink, reading "Geraldine Fee". The signature is written in a cursive style, with the first name "Geraldine" and the surname "Fee" clearly legible.

Geraldine Fee

# Department of Justice to Justice Committee

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of  
**Justice**  
www.dojni.gov.uk

Minister's Office Block B,  
Castle Buildings  
Stormont Estate  
Ballymiscaw  
Belfast  
BT4 3SG  
Tel: 028 90529272  
[private.office@dojni.x.gsi.gov.uk](mailto:private.office@dojni.x.gsi.gov.uk)

Our ref SUB/1960/2012

**FROM:** BARBARA MCATAMNEY

**DATE:** 04 DECEMBER 2012

**TO:** CHRISTINE DARRAH

## Summary

**Business area:** Department of Justice (Jurisdictional Redesign Division)

**Issue:** To seek the Committee's views on the options for the rationalisation of the functions of the office of the Northern Ireland Judicial Appointments Ombudsman.

**Action required:** The Committee is invited to consider the options and offer its views.

**Officials Attending:** N/A

## INTRODUCTION

1. The Committee has previously been advised that, in the context of the Executive review of arm's-length bodies, officials were considering alternative options for the delivery of the functions of the Northern Ireland Judicial Appointments Ombudsman (NIJAO). This paper considers the options and the issues arising and sets out the preferred option.

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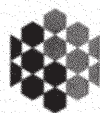


### **BACKGROUND**

2. The NIJAO is a statutory office, established in 2006 by the Constitutional Reform Act 2005, and forms part of the architecture surrounding judicial appointments that were put in place, principally by the creation of the Northern Ireland Judicial Appointments Commission (NIJAC), following the Criminal Justice Review.<sup>1</sup>
3. The NIJAO's role is to investigate complaints from applicants for judicial appointments in Northern Ireland, where maladministration is alleged against the NIJAC.
4. The NIJAO also has a power, having consulted the Lord Chief Justice, to convene a tribunal to remove a judicial office-holder and is responsible for selecting a lay member of NIJAC to sit on such a tribunal. This role was given to the NIJAO under the Northern Ireland Act 2009 when the role anticipated for the First Minister and deputy First Minister in relation to judicial removals was transferred to the Lord Chief Justice.
5. The NIJAO is appointed by the Queen on the recommendation of the Department. He is independent of Government and the Judiciary, but is sponsored by the Department (in respect of providing funding and overseeing the NIJAO's budget, office, etc.). The sponsorship function is currently carried out by the Courts and Tribunals Service.
6. Since 2006, there have been six complaints of alleged maladministration by NIJAC to investigate (an average of one per year), and there has been no exercise of his removals powers. A table of costs for the past three financial years and projected costs for the current year is below.

<sup>1</sup> The relevant statutory provisions were inserted by the Constitutional Reform Act 2005 into the Justice (Northern Ireland) Act 2002.

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### Northern Ireland Judicial Appointments Ombudsman: annual costs

	2009-10	2010-11	2011-12	2012-13 (projected)
<sup>2</sup> Ombudsman	£19, 581	£19,641	£20,627	£19,671
<sup>3</sup> Office and support	£76,318	£70,922	£43,267	£36,647
Total	£95,899	£90,562	£63,894	£56,318

7. As the table shows, costs have been reduced in recent years. This has been achieved by relinquishing separate office accommodation for the NIJAO Secretariat and reducing spend on secretariat support.

#### *Other jurisdictions*

8. The arrangements for investigating complaints of maladministration in relation to judicial appointments are different in each of our neighbouring jurisdictions.
9. In England and Wales, judicial-appointments complaints are investigated by the Judicial Appointments and Conduct Ombudsman (JACO), who also has a power to investigate how complaints about judicial conduct have been handled. In Scotland, judicial-appointments complaints may be investigated by the Scottish Public Services Ombudsman (SPSO) (the equivalent to the Northern Ireland Ombudsman). In the Republic of Ireland, there is no ombudsman role in relation to judicial appointments. As far as eligibility is concerned, the NIJAO and JACO have broadly the same disqualifications, but the SPSO does not. A comparative table is at the Annex.

<sup>2</sup> Retainer and daily fees; travel and subsistence; professional subscriptions; air fares; design and print (annual report)

<sup>3</sup> Secretariat salary; travel and subsistence; rent, rates and office running costs

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## **REVIEW**

10. The Executive review of arm's-length bodies was announced in December 2010. The objective is to assess whether individual bodies might be abolished, absorbed into their parent department or merged with another body with resultant efficiencies and savings. As part of that review, the Department has been considering the future role of the NIJAO.
11. We consider that the functions of the NIJAO have been delivered satisfactorily to date, but the low volume of complaints means that it was appropriate to look at alternative ways of delivering these functions. The purpose of this review, therefore, was not to question the functions of the NIJAO, but to examine options for how efficiency might be improved through alternative ways of delivery. The Department believes strongly that an ombudsman function in relation to complaints about judicial appointments strengthens confidence in the independence of the process for appointing judges and, in turn, in judicial independence itself.
12. Our guiding principle, therefore, has been that, in looking at alternative ways of delivering the functions, we ought to disturb those functions as little as possible.

## **OPTIONS**

13. There are two main options for rationalising the delivery of the NIJAO's functions: joining a shared platform with other justice ombudsmen; or combining with the Northern Ireland Ombudsman (potentially under the proposed new Northern Ireland Public Services Ombudsman).



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### Shared platform with other justice ombudsmen

14. There are three justice ombudsmen: the Police Ombudsman, the Prisoner Ombudsman and the NIJAO. One option is the development of a “shared platform” which would mean that each ombudsman would remain as a statutorily separate and independent office, but would share office services and, where appropriate, investigating resources. This could generate economies of scale, allow for a wider pool of experience and skill among staff, and facilitate the better management of fluctuations in work. If we assume that the secretarial and support services currently provided for the NIJAO could be absorbed by the shared platform, this option might generate annual savings of £35-45,000.
  
15. There are, however, intrinsic differences in the roles performed by each ombudsman, and the role of the NIJAO in particular is quite distinct from those of the other two:
  - the NIJAO’s powers relate to maladministration, whereas the Police Ombudsman investigates complaints into the conduct of police officers and the Prisoner Ombudsman investigates complaints by prisoners and prison visitors and deaths in prison;
  - the Police Ombudsman and Prisoner Ombudsman operate in rather more high-profile, sensitive and potentially controversial environments than does the NIJAO; and
  - investigations by the Police Ombudsman and Prisoner Ombudsman are carried out by their own staff of investigators, whereas the NIJAO carries out investigations – which often involve sensitive discussions with the most senior members of the judiciary – himself.

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16. A further consideration is the importance of ensuring that any arrangements for the NIJAO must uphold, and be seen to uphold, the principle of judicial independence. Combining with ombudsmen concerned with other areas of the justice system may not presentationally be desirable. It may also be the case that the relatively low volume of complaints to, and lower profile of, the NIJAO may give the impression of judicial appointments being the least important of the three areas.
17. These considerations tend to suggest that a shared justice ombudsman platform may not be the most appropriate solution.

#### **Combining with the Northern Ireland Ombudsman**

18. The Northern Ireland Ombudsman investigates complaints of maladministration against Government departments and most public bodies in Northern Ireland.
19. Statutorily, there are currently two Ombudsman offices: the Assembly Ombudsman for Northern Ireland (dealing with central government) and the Northern Ireland Commissioner for Complaints (dealing with local government and other public bodies). The Committee for the Office of the First Minister and Deputy First Minister is proposing legislation to combine these into a single statutory office (to be known as the Northern Ireland Public Services Ombudsman) and make some other reforms, such as extending the number of bodies in the Ombudsman's jurisdiction and providing a power to initiate investigations.
20. It would be possible to combine the office of the NIJAO with the Northern Ireland Ombudsman. Rather than abolish the separate office of NIJAO, the Northern Ireland Ombudsman (or future Public Services Ombudsman) could also hold the office of NIJAO simultaneously. This would recognise the



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particular importance of the ombudsman function in relation to judicial appointments by retaining the NIJAO's existing statutorily separate powers, duties, etc., but remove the need for a different person to be appointed to that office and for any separate NIJAO office support function. The support function could be absorbed by the much larger administrative function of the Northern Ireland Ombudsman. Annual savings of around £60,000 in relation to the entire NIJAO budget would therefore be achieved.

21. Our initial view is that combining with the Northern Ireland Ombudsman would be the preferred option for the following reasons:

- the roles of both the NIJAO and the Northern Ireland Ombudsman are complementary as they are restricted to maladministration (and do not involve, e.g. investigations of conduct);
- the Northern Ireland Ombudsman has a large resource of relevant investigative skill and experience;
- the projected savings are greater;
- although judicial-appointments complaints would become a very small element of the Northern Ireland Ombudsman's role, the fact that the NIJAO role would remain statutorily distinct should serve to counter any perception that the NIJAO role was in any way being diminished in importance.

### **ISSUES**

22. There would, however, be a number of discrete issues to be considered in relation to this option.

#### *Eligibility*

23. The first relates to eligibility for appointment as Judicial Appointments Ombudsman. The eligibility restrictions for the NIJAO are much wider than

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those for the Northern Ireland Ombudsman. The following persons may not be appointed as the NIJAO:

- civil servants;
- MLAs and MPs;
- members of political parties engaged in political activity;
- current or past members of the legal profession;
- current or past holders of judicial office.

24. Currently, the only restriction in relation to the Northern Ireland Ombudsman is on members of health and social care bodies and health service providers. (The eligibility restrictions for equivalent offices in other jurisdictions are noted in the Annex.) While, in relation to the proposed Public Services Ombudsman, the OFMDFM Committee is considering additional statutory disqualifications (of MPs, MLAs, MEPs, current members and staff of bodies that may be investigated by the Ombudsman and persons disqualified from membership of the Assembly), this would not extend to lawyers and former judicial office-holders.

25. If there were to be a single holder of the two offices of NIJAO and Public Services Ombudsman, there could not continue to be different eligibility criteria. We do not consider that it would be desirable to extend the NIJAO disqualifications in relation to the legal profession and judicial office to the Public Services Ombudsman because:

- while there may be a risk of a conflict of interest (or perception of such) in relation to a person with a legal or judicial background investigating complaints about judicial appointments, such a risk does not arise in relation to complaints of maladministration against other public bodies;

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- such restrictions would therefore be disproportionate as they would only serve to narrow the field of candidates for the Public Services Ombudsman in order to address a risk pertaining only to a very small proportion of potential investigations.
26. We have identified the following options for overcoming this difficulty:
- (a) remove the restrictions on eligibility for appointment as NIJAO altogether and require the application of a general conflict of interest test before the Public Services Ombudsman may investigate a complaint relating to a judicial appointment; or
  - (b) retain the effect of the current restrictions by requiring that in the event that the Public Services Ombudsman is or has been a member of the legal profession or holder of judicial office, the Deputy Ombudsman would carry out an investigation relating to a judicial appointment; if the Deputy is also similarly disqualified, a Director of Investigations would investigate; and if all Directors are disqualified, a third party (such as an ombudsman from another jurisdiction) would carry out the investigation; or
  - (c) retain only the restriction on the appointment of current or past holders of judicial office to the position of Judicial Appointments Ombudsman.
27. We would welcome the Committee's views on whether to retain the bar on appointing a lawyer or a former holder of judicial office to the position of Judicial Appointments Ombudsman.

*Scrutiny and accountability*

28. The second issue is about scrutiny and accountability. The OFMDFM Committee's proposals include arrangements for the Public Services Ombudsman to report to the Assembly. These include a power to lay special

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reports before the Assembly (where the Ombudsman is not satisfied with a response to his or her recommendations) and a power for the OFMDFM Committee to request briefing. In respect of financial accountability, it is proposed that the Public Services Ombudsman will appear before an Assembly Committee to account for performance and resources.

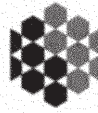
29. The need to maintain the integrity and independence of judicial appointments and removals means that we do not think that it would be appropriate for the NIJAO to lay special reports or to brief the Assembly on anything other than governance, resources and general performance. Currently the NIJAO is required to provide an annual report to the Department, which is then laid before the Assembly. The proposed policy of retaining the NIJAO's existing powers, duties, etc., would mean that this separate reporting arrangement would remain, but there should be no difficulty in the Public Services Ombudsman's answers to an Assembly Committee in relation to performance and resources encompassing (in general terms) all activities, including those relating to judicial appointments.

#### *Appointment*

30. The third issue relates to appointment. The NIJAO is appointed by Her Majesty The Queen on the recommendation of the Department. If the Public Services Ombudsman were also to hold the office of NIJAO, the appointment arrangements for the Public Services Ombudsman would also therefore apply to the NIJAO. The OFMDFM Committee is considering how the Public Services Ombudsman should be appointed. Proposals involve a recruitment and selection exercise undertaken by the Assembly Commission with the following options for appointment: appointment by Her Majesty, appointment by Her Majesty on the nomination of the Assembly; appointment by the



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Assembly; and appointment by the Assembly Commission. The Ombudsman would be an officer of the Assembly.

31. We do not see any immediate difficulty with any of these options but would need to consider in detail the OFMDFM proposals when confirmed.

#### **FURTHER REVIEW OF JUDICIAL APPOINTMENTS AND REMOVALS PROCESSES**

32. The Committee stated in its report on judicial appointments that it intended to undertake a further review of the judicial appointments and removals processes.
33. As outlined above, our starting point for this review has been the principle of disturbing the existing functions as little as possible and focusing on how the current functions might best be delivered.
34. The Department considers that any changes to the remit of the NIJAO would be best considered as part of the Committee's proposed further review of judicial appointments and removals, so that any proposals could be fully evaluated against the wider judicial appointments landscape. As this review is about the delivery of the NIJAO's functions, and not about the functions themselves, we do not consider that such future considerations should preclude us from concluding this review now and making final decisions about how best the NIJAO's functions can be delivered.

#### **VIEWS OF STAKEHOLDERS**

35. We have consulted with the NIJAO, the Northern Ireland Ombudsman, the Lord Chief Justice, NIJAC, the Law Society and the Bar Council. Copies of their letters are attached at **Flag A**.

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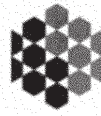


36. The NIJAO accepts the need to look at rationalisation, but queries the “fit” with the Public Services Ombudsman. He is also of the view that the eligibility restrictions should remain. He also considers that the Public Services Ombudsman (or another ombudsman or another organisation) could be given an “audit function”.
37. The Northern Ireland Ombudsman is content that the core role of the NIJAO could be included within the jurisdiction of the proposed Public Services Ombudsman.
38. The Lord Chief Justice is content with the proposal that the NIJAO should combine with the Public Services Ombudsman. He considers that an arrangement short of the current eligibility restrictions may be sufficient.
39. NIJAC is similarly content that NIJAO should combine with the Public Services Ombudsman. Regarding eligibility, it considers retaining the NIJAO disqualifications to be appropriate, and would prefer the appointment of a third party in the event that the Ombudsman is disqualified in relation to a judicial-appointments complaint.
40. The Law Society is of the view that the NIJAO should remain as a separate office. We still await a response from the Bar Council.

### **CONCLUSIONS**

41. We consider that, for the reasons discussed above, on balance, combining with the proposed Public Services Ombudsman – while retaining all the NIJAO’s current duties and powers – would be the most appropriate option for rationalising the functions of the NIJAO. We would be grateful for the Committee’s views.

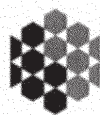
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42. This solution could be achieved by seeking the agreement of the OFMDFM Committee to include relevant provisions in its proposed Bill to create a Public Services Ombudsman. As the OFMDFM Committee is at a relatively advanced stage, this would require the Minister to make an early decision to proceed.

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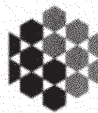
## ANNEX

**TABLE COMPARING NORTHERN IRELAND JUDICIAL APPOINTMENTS  
OMBUDSMAN WITH EQUIVALENT OFFICES**

<i>Jurisdiction</i>	<i>Office</i>	<i>Functions in relation to the judiciary</i>	<i>Eligibility</i>
Northern Ireland	Northern Ireland Judicial Appointments Ombudsman	<ul style="list-style-type: none"> <li>Investigating complaints about maladministration in relation to <u>judicial appointments</u></li> <li>Convening a <u>tribunal to remove</u> a judicial office-holder and selecting a lay member to sit on such a tribunal</li> </ul>	<p>The following are disqualified:</p> <ul style="list-style-type: none"> <li>civil servants</li> <li>MPs, MLAs</li> <li>active members of a political party</li> <li>current or former lawyers</li> <li>current or former judicial office-holders</li> </ul>
England and Wales	Judicial Appointments and Conduct Ombudsman	<ul style="list-style-type: none"> <li>Investigating complaints about maladministration in relation to <u>judicial appointments</u></li> <li>Investigating complaints about maladministration in relation to <u>judicial conduct complaints</u></li> </ul>	<p>The following are disqualified:</p> <ul style="list-style-type: none"> <li>civil servants</li> <li>current or former lawyers</li> <li>current or former judicial office-holders</li> </ul>
Scotland	Scottish Public Services Ombudsman	<ul style="list-style-type: none"> <li>Investigating complaints about maladministration in relation to the <u>Judicial Appointments Board</u></li> </ul>	<p>The following are disqualified:</p> <ul style="list-style-type: none"> <li>MPs, MSPs</li> <li>Members and staff of authorities that may be investigated</li> <li>persons disqualified from election to</li> </ul>



FROM THE OFFICE OF THE JUSTICE MINISTER



Department of  
**Justice**  
[www.dojni.gov.uk](http://www.dojni.gov.uk)

			Scottish Parliament or local council
Republic of Ireland	No ombudsman role in relation to the judiciary	n/a	n/a

**BARBARA McATAMNEY**  
**DALO**

**ENC**

# Department of Justice correspondence from Stakeholders

## **REVIEW OF THE DELIVERY OF THE FUNCTIONS OF THE NORTHERN IRELAND JUDICIAL APPOINTMENTS OMBUDSMAN**

### **COPIES OF CORRESPONDENCE FROM STAKEHOLDERS**

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## NORTHERN IRELAND JUDICIAL APPOINTMENTS OMBUDSMAN

Karamjit Singh CBE

Ms Geraldine Fee  
Deputy Director  
Jurisdictional Redesign Division  
Massey House  
Stormont Estate  
Belfast  
BT4 3SX

18 SEP 2012

17<sup>th</sup> September 2012

Dear Ms Fee,

**Reform of the Office of the Judicial Appointments Ombudsman**

Thank you for your letter dated 10<sup>th</sup> August 2012 seeking my views on the proposed rationalisation of the delivery of the functions of my Office. I welcome the proposal to retain the core powers, duties and responsibilities conferred on this Office under sections 9G – 9I of the Justice (Northern Ireland) Act 2002. I note that you are aware of the comments which I made in my evidence to the Justice Committee in its recent Review of Judicial Appointments. I accept that ultimately it is for the Assembly to decide how these functions should be delivered but I would like to take this opportunity to make some general as well as specific comments about issues that should (in my view) be considered without necessarily expressing a personal opinion on what course of action should be adopted.

General Points

The principle of judicial independence is a cornerstone of our constitutional democracy and the separation of powers ensures that the Executive does not appoint judges. Whilst ensuring the independence of the Judicial Appointments Commission from direct Ministerial or Executive involvement in its functions, the issue of accountability and scrutiny needs to be addressed. One element of this is the operation of my Office in considering individual complaints that are made in respect of specific competitions. As you know in my evidence to the Justice Committee I made the point the *raison d'être* of Judicial Appointments Commissions was to emphasise the independence of the process for appointing judges. In my view the arrangements for investigating complaints and external to the Commission need to promote the same confidence.

This raises two questions at a strategic and operational level. The first is whether it is appropriate that a single Office (such as that of the proposed Northern Ireland Public Services Ombudsman) should have such a broad span of responsibilities which also incorporate the delivery of functions of my Office. Should the appointments process for judges be regarded as a public service in a similar context to the actions of other public organisations providing personal services to citizens, consumers, clients or customers? The second is how the investigation and determination of these complaints within the ambit of a relatively small legal and judicial jurisdiction be undertaken in a manner which promotes confidence and ensures confidentiality?

6th Floor . Bedford House . Bedford Street . Belfast . BT2 7DS

Tel: (028) 9072 8930 Fax: (028) 9072 8936

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## NORTHERN IRELAND JUDICIAL APPOINTMENTS OMBUDSMAN

Karamjit Singh CBE

In posing these questions I would not wish this to be interpreted as disagreement with the issue of considering possible rationalisation because I accept the principle that my Office (and others) should be reviewed in terms of value for money and efficiency. However I add the caveat that other dimensions such as ensuring confidence and independence are also crucial and I accept without hesitation that the current Office of Northern Ireland Ombudsman and its successor role will have similar objectives.

I note that a review of the Office of the Judicial Appointments and Conduct Ombudsman in England and Wales culminated in a decision to retain the Office as a separate entity which would be distinct from the Office of the Parliamentary and Health Services Ombudsman. I also note that recent legislation (about two years ago) in Scotland resulted in the external review of complaints being undertaken by the Scottish Public Services Ombudsman where previously there had been no arrangements. It would be appropriate for the relevant Committee(s) considering these issues to be made aware of any deliberations which took place in these two jurisdictions.

Some of these general comments have implications for the sections below.

### Eligibility

As you know my evidence to the Justice Committee drew attention to the existing disqualifications in relation to investigations into judicial appointments. After six years operating within a relatively small legal jurisdiction I am firmly of the view that the restrictions which currently apply to my Office should remain. My opinions are shaped by factors such as the need to promote confidence on the part of complainants and others and ensuring confidentiality exists both during investigations and after complaints have been considered. I do not consider that a general conflict of interest provision is sufficient. It might be that a specific individual (and colleagues) within the Ombudsman's office would need to be subject to these restrictions if that was the proposed model.

### Remit

I note that paragraph 7a of Appendix 1 proposes that public sector employment issues should be removed from the jurisdiction of the Northern Ireland Public Services Ombudsman. I am not sure what the rationale is for the functions of my Office to be covered by the Public Services Ombudsman although I accept that it can be argued that a focus on appointments to a judicial role is narrower in scope to wider concerns about employment in the public sector. I am assuming that the current requirements for a complaint to be made in writing by the individual who had applied or participated in the selection process would remain rather than the more general provision set out in paragraph 8a of Appendix 1a which (in my view) would not be appropriate.

6th Floor . Bedford House . Bedford Street . Belfast . BT2 7DS

Tel: (028) 9072 8930 Fax: (028) 9072 8936

## NORTHERN IRELAND JUDICIAL APPOINTMENTS OMBUDSMAN

Karamjit Singh CBE

Whilst giving evidence to the Justice Committee the concept of a Justice Ombudsman incorporating the functions of my Office was raised by Members. I pointed out that a distinction had to be made between areas such as complaints against police officers by members of the public, complaints by prisoners against prison staff, and complaints by those applying for judicial positions. However this distinction might be overcome in practical terms if there was a focus on the justice system either through the Office of a Justice Ombudsman or a Deputy Ombudsman with a specific responsibility.

You will be aware that I also drew the attention of the Justice Committee that the predecessor role to my Office, namely the Commissioner for Judicial Appointments, had a power to undertake systemic audits which I do not have under current legislation. I note the Judicial Appointments Commission has published reports on matters such as gender representation within the legal and judicial professions. Such reports could arguably become the responsibility of the Public Services Ombudsman as proposed under paragraph 13 of Appendix 1.

Scrutiny and accountability

I do not consider that it would be appropriate for the Ombudsman to be reporting to the Assembly on specific complaints and the investigations which have been undertaken. The Annual Report currently provides a mechanism in reporting in appropriate terms in respect of such issues. However Assembly Members will have a legitimate concern about governance and resource matters and there is no reason why arrangements for this could not be instituted.

I also consider that the current arrangements for considering my draft complaints reports (and which have not been utilised until now) since the devolution of justice to the Assembly should be reviewed in terms of whether this is an appropriate long term arrangement.

Appointment

Given that the Public Services Ombudsman will be an officer of the Assembly it would seem appropriate for there to be some involvement of the Assembly in the appointment process whilst ensuring the independence of the post. Three of the options listed in paragraph 1b of Appendix 1 could be considered. When I was appointed to my role in September 2006 by Royal Warrant, justice had not yet been devolved to the Assembly. Given the developments in respect of justice since then, it would seem appropriate for there to be some Assembly involvement.

I hope these comments are helpful to your deliberations and would be available to discuss them further.

Yours sincerely,

  
Karamjit Singh CBE

Northern Ireland Judicial Appointments Ombudsman

6th Floor . Bedford House . Bedford Street . Belfast . BT2 7DS

Tel: (028) 9072 8930 Fax: (028) 9072 8936

4



Ms Geraldine Fee  
Deputy Director  
Department of Justice  
Jurisdictional Redesign Division  
5<sup>th</sup> Floor  
Laganside House  
23-27 Oxford St  
BELFAST  
BT1 3LA

October 2012

Dear

**REFORM OF THE OFFICE OF NORTHERN IRELAND JUDICIAL  
APPOINTMENTS OMBUDSMAN (NIJAO)**

I am writing to respond to your letter of 10 August 2012 inviting my views on various issues arising from the proposal to combine statutorily the functions of the NIJAO and the new Northern Ireland Public Services Ombudsman (NIPSO) as envisaged by proposed legislation being promoted by the Assembly by way of the OFMdfM Committee (COFMdfM). I attach in confidence my response to the second consultation which sets out my views on the proposed Bill and I refer to sections of this response in this correspondence.

**NIJAO Core Powers and Duties**

My Deputy Mrs Marie Anderson has been involved in discussions with your staff and Ms Audrey Fowler (NIJAO) in relation to the question of the NIJAO core powers, duties and responsibilities. In those discussions, account has been taken of the proposed changes in jurisdiction and powers of the new NIPSO. One of the current proposals for jurisdictional changes is the removal of the employment jurisdiction from the NIPSO remit. It is my view that this would not preclude the new NIPSO from looking specifically at complaints about the judicial appointments process as currently the Public Services Ombudsman for Wales has jurisdiction in the area of complaints about recruitment or appointment procedures of bodies in his jurisdiction, he cannot look into other staff matters such as pay, discipline or grievances. Also there is a proposal to permit the NIPSO to investigate issues of maladministration on his own initiative. This power is not currently provided for in the Justice (NI) Act 2002 in respect of the NIJAO and it may not be a matter which the key stakeholders consider is necessary given that the NIJAO's remit is solely in relation to judicial appointments, it is the only body dealing with this recruitment and NIJAO has had to date a very limited number of complaints about its processes.

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In these circumstances I do consider that given the unique nature of the NIJAO remit that core powers, duties and responsibilities could be included in the jurisdiction of the proposed Northern Ireland Public Service Ombudsman.

### **Eligibility Issues**

I consider that the proposal to remove the eligibility restriction all together for NIJAO would be preferable as it is not appropriate in my view to limit the pool of potential candidates for the NIPSO office. You may be aware that in Europe and Internationally many of the Ombudsman have a legal or judicial background and given its quasi-judicial nature, it is important that the new NIPSO has knowledge of the courts competence and authority to remedy injustice in order to exercise his discretion whether or not to accept a case for investigation..

It is appropriate in my view to have a general provision in the legislation as proposed at section 3 of the attached response document that where the NIPSO is for any reason precluded from being involved in reviewing a decision (which would include actual or perceived conflicts of interest) that he may invite his deputy, or where there is a conflict another Ombudsman, to act. For instance such provision exists in paragraph 11 of schedule 1 of the Scottish Public Services Ombudsman Act 2002 as follows -.

*'Any function of the Ombudsman may be exercised on the Ombudsman's behalf:*

- (a) *by any person (whether or not a deputy Ombudsman or a member of the Ombudsman's staff) authorised by the Ombudsman to do so, and*
- (b) *to the extent so authorised.*

### **Scrutiny and Accountability**

I fully appreciate the need to maintain the integrity and independence of judicial appointments and removals and as you will see in relation to the proposed reporting to the Audit Committee of the Assembly is solely in relation to governance and resources (see section 17 of the attachment) In relation to the reporting powers concerning his investigations, you will note my response at sections 10 and 13 of the attachment. It may be possible as suggested by you that there be separate provision in the NIPSO legislation in relation to the annual and any other reports that relate to the NIJAO jurisdiction.

I also appreciate that some stakeholders may be concerned about the issue of accountability to a Committee of the NI Assembly for the NIPSO accounts and performance. My 'preferred' approach would be to report formally to a sub-committee of PAC as with the Parliamentary and Health Service Ombudsman in Westminster. This accountability mechanism recognises the need to ensure independence from the Executive and the primary role of OFMDFM Committee is to scrutinise the OFMDFM Department. This



proposal would ensure also that the statutory 'Officers of the Assembly' (C&AG, and PSO) would have similar reporting mechanisms.

#### **Appointment**

The NIJAO is appointed by the Queen on the recommendation of the Department of Justice. I note the proposal that the NIPSO be appointed by the Queen on the recommendation of the NI Assembly as referred to in paragraphs 1 and 2 of the attached response document. This is in my view essential in order to ensure independence from a body in NIPSO jurisdiction.

I am happy to discuss any of these issues further.

Yours sincerely

**Dr Tom Frawley CBE**  
**Northern Ireland Ombudsman**

7



Laurene McAlpine  
Principal Private Secretary

Martin - to me.



RT 1/10.

LORD CHIEF JUSTICE'S OFFICE,  
ROYAL COURTS OF JUSTICE, BELFAST, BT1 3JF  
TELEPHONE: (028) 9072 4614 • FAX: (028) 9023 6838  
E-MAIL Laurene.McAlpine@courtsni.gov.uk

✓ RT 1/10.  
Dorothy Geraldine

27 September 2012

### REFORM OF THE OFFICE OF THE JUDICIAL APPOINTMENTS OMBUDSMAN

Thank you for your letter of 10 August.

The Chief Justice remains content with the proposal to statutorily combine the Offices of the Judicial Appointments Ombudsman and Northern Ireland Ombudsman but notes progress is contingent on further consultations and agreement.

No concerns arise in respect of the proposal to retain the 2002 Act infrastructure for the investigation of complaints relating to judicial appointments. Variances in the powers and duties of the two office holders appear to be consequential on the inherent differences in their roles and the nature of the investigations undertaken and it would seem reasonable to retain arrangements which have not given rise to any concerns.

The Chief Justice is aware the Judicial Appointments Ombudsman has expressed a view that prohibitions on the appointment of current and past members of the judiciary and the legal profession to his Office should be maintained. While he agrees that a mechanism for managing potential conflicts of interest is critical to the perceived independence and effectiveness of the Ombudsman's function, it may be that an arrangement short of the current restrictions would provide sufficient safeguards. The Chief Justice is also mindful, that failure to conclude investigations expeditiously can be repercussive for filling of judicial vacancies and would wish to be assured that new arrangements would not lead to delay in the instigation and completion of investigations.

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The Chief Justice notes that a number of other policy matters, including arrangements for the appointment of the Public Service Ombudsman and for scrutiny of his Office, remain to be settled. He notes the potential options outlined in your letter and looks forward to receiving further updates in that regard.

I hope this is helpful.

Regards

Laurene

**Laurene McAlpine**

Ms Geraldine Fee  
Head of Jurisdictional Redesign Division  
Department of Justice  
Massey House  
Stormont Estate  
BELFAST BT4 3SX



Headline Building  
10-14 Victoria Street  
Belfast BT1 3GG

Telephone: 028 90569 100  
Fax: 028 90569 101

www.nijac.gov.uk  
judicialappointments@nijac.gov.uk

26 November 2012

Geraldine Fee  
Deputy Director  
Jurisdictional Redesign Division  
Department of Justice  
Massey House  
Stormont Estate  
BELFAST  
BT4 3SX

*Dear Geraldine,*

Thank you for advising of the possible rationalisation of the delivery of the functions of the Northern Ireland Judicial Appointments Ombudsman (NIJAO). Your correspondence was discussed by Commissioners and I have been instructed to respond on their behalf. It was noted that this work is still at an early stage and Commissioners look forward to contributing further as issues develop.

In principle the Commission would have no objection to the retention of the core powers, duties and responsibilities conferred on the NIJAO under sections 9G-9I of the Justice (Northern Ireland) Act 2002. To allow NIJAC to operate in an efficient manner our main interest is in ensuring that the duties of the NIJAO are carried out without delay and completed at the earliest possible opportunity.

In relation to investigation into judicial appointments the present disqualifications have been considered appropriate and in the view of the Commission should be maintained. The Commission would be particularly concerned about any involvement by those with a background as civil servants, MPs, MLAs or members of political parties. If the NIPSO is prohibited from carrying out investigations the Commission would prefer the appointment of a third party to do so, arrangements must however be such as to ensure that any investigation is carried out expeditiously.

The need to carefully consider scrutiny and accountability appears to be well recognised in your letter, the Commission would agree that separate provision may be necessary.

The Commission has no particular view at this point on the method of appointment of the Ombudsman.

Yours sincerely,

Edward Gorringe  
Chief Executive

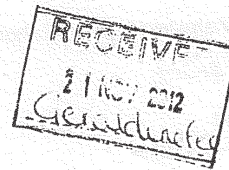
THE LAW SOCIETY  
OF NORTHERN IRELAND



Ref: AH/CE/Lett/DOJ

From: The Chief Executive

20 November 2012



Geraldine Fee  
Deputy Director, Jurisdictional Redesign Division  
Department of Justice  
Massey House  
Stormont Estate  
Belfast  
BT4 3SX

Dear *Geraldine*

**Re: Reform of the Office of the Judicial Appointments Ombudsman**

I am writing further to your correspondence and to thank you for the short extension of time to allow the Committee of the Law Society time to consider the matter. Our committees meet on a six weekly basis.

I provided you earlier with a copy of our submission in relation to the review of the Office of the Ombudsman for Northern Ireland.

You will have seen already from that paper that the Society takes the view that there is merit in the role of the Ombudsman not growing to such an extent that a small number of office holders superintend a wide variety of circumstances in public administration. Knowledge and experience of administration generally as a background together with knowledge of the particular and exceptional circumstances of each area of public administration can more practically be built up if there is some focus on that area. Similarly with the range of Ombudsmen appointed sharing of experience can be beneficial also.

The Committee considered the matters raised in your correspondence and consistent with earlier views concluded that particularly in relation to judicial appointments, the unique circumstances, processes and considerations that apply to the Northern Ireland Judicial Appointments Commission mean that the Ombudsman for Judicial Appointments should be a separate appointment. There is a separate statutory basis for the Northern Ireland Judicial Appointments Commission and its role is defined under statute. Their role goes to the heart of administration of justice in this jurisdiction and they are uniquely placed within the jurisdiction. It therefore follows to our mind that superintendence of the Commission requires a separate identified Ombudsman.

The Law Society of Northern Ireland, 96 Victoria Street, Belfast, BT1 3GN  
Tel: 028 9023 1614 Fax: 028 9023 2606 DX 422 NR Belfast 1

[www.lawsoc-ni.org](http://www.lawsoc-ni.org)



Page 2  
Geraldine Fee  
20 November 2012

The Committee also noted the practical arrangements that would require to be put in place should the Office be combined with other offices and took the view that in terms of efficiency and effectiveness a separate part-time Ombudsman was likely to most effective and efficient.

I am grateful to you for the short extension of time to allow us to consider this important matter.

Yours 



Alan Hunter  
Chief Executive



## Ombudsman to OFMDFM Committee re NIJAO



Mr Mike Nesbitt MLA  
Parliament Buildings  
Ballymiscaw  
Stormont  
BELFAST  
BT4 3XX

30/5 April 2013

Dear *Mr. Nesbitt*,

### **Functions of the Office of the Northern Ireland Judicial Appointments Ombudsman**

You will be aware that at its meetings on 21 and 28 February 2013 the Committee for Justice took evidence and considered the proposals by the Department of Justice to rationalise the functions of the Office of the Northern Ireland Judicial Appointments Ombudsman (NIJAO).

I have now been informed by the Department of Justice that the Committee is content with the proposal to retain the current duties and powers of the NIJAO and to combine the role with that of the proposed Northern Ireland Public Services Ombudsman (NIPSO). The Committee for Justice also agreed that the effect of the current restrictions on eligibility for appointment as of the NIJAO should be retained by requiring that, in the event that the Public Services Ombudsman is or has been a member of the legal profession or holder of judicial office, the Deputy Ombudsman would carry out an investigation relating to a judicial appointment. If the Deputy is also similarly disqualified, a Director of Investigations would investigate; and if all Directors are disqualified, a third party (such as an Ombudsman from another jurisdiction) would carry out the investigation. I am aware that the Committee for Justice has now written to you regarding this issue, given the relevance to the Bill that is currently being developed to create a Public Services Ombudsman.

The Department of Justice has asked me to clarify my views on the issue of extending the current 'eligibility' bar for appointment to the NIJAO, for persons who are 'engaged in political activity as a member of a political party' the ineligibility criteria for the NIPSO. In my response to your July 2012 consultation, I did raise the possibility of further changes to the proposed NIPSO legislation should the functions of the Judicial Appointments Ombudsman be transferred to the new NIPSO. I can confirm that I am content given the nature of the role and function of the new NIPSO combined with the judicial appointments role, that this eligibility bar is extended.

ASSEMBLY OMBUDSMAN FOR NORTHERN IRELAND  
NORTHERN IRELAND COMMISSIONER FOR COMPLAINTS

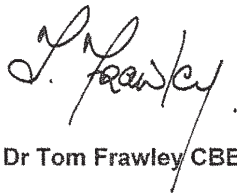
33 Wellington Place, Belfast BT1 6HN Tel: (028) 9023 3821 Fax: (028) 9023 4912  
email: ombudsman@ni-ombudsman.org.uk web: www.ni-ombudsman.org.uk



I am aware that the Committee intends to invite both myself and my deputy to give evidence on the financial implications of the new NIPSO legislation. I confirm that we are willing to attend the Committee at a mutually convenient date and time. You may also be aware of the proposals that are being developed to extend the remit of the Commissioner for Complaints under existing legislation to include a role of the Commissioner for Local Government Standards. This is a significant extension of remit which also will have financial implications which will require to be realistically addressed by both DFP and DOE. I will be happy to update the Committee on the proposals but these are being developed, however I am mindful of the potential involvement of the Environment Committee in scrutinising the amendment Order to the Commissioner for Complaints (NI) 1996. Depending on the timetable for the NIPSO Bill it may be possible to include these provisions as a schedule to that Bill.

Finally, again can I record my thanks to the Committee and staff for progressing this significant piece of primary legislation to this advanced stage, particularly when one considers the dynamic agenda the Committee is required to address.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Dr Tom Frawley', with a stylized flourish at the end.

Dr Tom Frawley CBE

## OFMDFM Committee to Justice Committee regarding NIJAO

**Committee for the Office of First Minister  
and deputy First Minister**

Room 435  
Parliament Buildings

From: Shauna Mageean  
Clerk to the Committee for the  
Office of the First Minister and Deputy First Minister

Date: 6 June 2013

To: Christine Darrah  
Committee for Justice

Subject: Northern Ireland Judicial Appointments Ombudsman

At its meeting of 22 May 2013, the Committee for the Office of the First Minister and deputy First Minister received a briefing from Department of Justice officials on the Department of Justice's proposals for the Northern Ireland Judicial Appointments Ombudsman (NIJAO).

At its meeting on 5 June 2013 the Committee agreed to write to the Department of Justice and I enclose a copy of this letter by way of updating the Justice Committee.

**Shauna Mageean**  
Committee Clerk

# OFMDFM Committee to Department of Justice regarding NIJAO

## **Committee for the Office of the First Minister and deputy First Minister**

Geraldine Fee  
Deputy Director  
Jurisdictional Redesign Division  
Massey House  
Stormont Estate  
Belfast  
BT4 3SX

6 June 2013

Dear Ms Fee,

I refer to the briefing from Department of Justice officials to the Committee for the Office of the First Minister and deputy First Minister at the Committee's meeting on 22 May 2013 regarding the Department of Justice's proposals for the office of Northern Ireland Judicial Appointments Ombudsman (NIJAO).

The proposal is that the office of NIJAO would remain a distinct office but would be filled by reference to the person holding the office of Northern Ireland Public Services Ombudsman – the new office envisaged in the OFMDFM Committee's legislative proposals for merger and reform of the offices of Assembly Ombudsman and Commissioner for Complaints.

The Committee noted the anticipated savings and also heard from the Ombudsman and deputy Ombudsman who were broadly positive about the proposal. The Committee was also broadly supportive. However, a number of issues were identified and discussed with Department of Justice officials and some additional clarity would be helpful in these areas.

### **Eligibility Restrictions**

The OFMDFM Committee noted that there are currently eligibility restrictions in relation to the appointment of the NIJAO which precludes the appointment of lawyers, persons who have held judicial office and persons who have been engaged in political activity as a member of a political party.

The Committee understands that it would be acceptable for the Department of Justice's purposes – should the person holding office as NIPSO be a lawyer, have held judicial office or been politically active – for that person also to hold office as NIJAO but subject to a requirement to delegate the investigation of a NIJAO complaint to a deputy NIPSO or NIPSO director or, if necessary, to an Ombudsman from outside the jurisdiction. I should be grateful if you could confirm that this reflects the Department's understanding of how its proposals would work.

On a general point the Committee felt that it would be helpful to have greater clarity about the level of political activity which would make a person ineligible for appointment.

### **NIJAO's Operating Costs**

The OFMDFM Committee understands that some of the establishment costs involved in operating the current NIJAO could be absorbed by the NIPSO. However, the costs of conducting investigations into complaints to the NIJAO (a cost which would vary depending on

the number of complaints received/investigated) would require a financial reallocation to the NIPSO.

### **NIJAO Reporting**

The OFMDFM Committee noted that the NIJAO would report to the relevant judicial appointing authority – as well as to the complainant – in respect of his or her investigations.

It would be helpful for the OFMDFM Committee to understand whether the Department of Justice envisages a system of annual reporting or accountability and to whom.

### **Associated Parliamentary Drafting Costs**

The Committee was content with the assurance that the Department of Justice would bear the costs of the Parliamentary Drafter associated with the Department's proposals.

I look forward to receiving the Department of Justice's comments on the issues raised above to enable the Committee to take procedural and legal advice on the implications of the proposal.

Please note that while return correspondence should be directed to the Committee as usual, should officials have any queries, they can contact the Ombudsman Bill Project Officer, Alyn Hicks on 028 90521866 or [alyn.hicks@niassembly.gov.uk](mailto:alyn.hicks@niassembly.gov.uk).

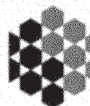
Yours sincerely

**Shauna Mageean**

Clerk to the Committee

# Department of Justice response to OFMDFM Committee

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of  
**Justice**  
[www.dojni.gov.uk](http://www.dojni.gov.uk)

Minister's Office Block B,  
Castle Buildings  
Stormont Estate  
Belfast  
BT4 3SG  
Tel: 028 90528121  
Fax: 028 90528597  
[private.office@dojni.x.gsi.gov.uk](mailto:private.office@dojni.x.gsi.gov.uk)

Our ref: SUB/836/2013

Ms Shauna Mageean  
Clerk to the Committee  
Committee for the Office of the First Minister  
and deputy First Minister  
Northern Ireland Assembly  
Parliament Buildings  
BELFAST  
BT4 3XX

14 June 2013

Dear Shauna

## **NORTHERN IRELAND JUDICIAL APPOINTMENTS OMBUDSMAN**

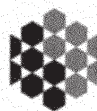
Thank you for your letter to Geraldine Fee of 6 June 2013 about our proposals for the office of the Northern Ireland Judicial Appointments Ombudsman. I have been asked to reply.

We are pleased that the Committee is broadly supportive of our request that provisions to give effect to our proposals could be carried in its proposed legislation, and I am happy to provide clarity on the issues raised in your letter.

First, in relation to eligibility restrictions, I can confirm that the Committee's understanding of how the proposals would work (i.e. in the event that the NIJAO-specific restrictions applied to the person holding the office of NIPSO) is accurate.

Building a fair, just and safer community

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of  
**Justice**  
[www.dojni.gov.uk](http://www.dojni.gov.uk)

More specifically, you asked for greater clarity about the level of political activity that would disqualify someone from the NIJAO role. This disqualification is contained in Schedule 3A to the Justice (Northern Ireland) Act 2002, which does not provide an interpretation of “engaged in political activity”. It would be a matter for the selection panel for the NIPSO appointment to consider whether or not the extent or nature of a candidate’s political activity ought to preclude him or her from undertaking judicial-appointments investigations. We would expect that a common-sense approach would be taken. Our understanding of the policy behind the legislation is that it was intended to have the same effect as the terms and conditions of the then Commissioner for Judicial Appointments for Northern Ireland (the predecessor of the NIJAO), which did not allow that office-holder to engage in political activity. Those terms and conditions defined “political activity” as including:

obtaining office as a local councillor, MP, MEP or member of a devolved assembly or standing as a candidate for such office; acting as a political agent; holding office in a local branch of a political party, and canvassing or speaking on behalf of a political party, or a candidate, or helping at elections. (Mere membership of a political party is not, in itself, however, regarded as political activity.)

Regarding operating costs, Departmental officials will work with colleagues in the Ombudsman’s office to identify any additional costs that will be incurred by the NIPSO as a result of taking on the responsibilities of the NIJAO, and facilitate the funding of these.

Finally, as regards reporting, the NIJAO legislation provides that reports of investigations are sent to the complainant, the Northern Ireland Judicial Appointments Commission and the First Minister and deputy First Minister (the sponsors of the Commission). This would not change. There is also a requirement

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FROM THE OFFICE OF THE JUSTICE MINISTER



for the NIJAO to provide an annual report, accounting for his performance, to the Department of Justice and for the Department to lay that report before the Assembly. Following consultation with the Northern Ireland Ombudsman, we are proposing that, since the Department of Justice would no longer have a sponsorship role for the NIJAO, this annual report would be provided directly to the Assembly. We wish, however, to obtain the Justice Committee's views on this point before finalising.

I trust that the Committee will find these comments helpful. If you require any further clarification from lead officials, Geraldine Fee (9016 9571) or Martin Moore (9016 9553) are available to answer any questions. We look forward to hearing from you once the Committee has obtained its procedural and legal advice.

I am copying this letter to the Clerk of the Committee for Justice.

*D. Galan*  
PP **BARBARA McATAMNEY**  
**DALO**







Northern Ireland  
Assembly

Appendix 6

# Research Papers



## Appendix 6 – Research Papers

1.	Research and Library Service Briefing Note - The Northern Ireland Ombudsman (NIAR 426-10) - 9 September 2010	714
2.	Research and Library Service Research Paper – The office of the Northern Ireland Ombudsman (Issues arising from consultation) (NIAR 145-11) - 4 March 2011	728
3.	Research and Information Service Briefing Note – Office of the Ombudsman (appointment and salary) (NIAR 376-11) - 28 June 2011	748
4.	Research and Information Service Briefing Note - Supplementary Information relating to Ombudsmen (comparisons with other Ombudsmen) (NIAR 435-11) - 8 September 2011	752
5.	Research and Information Service Briefing Note - Following the public pound' - Accountability of bodies identified in the 2004 Deloitte Review of the Northern Ireland Ombudsman (NIAR 603-11) - 15 October 2011	763
6.	Research and Information Service Briefing Note - Role and remit of certain public bodies (NIAR 604-11) - 21 November 2011	773
7.	Research and Information Service Briefing Note - Power of Northern Ireland Ministers or Secretary of State to order non-disclosure of documents (NIAR 228-12) - 11 April 2012	782



Northern Ireland  
Assembly

## Research and Information Service Briefing Note

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Paper 000/00

9 September 2010

NIAR 426-10

**Ray McCaffrey**

# The Northern Ireland Ombudsman

## 1 Background

This briefing paper looks at issues surrounding the proposed Committee Bill to legislate for a single Northern Ireland Ombudsman. These include:

- The existing legislation
- A comparison with existing legislation in Scotland and Wales
- Potential overlap and duplication of effort with existing organisations
- The proposal to give the Ombudsman the power to carry out systemic reviews
- The principle of following the 'public pound' and the potential implications of this for voluntary/community groups

The paper compares proposals contained in the draft consultation paper with existing provisions in Scotland and Wales. It then focuses on two key issues: the proposal to grant the Ombudsman power to carry out systemic reviews and the implications of 'following the public pound' on smaller community/voluntary groups.

## 2 The existing legislation

The Northern Ireland Ombudsman encompasses two offices: the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints. The powers and responsibilities of the respective offices are set out in the Ombudsman (Northern Ireland) Order 1996 and the Commissioner for Complaints (Northern Ireland) Order 1996. The Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997 extended the Commissioner's remit to include health care professionals such as doctors, dentists, pharmacists and optometrists. The Northern Ireland Ombudsman can investigate different

bodies depending on whether he is acting as Assembly Ombudsman or the Commissioner for Complaints, but the investigative and reporting processes are largely the same.

The Assembly Ombudsman investigates complaints of alleged maladministration by Northern Ireland Government Departments, their agencies and cross-border institutions set up under the Belfast (Good Friday) Agreement. Complaints to the Assembly Ombudsman can only be made through an MLA.

The Commissioner for Complaints investigates complaints of maladministration against a range of public bodies. Members of the public may complain directly to the Commissioner.

### 3 Comparisons with Scotland and Wales

Both Scotland and Wales have restructured their Ombudsman services over the last number of years. In both cases a single Ombudsman office was created to replace various Ombudsmen which had been responsible for different public bodies.

#### **Consultation and legislation in Scotland**

The creation of a single Ombudsman followed a two-stage consultation process in 2000-01. The first stage sought views on the structure and powers of the existing ombudsmen and the possibility of creating a 'one-stop-shop'. The second part of the consultation included more concrete proposals, including those relating to a single public services ombudsman.

The Scottish Public Services Ombudsman Act 2002 established the Scottish Public Services Ombudsman (SPSO) to deal with complaints that at the time were dealt with by:

- The Scottish Parliamentary Commissioner for Administration
- The Health Service Commissioner for Scotland
- The Commissioner for Local Administration in Scotland and
- The Housing Association Ombudsman for Scotland

These offices were abolished following the establishment of the SPSO.

Other key changes introduced by the 2002 Act included:

- Removing the requirement that complaints have to go through MSPs
- Enhanced accessibility to the Ombudsman including provision for a person to authorise a representative to complain on their behalf
- Complaints could be made orally in special circumstances
- The publication of all investigation reports
- Empowering the Ombudsman to publicise cases where an injustice had not been remedied

During the consultation process consideration was given to whether the new Ombudsman should have the power to enforce his or her decisions, but a clear majority were not in favour of this. One consultee commented that "(the Ombudsman's) duty is to investigate, to reach conclusions and to make recommendations; others have executive powers and responsibilities to ensure that our recommendations are carried out. That is the correct division of functions"<sup>1</sup>.

There was unanimous support in the consultation process for the removal of the MSP filter. However, the Act allows for a person to approach their MSP in the first instance if they wish, but it is no longer mandatory.

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1 'Scottish Public Sector Ombudsman Bill' Scottish Parliament Information Centre Research Paper, 19 December 2001

The Act also 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. 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 complaints<sup>2</sup>.

### **Consultation and legislation in Wales**

The original recommendation for streamlining ombudsman services in Wales was made by the National Assembly Advisory Group in 1998. As in Scotland, the aim was to create a single Public Services Ombudsman to replace a number of existing Ombudsmen, including the ombudsman for Welsh Administration, Welsh Local Government and Social Housing and the office of the Health Service Commissioner for Wales. The process was similar to that undertaken in Scotland, with a two-stage consultation process. Again, there was unanimous support for the creation of a single ombudsman.

During the passage of the legislation enhanced powers of enforcement were considered for the new office, 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"<sup>3</sup>. 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 used 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).

Key aspects of the Welsh legislation include:

- The creation of the Public Services Ombudsman for Wales (PSOW)
- Early resolution of complaints without the need for an investigation (it was argued that the equivalent legislation in Scotland placed too much emphasis on formal investigations)
- Complaints accepted orally in special circumstances
- Increased transparency around publication of reports

### **Key differences between the Northern Ireland Ombudsman consultation paper and the Scottish and Welsh legislation**

The proposals outlined in the consultation paper aim to bring Northern Ireland into line with the updated legislation in Scotland and Wales, drawing on the key aspects from both the Scottish and Welsh legislation. Some of the key proposals and their potential implications are outlined below:

2 As above

3 HL 16 December 2004 c1442



**Table 1: Comparison of proposed powers for the Northern Ireland Ombudsman with existing arrangements in Scotland and Wales**

<b>Proposal in consultation paper</b>	<b>Scotland</b>	<b>Wales</b>	<b>Issues to consider</b>
Do you agree that the Ombudsman should have a power of own initiative investigation/systemic review?	Not available	Not available	It would bring the office into line with established practice of other Ombudsmen in Europe <sup>1</sup> . Powerful tool to tackle maladministration Would be a major deviation from established practice in the UK Issue is discussed further in section 5
Do you agree that the Ombudsman should provide guidance on good administrative practice which public bodies should be required/expected to take into account?	Section 16G of the 2002 Act (inserted by the Public Services Reform (Scotland) Act 2010) states that the SPSO must monitor and identify trends in complaints handling and promote best practice in relation to complaints handling	Section 31 of the Ombudsman Act allows the PSOW to issue guidance to listed authorities about good administrative practice. Listed authorities are required to have regard to this. (The PSOW has published a document entitled 'Principles of Good Administration'.)	Would significantly enhance the remit of the office
Do you think that the Ombudsman should play a 'design authority' role in public sector complaints processes?	Section 16B of the 2002 Act inserted by the Public Services Reform (Scotland) Act 2010) gives the SPSO power to publish complaints handling procedures to provide support and broad direction to public service providers	Power derived from Section 31 of the Ombudsman Act. The PSOW chaired the 'Complaints Wales' working group which was tasked with developing a common complaints handling system for public service providers in Wales. It is aiming to submit recommendations to the First Minister in Wales in September 2010.	Potentially a significant broadening of the remit of the office, although NI Ombudsman has produced guidance on complaints-handling and offers training to public bodies)
Do you agree that the broad principle of following the public pound should be the basis on which bodies will be included within the Ombudsman's jurisdiction?	N/A	The PSOW has advised that the public body that contracted the service or provided the funds is responsible if a complaint of maladministration is made	Many services are delivered privately using public funds Where should the line be drawn? How would this impact on smaller voluntary/community groups? Discussed further in section 6

<b>Proposal in consultation paper</b>	<b>Scotland</b>	<b>Wales</b>	<b>Issues to consider</b>
Should bodies within jurisdiction be able to refer a complaint to the Ombudsman and if so under what circumstances?	Section 5 of the 2002 Act allows for this but during the passage of the Bill there were concerns that the focus should remain on the individual	Section 2 of the 2005 Act allows a listed authority to refer a complaint	Does this shift the focus away from the Ombudsman providing a service solely for individuals, rather than public bodies?  (Commissioner for Complaints legislation provides for health and social services bodies to refer a complaint but does not specify under what circumstances)
Do you agree that the Ombudsman should be authorised to take any action to resolve a complaint in addition to, or instead of conducting an investigation?	Prior to the establishment of the PSOS, emphasis was placed on informal resolution of complaints. The initial draft of the Bill was criticised because it was perceived to restrict the Ombudsman to carry out formal investigations without leaving room for informal resolution. This was subsequently amended.	Section 3 of the 2005 Act allows for early resolution of complaints without the need to proceed to investigation	Proposal would bring Northern Ireland more into line with existing arrangements in Wales
Proposals around publication of reports	Section 15 of the 2002 Act specifies the steps that must be taken by a public body to publicise reports	Sections 17 to 23 of the 2005 Act specify the steps that must be taken by a public body to publicise reports and informing the PSOW of the steps it will take regarding the report. There is also provision for non-publication of reports where no injustice has been found, where the complaint has been upheld but the relevant body agrees to implement the findings within an agreed timescale or where the PSOW feels there is no public interest in publicising the report.	Wider public disclosure of the Ombudsman's investigations is currently limited to summaries in his annual report. Provisions similar to that in Wales and Scotland are likely to increase the transparency and accountability of the office.

## 4 Minimising duplication of effort and overlap with other organisations

It has been suggested that there are “legitimate concerns that too much scrutiny can render government inefficient, lead to greater duplication of work and generally obstruct the process of government”<sup>4</sup>. The Northern Ireland Ombudsman already exists alongside a range of organisations that have oversight and regulatory roles. The proposals contained in the consultation paper will not, if implemented, significantly alter this. It could be argued however, that it would be timely to review the operation of the Ombudsman’s office within this framework, with an emphasis on value for money, efficiency and effectiveness.

The Northern Ireland Ombudsman has advised that the office 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). For example, 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. Therefore, when the Ombudsman receives a complaint regarding a non-devolved institution that has an office in Northern Ireland, such as HMRC, the complainant is directed to the appropriate organisation such as the Parliamentary Ombudsman or the Equality Commission.

The Northern Ireland Ombudsman has to date been reluctant to enter into Memorandums of Understanding (MOUs) with organisations under his remit due to the risk that this could potentially impact on the independence of his office. However, the Ombudsman is currently exploring the option of an information sharing protocol with the RQIA and the General Medical Council for issues regarding complaints about healthcare professionals.

### Approaches of other organisations with oversight/regulatory roles

There are a number of other organisations in Northern Ireland with investigatory/regulatory roles. Some of these have agreed MOUs between themselves and with other organisations. Examples are highlighted below:

**Table 1: Organisations with oversight/regulatory powers that have memorandums of understanding in place**

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

<sup>4</sup> Kirkham, Thompson and Buck, ‘Putting the Ombudsman into Constitutional Context’ Parliamentary Affairs (2009) 62: 600-617

## Wales

Section 25 of the Ombudsman Act outlines how the Ombudsman may consult and co-operate with other Ombudsmen. Specifically, section 25A of the Act (inserted by the Commissioner for Older People (Wales) Act 2006 states that the Ombudsman must inform and consult the Commissioner in circumstances where it appears that both the Commissioner and Ombudsman would be entitled to investigate a case. The Act allows for co-operation between the two offices in relation to a case.

The Public Services Ombudsman for Wales also advised that he was in the process of formalising MOUs with both the Older People's Commissioner and Young People's Commissioner outlining their particular jurisdictions. He stated that while these organisations can undertake generic investigations, individual complaints are signposted to his office. The Ombudsman shares information with other relevant organisations while ensuring that confidentiality is maintained. He said that it was a slight legislative anomaly that the Older People's Commissioner and Young People's Commissioner did not currently fall under his remit and that this was probably due to the fact that they were government appointments rather than offices of the Assembly. He stated that he would like to see a committee for Assembly appointments established as it was not satisfactory that his reports currently go before a plenary of the Assembly.

## Scotland

The 2002 Ombudsman Act contains provisions similar to those in Wales regarding co-operation and consultation with other Ombudsmen. Furthermore, the SPSO has agreed MOUs with a number of other organisations (an example is attached at Annex 1).

# 5 Systemic reviews

## Power to carry out systemic investigations

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 concerned<sup>5</sup>.

Most Ombudsman offices in Europe<sup>6</sup> have the power to carry out systemic investigations, but this is not a power enjoyed by the UK Ombudsmen. The legislation relating to the Ombudsman in Ireland allows her to initiate an investigation, but there is no specific provision authorising her to carry out a systemic review. Rather, this appears to have been established through custom and practice.

A stakeholder consultation exercise carried out as part of the Deloitte review of the Northern Ireland Ombudsman's office in 2003 found "general support for the Ombudsman having a power to initiate systemic investigations but only if there is sufficient evidence arising from casework and provided there is no duplication with other organisations, such as

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

6 The Ombudsmen in Europe and their legal bases [http://www.omeurope.info/uk/index\\_e.html](http://www.omeurope.info/uk/index_e.html) retrieved 2 September 2010

the Comptroller and Auditor General”<sup>7</sup>. The review subsequently recommended that “the Ombudsman should have authority to undertake systemic reviews flowing from individual complaints and following consultation and agreement with the Comptroller and Auditor General”<sup>8</sup>. It has been argued that:

While (this) would be an advance on the position of all of the UK Ombudsmen, it would fall short of the situation enjoyed by all of the Ombudsmen in Ireland, Australia and New Zealand. In those three countries the Ombudsmen are not restricted to a reactive approach waiting for a complaint before they can take action, but rather they have an ‘own motion’ power enabling them to be proactive and investigate an issue<sup>9</sup>.

Research has also shown that nearly all European Ombudsmen have the power to initiate investigations. The proposal for the Northern Ireland Ombudsman to have this power would place him ahead of his UK counterparts, but 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 powers<sup>10</sup>.

### **Consultation before carrying out a systemic review**

As noted above, the Deloitte review recommended that the Ombudsman should have the power to carry out systemic reviews following consultation with the Comptroller and Auditor General. This had followed concerns raised by some stakeholders during the review process that granting the Ombudsman this power could lead to duplication with the Comptroller and Auditor General. The Ombudsman has said that he would support a requirement on him to consult<sup>11</sup>, although it has been argued that:

While...there should indeed be co-operation with the C&AG, it is inappropriate for this officer to have a veto over the work of the Ombudsman. First, it is wrong in principle for anyone, other than a court, to interfere with the Ombudsman’s discretion. Secondly, while the Ombudsman and the C&AG have a shared interest in improving administration, the Ombudsman’s investigations whether prompted by complaint or own motion, are about injustice caused by maladministration, which is not within the C&AG’s remit<sup>12</sup>.

Nevertheless, there seems to be a rationale for increased cooperation between ombudsmen and auditors:

Each receives complaints from the public which are more properly within the remit of the other and such complaints are transferred accordingly. In some Australian states this cooperation has been formalised with the establishment of regular meetings among a

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

8 As above

9 Brian Thompson ‘An Innovator in Need of Reform’ in 40 Years of the Office of the Northern Ireland Ombudsman: Reflections in Time’, Office of the Northern Ireland Ombudsman 2010

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

11 NIA OR 21 April 2010 <http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2009-2010/april-2010/assembly-ombudsman-for-northern-ireland-and-northern-ireland-commissioner-for-complaints/>

12 As above

number of accountability/integrity agencies. This form of cooperation involves checking work programmes in order to avoid an agency being subject to duplicate investigations<sup>13</sup>.

The office of the Ombudsman in Ireland advised that she does liaise closely with the Comptroller and Auditor General and has regard to the Auditor's programme of activities. Nevertheless, it was made clear that a balance needed to be struck between engaging in consultation and maintaining the independence of the office.

## 6 Following the public pound

Increasingly, private organisations are contracted to deliver public services with the result that the line between the private and public sector has become blurred.

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"<sup>14</sup>. 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"<sup>15</sup>. 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

The review did not define 'substantially funded'. 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

13 Thompson, Buck and Kirkham 'Public Services Ombudsmen and Administrative Justice: Models, Roles, Methods and Relationships' ESRC website

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

15 As above

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 annually<sup>16</sup>.

Since the Deloitte review, Housing Associations have been added to the remit of the Commissioner for Complaints under the Housing (Northern Ireland) Order 2003. This reflected the "change in emphasis in the work of the Housing Executive in Northern Ireland. Rather than being a direct provider of housing, the Housing Executive (was) becoming a funding body and policy maker"<sup>17</sup>.

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.

Currently, under the Northern Ireland Ombudsman Order 1996 an organisation may only be included in the list of relevant authorities if it is a government department or an authority whose functions are exercised on behalf of the Crown. The Commissioner for Complaints may investigate a department or a body which either exercises functions conferred on it by statutory provision or has its expenses substantially defrayed out of monies appropriated by Measure.

The office of the Public Services Ombudsman in Wales has advised that in its view if a complaint is made against a private company carrying out an activity on behalf of a public body, then it is the responsibility of the public body to answer the complaint. It also advised that it does not seek to pursue voluntary or community groups.

16 Audit Scotland 'Following the Public Pound' 2004  
[http://www.audit-scotland.gov.uk/docs/local/2003/nr\\_040311\\_following\\_public\\_pound.pdf](http://www.audit-scotland.gov.uk/docs/local/2003/nr_040311_following_public_pound.pdf)

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



# Annex 1

## **PROTOCOL**

### **between**

**the Scottish Public Services Ombudsman,**

**the Chief Investigating Officer**

### **and**

**the Standards Commission for Scotland**

### **Introduction**

1. The Scottish Public Services Ombudsman ("the Ombudsman") has the functions set out in the Scottish Public Services Ombudsman Act 2002 ("the 2002 Act").
2. The Chief Investigating Officer ("the CIO") has the functions set out in the Ethical Standards in Public Life etc. (Scotland) Act 2000 "the 2000 Act").
3. The Standards Commission for Scotland has the functions set out in the 2000 Act.
4. The Ombudsman, the CIO and the Standards Commission recognise that their respective functions and responsibilities are related and wish to set out, in this Protocol, arrangements for co-operating and working together to best advantage.

### **Purpose of the Protocol**

5. The Ombudsman, the CIO and the Standards Commission agree that the purpose of the Protocol is to articulate shared aims and objectives which are –
  - to set out arrangements for co-operation to ensure that the Ombudsman's Office, the Office of the CIO and the Standards Commission can fulfil their respective statutory responsibilities as fully, effectively and efficiently as possible.
  - to liaise together and facilitate working arrangements in dealing with complaints where there is – or may be – overlapping jurisdiction.
  - to help complainants where complaints could be made to the three organisations.

- to work together in apprising the public and affected authorities of the respective responsibilities of the three organisations.
- to review periodically the terms and scope of the Protocol.

### **Statutory Responsibilities and Jurisdictions**

#### **Ombudsman**

6. The functions of the Ombudsman include investigating and reporting on complaints of maladministration involving injustice or hardship in respect of any of the authorities listed in the 2000 Act (as amended).

#### **The CIO**

7. The functions of the CIO include investigating and reporting to the Standards Commission on cases in which a councillor or a member of a devolved public body (as listed in schedule 3 to the 2000 Act (as amended)) may have contravened the Councillors' or, as the case may be, the Members' Code of Conduct.

#### **The Standards Commission**

8. The functions of the Standards Commission include adjudicating on reports of alleged misconduct submitted by the CIO following his investigation of a complaint properly made in relation to councillors of local authorities and members of public bodies.

### **Consultation and Co-operation**

9. The Ombudsman, the CIO and the Standards Commission agree that where the functions of one organisation affect the functions of the other, they will consult and co-operate together in order to fulfil their respective statutory responsibilities as fully, effectively and efficiently as possible.
10. Before issuing any general guidance, publicity or information to the public or affected authorities about any aspect of their responsibilities, each organisation will consider the extent to which it might be useful or helpful (i) to refer in such guidance, publicity or information to the responsibilities and remit of the other organisation or (ii) to issue such guidance, publicity or information jointly.
11. Where a member of the public makes a general enquiry (not a specific complaint) to one organisation which is more appropriate for the other organisation, then that person may be advised to put the enquiry to another organisation. The other organisation should be advised of the referral.

### **Liaison on Complaints**

12. The Ombudsman and the CIO recognise that certain complaints may be submitted (or may be capable of being submitted) to both organisations. In these circumstances, it would be useful for both organisations to liaise together while having regard to the provisions relating to confidentiality and disclosure of information set out in sections 19 and 20 of the 2002 Act and section 12 of the 2000 Act. Subject to these provisions, the Ombudsman's Office and the Office of the CIO will liaise regarding complaints as set out in paragraphs 13 to 18 below.

#### **Complaint within one organisation's jurisdiction only**

13. In such a case, the organisation will deal with the complaint follow its own procedures, without reference to the other.

#### **Complaint made to both organisations**

14. In such a case, each organisation will consider whether it would be appropriate – having regard to their respective statutory responsibilities for investigating the complaint – to discuss the complaint with the other, with a view to sharing information that would be of assistance to the respective investigations.

#### **Complaint made to one organisation, that could also be made to the other**

15. In such a case, the organisation that receives the complaint will consider whether it would be useful to the complainant for the complaint also to be referred to the other organisation. If so, the organisation will either (a) recommend to the complainant that the complaint could be referred to the other organisation and provide contact information for that purpose or (b) with the complainant's written consent, refer the complaint to the other organisation.

#### **Complaints made wrongly to either organisation**

16. In such a case, the organisation that receives the complaint will either (a) recommend to the complainant that he or she should refer the complaint to the other organisation or (b) with the complainant's written consent, refer the complaint to the other organisation.

#### **Complaint where jurisdiction is unclear**

17. In such a case, the organisation that receives the complaint will liaise with the other organisation to clarify responsibility for dealing with the complaint.

### **Operational Contact on Individual Cases**

18. Contact on conducting individual cases will be made by staff authorised to act on behalf of the Ombudsman and the Standards Commission. In the case of the Standards Commission that person will be its CIO.

### **Commencement of the Protocol**

19. The Protocol will take immediate effect (and supersedes the Protocol entered into on 29 April 2003).

### **Review of the Protocol**

20. The Ombudsman, the CIO and the Standards Commission agree to review the Protocol from time to time and, in any event, every fourth year.

Signed:

Date:

**Jim Martin**

**Scottish Public Services Ombudsman**

Signed:

Date:

**Ian Gordon**

**Convener**

**The Standards Commission for  
Scotland**

Signed:

Date:

**D Stuart Allan**

**Chief Investigating Officer**



Northern Ireland  
Assembly

## Research and Information Service Research Paper

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4 March 2011

# The office of the Northern Ireland Ombudsman

**NIAR 145-11**

**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.



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## **Executive summary**

- 1 Introduction
- 2 Addressing possible overlap with existing bodies
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## 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'<sup>1</sup>. 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 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 jurisdictions<sup>2</sup>.

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

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1 Explanatory note to the Scottish Public Services Ombudsman Act 2002

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](http://www.ombudsman.org.uk/__data/assets/pdf_file/0015/4281/HC858_report-low-res.pdf)

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the other commissioners or ombudsman) before making such an order<sup>3</sup>. 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 understanding<sup>4</sup>.

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?**

#### **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

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

4 HC Deb vol447 col929

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](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

Organisation	Powers of investigation	MOUs/Protocols
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:

	<b>Northern Ireland</b>	<b>Wales</b>	<b>Scotland</b>
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...<sup>5</sup>

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>

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 effectively<sup>6</sup>.

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:

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 work<sup>7</sup>.

## 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 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 Assembly<sup>8</sup>. 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 Assembly<sup>9</sup>. 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?**

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

8 Northern Ireland Act 1998

9 Assembly Members (Independent Financial Review and Standards) Bill [http://archive.niassembly.gov.uk/legislation/primary/2010/nia3\\_10.htm](http://archive.niassembly.gov.uk/legislation/primary/2010/nia3_10.htm)

- **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**

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'<sup>10</sup>.

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 accordingly<sup>11</sup>.

### **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:

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 functions<sup>12</sup>.

10 Finance Committee Inquiry on Accountability and Governance

11 Finance Committee report

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

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 Ombudsman<sup>13</sup>.

## 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 concerned<sup>14</sup>.

Most Ombudsman offices in Europe<sup>15</sup>, 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 powers<sup>16</sup>.

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.

13 Reinventing Government: Protecting Government and Getting the Economy Back on Track, Fine Gael <http://www.finegae2011.com/pdf/ReinventingGovernment.pdf>

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

15 The Ombudsmen in Europe and their legal bases [http://www.omeurope.info/uk/index\\_e.html](http://www.omeurope.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

### 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 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 framework<sup>17</sup>.

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

17

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

handling systems which include realistic but challenging timescales and processes to keep all parties informed of progress<sup>18</sup>.

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 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 appeals<sup>19</sup>". 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 award<sup>20</sup>".

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'<sup>21</sup>. 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 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

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

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](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/>

the public/ private divide, as for example, where a public function is contracted out to a private supplier<sup>22</sup>.

### 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'<sup>23</sup>. 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"<sup>24</sup>. 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

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 annually<sup>25</sup>.

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

25 Audit Scotland 'Following the Public Pound' 2004  
[http://www.audit-scotland.gov.uk/docs/local/2003/nr\\_040311\\_following\\_public\\_pound.pdf](http://www.audit-scotland.gov.uk/docs/local/2003/nr_040311_following_public_pound.pdf)



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:

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)<sup>26</sup>.

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:

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 addressed<sup>27</sup>.

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 is 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'.

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 complaints<sup>28</sup>.

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**

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'<sup>29</sup>. 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 used<sup>30</sup> 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

28 As above

29 HL 16 December 2004 c1442

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

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 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 lost<sup>31</sup>.

#### **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 report<sup>32</sup>.

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



Northern Ireland  
Assembly

## Research and Information Service Briefing Note

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Paper 000/00

28 June 2011

NIAR 376-11

**Ray McCaffrey**

# Office of the Ombudsman

## 1 Introduction

This briefing note provides further information to inform the Committee for the Office of First and deputy First Minister's work to update and reform the legislation relating to the Northern Ireland Ombudsman. In particular, it outlines the appointments process for similar office holders in the Northern Ireland Assembly, Scottish Parliament and National Assembly for Wales. It also outlines the salary arrangements for the Scottish Public Service Ombudsman (SPSO), the Public Service Ombudsman for Wales (PSOW) and the Ombudsman in the Republic of Ireland.

## 2 Appointments process for similar office holders

The charts below provide an overview of the appointments process for office holders that could be considered equivalent to the office of Ombudsman. Despite some variations, all of the appointments were made through open competition. Detailed information on the appointments process for the SPSO and PSOW was not available, but reference to the Official Record<sup>1</sup> of the Scottish Parliament shows that:

- the selection panel was chaired by the Presiding Officer of the Parliament and included the Chair of the Local Government and Communities Committee
- although the Parliament is not subject to the "Code of Practice for Ministerial Appointments to Public Bodies in Scotland", those guidelines were followed to ensure that best practice was observed and that the process was fair.
- an independent assessor oversaw the selection process and provided the Parliament with a validation certificate confirming that the process complied with good practice and that the nomination of the ombudsman was made on merit after a fair, open and transparent process

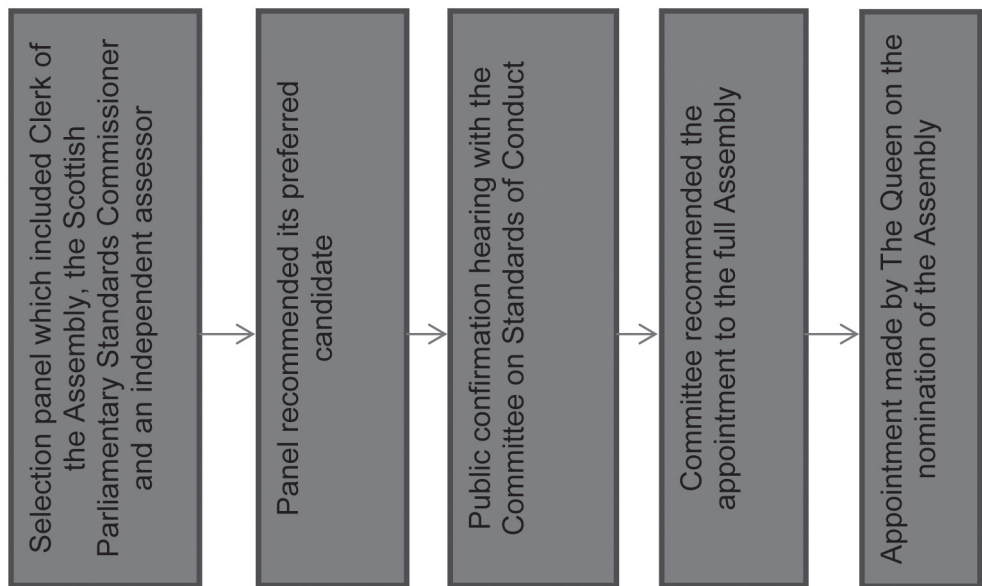
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1 <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0325-02.htm#Col16124>

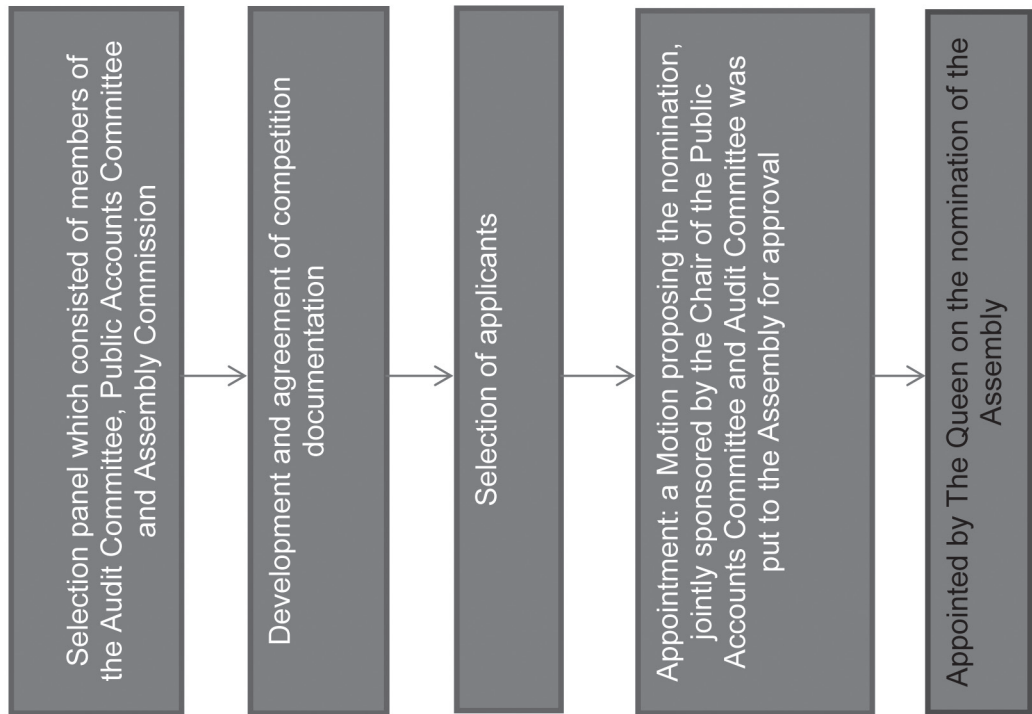
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It is interesting to note that the appointments process for the National Assembly for Wales Standards Commissioner (see below) included a confirmation hearing with the Standards Committee.

**Appointment of National Assembly for Wales  
Commissioner for Standards**



**Northern Ireland Comptroller and Auditor General  
Section 65(1) of the Northern Ireland Act 1998**



### 3 Salaries of the Scottish, Welsh and Irish Ombudsmen

The following table lists the salaries of the SPSO, PSOW and Ombudsman in the Republic of Ireland:

Office	Salary	Comments
Scottish Public Services Ombudsman	£83,000	Figure taken from Resource Accounts for year ending 31 March 2010
Public Service Ombudsman for Wales	£135-140,000	Figure taken from Resource Accounts for year ending 31 March 2010 Remunerated at Group 5 of the Judicial Scale
Office of the ombudsman, Ireland	€243,0802 (approximately £217,000)	Section 3(1) of the Ombudsman Act 1980 states: 'There shall be paid to the holder of the office of Ombudsman the same remuneration and allowances for expenses as are paid to a judge of the High Court'.

There is clearly a significant difference in the salary of the SPSO compared to his counterparts in Wales and the Republic of Ireland. The office of the SPSO explained that this was historical and it had made representations to the Scottish Parliamentary Corporate Body to the effect that the remuneration did not reflect the status of the office. However, to date this has not been addressed.

The European Commission for Democracy through Law issued a "Draft Vademecum on the Ombudsman Institution" in March 2010<sup>3</sup>, in which the Commission addressed the status of the office of Ombudsman:

Whatever the status the Ombudsman institution is assimilated with – the judiciary or public officials – it is always given an appropriately high rank. The high rank is one of the essential factors that guarantee the Ombudsman's independence from political interference and enable that institution to function effectively and efficiently.

<sup>2</sup> Figure taken from The Irish Times, 25 June 2011: <http://www.irishtimes.com/newspaper/frontpage/2011/0625/1224299586896.html>

<sup>3</sup> [http://www.venice.coe.int/site/main/texts/CDL\\_2010\\_OMBUD\\_e.pdf](http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf)





Northern Ireland  
Assembly

## Research and Information Service Briefing Note

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Paper 000/00

8 September 2011

NIAR 435-11

**Ray McCaffrey**

# Supplementary information relating to Ombudsmen

**This briefing note provides further information on a number of issues relating to proposals to update and reform the office of the Northern Ireland Ombudsman.**

## 1 Background

This briefing paper provides supplementary information to inform the Committee for the Office of the First and deputy First Minister's proposals to update and reform the office of the Northern Ireland Ombudsman. The briefing paper looks at a number of specific issues and where appropriate draws comparisons with Ombudsmen in other jurisdictions.

## 2 Issues

### **Appointments process for similar office holders**

The information and charts below provide an overview of the appointments process for other office holders in the devolved legislatures. Despite some variations, all of the appointments were made through open competition. In terms of the Scottish Public Services Ombudsman (SPSO), reference to the Official Record<sup>1</sup> of the Scottish Parliament shows that:

- the selection panel was chaired by the Presiding Officer of the Parliament and included the Chair of the Local Government and Communities Committee
- although the Parliament is not subject to the "Code of Practice for Ministerial Appointments to Public Bodies in Scotland", those guidelines were followed to ensure that best practice was observed and that the process was fair.

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1 <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0325-02.htm#Col16124>

- an independent assessor oversaw the selection process and provided the Parliament with a validation certificate confirming that the process complied with good practice and that the nomination of the ombudsman was made on merit after a fair, open and transparent process

Regarding the Public Services Ombudsman in Wales (PSOW), the recruitment panel for the post was chaired by the Chair of the Assembly Finance Committee. The other panel members were the Parliamentary and Health Services Ombudsman for England, the Chief Operating Officer to the National Assembly for Wales and an Independent Assessor.<sup>2</sup>

It is interesting to note that the appointments process for the National Assembly for Wales Standards Commissioner (see below) included a confirmation hearing with the Standards Committee<sup>3</sup>. In evidence to the Committee in June 2011, the Ombudsman in the Republic of Ireland said that she would be in favour of such a hearing for her post<sup>4</sup>.

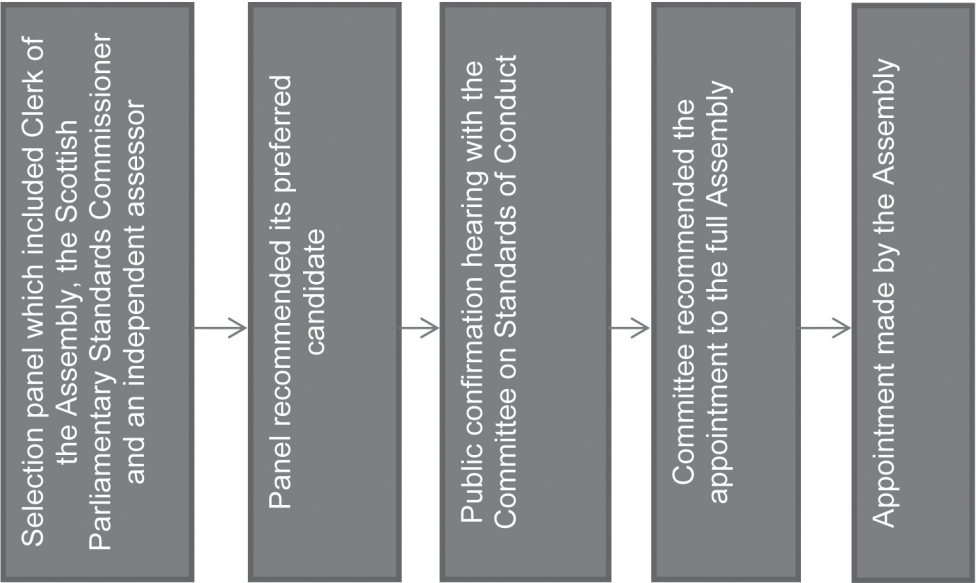
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2 <http://www.assemblywales.org/newhome/new-news-third-assembly.htm?act=dis&id=78496&ds=3/2008>

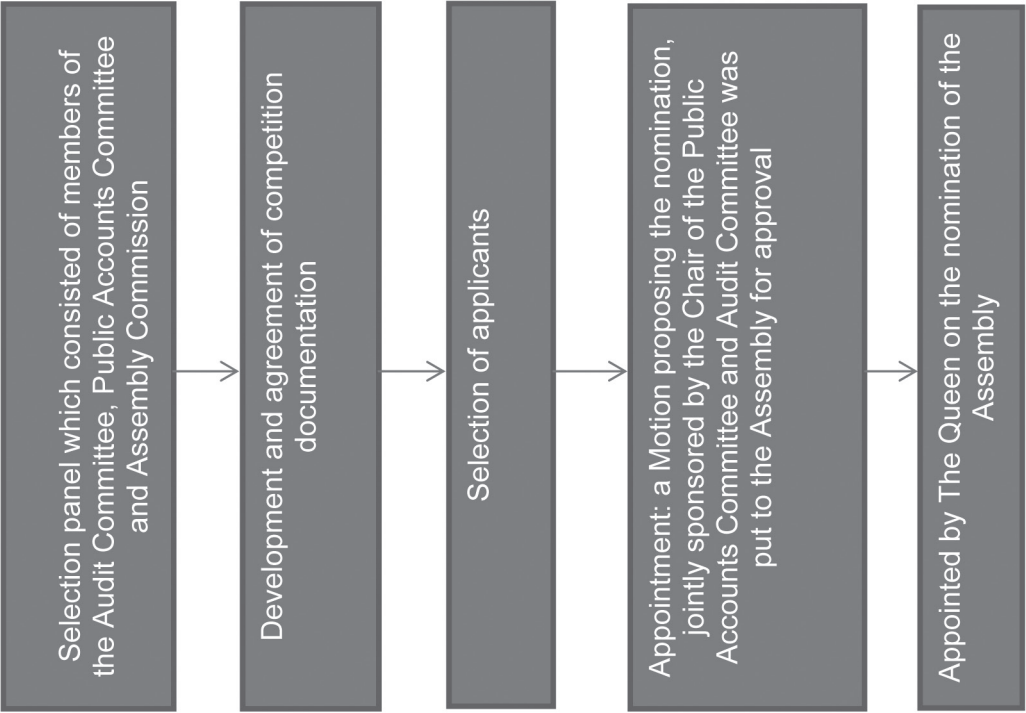
3 [http://www.assemblywales.org/bus-home/bus-third-assembly/bus-committees/bus-committees-other-committees/bus-committees-third-std-home/bus-committees-third-std-agendas/safonau20101021fv-soc\\_3\\_-05-10.pdf?langoption=3&ttl=SOC%283%29-05-10%20%3A%20Transcript%20%28PDF%2C%20306KB%29](http://www.assemblywales.org/bus-home/bus-third-assembly/bus-committees/bus-committees-other-committees/bus-committees-third-std-home/bus-committees-third-std-agendas/safonau20101021fv-soc_3_-05-10.pdf?langoption=3&ttl=SOC%283%29-05-10%20%3A%20Transcript%20%28PDF%2C%20306KB%29)

4

**Appointment of National Assembly for Wales  
Commissioner for Standards**



**Northern Ireland Comptroller and Auditor General  
Section 65(1) of the Northern Ireland Act 1998**



### Salaries of the Ombudsmen in Scotland, Wales, Republic of Ireland and Northern Ireland

The following table lists the salaries of the SPSO, PSOW, Ombudsman in the Republic of Ireland and Northern Ireland:

Office	Salary	Comments
Scottish Public Services Ombudsman	£83,000	Figure taken from Resource Accounts for year ending 31 March 2010
Public Service Ombudsman for Wales	£135-140,000	Figure taken from Resource Accounts for year ending 31 March 2010 Remunerated at Group 5 of the Judicial Scale
Office of the ombudsman, Ireland	€243,080 <sup>5</sup> (approximately £217,000)	Section 3(1) of the Ombudsman Act 1980 states: 'There shall be paid to the holder of the office of Ombudsman the same remuneration and allowances for expenses as are paid to a judge of the High Court'.
Northern Ireland Ombudsman	£128,295	Figure taken from Resource Accounts 2010-2011

There is clearly a significant difference in the salary of the SPSO compared to his counterparts in Wales and the Republic of Ireland. The office of the SPSO explained that this was historical and it had made representations to the Scottish Parliamentary Corporate Body to the effect that the remuneration did not reflect the status of the office. However, to date this has not been addressed.

The European Commission for Democracy through Law issued a "Draft Vademecum on the Ombudsman Institution" in March 2010<sup>6</sup>, in which the Commission addressed the status of the office of Ombudsman:

Whatever the status the Ombudsman institution is assimilated with – the judiciary or public officials – it is always given an appropriately high rank. The high rank is one of the essential factors that guarantee the Ombudsman's independence from political interference and enable that institution to function effectively and efficiently.

### Staff complement and general remit

This section looks at the number of staff employed by other ombudsman offices and provides an overview of the general remit of the offices.

5 Figure taken from The Irish Times, 25 June 2011: <http://www.irishtimes.com/newspaper/frontpage/2011/0625/1224299586896.html>

6 [http://www.venice.coe.int/site/main/texts/CDL\\_2010\\_OMBUD\\_e.pdf](http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf)

7 Annual Report 2009-10

8 2009-10 Resource Accounts

9 Website of the Ombudsman Ireland: <http://www.ombudsman.gov.ie/en/AboutUs/OfficeoftheOmbudsman-Staff/> retrieved 23 August 2011

10 2009-10 Resource Accounts

Office	Staff complement
Scottish Public Services Ombudsman <sup>2</sup>	47
Public Service Ombudsman Wales <sup>3</sup>	48
Ombudsman Ireland <sup>4</sup>	75
Northern Ireland Ombudsman <sup>5</sup>	29

The Ombudsman offices in the UK and Ireland share a general broad remit handling complaints about public services. These are cases where a member of the public has been subject to maladministration or service failure on the part of a public body.

It is worth noting that recent legislation transferred responsibility for complaints from prisoners<sup>11</sup> and complaints about the water service<sup>12</sup> to the Scottish Public Services Ombudsman (SPSO).

There are some other important distinctions between the jurisdictions:

- In Northern Ireland, responsibility for complaints against the police service and prison service are the remit of the Police Ombudsman and Prisoner Ombudsman respectively
- In the Republic of Ireland, the Garda Síochána Ombudsman Commission is charged with investigating complaints against the police
- There is no Prisoner Ombudsman in the Republic of Ireland. Instead, “the main channels for prisoners’ complaints are the prison governor, the Visiting Committees, the prison’s Chaplain and a representative of the Minister”<sup>13</sup>.

The following table provides examples of the organisations falling under the remit of the Ombudsmen in Scotland, Wales and Northern Ireland.

11 Scottish Parliamentary Commissions and Commissioners etc Act 2010

12 Public Services Reform (Scotland) Act 2010 transferred the complaints handling function of Waterwatch Scotland to the SPSO

13 <http://www.scotland.gov.uk/Publications/2007/03/28114328/19>

**Table 1: Examples of public bodies under the remit of the Ombudsmen in Scotland, Wales and the Republic of Ireland**

Scotland	Wales	Republic of Ireland
<p>The Scottish Parliament and Scottish Government/ Administration</p> <p>(but not the decisions or actions of Members of the Scottish Parliament)</p> <p>The NHS in Scotland</p> <p>Local Government (but not the decisions and actions of Councillors)</p> <p>Housing (but not private landlords)</p> <p>Colleges and universities</p> <p>Scottish Prison Service (Scottish prisons and YOIs)</p> <p>Most water and sewage providers</p> <p>Most other Scottish public organisations with responsibility for devolved Scottish matters (often called quangos)</p> <p>Cross-border public authorities (usually a UK authority with a Scottish base, but only where their actions are about devolved Scottish matters)</p> <p>Scottish Tribunals (but only the administrative actions of staff, not the outcome of a tribunal decision)</p>	<p>Government of Wales</p> <p>The Welsh Assembly Government</p> <p>The National Assembly for Wales Commission</p> <p>Health and social care</p> <p>The Care Council for Wales</p> <p>The Board of Community Health Councils in Wales</p> <p>A Local Health Board</p> <p>An NHS trust managing a hospital or other establishment or facility in Wales</p> <p>Local government, fire and police</p> <p>A local authority in Wales (this includes county/county borough councils and community councils)</p> <p>Housing</p> <p>A social landlord in Wales (this includes housing associations)</p> <p>Education and training</p> <p>The Office of Her Majesty's Chief Inspector of Education and Training in Wales or</p> <p>The Higher Education Funding Council for Wales</p> <p>An admission appeal panel constituted in accordance with regulations under section 94(5) or 95(3) of the School Standards and Framework Act 1998 (c. 31).</p> <p>Environment</p> <p>A National Park authority for a National Park in Wales</p> <p>The Countryside Council for Wales</p> <p>The Environment Agency</p>	<p>All government Departments including Department of the Taoiseach</p> <p>The Health Service Executive (HSE)</p> <p>Agencies, such as charities and voluntary bodies, that deliver health and social services on behalf of the HSE</p> <p>An Post</p> <p>All public bodies covered by the Disability Act 2005. (The Ombudsman may investigate complaints concerning compliance by public bodies and some other bodies with Part 3 of the Disability Act 2005.)</p> <p>Local authorities</p>

Scotland	Wales	Republic of Ireland
	The Forestry Commissioners A regional flood defence committee for an area wholly or partly in Wales An internal drainage board for an internal drainage district wholly or partly in Wales Arts and leisure Miscellaneous The Welsh Language Board	

### Own-motion investigations

An Ombudsman may initiate an 'own-motion' investigation in circumstances where they are not in receipt of a complaint but are nevertheless aware of maladministration.

There is no provision for the Scottish Public Services Ombudsman, Public Service Ombudsman for Wales or the Northern Ireland Ombudsman to initiate an investigation in circumstances where they are not in receipt of a complaint. This has been cited as an anomaly compared to Ombudsmen in other jurisdictions, for example the Republic of Ireland and others described below.

The Office of the Ombudsmen in New Zealand "has the power, under section 13(3) of the Ombudsmen Act, to undertake "own-motion" investigations. In other words, an Ombudsman can investigate any administrative act, omission, recommendation or decision even though no complaint about that act, omission, recommendation or decision has been made". The New Zealand Ombudsmen use this power sparingly<sup>14</sup>.

In Australia, Section 5(1)(b) of the Ombudsman Act 1976 states that the Commonwealth 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 by a prescribed authority"<sup>15</sup>. The annual report of the Commonwealth Ombudsman explains an increase in the number of own motion reports as being the result of "a broader move across the work of the office, towards finding solutions and fixing problems, rather than laying blame or simply identifying error"<sup>16</sup>.

The Ombudsman of Ontario in Canada is similarly empowered by legislation to undertake own motion investigations: "The Ombudsman may make any such investigation on a complaint made to him or her by any person affected or by any member of the Assembly to whom a complaint is made by any person affected, or of the Ombudsman's own motion"<sup>17</sup>. There appears to be wide discretion as to whether the Ombudsman undertakes an own motion investigation. For example, an investigation into the Ontario Lottery and Gaming Commission was prompted by the ombudsman having watched a television documentary on the subject and feeling compelled to investigate<sup>18</sup>.

### Ability of bodies to refer complaints

In Scotland, a body under the remit of the Ombudsman may ask the Ombudsman to undertake an investigation if it feels it cannot resolve a complaint that has been brought to it.

<sup>14</sup> <http://www.ombudsmen.parliament.nz/>

<sup>15</sup> Section 5(1)(b) of the Ombudsman Act 1976

<sup>16</sup> Annual report of the Commonwealth Ombudsman 2009-10: [http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2009-10/download/PDF/ombudsman\\_anrep\\_2009\\_2010\\_full.pdf](http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2009-10/download/PDF/ombudsman_anrep_2009_2010_full.pdf)

<sup>17</sup> Section 14(2) of the Ombudsman Act: [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90o06\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90o06_e.htm)

<sup>18</sup> <http://www.ombudsman.on.ca/Resources/Reports/A-Game-of-Trust.aspx> retrieved 22 August 2011



Section 2(2) of the Scottish Public Services Ombudsman Act 2002 says that the Ombudsman may investigate a matter if the listed authority concerned requests an investigation of a complaint that has been brought to them. As per Section 5(5) of the Act, this should only be done in circumstances where:

- it has been alleged publicly (whether or not by a person aggrieved) that one or more members of the public have sustained injustice or hardship, and
- the listed authority in question has taken all reasonable steps to deal with the matter to which the allegation relates.

The Scottish Executive provided guidance on the intent behind the 2002 Act. This includes the following:

Requests by listed authorities Section 2(2) allows a listed authority to request an investigation by the Ombudsman. This provides a means to address cases where there has been public criticism of an authority but, as no complaint has been made to the Ombudsman, she cannot investigate. The intention is that this option should be used very much as a last resort and so that it does not divert the Ombudsman from her main function of dealing with complaints from members of the public<sup>19</sup>.

The office of the SPSO has advised that in the previous six years, only two authorities have utilised this aspect of the legislation<sup>20</sup>.

### **Northern Ireland Consolidated Fund**

One aspect of the proposals to reform the office of the Northern Ireland Ombudsman has been the future accountability and funding of the office. Accordingly, the Committee requested some background information on the Northern Ireland Consolidated Fund. The Office of the First and deputy First Minister 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.

Northern Ireland has a separate Consolidated Fund, which is funded by a Block grant voted by Parliament as part of the Supply Estimates of the Ministry of Justice, and by local revenues. The cash requirements of the Department of Justice, the Office of the First Minister and Deputy First Minister and the Public Prosecution Service for Northern Ireland, as approved by the Northern Ireland Assembly, will be met from issues from the Consolidated Fund. The detailed accounts of the Consolidated Fund for Northern Ireland will be presented to the Assembly each year by the Department of Finance and Personnel in the Public Income and Expenditure Account<sup>21</sup>.

The Comptroller and Auditor General for Northern Ireland (C&AG) is head of the Northern Ireland Audit Office (NIAO). He is responsible for authorising the issue of money from the Northern Ireland Consolidated Fund to enable Northern Ireland Departments to meet their necessary expenditure, and for ensuring that there are adequate arrangements for the collection of revenue<sup>22</sup>.

### **Accountability of the Ombudsman as an Officer of the Assembly**

The term "Officer of the House" or Parliament/Assembly appears very rarely in statute and has never been subject to judicial review. It was originally confined to the UK Parliament, but the advent of devolution has given rise to the development of the role in the devolved institutions, particularly with regard to offices that have 'watchdog' functions. It is however,

19 <http://www.scotland.gov.uk/Publications/2002/10/15564/11762> retrieved 5 September 2011

20 Information received from the office of the SPSO 5 September 2011

21 <http://www.dfpni.gov.uk/ni-estimates-for-2010-2011.pdf> retrieved 22 August 2011

22 <http://www.niauditoffice.gov.uk/about/role.asp> retrieved 22 August 2011

also applied to offices such as the Speaker/Presiding Officer, Clerk and other senior office holders within a legislature. Within the Northern Ireland Assembly, the Examiner of Statutory Rules is referred to as such in Standing Order 43(3). However, in terms of the 'watchdog' type offices, 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
- The Northern Ireland Assembly currently has two 'Officers of the Assembly' that would fall within this category<sup>23</sup>:
- The Comptroller and Auditor General (C&AG)
- The Commissioner for Standards

The C&AG is an Officeholder of the Assembly and is appointed under Section 65(1) of the Northern Ireland Act 1998 by Her Majesty on the nomination of the Assembly.

If the Northern Ireland Ombudsman is to be made an Officer of the Assembly as measured against the core characteristics outlined above, then the question arises as to which Committee he/she should report. The Ombudsmen in Scotland and Wales largely meet the criteria for officers of the Parliament/Assembly, although both Ombudsmen have expressed a desire for a more formal relationship with a Committee for reporting purposes, most recently in evidence to the Committee for the Office of the First and deputy First Minister on 15 June 2011. The Ombudsman in the Republic of Ireland has also raised the issue of a closer relationship with a Committee of 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 work<sup>24</sup>.

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.

The Parliament of New South Wales in Australia's Committee on the Office of the Ombudsman and the Police Integrity Commission performs the following functions in relation to the Ombudsman:

- to monitor and to review the exercise by the Ombudsman of the Ombudsman's functions;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Ombudsman or connected with the exercise of the Ombudsman's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- to examine each annual and other report made by the Ombudsman, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;

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24 Developing and optimising the role of the Ombudsman: <http://www.ombudsman.gov.ie/en/OtherPublications/StatementsandStrategyDocuments/February2011-DevelopingandOptimisingtheroleoftheOmbudsman/File,13559,en.pdf>

- to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Office of the Ombudsman;
- to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question<sup>25</sup>.

The Ombudsman appears before the Committee on an occasional basis and is subject to questioning on a range of issues, including budget, staffing, working with minority groups and children and young people<sup>26</sup>. The Committee may also receive complaints from members of the public who are unhappy with the service provided by the Ombudsman. However, it cannot review decisions made about individual complaints<sup>27</sup>.

### County Court

The current legislation for the Commissioner for Complaints contains a provision that allows a complainant to seek an award of damages in the county court where the body has failed to remedy the injustice. It is rarely used and a review of the relevant Hansard debates from the time reveal that this particular provision was not the subject of any discussion by the Northern Ireland Parliament.

As noted in a previous research paper, 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. This paper also highlighted the views of the Parliamentary Commissioner on the appropriateness of enforcement powers for Ombudsmen:

A second consideration is the principal reason why the (Parliamentary Ombudsman) 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<sup>28</sup>.

### Following the public pound

The Committee has previously discussed the issue of bringing more organisations in receipt of public money under the remit of the Ombudsman, with concerns expressed that this could place undue burden on smaller voluntary or community groups<sup>29</sup>

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25 Committee on the Office of the Ombudsman and the Police Integrity Commission: Committee Report on the Sixteenth General Meeting with the NSW Ombudsman, April 2010

26 As above

27 <http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2011-2012/june-2011/legislation-to-reform-the-office-of-the-northern-ireland-ombudsman1/> retrieved 5 September 2011

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

29 Meeting of OFMdfM Committee, 15 June 2011: <http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2011-2012/june-2011/legislation-to-reform-the-office-of-the-northern-ireland-ombudsman1/>

In Wales, an organisation may come under the remit of the Ombudsman if “at least half of its expenditure on the discharge of its functions in relation to Wales is met out of the Welsh Consolidated Fund or is met directly from payments made by other listed authorities”<sup>30</sup>. There is no such explicit reference in legislation relating to the Ombudsmen in Scotland, the Republic of Ireland or Northern Ireland.

The website of the Ombudsman in the Republic of Ireland lists “agencies, such as charities and voluntary bodies, that deliver health and social services on behalf of the HSE (Health Service Executive)”. The latest annual report of the HSE reveals a significant number of smaller organisations currently delivering services on behalf of the Executive<sup>31</sup>.

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30 Section 29(3) of the Public Services Ombudsman (Wales) Act 2005

31 Appendix 1 2010 Annual Report of the Health Service Executive: <http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2011-2012/june-2011/legislation-to-reform-the-office-of-the-northern-ireland-ombudsman1/>

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Northern Ireland  
Assembly

## Research and Information Service Briefing Note

Paper 000/00

15 October 2011

NIAR 603-11

**Ray McCaffrey**

# ‘Following the public pound’ - Accountability of bodies identified in the 2004 Deloitte Review of the Northern Ireland Ombudsman

## 1 Introduction

This briefing paper seeks to identify the accountability and financial arrangements of bodies identified in the 2004 review of the office of the Northern Ireland Ombudsman. The review was commissioned by the Office of the First Minister and Deputy First Minister and was undertaken by Deloitte. At the time, these bodies were identified as being in receipt of public funds but remained outside the remit of the Ombudsman and it was recommended that this situation be addressed. These bodies were:

- General Teaching Council for Northern Ireland
- Northern Ireland Higher Education Council<sup>1</sup>
- Northern Ireland Council for Integrated Education
- Integrated Education Fund
- Northern Ireland Water Council<sup>2</sup>

1 This body was abolished in 2010. This appears to have happened following a review which was announced by the then Minister for Employment and Learning, Sir Reg Empey. See Assembly Question AQO 3000/08, 25 April 2008

2 This body was abolished by the Water and Sewerage Services (Northern Ireland) Order 2006

- Northern Ireland Economic Council<sup>3</sup>
- Drainage Council
- Historic Buildings Council
- Historic Monuments Council
- Armagh Observatory and Planetarium

In addition, the Committee asked for information on the accountability and funding arrangements for Colleges of Further Education and Queen's University Belfast and the University of Ulster, as these also currently lie outside the jurisdiction of the Ombudsman.

A key issue in the proposals to update and reform the office of the Northern Ireland Ombudsman has been the extent to which the office should be empowered to 'follow the public pound' in respect of organisations in receipt of public money. Therefore, the paper provides the current governance and accountability arrangements and, where possible, the amount of public funding received by each organisation.

The figures show considerable variation in the extent to which the bodies identified in the Deloitte review benefit from public funding.

## 2 Listed bodies

### General Teaching Council for Northern Ireland<sup>4</sup>

Established under the auspices of the Education (Northern Ireland) Order 1998, the Council has a membership of 33, the majority of whom are teachers. They are a statutory independent body for the teaching profession. The 1998 Order authorises the Council to establish and maintain a Register of Teachers. Registration is required for all teachers, including peripatetic teachers, working in grant-aided schools. Employing authorities are required to ensure that they only employ teachers that are registered with the GTCNI.

The Council is constituted as follows: 14 members are elected directly by the profession with a further five members nominated by the Northern Ireland Teaching Council. In addition, 10 members are nominated by broader interests within education including the Higher Education Institutions, Employing Authorities and other agencies. There are also four members appointed by the Department of Education for Northern Ireland.

The Council's responsibilities as set out in the Education (Northern Ireland) Order 1998, Articles 34-41, are:

- The registration of teachers
- The development of a Code of Professional Values and Practice for the profession
- Disciplinary functions relating to professional misconduct
- The provision of advice to the Department of Education and Employing Authorities on:
  - The training, career development and performance management of teachers
  - Standards of teaching
  - Registration issues
  - Standards of conduct for teachers
  - Other issues such as may be determined by the Department of Education

<sup>3</sup> In 2004 the Northern Ireland Economic Council (NIEC) and the Northern Ireland Economic Research Centre (NIERC) were merged to form the Economic Research Institute of Northern Ireland. The Institute was then abolished in 2011

<sup>4</sup> Information in this section is drawn from the website of the General Teaching Council for Northern Ireland: <http://www.gtcni.org.uk/index.cfm/page/AboutUs/area/information>

### Funding

In response to an Assembly Question asked in February 2011, the Minister of Education provided a breakdown of funding for the Council over the previous five years<sup>5</sup>:

**Table 1: Funding for the General Teaching Council for Northern Ireland**

Financial Year	Allocation
2010-11	73,000
2009-10	72,000
2008-09	71,000
2007-08	29,000
2006-07	0

### Northern Ireland Council for Integrated Education<sup>6</sup>

The Northern Ireland Council for Integrated Education (NICIE) was established in 1987. Its role is to co-ordinate efforts to develop Integrated Education and to assist parent groups in opening new integrated schools. It is a registered charity in receipt of core funding from the Department of Education but drawing money from other donors as well. NICIE employ 14.5 staff working in varying roles, with 12.5 staff funded by the Department.

### Funding

NICIE received £651,000 from the Department of Education for the year 2010-11<sup>7</sup>.

### Integrated Education Fund<sup>8</sup>

The Integrated Education Fund (IEF) is an independent charitable trust established in 1992 with money from EU Structural Funds, the Department of Education, the Nuffield Foundation and the Joseph Rowntree Charitable Trust, as a financial foundation for the development and growth of integrated education.

The Board of Trustees, which at 31 January 2011 had 13 members, administers the charity; the day to day operations of the IEF are managed by the Chief Executive, appointed by the Board, and her staff. The Board is made up of individuals nominated by the founding bodies together with others co-opted for their skills and expertise, including a nominee from the Northern Ireland Council for Integrated Education (NICIE). Trustees receive no remuneration from the Fund. In addition, there is a Campaign Executive made up of volunteers.

### Funding

The website of the IEF makes clear that “the IEF is an independent charitable trust which is entirely dependent on fundraising”<sup>9</sup>. For the purposes of this research, the IEF confirmed that it had not been in receipt of Departmental funding for approximately 10 years.

5 AQW 4221/11 Answered 4 February 2011

6 Information drawn from the website of the Northern Ireland Council for Integrated Education <http://www.nicie.org/aboutus/default.asp?id=26>

7 AQW 7393/10 Answered 4 June 2010

8 Information drawn from the website of the Integrated Education Fund: <http://www.ief.org.uk/aboutus/>

9 Integrated Education Fund Who We Are <http://www.ief.org.uk/aboutus/whoweare> retrieved 12 October 2011



## Drainage Council

The Drainage Council for Northern Ireland is responsible for ensuring the impartial and uniform application of the Rivers Agency's drainage and flood defence programme throughout Northern Ireland.

The Council is a non-Departmental Public Body constituted under the Drainage (NI) Order 1973. The Council has a general scrutiny role in relation to the Department's drainage functions, and has a statutory duty to ensure uniformity of treatment of drainage throughout Northern Ireland. The Council is an independent advisory body.

In response to an Assembly Question in February 2011, the Minister for Agriculture and Rural Development stated: "The members of the Drainage Council receive no salary but are entitled to reimbursement of travelling expenses. Therefore, the running costs for the Drainage Council consist only of venue costs and travel expenses"<sup>10</sup>. The Minister then outlined the running costs of the Council for the previous three years<sup>11</sup>:

**Table 2: Funding for the Drainage Council**

Year	Costs (£)
2010	2231
2009	1990
2008	1813

## Historic Buildings Council<sup>12</sup>

The HBC was established in 1973 under the Planning (Northern Ireland) Order 1972, as an independent statutory advisory body sponsored by the Department of the Environment (DOE). This was subsequently repealed and an amended Planning (NI) Order was passed in 1991. Other legislation affecting Council's role includes the Planning (General Development) Order 1992 and Planning Amendment Bill 2004.

The HBC advises the Department through the Department's Environmental Policy Division (EPD), which prepares policy and legislation on environmental matters; Environment and Heritage Service (EHS), which implements environmental policy; and Planning Service on the designation of Conservation Areas. The Council is appointed by the Minister for the Environment. Appointments are subject to the Code of Practice for Public Appointments procedures.

In addition to the provisions of this legislation Council is also consulted on Planning Policy Statements, Development Plans and development control applications.

It is a statutory advisory body and does not have an executive function. It is a statutory consultee for the designation of Listed Buildings and Conservation Areas and as such government must give its advice due consideration.

## Funding

Members of the Council are not remunerated for their service, except for travel and out-of-pocket expenses<sup>13</sup>.

10 AQW 2915/11 Answered 9 December 2010

11 As above

12 Information drawn from the website <http://www.hbcni.gov.uk/>

13 Schedule 3 of the Planning(Northern Ireland) Order 1991

## Historic Monuments Council

The Historic Monuments Council was first established in 1971 under the provisions of the Historic Monuments (Northern Ireland) Act 1971. Its current authority is derived from the Historic Monuments and Archaeological Objects (Northern Ireland) Order 1995 (the Order). Its roots rest in the Ancient Monuments Advisory Council 1926-1970. The Council's role as a statutory advisor can be summarised as follows:

- To advise on adding to or removing any monument in or from the schedule.
- To advise the DoE in the exercise of its powers under the Order and to exercise other functions conferred under Part II relating to scheduled monuments and scheduled monument consent. This also includes such matters relating to the preservation and conservation of monuments in state care, industrial heritage, defence heritage and maritime heritage.
- To advise on the disposal of any land acquired under Article 13,14, or 18 (a monument or land in the vicinity thereof).
- To advise on the making of regulations providing for application for Scheduled Monument Consent.

The Minister of the Environment appoints the members of the council following open competition. The role of the Council is to advise the Department of the Environment for Northern Ireland on, inter alia, the scheduling of monuments, conservation of monuments in state care, maritime archaeology, industrial and defence heritage and Areas of Significant Archaeological Interest within Development Plans. Council also offers advice to other government departments such as DARD, DRD and DCAL. In practice much of the Council's advice is channelled through the Department's Northern Ireland Environment Agency and Planning Service.

### Funding

Members of the Council are not remunerated for their service, except for travel and out-of-pocket expenses<sup>14</sup>.

## Armagh Observatory and Planetarium

The Armagh Observatory and Armagh Planetarium (AOP) is a Statutory Corporation, registered as a Company Limited by Guarantee and has charitable status. The Armagh Observatory and the Armagh Planetarium are distinct institutions, though are part of a single statutory corporation and arms-length body. This arrangement was established by the Armagh Observatory and Planetarium (Northern Ireland) Order 1995. The Observatory and Planetarium receive their core funding from the Department of Culture, Arts and Leisure (DCAL). The Observatory is an academic/research institute and the Planetarium is run as a commercial enterprise<sup>15</sup>. The Director of the Observatory has periodic meetings with DCAL and reports to the management committee which meets up to four times a year.

Armagh Observatory and Planetarium (AOP) is governed by a 'stakeholder' Board with up to 15 Members comprising the Church of Ireland Archbishop of Armagh, the Dean and Chapter of the Church of Ireland Cathedral of Armagh (9 Members), one DCAL nominee, one nominee from Queen's University Belfast and up to three additional Members nominated by the Board of Governors. There is also a Management Committee which has up to 15 Members drawn

<sup>14</sup> Section 22 of the Historic Monuments and Archaeological Objects (Northern Ireland) Order 1995

<sup>15</sup> Review of the Governance Arrangements in DCAL's Arm's Length Bodies Chartered Institute of Public Finance and Accountancy, May 2008

from the Board (Church of Ireland), academia, DCAL and other nominees. For policy and administrative purposes, AOP is classified as an NDPB<sup>16</sup>.

The 2008 Review of DCAL's arm's length bodies highlighted some concerns with the AOP:

The AOP Board is an advisory body built on historical foundations and is more akin to a University Court than a Board of a public body. The Management Committee operates more like a Board but only meets twice a year and does not set the strategic direction or closely scrutinise progress. This means there is greater reliance on the Directors to fulfil governance and accountability requirements, working alongside DCAL officials.

Although AOP receives a high proportion of its revenue from DCAL, a fresh funding and governance model that meets the needs of DCAL but which takes account of the background, activities and nature of AOP would be worth exploring<sup>17</sup>.

### Funding

According to its 2009/10 annual report the AOP received funding of £1,025,312 from DCAL<sup>18</sup>.

## Colleges of Further Education

The Department for Employment and Learning provides the following background on further education: "On 1 April 1998, the Further Education Colleges became free-standing incorporated bodies. Management responsibility now lies with each individual college's governing body"<sup>19</sup>.

The Department for Employment and Learning is responsible for the policy, strategic development and financing of the statutory Further Education Sector. The FE Colleges are classified as Arm's Length Bodies<sup>20</sup>. The Association of Northern Ireland Colleges (ANIC) acts as the representative body for the Further Education Colleges in Northern Ireland.

The Department's Statement of Accounts for the year ending March 2010 states:

There is a number of bodies beyond the Departmental boundary in receipt of substantial financial support from the Department. They are responsible for their own internal control arrangements and are required to provide annually to the Department assurance that their arrangements are sound and comply with requirements. These bodies are the two local universities; the two local teacher training colleges; **the six further education colleges**, the five Education and Library Boards, the Student Loans Company Limited, the Labour Relations Agency (LRA), Ulster Supported Employment Ltd. (USEL) and the Construction Industry Training Board (CITB)<sup>21</sup>.

### Funding

According to the Colleges latest Financial Statements, the following funding levels were provided by the Department:

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16 As above

17 As above

18 2009-10 Annual Report of the Armagh Planetarium and Observatory <http://www.armaghplanet.com/pdf/Administration/2009-2010-Full-Accounts-Final-07-Sep-2010-NoSignatures-Web.pdf>

19 Background to the further education sector: <http://www.delni.gov.uk/index/further-and-higher-education/further-education/fe.htm>

20 Department for Employment and Learning Resource Accounts for year ending March 2010 <http://www.delni.gov.uk/final-published-del-resource-accounts-2010.pdf>

21 As above

- North-West Regional College: £20m<sup>22</sup>
- Belfast Metropolitan College: £39.6m<sup>23</sup>
- South-Eastern Regional College: £27.9m<sup>24</sup>
- Northern Regional College: £24.3m<sup>25</sup>
- Southern Regional College: £26.3m<sup>26</sup>
- South-West College: £23m<sup>27</sup>

## Universities

According to the website of the Department for Employment and Learning, the Department's role is to formulate policy and administer funding to support education, research and related activities in the Northern Ireland higher education sector. Unlike other parts of the UK, Northern Ireland has no higher education funding council so the Department fulfils the roles of both a government department and a funding council<sup>28</sup>.

The Universities are autonomous bodies which have the status of a charitable institution. However the Department takes overall responsibility for policies relating to higher education in Northern Ireland.

### University of Ulster

The Financial Statement for year ending July 2010 sets out the structure of corporate governance of the University of Ulster:

The University is an independent educational charity, whose legal status derives from a Royal Charter originally granted in 1984. Its objects, powers and framework of governance are set out in the Charter and its supporting Statutes, the latest version of which was approved by the Privy Council in 2007.

The Charter and Statutes require the University to have three separate bodies (Council, Senate and Court), each with clearly defined functions and responsibilities, to oversee and manage its activities.

The Council is the governing body and its members are charity trustees. It is responsible for setting the general strategic direction of the institution and for ensuring effective management and control of: finance, property, investments, structure, staffing and the general business of the University<sup>29</sup>.

### Queen's University Belfast

The Consolidated Financial Statements of Queen's University Belfast for 2009-10 detail the corporate governance of the institution:

- 
- |    |  |
|----|--|
| 22 | North-West Regional College Operating and Financial Statement for year ending July 2010 <a href="http://www.nwrc.ac.uk/our_college/doc/reports/NWRC%20Financial%20Statements%2031%20July%202010.pdf">http://www.nwrc.ac.uk/our_college/doc/reports/NWRC%20Financial%20Statements%2031%20July%202010.pdf</a>  |
| 23 | Belfast Metropolitan College Annual Report 2009 <a href="http://www.belfastmet.ac.uk/Docs/AboutUs/Public/master_annualReport2009.pdf">http://www.belfastmet.ac.uk/Docs/AboutUs/Public/master_annualReport2009.pdf</a>  |
| 24 | South Eastern Regional College Annual Report 2010 <a href="http://www.serc.ac.uk/publicinformation/Freedom%20of%20Information%20Documents/200910%20SERC%20%20Financial%20Statements%20-%20Publication.pdf">http://www.serc.ac.uk/publicinformation/Freedom%20of%20Information%20Documents/200910%20SERC%20%20Financial%20Statements%20-%20Publication.pdf</a>      |
| 25 | Assembly Research Paper Review of Colleges' Annual Reports and Financial Statements for year ending July 2010 <a href="http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2011/employment-and-learning/7411.pdf">http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2011/employment-and-learning/7411.pdf</a> 24 June 2011 |
| 26 | As above   |
| 27 | As above   |
| 28 | Department for Employment and Learning Higher Education Policy <a href="http://www.delni.gov.uk/index/further-and-higher-education/higher-education/role-structure-he-division/he-policy.htm">http://www.delni.gov.uk/index/further-and-higher-education/higher-education/role-structure-he-division/he-policy.htm</a> retrieved 12 October 2011                   |
| 29 | Financial Statements for the year ended July 2010  |
-

The University's Senate comprises lay and academic persons appointed under the Statutes of the University, the majority of whom are non-executive. The role of the Chairman of Senate is separate from the role of the University's Vice-Chancellor as Chief Executive. Senate is responsible for the ongoing strategic direction of the University whilst the Executive Officers are responsible for the operational management of the institution. Senate approves all major developments and receives regular reports on the day to day activities of the University and its subsidiary companies.

Senate meets at least four times a year and is supported by several committees, including a Planning and Finance Committee, a Membership Committee, a Remuneration Committee and an Audit Committee. All of these committees are formally constituted with Terms of Reference and are comprised mainly of lay members of Senate<sup>30</sup>.

### Funding

The following table shows the Department's budget allocation for Higher Education from 2010-11 to 2014-15<sup>31</sup>:

**Table 3: Budget allocation for Higher Education 2010-11 to 2014-15**

Objective and Spending Area	2010-11 (£m)	2011-12 (£m)	2012-13 (£m)	2013-14 (£m)	2014-15 (£m)
Higher Education (including Teacher Training)	230.0	206.3	199.9	187.5	174.3

Within the terms and conditions of a Financial Memorandum agreed between the Department and the Universities, Queen's university Belfast and the University of Ulster are required to prepare Financial Statements for each financial year<sup>32</sup>.

### Schools

The Department of Education states that: "Controlled and maintained schools are funded through the Education and Library Board in whose area the school is located while voluntary grammar schools and grant-maintained integrated schools are funded directly by the Department of Education. The board of governors for each school under the education and library boards' management must report to the education and library board"<sup>33</sup>.

The Belfast, North-Eastern, Southern, South-Eastern and Western Education Boards are Executive NDPBs sponsored by the Department of Education, and the Department for Employment and Learning. However, the vast majority of funding is provided by the Department of Education. The Boards themselves are already under the jurisdiction of the Ombudsman.

### Funding

The table below provides the allocation from the Department for Education to each Board for 2011-12<sup>34</sup>:

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- 30 Consolidated Financial Statements of Queen's University Belfast for 2009-10: <http://www.qub.ac.uk/home/RegistrarsOffice/UniversityGovernance/UniversityCommittees/DirectoryofCommittees/Senate/SenatePapers/Senate2010-11/23November2010/pdfword,221149,en.pdf>
- 31 Department for Finance and Personnel, Budget 2011-15 Department for Employment and Learning 4th March 2011
- 32 <http://www.ulster.ac.uk/finance/statements/2010/2010.pdf#page=12?x=timestamp>
- 33 Department of Education School Funding [http://www.deni.gov.uk/index/85-schools/schools\\_funding\\_pg.htm](http://www.deni.gov.uk/index/85-schools/schools_funding_pg.htm) retrieved 12 October 2011
- 34 Education and Library Boards Recurrent Allocations 2011-12: <http://www.deni.gov.uk/index/8-admin-of-education-pg/funding-of-education-and-library-boards/education-and-library-boards-funding-2011-12.htm>
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**Table 4: Funding allocation for the Education and Library Boards 2011-12**

<b>Board</b>	<b>Allocation (£)</b>
Belfast	61,515,000
North Eastern	85,460,000
South Eastern	75,781,000
Southern	88,159,000
Western	74,166,000
Total	385,081,000

The following link provides the budget allocations for 2011-12 for all schools in Northern Ireland<sup>35</sup>: [http://www.deni.gov.uk/all\\_schools\\_2011-12\\_indicative\\_budgets.pdf](http://www.deni.gov.uk/all_schools_2011-12_indicative_budgets.pdf)

## Northern Ireland Audit Office<sup>36</sup>

The Comptroller and Auditor General for Northern Ireland (C&AG) is head of the Northern Ireland Audit Office (NIAO). He is responsible for:

- authorising the issue of money from the Northern Ireland Consolidated Fund to enable Northern Ireland Departments to meet their necessary expenditure, and for ensuring that there are adequate arrangements for the collection of revenue; and
- the external audit of central government bodies in Northern Ireland, including Northern Ireland Departments and their Executive Agencies and a wide range of other public sector bodies, including Executive Non-Departmental Public Bodies and health and personal social service bodies. He undertakes financial audit and value for money audit and the results of his work are reported to the Northern Ireland Assembly<sup>37</sup>.

Under the Northern Ireland Act 1998 the C&AG is an Officer of the Northern Ireland Assembly and is a Crown Appointment made on the nomination of the Northern Ireland Assembly. The Office's resources are approved each year through the estimates process by the Assembly.

### Funding

Prior to the commencement of each financial year the Northern Ireland Audit Office prepares an estimate of its use of resources. This estimate is reviewed by the Audit Committee of the Northern Ireland Assembly which, having agreed any modifications with the C&AG, then lays the estimate before the Assembly. The funds are then made available through the annual Northern Ireland Budget Act<sup>38</sup>. The 2011 Act designated £8,339,000 to the NIAO<sup>39</sup>.

## Northern Ireland Assembly Commission

The Commission is the body corporate of the Northern Ireland Assembly. It has the responsibility, under section 40(4) of the Northern Ireland Act 1998, to provide the Assembly, or ensure that the Assembly is provided with the property, staff and services required for the Assembly to carry out its work. The Assembly Commission may delegate any of its

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35 Department of Education Budget Allocations for all Schools 2011-12 [http://www.deni.gov.uk/all\\_schools\\_2011-12\\_indicative\\_budgets.pdf](http://www.deni.gov.uk/all_schools_2011-12_indicative_budgets.pdf)

36 Information taken from the website of the Northern Ireland Audit Office: <http://www.niauditoffice.gov.uk/about/role.asp>

37 Role of the NIAO: <http://www.niauditoffice.gov.uk/about/role.asp> retrieved 12 October 2011

38 Annual Report and Accounts 2010-2011 of the Northern Ireland Audit Office: [http://www.niauditoffice.gov.uk/pubs/CorporateDocuments/ResourceAccount/Annual\\_Report\\_and\\_Accounts\\_2010-11.pdf](http://www.niauditoffice.gov.uk/pubs/CorporateDocuments/ResourceAccount/Annual_Report_and_Accounts_2010-11.pdf)

39 Schedule 1 of the Budget Act (Northern Ireland) 2011: <http://www.legislation.gov.uk/nia/2011/14/schedule/1>

functions to the Speaker or a member of staff of the Assembly and may determine its own procedures<sup>40</sup>.

The Scottish Parliamentary Bureau is within the jurisdiction of the Scottish Public Services Ombudsman and the National Assembly for Wales Commission is within the jurisdiction of the Public Services ombudsman for Wales.

### **Funding**

The Budget Act (Northern Ireland) 2011 allocated £45,697,000 to the Assembly Commission<sup>41</sup>.

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40 The Northern Ireland Assembly Commission <http://www.niassembly.gov.uk/about-the-assembly/assembly-commission/> retrieved 12 October 2011

41 Budget Act (Northern Ireland) 2011 <http://www.legislation.gov.uk/nia/2011/14/schedule/1>

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Northern Ireland  
Assembly

## Research and Information Service Briefing Note

Paper 000/00

21 November 2011

NIAR 604-11

### **Ray McCaffrey and Leigh Egerton**

#### **1 Introduction**

This briefing note has been prepared for the Committee for the Office of the First Minister and Deputy First Minister to inform its proposals to reform and update the office of the Northern Ireland Ombudsman. The Committee asked for information on the role/remit, salaries, staffing, date of establishment and accountability arrangements of the following offices:

- Commission for Victims and Survivors
- Northern Ireland Children's Commissioner
- Older Persons Commissioner
- Northern Ireland Assembly Commissioner for Standards
- Chief Equality Commissioner
- Chief Human Rights Commissioner
- Chief Executive of the Strategic Investment Board

	<b>Role and remit</b>	<b>Salary and staff</b>	<b>Date established/appointed</b>	<b>Reporting/accountability</b>
Victims Commissioners	<p>The principal aim of the Commission is to promote the interests of victims and survivors of the conflict in Northern Ireland.</p> <p>The Commission has six statutory duties:</p> <ul style="list-style-type: none"> <li>• To promote awareness of matters relating to the interests of victims and survivors and the need to safeguard those interests</li> <li>• To keep under review the adequacy and effectiveness of law and practice affecting the interests of victims and survivors</li> <li>• To keep under review the adequacy and effectiveness of services provided for victims and survivors</li> <li>• To provide advice to government on matters affecting victims and survivors</li> <li>• To ensure that the views of victims and survivors are sought by the Commission in carrying out its work</li> <li>• To make arrangements for a forum for consultation with victims and survivors</li> </ul>	<p>£65,000 each for the three Commissioners</p> <p>Supported by eleven staff<sup>1</sup>.</p> <p>The Secretary to the Commission is responsible for supporting the work of the Commission and the day-to-day management of the organisation.</p> <p>The Secretary is supported by two deputies whose responsibilities cover policy and research and corporate services.</p>	<p>Established in May 2008 under the Victims and Survivors Act (Northern Ireland) Order 2006, as amended by the Commission for Victims and Survivors Act (Northern Ireland) 2008</p>	<p>NDPB within OFMDFM</p> <p>OFMDFM keeps the working arrangements under review and approve the plan of work for the Commission.<sup>2</sup></p> <p>DFP approves accounting reports.</p> <p>Annual report laid before Assembly and Secretary of State by OFMDFM.<sup>3</sup></p>

	<b>Role and remit</b>	<b>Salary and staff</b>	<b>Date established/appointed</b>	<b>Reporting/accountability</b>
Children's Commissioner	<p>The Commissioner for Children and Young People for Northern Ireland's principal aim is to safeguard and promote the rights and best interests of children and young persons.<sup>4</sup></p> <p>The Commissioner for Children and Young People for Northern Ireland's principal aim is to 'safeguard and promote the rights and best interests of children and young persons'. While the detailed powers are set out in the legislation, they may be grouped under three main areas as follows:</p> <ul style="list-style-type: none"> <li>• Promoting children's rights <ul style="list-style-type: none"> <li>- the Commissioner will be guided by the United Nations Convention on the Rights of the Child (UNCRC), an international agreement setting out how children should be treated and the rights that they have;</li> </ul> </li> <li>• Complaints and legal action <ul style="list-style-type: none"> <li>- the Commissioner can deal with individual complaints from children and young persons, or their parents/guardians about any services that impact on those under 18 years of age (or under the age of 21 for those with a disability or leaving care);</li> </ul> </li> </ul>	<p>£75-80,000 for the Commissioner</p> <p>Supported by 25 staff<sup>5</sup>.</p> <p>Key posts include Chief Executive, Head of Legal and Casework, Head of Policy and Research, Head of Communications and Participation</p>	<p>Established under the Commissioner for Children and Young People (Northern Ireland) Order 2003. Established 1st October 2003</p> <p>Current Commissioner appointed in December 2006</p>	<p>NDPB within OFMDFM</p> <p>DFP approve accounting reports.</p> <p>Annual report must be submitted to OFMDFM and laid before Assembly and Secretary of State by OFMDFM.<sup>6</sup></p>

	<b>Role and remit</b>	<b>Salary and staff</b>	<b>Date established/appointed</b>	<b>Reporting/accountability</b>
	<ul style="list-style-type: none"><li>• Research and enquiries - the Commissioner will base all her work on thorough research and evidence. The Commissioner has the power to undertake general enquiries into issues where she believes children and young people are being adversely affected. The Commissioner is also required to review the ways that those providing services for children and young people listen to complaints and take account of their views.</li></ul>			

	Role and remit	Salary and staff	Date established/appointed	Reporting/accountability
Older Person's Commissioner	<ul style="list-style-type: none"> <li>• Promote an awareness of matters relating to the interests of older people and of the need to safeguard those interests ;</li> <li>• Keep under review the adequacy and effectiveness of the law and practice relating to the interests of older people;</li> <li>• Keep under review the adequacy and effectiveness of the services provided to older people by relevant authorities;</li> <li>• Promote the provision of opportunities for, and the elimination of discrimination against, older people;</li> <li>• Encourage best practice in the treatment of older people;</li> <li>• Promote positive attitudes towards older people and encourage participation by older people in public life;</li> </ul>	£60,000 <sup>7</sup> . Staff yet to be appointed.	Established under the Commissioner for Older People Act (Northern Ireland) 2011 The first Commissioner was appointed in October 2011 and took up her post on 14 November 2011	NDPB within OFMDFM DFP approve accounting reports. Annual report must be submitted to OFMDFM and laid before Assembly and Secretary of State by OFMDFM. <sup>8</sup>

	<b>Role and remit</b>	<b>Salary and staff</b>	<b>Date established/appointed</b>	<b>Reporting/accountability</b>
	<ul style="list-style-type: none"> <li>• Advise the Assembly, the Secretary of State and a relevant authority on matters concerning the interests of older people (this could cover any issue);</li> <li>• Take reasonable steps to make older people aware of the existence and functions of his/her office and its location;</li> <li>• Take reasonable steps to encourage older people to communicate with the Commissioner and his or her staff and to seek the views of older people; and</li> <li>• Make themselves or their staff available, as far as is practicable, at a place convenient for older people.</li> </ul>			

	<b>Role and remit</b>	<b>Salary and staff</b>	<b>Date established/appointed</b>	<b>Reporting/accountability</b>
Standards Commissioner (Northern Ireland Assembly)	<p>To receive and investigate complaints and other issues concerning Members of the Assembly and to report to the Assembly on the outcome of investigations<sup>9</sup>.</p> <p>The Act allows for the Commissioner to have the power to call for witnesses and documents and creates offences in relation to refusing to provide or otherwise failing to give evidence.</p>	<p>£380 per day plus annual retainer of £3,800.<sup>10</sup></p> <p>Commissioner and staff yet to be appointed.</p>	<p>Established under the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011</p>	<p>Commissioner will be an Officer of the Assembly</p> <p>Must lay before the Assembly an annual report of the commissioner's activities, including the use of financial resource.</p> <p>Should provide the Commission with information the commissioner's financial affairs.<sup>11</sup></p>
Chief Equality Commissioner	<p>To advance equality, promote equality of opportunity, encourage good relations and challenge discrimination through promotion, advice and enforcement.<sup>12</sup></p>	<p>£80-85 for Chief Equality Commissioner.<sup>13</sup> Supported by 125 staff.<sup>14</sup></p> <p>Current Chief Commissioner appointed in August 2005.</p> <p>Key aspects of the organisational structure include strategic enforcement, Policy and Development, Promotion and Education, Employment Development and Corporate Services</p>	<p>Established under section 73 of the Northern Ireland Act 1998.</p>	<p>NDPB within OFMDM</p> <p>Submit a corporate plan to OFMDM for approval.<sup>15</sup></p> <p>Provide an annual report to OFMDM.<sup>16</sup></p>



	<b>Role and remit</b>	<b>Salary and staff</b>	<b>Date established/appointed</b>	<b>Reporting/accountability</b>
Chief Human Rights Commissioner	In charge of the work of the commission which is to promote awareness of the importance of human rights in Northern Ireland, to review existing law and practice and to advise government on what steps need to be taken to fully protect human rights in Northern Ireland. <sup>17</sup>	£77,000 for Chief Commissioner. <sup>18</sup> Supported by 21 staff. <sup>19</sup>	Created under Section 68 of the Northern Ireland Act 1998. Came into existence in March 1999	The Commission provides an annual report to the Secretary of State that is then laid before parliament. <sup>20</sup> NDPB funded by the Northern Ireland Office.
Chief Executive of the Strategic Investment Board	Oversee the strategic investment board, who are tasked with overseeing the investment strategy and the ten year plan for investment infrastructure and supporting the procurement and delivery of major infrastructure projects. <sup>21</sup>	Previous Chief Executive had earned £210,000 in 2009 although this had dropped to £159,000 in 2010. The SIB currently has an interim Chief Operating Officer and CEO. Supported by 33 staff. <sup>22</sup>	Following the announcement of the Reform and Reinvestment Initiative in 2002, the SIB was established in 2003 under the terms of the Strategic Investment and Regeneration of Sites (Northern Ireland) Order 2003	SIB is a company limited by guarantee. It is owned by OFMDM and financed from within its departmental expenditure limit. The Board of SIB is accountable to OFMDM.

\*Date established denotes the date the legislation was enacted for the creation of the organisation, not the date the organisation became active

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**Footnotes**

- 1 Email from the Commission received 01/11/2011
- 2 Commission for Victims and Survivors (2011) Annual Report 2009-2010
- 3 Commission for Victims and Survivors Act (Northern Ireland) 2008, c.6 Schedule 1
- 4 The Commissioner for Children and Young People in Northern Ireland (2010) Annual Report and Accounts for the Year that Ended 31st March 2010” Available at: [http://www.niccy.org/uploaded\\_docs/2010/publications/NICCY%20Annual%20Report%209-10%20final%20\(Dec%2010\).pdf](http://www.niccy.org/uploaded_docs/2010/publications/NICCY%20Annual%20Report%209-10%20final%20(Dec%2010).pdf) Accessed: 02/11/2011
- 5 As above.
- 6 Commissioner for Children and Young People (Northern Ireland) Order 2003, No. 439 (N.I. 11), Schedule 2
- 7 OFMDFM Press Release, 3 October 2011: [http://www.northernireland.gov.uk/news-ofmdfm-031011-first-commissioner-for?WT.mc\\_id=rss-news](http://www.northernireland.gov.uk/news-ofmdfm-031011-first-commissioner-for?WT.mc_id=rss-news)
- 8 Commissioner for Older People Act (Northern Ireland) 2011, c.1 Schedule 1
- 9 Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 c.17
- 10 Northern Ireland Assembly (2011), “The Northern Ireland Assembly Commissioner for Standards (1 Appointment)”. Available at: Accessed: 02/11/2011
- 11 Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011 c.17 Schedule 4
- 12 Equality Commission “About Us” Available at: <http://www.equalityni.org/sections/default.asp?secid=0> Accessed: 02/11/2011
- 13 Equality Commission 2011 Annual Report: <http://www.equalityni.org/archive/pdf/EqualityCommAR2011.pdf>
- 14 Email from Equality Commission.
- 15 Equality Commission (2009), Reaching out to the whole community: Corporate Plan 2009-2012 Available at: <http://www.equalityni.org/archive/pdf/ECNICorporateplan0912.pdf> Accessed: 02/11/2011
- 16 Departments (Transfer and Assignment of Functions) Order (Northern Ireland) 1999 No. 481 Schedule 2
- 17 Northern Ireland Human rights Commission “About Us” [http://www.nihrc.org/index.php?option=com\\_content&task=view&id=7&Itemid=12](http://www.nihrc.org/index.php?option=com_content&task=view&id=7&Itemid=12) Accessed: 02/11/2011
- 18 House of Lords Written answers, 13 October 2011 Available at: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/111013w0001.htm#11101332000127> Accessed: 02/11/2011
- 19 Northern Ireland Human Rights Commission “Commission Staff” Available at: [http://www.nihrc.org/index.php?option=com\\_content&task=view&id=21&Itemid=26](http://www.nihrc.org/index.php?option=com_content&task=view&id=21&Itemid=26) Accessed: 03/11/2011
- 20 Northern Ireland Act (1998), c. 47 Schedule 7
- 21 The Strategic Investment and Regeneration of Sites (Northern Ireland) Order 2003 No. 410 (N.I. 1) Part II Article 3
- 22 Strategic Investment Board (2010), Annual report 2009-2010 Available at: [http://www.sibni.org/sib\\_annual\\_review\\_and\\_financial\\_statements\\_\\_2009-10.pdf](http://www.sibni.org/sib_annual_review_and_financial_statements__2009-10.pdf) Accessed: 02/11/2011



Northern Ireland  
Assembly

## Research and Information Service Briefing Paper

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Paper 000/00

11 April 2012

NIAR 228-12

**Ray McCaffrey**

# Power of Northern Ireland Ministers or Secretary of State to order non-disclosure of documents

## 1 Introduction

This briefing paper has been prepared to inform the work of Committee for the Office of the First Minister and deputy First Minister in relation to updating the legislation surrounding the Northern Ireland Ombudsman. The paper was asked to address:

*What powers/options, if any, are available to the Secretary of State or Head of a Northern Ireland Department where he or she considers that the disclosure of certain information or documents would be prejudicial to the safety of Northern Ireland or the UK or otherwise contrary to the public interest.*

The current legislation relating to the Northern Ireland Ombudsman<sup>1</sup> contains provision that allows the Secretary of State to give notice to the Ombudsman that the disclosure of certain information that would be prejudicial to the public interest. Similar provisions exist in all UK and Ireland Ombudsman legislation.

The paper focuses on the Freedom of Information Act 2000 as the most relevant piece of legislation regulating the flow of information between public authorities and the public. However, the paper cannot be conclusive that other relevant provisions do not exist elsewhere in legislation.

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1 Commissioner for Complaints (Northern Ireland) Order 1996 and Ombudsman (Northern Ireland) Order 1996

## 2 Relevant Ombudsman legislation

The Northern Ireland Ombudsman has significant power to require the production of information and documents relevant to an investigation under section 14 of the 1996 Ombudsman Order. However, section 14(5) restricts this power in respect of information relating to the Northern Ireland Executive.

The following table outlines the relevant Ombudsman legislation in the UK and Ireland regarding the power of Ministers/Secretary of State to order the non-disclosure of information.

It would appear that under the Northern Ireland legislation, the Secretary of State or a Department may be obliged to furnish the Ombudsman with documentation, but can subsequently give notice that the information should not be disclosed. The question remains whether the Ombudsman can be ordered to not publish information, or merely advised.

**Table 1: Ombudsman legislation relating to non-disclosure of information**

<p><b>Northern Ireland</b></p> <p>Section 19 (3)and(4) of the Ombudsman (Northern Ireland) Order 1996</p> <p>(3) The Secretary of State or the head of a department may give notice in writing to the Ombudsman with respect to any document or information specified in the notice, or any class of documents or information so specified, that in his opinion the disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of Northern Ireland or the United Kingdom or otherwise contrary to the public interest.</p> <p>(4) Where a notice is given under paragraph (3) nothing in this Order shall authorise or require the Ombudsman or any officer of the Ombudsman to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.</p> <p>Similar provision exists in the Commissioner for Complaints (Northern Ireland) Order 1996</p>
<p><b>Scotland</b></p> <p>Section 19 of the Scottish Public Services Ombudsman Act 2002</p> <p>(6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to</p> <p>(a) any document or information specified in the notice, or</p> <p>(b) any class of document or information so specified, that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.</p> <p>(7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified</p>
<p><b>Wales</b></p> <p>Section 27 of the Public Services Ombudsman (Wales) Act 2005</p> <p>(1)A Minister of the Crown may give notice to the Ombudsman with respect to</p> <p>(a)any document or information specified in the notice, or</p> <p>(b)any class of document or information so specified, that, in the opinion of the Minister, the disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of the State or otherwise contrary to the public interest</p> <p>(2)If a notice is given under subsection (1), nothing in this Act is to be construed as authorising or requiring the Ombudsman, a member of his staff or another person acting on his behalf or assisting him in the discharge of any of his functions to disclose to any person or for any purpose any document or information, or class of document or information, specified in the notice</p>

### England

#### Parliamentary Commissioner Act 1967

3) A Minister of the Crown may give notice in writing to the Commissioner, with respect to any document or information specified in the notice, or any class of documents or information so specified, that in the opinion of the Minister the disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of the State or otherwise contrary to the public interest; and where such a notice is given nothing in this Act shall be construed as authorising or requiring the Commissioner or any officer of the Commissioner to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.

### Ireland

#### Section 9 of the ombudsman Act 1980

2) (a) A Minister of the Government may give notice in writing to the Ombudsman, with respect to any document, information or thing specified in the notice, or any class of document, information or thing so specified, that, in the opinion of the Minister of the Government, the disclosure (other than to the Ombudsman or officers of the Ombudsman) of that document, information or thing or of documents, or information or things of that class, would, for the reasons stated in the notice, be prejudicial to the public interest.

(b) The Revenue Commissioners may give notice in writing to the Ombudsman, with respect to any document, information or thing in their power or control specified in the notice, or any class of such document, information or thing so specified, that in the opinion of the Revenue Commissioners the disclosure (other than to the Ombudsman or officers of the Ombudsman) of that document, information or thing or of documents, information or things of that class, would, for the reasons stated in the notice, be prejudicial to the public interest.

(c) Where a notice is given under this subsection, nothing in this Act shall be construed as authorising or requiring the Ombudsman or any officer of the Ombudsman to communicate to any person or for any purpose any document, information or thing specified in the notice or any document, information or thing of a class so specified.

## Use of Ministerial power on non-disclosure

The Parliamentary and Health Services Ombudsman (England) has reported two occasions on which Ministers have intervened to give notice regarding non-disclosure of information. The following is an extract from her report *Access to Official Information: Monitoring of the Non-statutory Codes of Practice 1994-2005*<sup>2</sup>:

**Section 11(3) cases**

Under section 11(3) of the Parliamentary Commissioner Act 1967 it is possible for a Minister of the Crown to give notice that, in respect of any document or information, in the opinion of the Minister ‘...disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of the state or otherwise contrary to the public interest.’ Throughout the duration of the Ombudsman’s office there was no evidence to suggest that this power had ever been used before: in 2003 it occurred twice, both times in (non-statutory) Code cases. In both instances, the issuing of the notice resulted in the Ombudsman deciding to discontinue her investigation.

(In the first case the Cabinet Secretary certified that the information sought about the development of policy leading up to the Human Rights Act 1998 related to the proceedings of a Cabinet Committee and could not, therefore, be provided to the Ombudsman).

The second...in which the bodies complained about were the Lord Chancellor’s Department and the Cabinet Office, has a more complicated history. In this case, which also related to the private interests of Ministers, a similar notice was issued. As before, the Ombudsman discontinued her investigation. However, in this case the complainant, a journalist, took the step of seeking a judicial review of the Government’s decision to issue the section 11(3) notice. Shortly before the hearing was due to take place the Government withdrew the notice, enabling the Ombudsman to re-open the investigation. Once again, however, the departments concerned, in particular the Cabinet Office, handled matters very poorly, resulting in a failure to respond to the Office’s recommendations despite repeated promptings. The Ombudsman therefore had to issue a report without the benefit of any substantive comments from the departments.

### 3 Freedom of Information

The Freedom of Information Act 2000 provides access to information held by public authorities. It does this in two ways:

- public authorities are obliged to publish certain information about their activities and
- members of the public are entitled to request information from public authorities

The Act covers any recorded information that is held by a public authority in England, Wales and Northern Ireland, and by UK-wide public authorities based in Scotland. Information held by Scottish public authorities is covered by Scotland’s own Freedom of Information (Scotland) Act 2002<sup>3</sup>.

**Exemptions**

There are a number of exemptions under the FOI Act. These are listed in sections 21 to 44 of the Act. Some of the key exemptions are:

- Section 28 - relations between the UK government, the Scottish Executive, the Welsh Assembly and the Northern Ireland Executive
- Section 35 – government policy
- Section 36 – prejudice to the effective conduct of public affairs

The Office of the Information Commissioner provides the following guidance in relation to exemptions under sections 35 and 36:

The section 35 exemption can only be claimed by government departments or by the Welsh Assembly Government. It is a class-based exemption, for information relating to:

- the formulation or development of government policy
- communications between ministers

3

[http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/guide/act.aspx](http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/act.aspx)

- advice from the law officers
- the operation of any ministerial private office

Section 35 is qualified by the public interest test.

For policy-related information held by other public authorities, or other information that falls outside this exemption but needs to be withheld for similar reasons, the section 36 exemption applies.

The section 36 exemption applies only to information that falls outside the scope of section 35. It applies where complying with the request would prejudice or would be likely to prejudice “the effective conduct of public affairs”. This includes, but is not limited to, situations where disclosure would inhibit free and frank advice and discussion<sup>4</sup>.

Furthermore, Section 44 of the Act exempts information from disclosure if other legislation would prevent its release. Unlike other exemptions in the FOI Act, Section 44 can be applied in circumstances where there is an overriding public interest in making information available. The FOI Act didn’t automatically repeal all other laws that prohibit public bodies from releasing information. However, it was anticipated that over time there would be fewer areas where FOI could not extend to.

- Guidance on the FOI Act further states:
- Information is exempt under section 36 if a qualified person reasonably considers that its disclosure would or would be likely to prejudice (among other things) the work of the Executive Committee of the Northern Ireland Assembly. A ‘qualified person’ means the Northern Ireland Minister in charge of the department in respect of information held by a Northern Ireland department, the Presiding Officer in respect of information held by the Northern Ireland Assembly, the Comptroller and Auditor General in respect of information held by the Northern Ireland Audit Office, and the public authority or any officer or employee thereof authorised by the First Minister and Deputy First Minister acting jointly in respect of information held by any Northern Ireland public authority other than the Northern Ireland Audit Office<sup>5</sup>.

The Ministerial veto:

- In the ordinary course of a request under the Act and subject to rights of appeal to the Information Tribunal and the courts, the Information Commissioner is the final arbiter as to whether or not information is to be disclosed
- Section 53 of the Act creates a controversial exception, which has been referred to as an ‘executive override’ and amounts in effect to a ministerial veto on disclosure. A decision notice or enforcement notice ceases to have effect if, no later than 20 working days after the effective date, an ‘accountable person’ in relation to the public authority certifies in writing that he has, on reasonable grounds, formed the opinion that there was no failure to comply with section 1(1) of the Act. In Northern Ireland, the accountable person is the First Minister and deputy First Minister acting jointly.

## 4 Conclusion

It would appear that under the Northern Ireland Ombudsman legislation, the Secretary of State or a Department may be obliged to furnish the Ombudsman with documentation, but can subsequently give notice that the information should not be disclosed. The question remains whether the Ombudsman can be ordered to not publish information, or merely advised.

<sup>4</sup> [http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/guide/refusing\\_a\\_request.aspx](http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/refusing_a_request.aspx)

<sup>5</sup> MacDonald, Crail and Jones, *The Law of Freedom of Information*, 2nd edition, Oxford, 2009



As regards powers to withhold disclosure of information, the Freedom of Information Act 2000 is the principal piece of legislation which governs access to information and provides public authorities with grounds for withholding information requested from them.

Whilst the Ombudsman is subject to the Fol Act, the ombudsman legislation itself contains provisions relating to access to information and the interplay between these provisions, Fol and other legislation providing access to information is complex. The office of the Ombudsman itself has produced a policy document which outlines obligations under various 'access to information' legislation<sup>6</sup> and includes a Memorandum of Understanding with the Information Commissioner's Office.

Unlike the Northern Ireland Ombudsman legislation, both the Scottish and Welsh Ombudsman legislation was updated following the introduction of FOI Acts. Whilst the issue of how the 'Executive restriction squared' with the then Freedom of Information (Scotland) Bill was noted during the Committee stage of the ombudsman legislation in the Scottish Parliament, no substantial debate on the issue took place. Similarly, it appears that no consideration was given to the relationship between the Fol and the 'Executive restriction' during parliamentary passage of the Welsh Ombudsman legislation.<sup>7</sup>

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6 <http://www.ni-ombudsman.org.uk/niombudsmanSite/files/08/08f9065a-fa6a-4b25-88bd-2cb9fab93150.doc>

7 <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=2769>





Northern Ireland  
Assembly

Appendix 7

# Deloitte Review and other papers



# Deloitte Review and Other Papers

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3	Law Commission – 'Public Services Ombudsmen - Summary of Consultation Paper No196'	879



# Deloitte Review Part 1



## **REVIEW OF THE OFFICES OF THE ASSEMBLY OMBUDSMAN FOR NORTHERN IRELAND AND THE COMMISSIONER FOR COMPLAINTS**

This Review of the Offices of the Assembly Ombudsman for Northern Ireland and the Commissioner for Complaints was completed on 30<sup>th</sup> April 2004. It should be noted that given the suspension of the Northern Ireland Assembly no policy consideration or decisions have been taken on the Review's recommendations. The recommendations of this Review will be the subject of future public consultation before any policy decisions are made.



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

**REVIEW OF THE OFFICES OF THE ASSEMBLY  
OMBUDSMAN FOR NORTHERN IRELAND AND THE  
NORTHERN IRELAND COMMISSIONER FOR  
COMPLAINTS**

**PART 1 REPORT**

**March 2004**

**FINAL REPORT**

**Deloitte MCS Limited  
19 Bedford Street  
Belfast BT2 7EJ  
Northern Ireland**



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## 1. INTRODUCTION

### 1.1 Introduction

This report concludes Part 1 of a review commissioned by the Office of the First Minister and Deputy First Minister (OFMDFM) of the Offices of the Assembly Ombudsman for Northern Ireland (AO) and the Northern Ireland Commissioner for Complaints (CC). Throughout this document and for ease of reference we refer to the post-holder as ‘the Ombudsman’ and to the Offices as ‘the Office’.

We propose future arrangements for the Ombudsman and have taken account of the views of and needs of customers, staff and their trade unions and other stakeholders to:

- ensure that proper structures are put in place so that the Office can deliver its work effectively and in a coordinated way; and
- provide a strong focus on improving future performance.

### 1.2 Terms of Reference

The terms of reference for the review were:

*“The review must focus on the future arrangements for the Offices of the AO and CC. It must consider and make recommendations with regard to the feasibility of combining the functions of the Offices and the potential for a restructured Office to include the conduct of local government elected representatives and appointees to public bodies within jurisdiction.*

*In particular the review must address the scope of the matters which would come within the investigative and oversight remit of the proposed structure, including:*

- *cases of maladministration by public authorities in Northern Ireland;*
- *measures to maintain and improve standards and encourage good governance in public administration in Northern Ireland;*
- *a mechanism for ensuring that all relevant public authorities are included within the remit of the proposed structure;*
- *the procedures to be adopted in referring matters for investigation and the nature of the remedies which would be available following investigation;*
- *the merit of an authority to initiate the investigation of matters at the discretion of the Ombudsman;*
- *the arrangements for reporting to the Northern Ireland Assembly;*

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- *the appropriateness of including other investigative roles within the remit of the proposed structure; and*
- *the administrative, legislative and resource arrangements necessary to underpin the proposed structure."*

### 1.3 Our Approach

A Project Board – membership at Appendix I - provided overall direction to the project and met on four occasions.

We approached the review in 5 stages viz:

#### Stage 1 – Project Set Up and Situation Analysis

In the **Project Set Up** phase we agreed with the Project Board the scope, timing and deliverables of our review.

In the **Situation Analysis Phase** we gained an appreciation of the Ombudsman's Office and the associated operations and activities. We also achieved an understanding of the historic levels of performance of the organisation and this was essential to developing practical future structures and processes. Our main outputs are an objective analysis of the current and historic operation and performance of the Ombudsman (as detailed in Section 3) and the agenda for change described in Section 4.

#### Stage 2 – Benchmarking

We examined the roles of the Ombudsman and compared these with similar offices in the British Isles. Whilst we are aware there is no direct comparator to the Ombudsman the exercise sought to report on the roles, functions and structures of the offices and provide comparable performance and activity information where possible. This information is set out in Section 5.

#### Stage 3 - Stakeholder Consultation

We relied on Customer Attitudes Surveys carried out for the Ombudsman to give us a customer perspective.

We conducted an extensive consultation process on a one-to-one basis with key stakeholders to ensure that the review was fully informed of all relevant matters and to begin the process of preliminary consultation on the nature of the possible changes. The results are summarised in Section 6.

#### Stages 4 and 5 – Activity Modelling and Options Appraisal

We examined the projected levels of activity that might derive from implementing the range of changes being considered. We modelled the possible impact on complaints cases; reports and associated activities that might arise based on both our benchmarking and the stakeholder consultation processes. We consolidated all the previous work into a comprehensive options appraisal that identifies in Section 7, a preferred way forward for the Ombudsman. In section 8 we set out our vision for the Northern Ireland Public Services Ombudsman.

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## 2. BACKGROUND

### 2.1 The Ombudsman's Origin

The office of Ombudsman was established in 1969 against the backdrop of the creation of the Office of Parliamentary Commissioner for Administration in Great Britain in 1967 and local pressure in Northern Ireland in respect of civil rights and related complaints about discrimination in employment and housing in particular.

The Ombudsman is appointed by Royal Warrant and is wholly independent of Government and the public bodies that he investigates. He is an Officer of the Northern Ireland Assembly.

The current Ombudsman is Mr Tom Frawley who has been in post since September 2000. He was appointed following a public advertisement and a competition administered under the rules for Public Appointments.

The way in which the Ombudsman works, the bodies that he can investigate and the types of case that may be investigated are determined by the relevant legislation.

### 2.2 The Ombudsman's Purpose

The purpose of the Ombudsman is:

*'To provide an independent, effective and free system for investigating complaints from people who claim to have suffered personal injustice through maladministration by Northern Ireland government departments, agencies, public and local bodies and the National Health Service.'*

The Ombudsman's role is of a 'quasi-judicial' nature; having thoroughly and impartially investigated complaints that are properly made to him, he determines whether or not maladministration has taken place and, if so, whether the complainant has suffered an injustice. As such he neither defends the body being complained against nor does he 'champion' the complainant.

Importantly while the word maladministration is not defined in legislation, it is accepted as embracing a wide range of conduct including neglect, bias, delay, incompetence, perversity, arbitrariness, rudeness, refusal to answer reasonable questions, neglecting to inform an individual, on request, of his rights or entitlements, giving inadequate or misleading advice, faulty procedures, etc.

The legislation gives the Ombudsman wide powers of discretion in deciding whether to take up a complaint and also the manner in which he may decide to investigate it. Where he considers there are issues that warrant investigation it then falls to the body concerned to explain its actions to the Ombudsman's satisfaction. Where he concludes that an injustice has arisen as a result of maladministration he recommends what he considers to be an appropriate remedy. His objective is to put the complainant into the position that existed before the maladministration happened.

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### 2.3 The Ombudsman's Roles

The offices of Assembly Ombudsman (AO) and Commissioner for Complaints (CC) are differentiated in terms of jurisdiction; means of access for complainants and ultimate remedy if a recommendation is ignored.

#### 2.3.1 The AO

The legislation that underpins the Office of Assembly Ombudsman is the Ombudsman (NI) Order 1996.

The main function of the Assembly Ombudsman is to investigate complaints of alleged maladministration by Northern Ireland Government Departments, their agencies and the Cross Border Institutions set up under the Belfast Agreement (see Appendix II for a complete list of the bodies within jurisdiction). Complaints to the AO must be made through a Member of the Northern Ireland Assembly. The AO's Report on the investigation is made to the sponsoring Member who may pass a copy to the complainant. The complainant can refer their complaint through any Member of the Assembly.

Should a Department refuse to implement the recommendation of the AO he has the power to make a Special Report to the Northern Ireland Assembly on the matter.

In November 2001, at the request of the Speaker of the Northern Ireland Assembly, the Ombudsman agreed to provide an investigation service for the Assembly's Committee on Standards and Privileges. The legislation to formalise this arrangement was being moved through the Assembly when the body was suspended in October 2002. The role involved the investigation of complaints against MLAs referred by the Committee that may involve a breach of the Code of Conduct and Guidelines on members' behaviour, which had been adopted by the Assembly.

#### 2.3.2 The CC

The legislation that underpins the authority of the CC is the Commissioner for Complaints (Northern Ireland) Order 1996 and the Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997.

The function of the CC is to investigate complaints of maladministration against the public bodies listed in the relevant Orders (see Appendix III for a complete list of the bodies within jurisdiction). A person can complain directly to the CC if they believe they have suffered personally as a result of maladministration by a body that comes within his jurisdiction. His Report on the investigation is made directly to the complainant.

If a Public Body refuses to implement the recommendation of the CC, the complainant has the right to refer the report to the County Court and ask for the award of damages.



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### 2.3.3 Shared Elements of AO and CC

There are many elements of approach and practice that are shared by both offices.

The core values of the offices are: courtesy, openness and integrity.

Complaints must be in writing and should generally be made within 12 months of the action complained of.

The complaint must be from “a person”, which can include a corporate body. The complaint should contain, as a minimum, the complainant’s full name and address, the name of the body/bodies complained of, details of the alleged maladministration, the date when this action occurred and how the individual was affected by it. The Ombudsman cannot deal with anonymous complaints or complaints where the author demands anonymity.

Every written complaint made to the Ombudsman (whether it is considered to be within jurisdiction or not) is acknowledged in writing.

Before accepting a complaint, the Ombudsman would usually expect the complainant to have raised the complaint with the body complained of and to have afforded the body an opportunity to respond.

Whilst the relevant legislation provides the statutory authority for the Ombudsman to undertake his investigation, he is also constrained by the same legislation in that there is a range of matters that he cannot investigate. He is not authorised to ‘second guess’ a discretionary decision (egg a planning approval) which has been reached without any maladministration in the administration of the process.

He cannot generally investigate matters that would be more appropriate to the courts, matters that are the subject of ongoing legal action and matters where the complainant has, or had, a right of recourse to a tribunal. Both pieces of legislation define “tribunal” as including any authority, body or person having power to determine any matter. He does have a narrow discretion in cases where he judges it inappropriate to expect the legal or tribunal route to have been followed.

All aspects of the investigation of a complaint are covered by confidentiality requirements. The Ombudsman and his staff cannot be compelled to give evidence in court in respect of information obtained during an investigation.

The Ombudsman has absolute privilege in respect of what he publishes in a report.

Complainants who are in doubt whether a body, or indeed a specific complaint, is within the Ombudsman’s jurisdiction are encouraged to contact the office for advice.

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### 2.4 The Ombudsman's Discretion

The Ombudsman is given a wide discretion by the legislation. His investigations are conducted in private and he may determine his own procedure for an individual investigation. In the course of a particular investigation he may obtain information from such persons and in such manner as he thinks appropriate. This may well include an interview with the complainant, a detailed examination of the relevant papers held by the body and interviews with officials. Refusal to provide evidence to the Ombudsman, or indeed providing false evidence, has the same effect in law as contempt of the High Court.

### 2.5 The Ombudsman's Location

The Ombudsman's office is located in Progressive House, 33 Wellington Place, Belfast. This location was specifically chosen some 20 years ago to be accessible to all sections of the community, to provide accessibility for disabled people and, importantly, to emphasise the independence of the Office from the bodies that are within its jurisdiction.

The Office occupies two floors of the building and the facilities provide self-sufficiency in terms of a Conference/Training room, catering support, interviews, medical examination room and reference library.

### 2.6 Other Means of Accessing the Office

In addition to the investigation of written complaints, the Office provides a number of other services to the public:

- **a telephone help line** provides advice on complaints. The free phone is provided through a 24 hour answering machine thus ensuring that calls made outside office hours can still be dealt with;
- **a facility for personal callers at the Office.** The Office is open to the public from 9:30 am to 4:00 pm A dedicated interview room is available where members of the public may receive advice in private;
- **an up-to-date record of the other main ombudsmen and other sources of advice.** Where a complaint is outside the Ombudsman's jurisdiction the Office will direct the complainant to the most appropriate source of help and advice;
- **a website** ([www.ni-ombudsman.org.uk](http://www.ni-ombudsman.org.uk)) which contains information about the role of the Office, lists the bodies within the Ombudsman's jurisdiction, provides 'hot links' to other ombudsmen/complaints bodies (where available) and provides a complaint form to help complainants make a complaint to the Ombudsman. **The Ombudsman will also accept initial complaints by e-mail** ([ombudsman@ni-ombudsman.org.uk](mailto:ombudsman@ni-ombudsman.org.uk));
- **talks to interested groups** on the role of the Ombudsman;

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- **information literature** - the Office supplies interested bodies and individuals with literature detailing the role of the Ombudsman and other ombudsmen/complaints bodies.

### 2.7 Support Services

The Department of Finance and Personnel (DFP) provides the Office with

- an administrative service in relation to routine payroll matters, advice on human resources and a welfare officer facility;
- accommodation services through Office Accommodation Branch and professional input to those accommodation services through Construction Service;
- the purchase of office equipment through Procurement Service and for which a service level agreement is in place.

As landlord, the Progressive Building Society provides the standard landlord services within the building on foot of the lease.

The Office employs external accountants to provide advice on resource accounts (Helm Corporation) and internal audit services (Beeches Management Centre). External audit is the responsibility of the Northern Ireland Audit Office.

Independent legal advice is provided as required by an external solicitor and independent medical advice is obtained from a retired senior medical practitioner.

The Ombudsman has authority to appoint any other necessary professional or technical advisers, eg medical, civil engineering, etc that particular cases may require. A key issue in the appointment of such advisers is to ensure that they are independent of the public body under investigation. On occasions this necessitates appointment of advisers from outside Northern Ireland.

### 2.8 Interaction with Government Departments

The founding legislation provided DFP with a role in relation to the Ombudsman. On devolution this responsibility was transferred (by a Transfer of Functions Order) to OFMDFM with effect from 1 December 1999. The designated functions are:

- determining, by statutory order, the salary of the Ombudsman;
- approving staff numbers and conditions of service;
- approving the expenses of the Office; and
- promoting subordinate legislation under the relevant Orders eg amending the list of bodies covered by the Ombudsman or determining matters not subject to investigation etc.

OFMDFM is also responsible for taking forward any primary legislation required for the Office and monitoring any alterations to jurisdiction, which would flow from legislation proposed elsewhere by government departments.

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In relation to staff matters the Office operates within the normal NI delegated authority in respect of staffing i.e. only posts above Grade 7 (Director) would require specific authority. Conditions of service are those of the Northern Ireland Civil Service and therefore do not require other specific authority,

In practice the Office deals directly with DFP Supply Division in relation to annual resource estimates and ongoing financial monitoring.

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## 3. THE ORGANISATION AND PERFORMANCE OF THE OMBUDSMAN'S OFFICE

### 3.1 Introduction

In this stage of our work we gained an appreciation of the Ombudsman's Office and the associated operations and activities. We also achieved an understanding of the historic levels of performance of the organisation and this was essential to developing practical future structures and processes.

### 3.2 Handling Enquiries and Complaints

The Ombudsman's Complaints Process is detailed in Appendix IV.

The Office's caseload is based on two main areas of work (with administrative and secretarial support):

#### ■ Advice and Information

Each year the Ombudsman's office receives numerous oral complaints and enquiries (by telephone and in person) on a variety of issues and concerns. In each case every effort is made to provide assistance, appropriate information or referral to the appropriate authority;

#### ■ Complaints Handling

Written complaints are first examined to see whether they are within the Ombudsman's jurisdiction and, if so, whether there is prima facie evidence of maladministration and injustice. If neither applies, the complaint is not accepted.

In some, usually less complex cases, where there appears to be a genuine grievance, a detailed investigation will not be mounted until the Investigating Officer has contacted the responsible body to attempt to obtain an early resolution.

In recognition of the changes brought about by the development of complaints procedures in the public sector, a complaint is generally regarded as being premature if it is made before the relevant body has been given a meaningful opportunity to respond. In this circumstance a complainant is requested to forward their complaint to the Chief Executive of the relevant body. If the complainant is still unhappy at the response received they can then seek the intervention of the Ombudsman.

Where the informal approach is unsuccessful, where the evidence suggests a systemic flaw or where it is obvious from the start that an early settlement would be unlikely, the complaint is investigated in detail.

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### 3.3 Number of Enquiries

Phone calls to the Office have risen significantly since 1996 and the number of interviews in the Office has stabilised in the past three years. Typically, phone calls can take around 10 minutes, but some can be much longer and personal interviews average some 30 minutes.

Table 3.1  
Number of Phone Calls and Interviews 1996 – 2002/03

Year	Phone Calls	Interviews
1996	1340	21
1997	2010	153
1998/99	1254	132
1999/00	752	61
2000/01	1554	88
2001/02	2379	84
2002/03	2572	86

Source – The Ombudsman's Office

In 2002/03 641 telephone calls and 72 interviews related to bodies and matters within jurisdiction.

### 3.4 Number of Complaints

The number of written complaints to the Office has risen by some 26 per cent over 10 years. In more recent times, apart from 1997 (the result of a TV campaign) and 1998/99 (figures covered 15 months) the number of written complaints received per annum has averaged close to present levels.

Table 3.2  
Number of Written Complaints 1996– 2002/03

Type	1996	1997	1998/99	1999/00	2000/01	2001/02	2002/03
AO	253	327	342	256	209	250	262
CC	384	432	387	308	292	303	298
HS	0	0	57	66	85	107	103
Total	637	759	786	630	586	660	663

HS = Health Service cases

Source – The Ombudsman's Office

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The principal factors that have an impact on the workload of the Office are:

- the increasing public awareness of the right to complain;
- the increasing public expectation for detailed explanation of their case;
- the increasing public perception of a right to be interviewed during the investigation;
- the quality of the output of the Office;
- the “signposting” to the Office in the internal complaints processes of public bodies; and
- the general increasing public awareness of the existence of the Office and its standing.

The Northern Ireland Assembly did not create an undue workload increase in terms of direct impact as suspension occurred before any arrangements were put in place to take evidence on the work of the Office. However there was an increase, mainly at senior management level, in handling correspondence from Members subsequent to the issue of reports and in giving evidence to a number of Assembly Committees on wider issues.

### 3.5 Pattern of Complaints

The pattern of complaints over the most recent five years shows a broad level of consistency year on year in the main areas of work with the Miscellaneous element producing the main increase in number of cases.

The apparent levelling off of Health and Social Services complaints is important as this area of jurisdiction, effective from 1 December 1997, represents significantly complex and intensive casework. Planning cases are also developing in complexity. Personnel cases that focus on the handling of internal grievances or promotion also tend to be closely argued by complainants because of the very direct personal impact and the ready availability of background information. This trend has a consequential impact on the resources required to deal with such cases.

Table 3.3  
Main Areas of Written Complaint 1998/99 – 2002/03

Type	98/99	99/00	00/01	01/02	02/03
Housing	138	123	122	115	99
Planning	63	85	46	74	72
Health	58	66	85	107	87
Personnel	156	99	110	115	110
Misc.	371	257	223	249	295
<b>Total</b>	<b>786</b>	<b>630</b>	<b>586</b>	<b>660</b>	<b>663</b>

Source – The Ombudsman's Office



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### 3.6 Business Activity 2002-03

The Office's business activity during the year 2002-03 compared to the previous year is set out in Table 3.4.

Table 3.4  
Office's Business Activity 2002-03

	2001/02	2002/03	%
Brought forward	89	130	+ 46.1
Complaints received	660	663	+ 0.5
Cleared without enquiry	295	280	- 5.1
Cleared after enquiry	217	244	+ 12.4
Completed and reported	81	97	+ 19.8
Settled	26	22	- 15.4
Carried forward	130	150	+ 15.4

Source – The Ombudsman's Office

### 3.7 Average Clearance Times

The average clearance times (weeks) taken from receipt of investigatable complaints to the issue of an Investigation Report are shown below.

Table 3.5  
Average Clearance Times

	2001/02	2002/03
AO	14.5	18.4
CC	13.6	15.4
Health	16.1	21.6

Source – The Ombudsman's Office

The Office considers that the longer clearance times are indicative of the increasingly complex nature of complaints subjected to investigation together with deep commitment of the parties to be rightness of their cases.

### 3.8 Results of Cases Completed and Reported

The findings for the 97 cases completed and reported in 2002/03, compared with the 81 similar cases in 2001/02, are shown in Table 3.6.



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Table 3.6  
Findings in Cases Completed

	2001/02			2002/03		
	AO	CC	HC	AO	CC	HC
Reports	23	52	6	34	59	4
Maladministration	10	16	2	10	13	1
Settlements	10	16	2	9	11	1

Source – The Ombudsman's Office

## 3.9 Maladministration

In 2002/03, maladministration was found in 24 of the complaints accepted for in-depth investigation, a decrease of 4 (14.3 per cent) on 2001/02.

## 3.10 The Funding of the Office

The Office is funded by the Assembly (or the UK Parliament) by Vote on the same basis as a government department and is answerable only to the Assembly (or Parliament). As a result, the Office is not dependent on grant funding from any of the government departments or public bodies, which the Ombudsman has power to investigate.

Table 3.7  
Office Funding 2002-03 and 2001-02

	2002-03 Actual £000	2001-02 Actual £000
Staff costs –		
Wages & salaries	539	471
Social Security costs	40	36
Other pension costs	80	70
Total	659	577
Other administration costs –		
Consolidated Fund charge*	134	117
Other	344	358
Total	478	475
Operating Income	-	-
Net Operating Costs	1137	1052
Staff numbers – wte	19.03	17.4

Source – The Ombudsman's Resource Accounts 2002-03

\*This relates to the Ombudsman's salary, social security and pension costs, which are met by the Northern Ireland Consolidated Fund.

## 3.11 Audit

The Office's Resource Accounts for the past two financial years received an unqualified audit opinion.

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Some difficulty was experienced by the Office in preparing the Resource Account for 2001-02 due to the availability of the external consultant. This matter and the need for better computer security were addressed in the external auditors management letter. Management responded positively to the suggestions for improvement. The management letter for 2002-03 is awaited.

The internal audit report for 2002-03 was completed in May 2003. It identified one Priority 1 Finding on Operational Procedures, nine Priority 2 Findings and six Priority 3 Findings. The only significant weakness identified was in relation to the need to expand the Finance Manual to include certain operating procedures and management has agreed to do so and has indicated that this will be completed by end January 2004. Other matters have been, or are being, addressed.

### 3.12 Corporate and Business Planning

The Office has commenced work on a Corporate and Business Plan and this should be completed as soon as possible. There is broad acceptance by staff of the vision and ethos of the Office and it will be important to enhance this by developing a business planning culture. This will require staff involvement in the development of the Plan and ownership of the objectives and targets set. Forward job plans would have to be revised to reflect the overall Plan in personal objectives and targets.

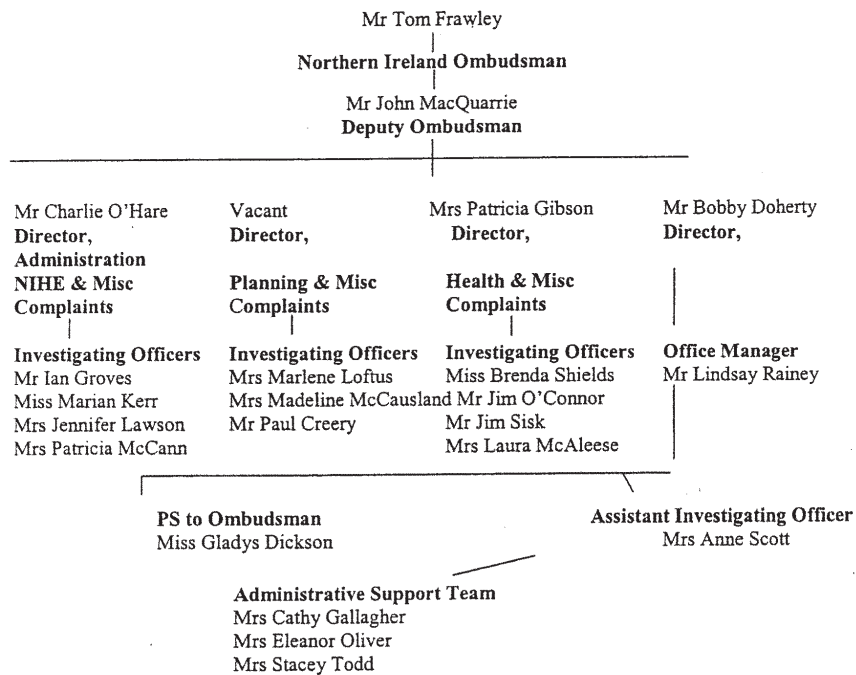
### 3.13 Corporate Governance

The Ombudsman is the designated Accounting Officer. Good work has been done in preparing a Corporate Governance Statement and associated policies. An Audit & Risk Management Committee has been established. The senior management team meets each month and reviews all business matters.

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## 3.14 The Office's Organisation

The present organisation structure is as follows:



We believe the organisational structure broadly meets present requirements and that the Directorates properly reflect the sectors that give rise to significant numbers of complaints. We comment later on the Administration team.

## 3.15 Workload Management

In 2002-03 the number of cases cleared by each directorate was Health 61, Housing 158 and Planning 133. The average number of cases cleared by investigators was 35 within a range of 22 to 53. This is by no means a scientific measure of workload or productivity but it does highlight the need for effective workload management.

In terms of the clearance of registered cases the following statistics are of interest.

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Table 3.8  
Clearance of Registered Cases

Timescale from Receipt	2002-03 Cases	%	April – Oct 2003 Cases	%
Within 3 months	205	58	114	59
3-6 months	68	19	40	17
6-9 months	27	8	18	8
9-12 months	30	8	17	7
> 12 months	24	7	21	9

Source – The Ombudsman's Office

At end October 2003 there were 56 cases more than 26 weeks old and these with the longest being 109 weeks old. Some 50 per cent of the cases were in the Health directorate reinforcing the complexity and sensitivity of these cases. The Senior Management Team formally reviews all cases each month. We recognise the arguments for ensuring the highest level of quality in clearing registered cases but we consider there is a need for more sophisticated performance measures to be adopted by the Office both for internal management purposes and for assuring complainants from the outset that their complaint will be dealt with thoroughly and expeditiously.

It is our view that whilst the database of information and the collation and production of casework statistics is well advanced, more use could be made of IT support in managing the initial sifting and subsequent tracking of registered cases. For example, with proper training and software support the administrative staff could input information direct to the database as calls are received. The possible recording of telephone calls should also be considered for training and monitoring purposes. These issues are worthy of more detailed examination by the Office.

Some staff also suggested that there needed to be proper account taken of down time in cases. The handling of 'protest' letters following a decision could be time-consuming and should be monitored. There should be a computer-assisted follow up to check that organisations have actually complied with the Ombudsman's recommendations.

We noted good support for the Office's approach to casework handling, described as 'cradle to grave'. This provides a reasonable mix of complex and less complex cases for investigators and ensures the complainant has one point of contact with the Office throughout. We also recorded a view from some staff that the initial screening of cases for investigation could be more robust in filtering out inappropriate cases and the Office should consider whether further measures are needed.

### 3.16 Manpower Levels

There is some substance in the view amongst the Investigation staff that similar posts in other jurisdictions are graded at a higher level – see Section 5. The complexity of the work has changed since the last job evaluation was carried out in 1992 and we consider a review is long overdue.

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As noted above some staff feel that more resource should be committed to the initial screening of cases to ensure that resources were devoted to appropriate cases.

In addition to the need for a concentrated and continuing effort on casework, we noted that the finance and corporate services needs of the Office have grown considerably in recent times especially with resource accounting, the need to follow up internal audit reports, freedom of information, risk management and records management and disposal. There is a need for a new IT strategy for the Office and it is clear that there is little capacity to move on these within present resources. We also believe that the Office needs to develop an equity monitoring system that will help to establish its impact on society and assist in targeting promotional activity.

The Director of Administration post is temporary and is to be reviewed on the retirement of the present post-holder in May 2004. The implementation of this Report will also fall largely to the Administration team. There is an urgent need to decide on an appropriate structure and resource level for the future.

Our preliminary view is that a new corporate services structure on the following lines might be appropriate –

<b>Director of Corporate Services</b> (Grade 7)	
Staff Officer	Staff Officer Executive Officer 1
PS/Ombudsman	Administration Officers (3)
Ombudsman's Secretariat*	Customer Services, Finance & Office Management

\*The Secretariat would be within the Corporate Services Directorate but report direct to the Ombudsman

This structure would result in the addition of 1 Staff Officer post at an annual cost of £35,000. This would meet the Ombudsman's view, with which we agree, that there is a case for an in-house research facility (presently contracted in), combined with a need to provide executive support for the Ombudsman in addition to secretarial services. One key task identified by the Ombudsman is to understand more clearly why certain groups do not use public sector complaints processes.

The loss of key staff on retirement over the next two years will add to the pressures and succession planning should commence now.

### 3.17 A Strategy for Human Resources

There is a high level of staff commitment to the Office and a dedication to operating in a fair and impartial manner at all times. The average length of service of those we interviewed was eight years and they consider there is a positive working atmosphere and practical support for training and personal development. They also feel that the fact that they are seconded civil servants has not compromised in any way the independence of the Office and this is borne out by our consultation with stakeholders.

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We believe however that the Office should develop a human resource strategy and enhance its equality and diversity programmes. Job descriptions need to be prepared or updated. Recruitment to the Office has benefited from an assessment centre approach and the employment opportunity of working for a time in the Ombudsman's Office should be available to the wider public sector. Also there is a need to have an external panel of trained investigators that can be utilised on an ad hoc basis in line with any unforeseen increase in workload.

The Ombudsman applied in March 2000 under the Cross Border SME Recognition Scheme and with a score of 270-299 was awarded Silver recognition. The highest score was for quality systems and processes and below average scores were recorded on people satisfaction and impact on society.

The Office has not sought IIP accreditation but is using the EFQM model as their framework to drive quality management within the organisation.

### 3.18 Support Services

The Office needs to have in place transparent mechanisms for the supply of support services to enhance its separation from the executive. Notwithstanding the difficulty already experienced, the Office should put in place proper service level agreements with DFP on payroll management and advice on human resources.

The arrangements for contracting legal and medical advice commenced initially on an ad hoc basis but they have become essential support services for the Office and will continue to be so in the future. The Office should keep the nature of the relationship and the terms on which the services are retained under review.

We also enquired whether the Assembly Commission could be a possible provider of recruitment and support services to the Office in the future. There is a possibility in the medium term when the Commission is fully restored that this might prove beneficial and underpin the independence of the Office. The position should be kept under review.

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## 4. AN AGENDA FOR CHANGE

### 4.1 Introduction

We set out below the issues forming an agenda for change in the Ombudsman's present arrangements.

### 4.2 New Legislation

The current legislative arrangement has its genesis in the creation of two separate offices in 1969. The Orders consolidated in 1996 effectively replicated the original legislation in terms of maintaining two separate legal Offices which causes confusion in the mind of the public and MLA/MPs about the identity and relevant jurisdiction of the Offices.

We were told that the Commissioner for Complaints role is not readily perceived as on a par with the Assembly Ombudsman i.e. some public bodies do not seem to recognise they could be called before an Assembly Committee on foot of a case referred to in the Ombudsman's Annual Report.

Our terms of reference ask us to consider the merits of a single and comprehensive legislative vehicle, combining both Offices and removing the present differential approach to jurisdiction, access for the public and ultimate remedy. A number of minor differences of jurisdiction would also need to be resolved e.g. the letting of contracts is not in jurisdiction for AO but is in jurisdiction for the CC.

### 4.3 MLA Sponsorship

One such issue is the current requirement for MLA sponsorship of the individual's complaint in Assembly Ombudsman cases which is said by some to be out of keeping with current thinking on access to remedy. The Commissioner for Complaints legislation ensures direct personal access by the aggrieved individual.

### 4.4 Different Final Remedies

The Ombudsman's conclusion in a case of maladministration is to make a recommendation as to remedy and we have been asked to comment on the present differential approaches.

Where a Government Department declines to implement a recommendation the Ombudsman would report the Department to the Assembly and it would then fall to MLAs as to how to take the matter forward – probably by way of a Committee hearing. This final recourse has never been used in Northern Ireland.

In a CC case, the complainant could go to the County Court and seek the award of damages in respect of "costs incurred and the opportunity lost". This recourse has not been utilised for many years and was primarily envisaged as a remedy in cases of discrimination in employment cases.



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It also came to our attention during the conduct of the Review that in the case of General Health Service providers e.g. GPs, Opticians, Dentists etc. and Independent Providers e.g. an Independent Clinic, that recourse to the County Court is not available to the aggrieved person. This group of providers can disregard the CC's recommendation and it has also been identified that they can disregard the recommendations of the earlier Independent Review Stage of the HPSS Complaints Procedure.

### 4.5 Registered Housing Associations

Registered Housing Associations are coming into jurisdiction on 1 April 2004. There are some 40 associations and under the existing legislation all aspects of their activities, including employment matters, will come within the Office's remit. The Department for Social Development has been asked to co-ordinate an information programme through which the Ombudsman can meet the Associations, review their complaints processes and develop protocols and procedures that will facilitate interaction with the Office.

### 4.6 Assembly Standards Commissioner

As indicated in Section 2.3.1 above, the Ombudsman provided an investigation service to the Committee on Standards and Privileges on an ad hoc basis until the Assembly was suspended in October 2002. It is anticipated a reconvened Assembly would put this role on a formal legislative footing.

### 4.7 Local Authority Standards Commissioner

There is an acknowledgement on the part of the Department of the Environment, which has lead responsibility for local government in Northern Ireland, and others that if the present voluntary code of local government conduct were to become mandatory, the Ombudsman might be a viable option in the possible models needed to monitor standards and have the additional merit of providing a uniform approach standard for elected representatives at Local and Assembly level.

### 4.8 Employment Matters

We were invited to consider the appropriateness of retaining wide-ranging employment and employment related issues as they affect public and civil servants, within the Ombudsman's jurisdiction. The original provision was an initiative to address perceived religious discrimination in employment when the Offices were established in 1969.

### 4.9 Challenging Merits of Decisions

The current legislation precludes the Ombudsman from questioning the merits of discretionary decisions in the absence of maladministration other than in cases involving clinical judgement. However, many complaints, such as those in Planning, centre on such decisions.



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The Ombudsman asked us to consider in cases where the decision appears to be of questionable quality, whether it would be more in keeping with public perception of modern standards of service for the Ombudsman to be able to examine a range of circumscribed discretionary decisions.

### 4.10 Systemic Reviews

The UK and French Ombudsmen alone within the European Community are precluded from initiating a review of any particular area of public administration where concerns may have been identified but about which a specific complaint from a directly affected individual must be received before an investigation can be undertaken.

We were told this is an issue which arises from time to time where elected representatives or concerned individuals bring a set of circumstances to the Ombudsman but have to be advised that, in the absence of a complaint from a directly affected person, he has no locus to query a trend or pattern of complaints that suggest a wider review is warranted.

### 4.11 Following Public Funds

We were also invited to consider whether the Ombudsman's jurisdiction, like that of the Comptroller & Auditor General, should follow public funds through to the relevant administration. At present major areas of expenditure such as Colleges of Further Education, Local Management of Schools and the Universities are outside jurisdiction.

### 4.12 Health Services Complaints

We were advised that the current review of the Health Service Complaints Procedure might alter the process by deleting the current element of Independent Review from the process. If Independent Review were removed the Ombudsman would be likely to receive a number of complaints, which have not been tested at the Health Board level within the HPSS. A number of these complaints could require him to engage independent professional advisers with a potential impact on investigation times and on the overall cost of investigating complaints that are already the most complex, time intensive and expensive investigations.

### 4.13 Justice Functions

The Ombudsman considers that the transfer of responsibility for Justice issues to the NI Assembly could have a significant impact on his Office. Such a transfer would bring the Probation, Prison and Youth Justice Services within jurisdiction. The remit of the GB Prisons Ombudsman, who operates from within the Home Office, does not cover Northern Ireland.

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Prior to the introduction of Direct Rule in 1972 the Office had prison complaints within its jurisdiction. However the developments in individuals' rights and heightened expectations of complaints investigation in the interim would imply that this extended jurisdiction could impact significantly on workload. Such a transfer could also bring the office of the Police Ombudsman within jurisdiction as envisaged in the Hayes Report, which preceded the setting up of that office. This would represent a further addition of a sensitive and potentially contentious area of responsibility.

### 4.14 Use of the Title 'Ombudsman'

The use of the title "Ombudsman" is protected by law within some countries e.g. New Zealand and Malta. The description can only be used with the permission of the Ombudsman who has been established by Parliament. This is to prevent offices that do not have the requisite level of independence and powers of examination from taking the title and diluting the impact of what was intended by Parliament as a title synonymous with the final level of recourse outside the judicial remedy for the individual citizen.

We were asked by the Ombudsman to consider whether the permission of the Northern Ireland Assembly should be needed for the use of the title locally.

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## 5. BENCHMARKING WITH OTHER PUBLIC SERVICES OMBUDSMEN

### 5.1 Introduction

We examined the roles of the Ombudsman and compared these with similar offices in the British Isles. Whilst we are aware there is no direct comparator to the Ombudsman the exercise sought to report on the roles, functions and structures of the offices and provide comparable performance and activity information where possible.

### 5.2 Arrangements in England

#### 5.2.1 The Parliamentary Ombudsman

The Parliamentary Ombudsman looks into complaints from members of the public, which must be referred by MPs, about maladministration by government departments and other public bodies. She also investigates complaints about problems in obtaining access to government information. In addition to England, her jurisdiction extends to government departments and public bodies exercising reserved functions in Northern Ireland, Scotland and Wales.

The Parliamentary Ombudsman is independent of Government. She is a Crown Servant, appointed by Her Majesty The Queen, and reports to Parliament. The Select Committee on Public Administration oversees the work of her office. She is Accounting Officer for the organisation and staff are employed directly. She has the powers of the High Court to obtain papers and interview anyone she wishes for the purposes of an investigation.

#### 5.2.2 The Health Services Commissioner

The same person has always held the position of Health Services Commissioner and the Parliamentary Ombudsman. She is able to review complaints of maladministration against the NHS and since 1993, the care and treatment of patients and the actions of family health practitioners. Over 90 per cent of the claims now received refer to clinical matters. There is no requirement for sponsorship of complaints by MPs. Staff are employed directly.

#### 5.2.3 The Local Government Commission

There are three Local Government Ombudsmen in England who investigate complaints against local authorities, education appeal committees, housing action trusts, police authorities and a range of other bodies providing local services. Similar arrangements apply to appointments, tenure of office and the ability to rely on High Court powers to obtain written and oral evidence. Staff are employed directly.

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Most of the complaints relate to local authorities and can cover housing, housing benefit, planning, social services, school admission appeals and special educational needs.

The Local Government Ombudsmen also have a role in disseminating guidance notes on good practice on complaints handling. They have been working with the Audit Commission relating to Comprehensive Performance Assessments for County and local authorities. A pilot scheme commenced for district councils.

The Commission for Local Administration has the most developed corporate and business planning process with goals on volume, cost and speed of casework. Quality standards for staff are also set through a new performance framework.

Investigation staff in the Commission for Local Administration are paid in the salary range £27,420 - £34,413, similar to the Deputy Principal grade in Northern Ireland.

### 5.2.4 Policy Developments

Following the Collcutt Report in 2000 the Government announced its intention to promote legislation in due course to bring together the existing Ombudsmen to provide an integrated service. Several Ombudsmen would serve together in a new collegiate structure. MP sponsorship of complaints to the Parliamentary Ombudsman may not be required. The Select Committee on Public Administration has been critical of the delay in bringing forward the necessary legislation but there is unlikely to be movement on what would be a major piece of legislation in this Parliament.

In the interim consideration is being given to some modest legislative change to promote joint working between Ombudsmen. The Parliamentary Ombudsman/Health Service Commissioner and the Commission for Local Administration now share the same office in central London.

### 5.3 Arrangements in Wales

Government decided in March 2003 to combine the work of the Welsh Administration Ombudsman, the Health Service Commissioner for Wales and the Commissioner for Local Administration in Wales. New primary legislation is needed to establish the Public Services Ombudsman for Wales (PSOW) and public consultation ends in December 2003.

As an interim measure arrangements are in hand to enable the functions of the three posts to be held by the same individual. The Parliamentary Ombudsman will continue to have jurisdiction on matters reserved to the Westminster Parliament.

Final decisions on the scope and functions of the PSOW will be made in due course. It is possible that the PSOW could:

- have extensive coverage of public bodies in Wales;

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- continue to exclude from jurisdiction, personnel matters and commercial transactions;
- retain jurisdiction substantially based on investigating complaints of maladministration (and 'service failure' in health matters) – no sponsorship of complaints will be required;
- restrict challenges on the merits of decisions to clinical judgement only;
- be empowered to assist potential complainants to prepare their complaints;
- issue advice and guidance about good administrative practice following investigations into systemic weaknesses arising from complaints;
- facilitate the resolution of complaints by appropriate means without the need to issue a formal report in every case; and
- retain similar provisions on redress.

The appointment of the PSOW will be by the Crown with provisions on security of tenure during a fixed term. The PSOW will be Accounting Officer and staff will be employed directly. Decisions will be made soon on organisational structure and staffing levels/grades in the PSOW.

### 5.4 Arrangements in Scotland

The new Scottish Public Services Ombudsman (SPSO) commenced in October 2002. The bodies within jurisdiction cover the Scottish Parliament, Scottish Administration, Health Service, Local Government, Housing and a wide range of other public bodies and tribunals (administrative actions of staff only).

It is not a one-stop shop as other bodies exist e.g. Parliamentary Ombudsman for matters reserved to the Westminster Parliament, Parliamentary Standards, Ethical Standards, Police, Information, and there are plans for Children and Human Rights Commissioners.

Complaints of injustice or hardship can be considered about poor service, failure to provide a service, administrative failure and complaints about the NHS. Complaints are no longer required to be sponsored by MSPs. Excluded are properly made decisions, complaints that could go to a court or tribunal, personnel issues, and most commercial or contractual matters.

There is explicit authority to achieve informal resolution of complaints and to carry out systemic reviews related to casework.

The SPSO and her three part-time deputies are appointed by the Crown on the nomination of the Scottish Parliament. The Ombudsmen hold appointments for 5 years and normally no longer than two consecutive terms will be permissible with retirement at 65.

The Scottish Parliamentary Corporation determines remuneration and resources. The SPSO is Accounting Officer for the organisation. Staff are employed directly.

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The first year has been one of concentration on amalgamating the offices into one, finding accommodation, resolving structure and grading issues, developing a comprehensive complaints handling process and purchasing new IT systems with considerable associated training.

The current year will see an increased attention on corporate and business planning and enhancing the accessibility of the service. The Ombudsman is taking on responsibility for the independent review level of complaints against the Health Service and additional staff are being recruited.

### 5.5 Arrangements in the Republic of Ireland

The Ombudsman is appointed by the President on the passing of a resolution by both Houses of the Oireachtas. She holds office for a period of 6 years and has security of tenure – retirement at 67. The Director General is the designated Accounting Officer for the organisation.

The Ombudsman also carries out the separate functions of Information Commissioner and Referendum Commissioner and she is a member of the Standards in Public Life Commission.

Following preliminary examination the Ombudsman can investigate an action 'that has adversely affected a person' and has been taken without proper authority, on improper grounds, the result of negligence and carelessness etc. She has authority to initiate her own investigations.

Exclusions from jurisdiction apply where the matter is before the court, there is a statutory right of appeal to the courts, there is an appeal to an independent appeal body, or the matter relates to recruitment or employment etc. Clinical judgement in health matters is excluded from remit

The Ombudsman employs staff directly. The Office is developing a new Corporate Strategy and has established a comprehensive Human Resources Strategy. The investigators grade is equivalent to the NI Deputy Principal level.

### 5.6 Workload Comparisons

A comparison of the Office's workload etc with other public services ombudsmen is set out in Table 5.1.

We are conscious that this comparison can only be of broad interest given the different scale, jurisdiction and complaints processing models utilised by the various organisations. We do believe however that the comparison with Wales could be a more productive one. Bearing in mind the more restricted jurisdiction there, the figures may nevertheless raise the need for a debate about the efficiency and cost effectiveness of the NI Office in terms of manpower numbers compared to workload, and this needs to be taken forward by the Office.



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Table 5.1  
Workload Comparison with Other Public Services Ombudsmen

Ombudsmen	Number of Enquiries	Number of Formal Complaints Received	Annual Budget £m	Staff Numbers wte	Cost Per Formal Complaint £
Local Government – England	15000	17610	11.67	209.3	663
Parliamentary Ombudsman – England	14381	2015	6.45	79.5	3200
Health Service Commissioner – England	102	3999	8.87	58	2218
Republic of Ireland	8501	3209	2.2Euro	31.5	685 Euro
Local Government – Wales	941	931	1.04	17.1	1117
Northern Ireland	2658	663	1.04	20	1569

\*Information on Scotland is not available in this form.

Source – British & Irish Ombudsman Association [BIOA] (except final column)

The following table also shows in comparison to other organisations that the NI Ombudsman betters most others in terms of the average time taken to determine complaints and issue reports. There is however a higher percentage of cases cleared in +26 weeks, which the Office suggests is due mainly to complex planning and health cases. The NI Ombudsman also has the lowest percentage of complaints upheld. This could be explained in a number of ways. For example, it might suggest, as mentioned earlier in this report, that the initial assessment of cases could be more robust. On the other hand if as has been mentioned to us the Ombudsman exercises his discretion in favour of some degree of investigation notwithstanding an apparently weak prima facie complaint, it would follow that the Ombudsman would uphold a lower percentage of cases. It might also suggest that public bodies in Northern Ireland are more thorough in their handling of complaints in the earlier stages. The Office will wish to pursue these comparisons in more detail in their follow up to this report.

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Table 5.2  
Comparison of Performance Indicators

Ombudsmen	Percentage of Complaints Determined within 13 weeks/14-26 weeks/27-52 Wks	Average Time –Complaints Determined Weeks	Average Time to Issue Reports Weeks	Complaints Upheld in whole/part %
Local Government – England	53.9/24.5/15.1	15.5	52.6	32
Parliamentary/ Ombudsman – England	88/3/6	31	40	85
Health Service Commissioner – England	N/A	N/A	64	19.1
Republic of Ireland	33.8/21.2/24.7	27	N/K	47.6
Local Government - Wales	79.6/16.5/ 3.7	8	17.6	16.2
Northern Ireland	57.9/19.2/16.1	10.2	17.3	10.8

\*Information on Scotland is not available in this form.



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## 6. CONSULTATION WITH KEY STAKEHOLDERS

### 6.1 Introduction

We relied on Customer Attitudes Surveys carried out for the Ombudsman to give us a customer's perspective. We conducted an extensive consultation process on a one-to-one basis with key stakeholders – see Appendix V - to ensure that the review was fully informed of all relevant matters and to begin the process of preliminary consultation on the nature of the possible changes.

### 6.2 Customer Attitude Surveys

The Office carried out Customer Attitude Surveys in 1996 and 1998 and responded to the findings, which were largely positive. A further survey is planned during 2004.

In June and July 2003 Research & Evaluation Services carried out a survey on public attitudes and knowledge of the Northern Ireland Ombudsman as part of the Northern Ireland Social Omnibus Survey. The Executive Summary is at Appendix VI. The key findings were that public awareness of the Ombudsman was very high at 85 per cent with awareness levels higher among the better educated and higher social classes. 57 per cent knew the role of the Ombudsman and equal numbers (47 per cent) were either satisfied or dissatisfied with how the Ombudsman handled their complaint – an outcome largely dictated by the decision on the complaint. Fifty-nine per cent of respondents perceived the Ombudsman to be independent of government with 27 per cent believing that the Ombudsman was part of government. Just 26 per cent know that if the complaint is against a government department the Ombudsman should be contacted via an MLA.

### 6.3 The Ombudsman

The Ombudsman and his Office are highly regarded by key stakeholders and the main points made were:

- the Ombudsman has an essential role to play in improving standards of service in the public sector;
- the Ombudsman's investigative process is considered to be thorough and the findings generally acceptable;
- no one raised any question about the impartiality and fairness of the Ombudsman and most pointed to the need to retain, and enhance if possible, the independence of the Office;
- some stakeholders have issues over the time taken by the Ombudsman to complete investigations but understand that many of the cases are complex and sensitive;

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- a few commented that they could be kept better informed of progress in cases – once a reply is given it could be a considerable time before there is any further engagement;
- many review the Ombudsman's Annual Report for trends on complaints and welcome the feedback on good practice;
- whilst recognising the quality of staff in the Office a number of stakeholders considered that the employment opportunity in the Office should be available to the wider public service;
- some also queried whether there was sufficient training on legal skills to enable staff to cope with the greater complexity of cases;
- many commented on the willingness of the Ombudsman to expand the awareness of the Office and some considered that there should be a structured annual outreach programme.

### 6.4 Comments on Possible Changes

Stakeholders were invited to comment on the possible changes to the Ombudsman's scope and jurisdiction and to introduce any other issues. The following is a summary of comments:

- dealing with complaints of maladministration is and should remain the Ombudsman's core business and we should be careful about proposing significant extensions to the role that would detract from a concentration on casework;
- the prior consultation on the addition of registered housing associations to the Ombudsman's jurisdiction in April 2004 has been exemplary and planning for their introduction is well advanced;
- there is no support amongst stakeholders for altering the basis tests of maladministration and injustice;
- the amalgamation of Offices and a single legislative vehicle is well supported;
- the Standards Commissioner role would be re-activated on an ad hoc basis once a working Assembly is established and subsequently legislated for in an Assembly Standards Bill;
- there is general recognition that the Ombudsman could perform a similar role as a local government standards commissioner if the code of conduct becomes mandatory but there are no plans for early legislation in this regard, but some pointed to the scale of such an operation and the capacity of the Ombudsman to properly carry out the task;
- the views on MLA sponsorship for Assembly Ombudsman cases vary considerably with political opinion broadly in support of retention and most others in favour of removal;

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- the views of stakeholders about the Ombudsman's present jurisdiction for employment matters are finely balanced with most recognising that there continues to be a significant number of complaints each year;
- the majority of stakeholders oppose any proposal that the Ombudsman should be able to challenge the merits of discretionary decisions, other than clinical judgement which is within scope. We were informed that Third Party Appeal in planning cases is under active consideration;
- there is general support for the Ombudsman having a power to initiate systemic investigations but only if there is sufficient evidence arising from casework and provided there is no duplication with other organisations, such as the Comptroller and Auditor General;
- the presumption should be that all public sector organisations must be within scope with any exceptions being justified by the existence of an independent review process for dealing with complaints in excepted organisations;
- whilst clearly a matter for the UK Government, it is possible that responsibility for Justice matters could be devolved in the lifetime of the new Assembly;
- the Review of Public Administration should bring some rationalisation to public services but without a significant impact on the Ombudsman's workload.
- it is possible following public consultation in early 2004 that the independent review stage of Health & Social Services Complaints Procedures will remain albeit in a different process;
- we were also informed that Independent Case Examination is working effectively in social security and child support in Northern Ireland and could usefully be extended to other bodies;
- some commentators said that Northern Ireland needs a single gateway for public sector complaints. Research carried out for the Review of Public Administration describes general public dissatisfaction with public sector complaints processes and there is reasonable support for the Ombudsman having a role in auditing those processes and ensuring best practice;
- Alternative Dispute Resolution mechanisms are not well developed in Northern Ireland and there is no early prospect of any initiative between the courts and the Ombudsman in promoting mediation cases;
- there was concern on the part of some stakeholders on the issue of vexatious complainants and the possible involvement of the Ombudsman was raised.

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## 7. A WAY FORWARD

### 7.1 Introduction

We have examined the projected levels of activity that might derive from implementing the range of changes being considered. We modelled the possible impact on complaints cases; reports and associated activities that might arise based on both our benchmarking and the stakeholder consultation processes. We consolidated all the previous work into a comprehensive appraisal that identifies a preferred way forward for the Ombudsman.

### 7.2 Issues of Scope

#### 7.2.1 New Legislation

We consider that there is a strong case for a single Office of the Northern Ireland Public Services Ombudsman under the law, reporting to the Northern Ireland Assembly on all areas within jurisdiction. This would require primary legislation.

The Office is presently operated as one unit and there would be no tangible benefits in terms of cost savings. There would be considerable administrative benefits in simplifying processes and in promoting the Office to the general public.

#### 7.2.2 MLA Sponsorship

In England the Colclutt Report in 2000 commented on the question of MP sponsorship of cases to the Parliamentary Ombudsman –

*“We believe that the MP filter can no longer be sustained in the era of joined up government and we strongly recommend that it is abolished”.*

Government expressed support in principle for the Colclutt Report and indicated that legislation would be promoted in due course. However that legislation has not been forthcoming and is unlikely to emerge in this Parliament. The MP filter remains and there are conflicting views on whether removal would now be supported by a majority of MPs.

In Scotland the legislation setting up the new Ombudsman service removed the need for MSP sponsorship of complaints. There is no requirement for sponsorship of complaints by elected representatives in Wales or in Ireland.

MLAs currently sponsor some 40 per cent of the complaints lodged with the Ombudsman each year. In our stakeholder consultation there was majority support for removing the requirement for MLA sponsorship of complaints in the interests of freeing up direct access to the Ombudsman.

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Political opinion however was broadly in favour of retaining sponsorship and in ensuring no diminution in the important constitutional role of elected representatives in seeking redress for their constituents.

We believe there is a balance between these points of view. Removing MP/MLA sponsorship does not necessarily remove the elected representative from the process. It would however remove a mandatory step in the citizen's access to the Ombudsman but many may still prefer to go to their elected representative and this could be encouraged in any new arrangements. The intention of the Ombudsman is to have a wide and meaningful engagement with the Assembly and MLAs – see 7.4 – and to utilise their good offices in supporting his work and in enhancing the accountability of the executive. This could provide a more meaningful and productive way of involving MLAs generally.

We suggest therefore that the way forward should be to allow a complainant to deal direct with the Ombudsman or to authorise an MLA to do so on their behalf. In the latter case the Ombudsman would deal directly on the complaint with the MLA as at present. These provisions, combined with a clear explanation of the role the Assembly and its MLAs should play in support of the Ombudsman's Office, might be persuasive.

Removal or retention of MLA sponsorship would have no direct impact on the Office. There could be an indirect impact if the number of complaints were to increase as has happened recently in Scotland and in England in 1984 when councillor sponsorship was removed from complaints to the Local Government Ombudsman. This would however be impossible to quantify.

### 7.2.3 Registered Housing Associations

There are some 40 registered housing associations, employing over 1500 staff and with 25,000 houses in management. The 8 largest associations manage 70 per cent of the houses. Some 3300 special needs tenants are supported in accommodation. A complaints scheme managed by the Department of Social Development (DSD) has been in place since 1994.

The associations come within the scope of the Commissioner for Complaints on 1 April 2004. The Ombudsman has commenced an awareness and information programme for directors, managers and staff of the associations and their tenants.

Statistics from DSD show a relatively low level of activity on the complaints scheme:



Table 7.1  
Complaints Under DSD Scheme

	2002	2003 (9 months)
Total Contacts	26	27
Complaints Received	14	7
Refused as internal complains procedures not exhausted	6	4
Investigations	8	3

Source – DSD

Complaints cover anti-social activity, housing allocations, housing transfer and house sales. Employees of the Associations will now have an additional remedy for employment matters and this could add to the present number of complaints. The Ombudsman has decided to allocate this new work to the Housing Directorate and to cover it within existing resources. We agree but the position should be kept under review.

#### 7.2.4 Assembly Standards Commissioner

The probability is that Ombudsman's role as Assembly Standards Commissioner would re-commence on an ad hoc basis once a working Assembly is in place and Statutory Committee business has resumed. New legislation on the lines of the former Assembly Standards Bill could be in place within a further six months.

In October 2001 the Ombudsman accepted the Speaker's invitation to investigate complaints made to the Standards and Privileges Committee on a case-by-case basis pending legislation. The Ombudsman reported to the Committee on 28 June 2002 that there had been 3 cases, 2 had been withdrawn and 1 report had been made. The Ombudsman and his deputy had handled the cases and spent 25 hours on them. The Committee was happy for other investigation staff to be involved in future and noted that the Office's computer security system had been enhanced to ensure confidentiality of the paperwork. 2 other cases lapsed when the Assembly was suspended in October 2002.

There were too few cases to form any basis for future planning. The sensitivity of handling such cases is obvious and a new section would probably be warranted in due course, especially if local authority and public appointee standards were brought within jurisdiction at a later date. In the interim the external panel of trained investigators – see section 3.17 – could be utilised in support of the Ombudsman if there was a sudden increase in workload. However, we could not recommend any new organisation or additional resources at this stage. The level of business should be kept under review.



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## 7.2.5 Local Authority and Public Appointees Standards

There is little likelihood of any early moves on new legislation to establish an Ethical Standards regime for local government elected representatives in Northern Ireland, as applies in the rest of the United Kingdom. It may be that this will be considered in the medium term. We note that the Department of the Environment does not collect statistics on the present level and nature of complaints against the conduct of local councillors.

Similarly there are no proposals to legislate for a standards regime for public appointees to NDPBs in Northern Ireland, as has happened in Scotland.

Some concern was expressed to us about the scale of the task faced by a single commissioner of standards in investigating allegations of misconduct of all elected representatives and public appointees. The number of such offices is over 1500. However we believe that in principle the Ombudsman could take on such a task and this could be justified in terms of both equity and uniformity of approach and the efficient use of resources. Other models are possible and the position should be reviewed at the appropriate time.

## 7.2.6 Employment Matters

The NI Ombudsman is unique amongst Ombudsmen in the British Isles in continuing to have a jurisdiction for employment matters. The debate on the retention or removal of employment matters from jurisdiction is finely balanced.

A number of stakeholders suggested to us that continued jurisdiction is now inconsistent with the full range of specific remedies developed since 1969 e.g. equality, employment and human rights legislation and the creation of the Pensions Ombudsman service. In particular, it is argued that recourse to the Ombudsman gives public servants in Northern Ireland, but not those under the jurisdiction of the Parliamentary Ombudsman, an additional avenue of complaint over and above all other citizens in relation to employment and recruitment matters. This is considered to be inconsistent with equality and does not acknowledge the development of a refined industrial relations infrastructure within the public sector.

However those in favour of retention of the jurisdiction point to the number of cases considered each year by the Ombudsman where maladministration is found and where they believe no other remedy is available. They also argue that the conclusions of the present Review of Public Administration could lead to a significant upheaval in public sector employment and it would be insensitive and inappropriate to remove the present remedy.

The cases examined by the Office have averaged 111 in each of the last three years. Of these, 64 per cent were in respect of complaints that were internal to organisations and the remainder focussed on recruitment competitions, which had been open to public advertisement and competition.

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The following table shows the level of business on employment matters in the past three years:

Table 7.2  
Employment Cases Received 2000-01 – 2002-03

	Recruitment	Discipline/ Grievance	Promotion	Pension	Other	Total
00-01	38	42	11	1	19	111
01-02	37	38	16	0	22	113
02-03	43	23	5	2	34	109
Total	120	103	32	3	75	333

Source – The Ombudsman's Office

Table 7.3  
Closed by Investigation Reports

	Recruitment	Discipline/ Grievance	Promotion	Pension	Other	Total
Upheld	10	2	2	1	3	18
Partially Upheld	4	6	1	0	0	11
Not Upheld/ Criticism	7	1	4	0	1	13
Not Upheld	13	7	10	0	1	31
Total	34	16	17	1	5	73

Source – The Ombudsman's Office

Over the three-year period the Ombudsman upheld some 5.4 per cent (18 cases) of the total number of complaints received. He partially upheld a further 11 cases and offered criticism in 13 cases. In total these accounted for 12.6 per cent of cases received. It has not been possible on the information presently available to us to establish the equality aspects of the present jurisdiction.

We are mindful that the essential role of the Ombudsman is to give redress to the citizen against the administrative action or inaction of the Executive. We also recognise the equality implications of the jurisdiction and agree that public and civil servants should not remain in an advantageous position on employment matters compared with other citizens. One option would be to limit the Ombudsman's jurisdiction to publicly advertised competitions by public bodies and government departments. However we consider there are sufficient remedies available to deal with most of the cases that come to the Ombudsman and we recommend the removal of employment matters from jurisdiction, subject to the outcome of an equality impact statement.



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If the jurisdiction were totally removed then the direct saving in investigators would be 2 wte or 18 per cent of the existing complement with further savings on administrative time. If the recruitment jurisdiction only were retained then the saving would be 1 wte or 9 per cent of the investigators' complement. There would be other indirect savings on the administration of the Office.

### 7.2.7 Challenging Merits of Decisions

There is virtually no support from stakeholders for the lifting of the blanket ban on the Ombudsman investigating discretionary decisions where no maladministration has been identified. This is a longstanding and common feature of Ombudsmen's schemes in the British Isles.

We are aware that the Ombudsman feels that such a challenge would be useful in some of the planning cases that come before him. We were informed by the Planning Service of the current work in considering whether a Third Party Appeal system should be introduced in Northern Ireland. An initiative such as this could go some way to alleviating the Ombudsman's concerns.

We consider that, with the exception of the present provision in health service cases, the Ombudsman should continue to be concerned with faulty administration rather than the merits of decision-making. The Ombudsman is not an alternative to the courts, tribunals or to ministerial appeal or other authorities that are empowered to examine discretionary decisions.

### 7.2.8 Systemic Reviews

The Ombudsman considers that it would be in the public interest if he had authority to initiate an investigation on a more comprehensive basis than an investigation of a complaint from an individual where he had cause, reflecting facts disclosed by a normal investigation, that there was a potential systemic problem with that area of public policy or service delivery.

Most stakeholders supported this proposal but with provisos. The possible duplication with the work of the Comptroller and Auditor General was an issue as was the capacity of the Ombudsman to undertake such reviews. We believe that there should be full consultation and agreement with the C&AG before the Ombudsman commenced a review. We also suggest that there could be a number of ways in which such reviews could be progressed. The Ombudsman could invite the organisation to take forward a review and keep him informed. He could invite experts to conduct a review on his behalf. In any event the Ombudsman's in-house resource would be related to the overall control and direction of such work.

There would a cost associated with an authority to initiate systemic investigations. We suggest that this function could be accommodated within our recommendation for a research capacity and the desirability of providing direct executive support to the Ombudsman – see 3.16.

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### 7.2.9 Following Public Funds

We support the general principle that organisation's substantially funded from public monies should be within the Ombudsman's jurisdiction unless they are explicitly excluded. Such exclusions would have to be justified on a case-by-case basis and under current legislation the gatekeeper role is the responsibility of OFMDFM.

Bodies such as the Equality Commission and others use the specific designation of organisations in the Ombudsman's legislation as the basis for defining public bodies within their remit. We consider this is a transparent process that should remain.

We have mapped the public bodies presently within the Ombudsman's jurisdiction and those outside. The vast majority of bodies are already within jurisdiction but there are a number of exceptions such as the Assembly Commission and the Northern Ireland Audit Office which is in contrast to the position in Scotland. Those that need to be reviewed against the principle we have suggested are:

- further education colleges;
- local management of schools;
- universities;
- bodies such as:
  - The General Teaching Council for Northern Ireland;
  - Northern Ireland Higher Education Council;
  - Northern Ireland Council for Integrated Education;
  - Integrated Education Fund;
  - Northern Ireland Water Council;
  - Northern Ireland Economic Council;
  - Drainage Council;
  - Historic Buildings Council;
  - Historic Monuments Council; and
  - Armagh Observatory and Planetarium.

Each of these should be considered afresh with a view to inclusion in list of bodies within the Ombudsman's jurisdiction, and by extension the jurisdiction of the Equality Commission and others. Any new additions to the Ombudsman's jurisdiction are likely to be minimal and associated casework could be absorbed within existing resources.

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OFMDFM should have a role to ensure in the longer term that the relevant Department address this issue when creating new bodies.

### 7.2.10 Health Service Complaints

The Ombudsman recognises that he could be affected by the wide-ranging HPSS Complaints Procedure Review and has drawn attention to the potential workload and resource implications of any changes to the HPSS procedures or structures. He believes it is also important to note the opportunity offered by the Independent Review for Boards to test how services they are commissioning are performing.

We agree that removal of Independent Review could potentially double the Ombudsman's present workload on Health Service complaints. Consultation on the Review is about to commence and will be concluded early in 2004. Decisions will be made following consultation but at this stage we believe it is unlikely that Independent Review will disappear or that the Ombudsman will be invited to take on an independent review function. We have not therefore considered any change to the status quo.

We refer in Section 4.4 to the case of General Health Service providers and Independent Providers where the final remedy of recourse to the County Court is not available to the aggrieved person. This issue must be resolved in the drafting of new legislation for a single office of Northern Ireland Ombudsman.

### 7.2.11 Justice Functions

Timing on the devolution of Justice functions is uncertain but when it happens all justice bodies currently with the scope of the Parliamentary Ombudsman would come within the Northern Ireland Ombudsman's jurisdiction. The reality is there have been a small number of complaints from these bodies (2 in 2002-03) in recent years. The employment jurisdiction if it was still in place when devolution of justice functions happened, might add some business but again this could be accommodated within existing resources.

Whilst this would be a matter for the devolved administration the consensus is that there would be no major change to the justice regulatory machinery in the period following devolution.

### 7.2.12 Use of the title 'Ombudsman'

This is a matter that would fall within the jurisdiction of the Assembly. Any move to restrict the use of the title would conflict with the present position of the Parliamentary Ombudsman and the Northern Ireland Police Ombudsman. We believe that the designation of the present Ombudsman as "Northern Ireland Public Services Ombudsman" would give sufficient emphasis to the new Office.

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### 7.3 Procedures and Remedies

We support the Ombudsman's suggestion that in new legislation a uniform approach to minor differences of jurisdiction in existing legislation for the two Offices should be resolved by utilising the existing jurisdictional remit of the Assembly Ombudsman e.g. commercial and contractual matters would not be subject to investigation.

The Ombudsman's preferred option as to the final sanction would be for the emphasis to be placed on the central role of the Assembly in terms of public administration and the existing Assembly Ombudsman recourse to make a Special Report extended to cover all cases. Should this approach be held to infringe the autonomy of any public body, he suggests that the preferred alternative would be for that public body to be required to publish in nominated local newspapers a notice detailing the case and describing the Ombudsman's findings and conclusions in a content and format that would be approved by the Ombudsman.

Within Great Britain, we are aware that the Local Government Ombudsman has had the sanction of requiring local authority to publish in the press the fact that an adverse report has been disregarded. There would be some evidence that this is not a particularly effective sanction if the public body has taken a determined stance against the Ombudsman's findings. In Northern Ireland the involvement of the court is unique within the traditional Public Sector Ombudsman model however it may provide an appropriate and relevant recourse within the context of ECHR legislation. It has also been effective.

We support the Ombudsman's option which would reinforce the centrality of the Assembly but we believe that the involvement of the court should be retained as a remedy for complainants in cases involving local government.

### 7.4 The Northern Ireland Assembly

We believe that in future the appointment of the Ombudsman should continue to be made by Her Majesty The Queen but following a resolution of the Northern Ireland Assembly. Tenure should continue to be guaranteed as at present although we would suggest for the future, fixed term appointments of say five years with the opportunity for renewal, except on grounds stated in the legislation. There should be an independent method of determining the Ombudsman's salary.

We believe that further measures should be adopted to bolster the independence of the Ombudsman in his decision-making role, whilst ensuring proper accountability to the Northern Ireland Assembly for the use of resources and the overall performance of the Office.

The Ombudsman should continue as Accounting Officer and be answerable to the Assembly through the Public Accounts Committee for the propriety and regularity of public funds. In addition we believe he should have clear accountability for the Office's performance, but not decisions, to an Assembly Committee (similar to the Audit Committee's arrangements in relation to the Comptroller and Auditor General) that would deal with performance, resources and salary.

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The Office's Corporate Plan would be the means of informing the Committee of future plans and the Committee would be supported in its work by DFP on Supply. The arrangements would be a matter for the Assembly but we suggest that it might be an appropriate role for the Assembly Commission or the Committee of the Centre.

The Ombudsman's Annual Report would be presented to the Assembly as a set piece occasion. We also support the Ombudsman's intention for the Assembly to gain a greater ownership of his work by encouraging the statutory departmental committees to examine the relevant aspects of his annual report.

### 7.5 Auditing Public Sector Complaints Processes

There is general support for the Ombudsman undertaking an "audit" role in relation to public sector complaints process and in ensuring best practice.

We are aware from our benchmarking that the Scottish Public Services Ombudsman may issue guidance to listed authorities on the performance of their duties to publicise information about the Ombudsman in their complaints scheme and in their correspondence with complainants.

We also noted that the Local Government Ombudsman in England has been working with the Audit Commission relating to Comprehensive Performance Assessments for county and unitary authorities and this is now being developed for district councils. The Local Government Ombudsman has recently commenced a pilot scheme in sending an annual letter to 120 local authorities containing an analysis of the types of complaints over the year, together with information about outcomes, examples of good practice and scope for improvement.

The Irish Ombudsman has recently updated his Guide to Standards of Best Practice for Public Servants.

These are examples of how other Ombudsmen are seeking to enhance the deliverance of better complaints services by bodies within their jurisdiction and we consider that a similar initiative is required in Northern Ireland.

In our discussions with the Review of Public Administration team we were informed that their research had revealed a lack of confidence in complaining about public services. In specific terms:

- 61 per cent were not confident or not at all confident that a complaint would be dealt with to their satisfaction;
- 22 per cent of respondents had complained about public services; and
- 56 per cent of these were dissatisfied or very dissatisfied with how the complaint was dealt with;
- 35 per cent of respondents said they had wanted to complain but didn't.



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These findings point to the need for a structured response and we consider that the Ombudsman is well placed to take the initiative in this area. We are mindful not to place unnecessary burdens on the Office but we consider that the Ombudsman should develop a code of best practice on complaints handling; issue a quarterly digest of recent cases highlighting good and best practice; and audit on a sample basis the complaints handling arrangements in those organisations which generate more complaints to his Office.

We believe this approach for the Ombudsman could be added to the work of the new resource (see 3.16) together with an additional administrative officer at an overall cost of £15,000.

We were impressed by Independent Case Examination and feel that this could be extended to a wider range of services as part of a best practice initiative. This would have the prospect of ensuring early resolution of complaints and filtering out cases that might otherwise go to the Ombudsman.

### 7.6 Annual Outreach Programme

The Ombudsman has made admirable efforts to promote the work of the Office and there is evidence that public awareness is very high among the better educated and higher social classes (see 6.2). He is keen to direct his outreach programme to those groups in society who may not be well disposed, or able, to pursuing complaints e.g. elderly people.

An annual outreach programme should be developed, utilising all means of communication, and targeted at the MLAs and other public representatives, bodies within jurisdiction, complainants and potential complainants, advice bodies and the general public. It might be appropriate for him to procure professional advice to help target the promotion activity and an annual budget of £25,000 is recommended.

### 7.7 Vexatious Complainants

The issue of vexatious complainants arose during consultation with stakeholders. Some felt that the Ombudsman could play a useful role in taking over such cases on referral by their organisation.

We have considered this proposal and our conclusion is that such a role is already provided for in present arrangements. If the organisation has fully considered the allegations made and has determined that there is no substance in the complaint then the complainant can be advised of his right to pursue the complaint with the Ombudsman. It would be legitimate for an organisation to cease any further correspondence with the complainant unless new evidence was produced in support of the allegations.

The Ombudsman points out however that complainants who might be regarded as vexatious are almost always concerned with the decision taken and not the process that was used. The Ombudsman can only be of limited practical assistance in such cases.



## 7.8 Alternative Dispute Resolution

We held discussions with the Northern Ireland Court Service and senior judiciary on the potential for greater utilisation of Alternative Dispute Resolution (ADR) mechanisms in civil justice. We were informed that ADR pilot schemes proposed in the Northern Ireland Review of Civil Justice had not yet been implemented and that there was a preference for litigation in this jurisdiction. We would contend there is potentially some merit in the Ombudsman being viewed as a suitable ADR mechanism in certain judicial review cases except where points of law or human rights considerations are at issue. We conclude from our discussions however that the matter should not be pursued at present but the Ombudsman should keep the position under review.

We support the general trend to encourage a greater focus on early resolution of cases coming before the Ombudsman and the removal of any legislative barriers. In this context the Ombudsman should ensure that his investigators are trained in mediation skills.



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### 8. THE NORTHERN IRELAND PUBLIC SERVICES OMBUDSMAN

#### 8.1 Introduction

In this section we draw together the recommendations of our report and conclude with our vision for the new office of Northern Ireland Public Services Ombudsman.

#### 8.2 Present Position

We set out in Section 3 a number of recommendations on the organisation and performance of the Ombudsman's Office:

- work on producing the Corporate and Business Plan should be completed as soon as possible (3.12);
- more sophisticated performance measures should be adopted (3.15);
- more use could be made of IT support in casework and statistics should cover all aspects of the process (3.15);
- investigator posts should be evaluated and a new corporate services structure should be implemented (3.16);
- a human resource strategy should be developed (3.17); and
- present support services arrangements should be formalised in proper service level agreements (3.18).

#### 8.3 An Agenda for Change

In Section 4 we have set out the extensive agenda for change in the Ombudsman's present arrangements and examined these in the context of benchmarking (Section 5) and the views of key stakeholders (Section 6). The developments in the work of Ombudsman in the United Kingdom are supportive of the need for change locally. The comments from stakeholders underline the high regard for the Ombudsman and his Office and demonstrate an acceptance of the need for change.

#### 8.4 A Way Forward

In Section 7 we set out the arguments for and against change in present arrangements and conclude:

- there is a case for a single Office of The Northern Ireland Public Services Ombudsman (7.2.1);
- MLA sponsorship should not be mandatory but MLAs should be encouraged to play a greater role in the work of the Ombudsman (7.2.2);
- registered housing associations will come within jurisdiction on 1 April 2004 (7.2.3);

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- the role of Assembly Standards Commissioner would recommence on an ad hoc basis once a working Assembly is in place and Statutory Committee business has resumed (7.2.4);
- if legislation on Ethical Standards for Local Authority and Public Appointees Standards is introduced in future the Ombudsman could in principle undertake the role of Commissioner but other models are possible (7.2.5);
- employment matters should be removed from the Ombudsman's jurisdiction, subject to the outcome of an equality impact statement (7.2.6);
- with the exception of the present provision in health service cases, the Ombudsman should continue to be concerned with faulty administration rather than the merits of decision-making (7.2.7);
- the Ombudsman should have authority to undertake systemic reviews flowing from individual complaints and following consultation and agreement with the Comptroller and Auditor General (7.2.8);
- 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 (7.2.9);
- these will be no significant implications for the Ombudsman in the Review of HPSS Complaints Procedures or in the devolution of Justice functions (7.2.10 and 7.2.11);
- minor differences of jurisdiction in existing legislation should be resolved by utilising the existing jurisdictional remit of the Assembly Ombudsman e.g. commercial and contractual matters would not be subject to investigation (7.3);
- the procedures and remedies for the combined Office of Ombudsman should reinforce the centrality of the Assembly but recognise the accountability of local government and ensure that remedies can be pursued against General Health Service providers and Independent Providers (7.2.10 & 7.3);
- the Ombudsman's relationship with the Assembly should be enhanced on the lines of the present Audit Committee arrangements for the Comptroller and Auditor General (7.4);
- the Ombudsman should take initiatives to ensure best practice in public sector complaints handling and Independent Case Examination could be usefully extended to other services (7.5);
- the Ombudsman should target those groups presently not utilising complaints processes generally or making use of his Office in particular through an annual outreach plan (7.6);
- no special provisions are needed in handling vexatious complainants (7.7);
- mediation could be used in encouraging a greater focus in the early resolution of complaints coming before the Ombudsman (7.8).

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### 8.5 The Northern Ireland Public Services Ombudsman

Our vision for the new Office of Northern Ireland Public Services Ombudsman is a combined Office for public bodies within jurisdiction with a single point of entry and consistent remedies and a focus on the core business of investigating complaints.

Key features would be:

- the inclusion of registered housing associations within jurisdiction;
- a resumption of the Assembly Standards Commissioner role;
- no power to challenge the merits of discretionary decisions, except in health service cases;
- no employment jurisdiction;
- MLA sponsorship as an option for complainants;
- assumption of responsibility for administrative actions of bodies in the justice sector following devolution;
- additional public bodies within remit on the principle of following public funds e.g. further education colleges;
- an authority to initiate systemic investigations flowing from casework following consultation and agreement with the Comptroller and Auditor General.
- an emphasis on early resolution of complaints with formal investigations the last resort;
- a direct interest in how public bodies within jurisdiction are processing complaints;
- an ability to co-operate with other Ombudsmen in carrying out investigations either jointly or on their behalf;
- an annual outreach plan to extend awareness of the Office using all communication techniques.

#### Possibly Over Long Term

- a role in the procedures for regulating the conduct of district councillors and public appointees on foot of any mandatory Codes of Conduct.

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## 8.6 Resource Implications

The net resource implications of the proposed changes are demonstrated in the following table.

Table 8.1  
Net Resource Implications of Proposed Changes

<b>A. Evaluation of Investigator Posts:</b>			
	Year 1 £000s	Year 2 £000s	Year 3 £000s
No change	0	0	0
Partial upgrade – a number of posts only	+25	+25	+25
Full upgrade – all posts	+50	+50	+50
<b>B. Corporate Services Structure:</b>			
	+35	+35	+35
<b>C. Employment Matters:</b>			
No change	0	0	0
Full removal	-60	-60	-60
Partial removal	-30	-30	-30
<b>D. Systemic Reviews:</b>			
(Covered in B)	0	0	0
<b>E. 'Auditing' Public Sector Complaints Processes</b>			
	+15	+15	+15
<b>F. Annual Outreach Programme</b>			
	+25	+25	+25

The range of net additional costs is broadly affordable as shown in Table 8.2

Table 8.2  
Range of Net Additional Costs

	Year 1 £000s	Year 2 £000s	Year 3 £000s
Worse Case (full costs and no savings)	+125	+125	+125
Best Case (no change on grading of posts, full removal of employment jurisdiction plus other costs)	+15	+15	+15
Probable Case (partial upgrade of posts, partial removal of employment jurisdiction plus other costs)	+70	+70	+70

**APPENDIX I**  
**MEMBERSHIP OF PROJECT BOARD**

## **Appendix I**

### **Membership of Project Board**

Mr Ian Smith, Chairman

Mr John MacQuarrie, Deputy Ombudsman

Mrs Dorothy Angus, Director of Corporate Services, OFMDFM

Mr Denis McCartney, Director of Legal Services, OFMDFM

Mr Aubrey Playfair, Head of Finance, OFMDFM

#### *In Attendance:*

Mr Bobby Doherty, Director of Administration, The Ombudsman's Office

**APPENDIX II**  
**ORGANISATIONS WITHIN THE JURISDICTION**  
**OF THE ASSEMBLY OMBUDSMAN**



## **Appendix II**

### **Organisations Within the Jurisdiction of The Assembly Ombudsman**

#### ***Northern Ireland Government Departments***

Department of Agriculture and Rural Development  
Department of Culture, Arts and Leisure  
Department of Education  
Department of Employment and Learning  
Department of Enterprise, Trade and Investment  
Department of the Environment  
Department of Finance and Personnel  
Department of Health, Social Services and Public Safety  
Department for Regional Development  
Department for Social Development  
Office of the First Minister and Deputy First Minister

#### ***Government Agencies***

Business Development Service  
Child Support Agency  
Driver and Vehicle Licensing Northern Ireland  
Driver and Vehicle Testing Agency  
Environment and Heritage Service  
Health and Social Services Estates Agency  
Land Registers  
Ordnance Survey  
Planning Service  
Public Record Office  
Rate Collection Agency  
Rivers Agency  
Roads Service  
Social Security Agency  
Statistics and Research Agency  
Valuation and Lands Agency  
Water Service

#### ***Other Organisations***

An Implementation body to which the North/South Co-operation (Implementation Bodies) (NI) Order 1999 applies  
Civil Service Commissioners for NI  
Office of the Director General of Electricity Supply for NI  
Office of the Director General of Gas for NI

*Tribunals (Administrative Functions only)*

Child Support  
Compensation for Loss of Employment through Civil Unrest  
Disability Appeal  
Fair Employment  
Industrial  
Industrial Court  
Lands  
Planning Appeals Commission  
Provision of General Medical Services List  
Medical Appeal  
Mental Health Review  
Registered Homes  
Rent Assessment Committees  
Social Security Appeal  
Vaccine Damage  
Water Appeals Commission

**APPENDIX III**  
**PUBLIC BODIES WITHIN THE JURISDICTION OF THE**  
**COMMISSIONER FOR COMPLAINTS**

### Appendix III

#### **Public Bodies within the Jurisdiction of The Commissioner for Complaints**

Agriculture Research Institute  
Arts Council  
Board of Trustees of National Museums and Galleries of NI

Central Services Agency  
Commissioner for Children  
Community Relations Council  
Council for Catholic Maintained Schools  
Council for the Curriculum, Examinations and Assessment  
Council for Postgraduate Medical and Dental Education

District Council, a joint committee appointed by two or more district councils for a purpose in which those councils are jointly interested, and any committee or sub-committee of a district or joint committee (26)

Development Corporation established under Part III of the Strategic Investment and Regeneration of Sites (NI) Order 2003

Education and Library Boards (5)  
Enterprise Ulster  
Equality Commission

Family health services in the National Health Service where provided by doctors, dentists, pharmacists and optometrists (ophthalmic opticians) - with effect from 1 December 1997

Fire Authority for Northern Ireland  
Fisheries Conservancy Board  
Fishery Harbour Authority

General Consumer Council for Northern Ireland

Harbour Authority within the meaning of the Harbours Act (Northern Ireland) 1970  
Health and Safety Agency  
Health and Safety Executive  
Health and Social Services Boards (4)  
Health and Social Services Councils (4)  
Health and Social Services Trusts (18)  
Housing Executive

Industrial Training Boards  
Invest Northern Ireland

Labour Relations Agency  
Laganside Corporation  
Livestock and Meat Commission  
Local Government Officers' Superannuation Committee  
Local Government Staff Commission

Mental Health Commission

New town commissions established under the New Towns Acts (Northern Ireland)  
1965 to 1968 and any of their committees or sub-committees

Office of the Certification Officer

Practice and Education Council for Nursing and Midwifery

Rural Development Council

Special Health and Social Services Agencies such as the Blood Transfusion Service,  
Regional Medical Physics, Health Promotion and Guardian Ad Litem Agencies

Sports Council

Staff Commission for Education and Library Boards

The Strategic Investment Board Ltd.

Tourist Board

Ulster Sheltered Employment Limited

Youth Council for Northern Ireland

**APPENDIX IV**  
**THE OMBUDMAN'S COMPLAINTS PROCESS**

## THE PROCESS:

### Stage 1 - Initial Sift

Each complaint is checked to ensure that:

- the body complained of is within jurisdiction;
- the matter complained of is within jurisdiction;
- it has been raised already with the body concerned;
- it has been referred to me by an MP (where necessary);
- sufficient information has been supplied concerning the complaint; and
- it is within the statutory time limits.

Where one or more of the above points are not satisfied a letter will issue to the complainant/MP explaining why I cannot investigate the complaint. Where possible, this reply will detail a course of action which may be appropriate to the complaint (this may include reference to a more appropriate Ombudsman, a request for further details, reference to the complaints procedure of the body concerned, etc.).

Where the complaint is found to satisfy all of the points listed above, it is referred to Stage 2 (see below). The Office target for the issue of a reply under Stage 1 or reference to Stage 2 is currently 5 working days.

### Stage 2 - Preliminary Investigation

The purpose of this stage is to ascertain whether there is evidence of maladministration in the complaint and how this has caused the complainant an injustice. At this stage enquiries will be made of the body concerned. These enquiries take the form of informal telephone calls to the body and/or a written request for information to the chief officer of the body. In Health Service cases it may also be necessary to seek independent professional advice. Once these initial enquiries have been completed, the complaint is referred to a Director of Investigation who decides what course of action is appropriate for each complaint. There are three possible outcomes to this stage of the investigation process:

- a. where there is no evidence of maladministration by the body - a reply will issue to the complainant/MP explaining that the complaint is not suitable for investigation and stating the reasons for this decision;
- b. Where there is evidence of maladministration but it is found that this has not caused the complainant a substantive personal injustice - an Investigation Report will issue to the complainant/MP detailing the findings of my preliminary investigation and explaining why it is considered that the case does not warrant further investigation. Where maladministration has been identified, the Report may contain criticism of the body concerned. In such cases a copy of the Report will also be forwarded to the chief officer of the body; or
- c. Where there is evidence of maladministration which has apparently also led to a substantive personal injustice to the complainant - the case will be referred to Stage 3.

The Office target for the issue of a reply under Stage 2 or reference to Stage 3 is currently 13 working weeks.



### Stage 3 - In-depth Investigation

If, at the outset of this stage of investigation, the maladministration and the injustice caused can be readily identified, I will consider whether it would be appropriate to seek an early resolution to the complaint. This would involve me writing to the chief officer of the body outlining the maladministration identified and suggesting a remedy which I consider appropriate. If the body accepts my suggested remedy, the case can be quickly resolved. However, should the body not accept my suggestion or where the case would not be suitable for early resolution a full formal investigation of the case will be undertaken. Such an investigation will involve interviewing the complainant and the relevant officials and inspecting all the relevant documentary evidence. Where the complaint is about a Health Service matter, including clinical judgement, professional advice will be obtained where appropriate from independent clinical assessors. At the conclusion of the investigation I will prepare a draft Report containing the facts of the case and my likely findings. At this point the case will be reviewed with the complainant. The body concerned will be given an opportunity to comment on the accuracy of the facts as presented, my likely findings and any redress I propose to recommend. Following receipt of any comments which the body may have I will issue my final Report to both the complainant/MP and to the body. This is a very time consuming exercise as I must be satisfied that I have all the relevant information available before reaching my decision.

The Office target is to complete a case involving a Stage 3 investigation within 12 months of initial receipt of the complaint.

## Oral Complaints/ Enquiries

During 2002/03 the Office dealt with 2,572 telephone calls and there were 86 personal callers.

Of these, 641 telephone calls and 72 interviews related to bodies and matters within my jurisdiction. I have included as Appendices to Sections 2, 3 and 4 details of the bodies complained of and the outcomes of the oral complaints which were received by telephone/interview.

The remaining 1,931 telephone calls and 14 interviews related to complaints where either the body or the subject of the complaint were clearly outside my jurisdiction. In such cases Administration Section staff give as much advice/information as they can about other avenues which may be open to the persons concerned to pursue their complaint and, if possible, provide appropriate contact information.

**APPENDIX V**  
**STAKEHOLDER CONSULTATION**

## Appendix V

### Stakeholder Consultation

#### Group A - General

##### Public body

##### Contact - Chief Executive unless otherwise noted

##### NDPBs

NI Housing Executive	Paddy McIntyre
NI Tourist Board	Bob McMillen, Director of Corporate Policy
Southern Education & Library Board	Helen McClenaghan

##### Health Service

Northern H&SS Board	Stuart McDonnell
Altnagelvin Hospital Trust	Raymond McCartney, Deputy CX (telephone discussion)
Eastern H&SS Council	Jane Graham – Director

##### District Councils

Belfast City Council	Peter McNaney
Down District Council	John McGrillen
Fermanagh District Council	Rodney Connor

##### Civil Service Departments

##### (Permanent Secretaries)

OFMDFM	Nigel Hamilton HOCSNI and Will Haire
DARD	Pat Toal
DCAL	Aideen McGinley
DENI	Gerry McGinn
DEL	Alan Shannon
DETI	Bruce Robinson
DFP	Andrew McCormick
DRD	Stephen Quinn
DSD	John Hunter
NIAO	John Dowdall, Comptroller and Auditor General

##### Executive Agencies

Planning Service	Ian Maye
Water Service	Charlie Grimes - Head of CX Secretariat
Roads Service	Maurice Galbraith - Head of CX Secretariat
Social Security Agency	Chris Thompson
Child Support Agency	Gerry Keenan

**Others**

Staff Commission E&LB	Philip Robinson, Deputy Chief Executive
Equality Commission	Evelyn Collins
Local Govt Staff Commission	Adrian Kerr
NIPSA	John Corey
North South Ministerial Council	
Pat Donaghy Assistant Joint Secretary	

**Political Parties**

Official Unionist Party	Robert Coulter, MLA
Social Democratic & Labour Party	Alastair McDonnell, MLA & Patricia Lewsley, MLA
Democratic Unionist Party	Richard Bullick, Policy Advisor
Sinn Fein	Conor Murphy, MLA
Progressive Unionist Party	David Ervine leader and MLA
Northern Ireland Women's Coalition	Jane Morrice former MLA

**Group B – Specific**

The Review	Tom Frawley - the Ombudsman
Registered Housing Associations	David Crothers - Director of Housing, DSD
Local Government Standards	John Ritchie - Director of Local Government, DOE
Assembly Standards/Assembly Commission	Lord Alderdice – former Speaker of the Northern Ireland Assembly Arthur Moir - Clerk of the Northern Ireland Assembly John Torney - Principal Clerk to the Standards and Privileges Committee
Justice Matters	Stephen Leach - Director of Criminal Justice, NIO
Employment Matters	Doreen Brown - PEFO, NIO
Review of Public Administration	Greg McConnell - Director, RPA
Independent Case Examination	Jodi Berg - Independent Case Examiner
Alternative Dispute Resolution mechanisms	Laurene McAlpine - Director of Policy and Legislation, NI Court Service
Public Pay Policy	Mr Justice (now Lord Chief) Kerr & Mr Justice Weatherup - Judicial Review Gareth Johnston, Central Personnel Group, DFP
Judicial Salaries	Anthony Carleton, Acting Director of Corporate Services, NI Court Service
Legal Services	Michael Lynch, Partner. Elliott Duffy Garrett
Medical Advice Services	Dr Philip McClements

**APPENDIX VI**  
**“PUBLIC KNOWLEDGE AND AWARENESS OF**  
**THE NORTHERN IRELAND OMBUDSMAN”**  
**– A SURVEY BY RESEARCH AND EVALUATION SERVICES**

**EXECUTIVE SUMMARY**

### EXECUTIVE SUMMARY

This report presents the findings of a survey on public attitudes and knowledge of the Northern Ireland Ombudsman. The survey was carried out by Research & Evaluation Services in June and July 2003 and was conducted as part of the Northern Ireland Social Omnibus Survey. The survey is based on a representative sample of 1000 adults (aged 18+).

Public awareness of the Northern Ireland Ombudsman was found to be very high at 86%, with awareness levels higher among the better educated and the higher social classes. However, set against this finding is the finding that a significant proportion of respondents (41%) reported that they did not know how to go about making a complaint against either a government department or public body in Northern Ireland, with 30% reporting that in such a situation they would go directly to the government department or public body concerned. Just 7% said that they would go directly to the Ombudsman, with a further 11% going directly to a political representative. In terms of the actual role of the organisation, the majority (57%) of all respondents reported that they knew what the role of the organisation is. Television was found to be the most common source of awareness of the organisation.

The majority of respondents (59%) in the survey perceived the Northern Ireland Ombudsman to be independent of government, with 27% of the view that the organisation is part of government. In availing of the services of the Ombudsman, the majority of those who were aware of the organisation reported to be aware that the public body/government department which you complain of should be afforded a reasonable opportunity to address the grievance before complaining to the Ombudsman (69%), with 61% aware that the initial approach should be made in writing. However, just 26% knew that if the complaint is against a government department, the Ombudsman should be contacted via an MLA (Member of Legislative Assembly) or MP (Member of Parliament) during the suspension of the Assembly.

Just 9% of respondents had ever made a complaint against a public body, health or social services organisation or government department, with approximately a third (35%) of these complaints being made in the last 12 months. The survey further revealed that the majority (53%) of those who had taken a complaint against such organisations, were dissatisfied with how the organisation handled the complaint, with the main reasons for dissatisfaction being that nothing had been done as a result of the complaint and being given the 'round around'.

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*Public Knowledge and Awareness of the NI Ombudsman (2003)*

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Among those who had made a complaint, less than a fifth (17%) had approached the Ombudsman, with equal numbers (47%) being satisfied and dissatisfied with how the Ombudsman handled their complaint.

Almost a quarter of all respondents in the survey (24%) indicated that they had at one time considered making a complaint against a government department, health services organisation or other public body. The main reason cited for not pursuing a complaint was that they felt that it wouldn't do any good, with others saying that they felt that the complaint was not important enough or that they could not be bothered. Indeed across the whole sample, the majority (72%) of respondents were of the view that it would be difficult to make a complaint against a government department, health services organisation or other public body.

Approximately a third (31%) of respondents rated the quality of services provided by government departments, health services organisations or other public bodies as excellent or good, with 22% rating the quality as poor or very poor. In terms of perceived change in service standards in recent years, 22% felt that standards in government departments, health services organisations or other public bodies had improved, with 37% saying that they had remained the same, and 39% of the view that service standards had got worse. Finally, 37% of respondents felt that people in Northern Ireland would be likely to make a complaint in cases where service standards in public organisations were poor, with the majority (59%) of the view that people would be unlikely to make a complaint.



# Deloitte Review Part 2

OFFICE OF THE FIRST MINISTER AND DEPUTY  
FIRST MINISTER

REVIEW OF THE OFFICES OF THE ASSEMBLY  
OMBUDSMAN FOR NORTHERN IRELAND AND THE  
NORTHERN IRELAND COMMISSIONER FOR  
COMPLAINTS

PART 2 REPORT – THE OMBUDSMAN'S  
REMUNERATION

FINAL REPORT

March 2004

Deloitte MCS Limited  
19 Bedford Street  
Belfast BT2 7EJ  
Northern Ireland

# Deloitte.

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## APPENDIX:

- I Salary Arrangements in Other Public Service Posts

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## 1. INTRODUCTION

### 1.1 Introduction

This report concludes Part 2 of a review commissioned by the Office of the First Minister and Deputy First Minister (OFMDFM) of the Offices of the Assembly Ombudsman for Northern Ireland (AO) and the Northern Ireland Commissioner for Complaints (CC). Throughout this document and for ease of reference we refer to the post-holder as ‘the Ombudsman’ and to the Offices as ‘the Office’.

In our separate report on Part 1 of the review, we have proposed future arrangements for the Ombudsman and taken account of the views of and needs of customers, staff and their trade unions and other stakeholders to:

- ensure that proper structures are put in place so that the Office can deliver its work effectively and in a coordinated way; and
- provide a strong focus on improving future performance.

This report deals with the future arrangements for the Ombudsman’s remuneration.

### 1.2 Terms of Reference

The current salary arrangements for the Ombudsman are linked to those of the Senior Civil Service. OFMDFM, in response to a request from the Assembly Ombudsman, undertook to review these arrangements. We were required to consider and make recommendations on the future salary arrangements for determining the remuneration of the Ombudsman in light of the findings of our report on Part 1.

### 1.3 Our Approach

Our recommendations on the future salary arrangements for the Ombudsman are derived from the following:

- review of the Ombudsman’s current salary arrangements and relevant public policy guidance;
- comparative analysis of salary arrangements for other Ombudsmen and analogous Northern Ireland public service positions;
- review of the impact of workload, staffing and resource implications arising from the recommendations of Part 1 of this Review;
- assessment of constraints including affordability, comparability and measurability issues;
- review and evaluation of options for the future salary arrangements of the Ombudsman.

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## 2. CONCLUSIONS AND RECOMMENDATIONS

### Status of the Ombudsman's Office (3.4)

The comparability of the Office of the Ombudsman to the status of Permanent Secretary and the Comptroller and Auditor General continued from 1969 until it was replaced in 1988 with a linkage to the Civil Service Grade 3 and latterly to the Senior Civil Service grade of Deputy Secretary.

### Job Evaluation in the SCS (4.4)

The office of Ombudsman has never been evaluated under JESP and it would not be possible to do so on the information presently available. We would also question the validity of applying this method of evaluation for the SCS to the quasi-judicial and independent office of Ombudsman. There are other evaluation methods that are more appropriate to such posts.

### Salary Linkage to the SCS (4.5)

The Ombudsman's present salary linkage to the SCS is inappropriate.

### Comparison of Workload (5.2/5.3)

The workload, budget responsibility and management task of the Northern Ireland Ombudsman are significantly less than that of the C&AG for Northern Ireland and other Ombudsmen in the British Isles, with the exception of Wales.

### Ombudsman's Salary Relative to Other Public Service Posts (5.4 and Appendix I)

We conclude that:

- with the exception of Scotland, all other Ombudsmen in the British Isles have a salary link to judicial offices and their salaries are higher than that of the Northern Ireland Ombudsman;
- the salary of the Scottish Ombudsman is significantly out of line and is under discussion at present;
- the salary of the Northern Ireland Ombudsman's is currently between the PTR and HPTR points on the Northern Ireland Deputy Secretary Payband and within the pay range of Northern Ireland Permanent Secretaries;
- the Northern Ireland Ombudsman's present salary is less than that of the C&AG for Northern Ireland;
- the Northern Ireland Ombudsman's salary is similar to the Judicial Group 6.2 salary.

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### Judicial Independence (6.2)

The rationale for a link to judicial salaries flows from the quasi-judicial nature of the work of an Ombudsman, the need to ensure that the independence of the post is not compromised and the availability of an independent pay review mechanism.

A link to a judicial salary group could be an appropriate mechanism for determining the salary of the Northern Ireland Ombudsman in future.

### The Ombudsman and a Judicial Salary Group (6.3)

In determining an appropriate linkage to a judicial salary group one option would be for OFMDFM to invite the Review Body on Senior Salaries to evaluate the post under its established criteria and advise on an appropriate linkage given its detailed knowledge of the judicial group structure.

There is however an existing hierarchy of Ombudsmen with salary linkages to judicial salary groups. The Northern Ireland Ombudsman's present salary is in line with a Judicial Group 6.2 salary and this could be justified on the workload comparison with other Ombudsmen.

The Local Government Ombudsman for Wales, who is linked to Judicial Group 6.1, could be an appropriate benchmark for the Northern Ireland Ombudsman when imminent changes to the latter's jurisdiction are in place.

In the medium term we consider that a link to an appropriate judicial salary group would be a more defensible basis for determining the Northern Ireland Ombudsman's salary. It would also cap the salary for the office at a spot rate and maintain relativity with the C&AG and other Ombudsmen.

The decision on the future pay arrangements for the present office-holder will be a matter for resolution between OFMDFM and the present Ombudsman. We would however draw attention to the probability that the Ombudsman's present linkage to the SCS would enable the salary for the office to increase over time close to the Judicial Group 5 salary. This would narrow the relativity with the C&AG and place the Northern Ireland Ombudsman in a higher salary group than the Local Government Ombudsmen in England & Wales, a position not supported by workload comparisons.

### Further Measures (6.4)

The Ombudsman's salary should be a matter for resolution by the Assembly and the Assembly should be prohibited from reducing the Ombudsman's salary.

Advice to the Assembly on the determination of the Ombudsman's salary should come from the Central Personnel Group of the Department of Finance & Personnel, which also advises on the salary of the C&AG.

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## 3. BACKGROUND

### 3.1 The Office of the Ombudsman

The statutory offices constituted under the Ombudsman (Northern Ireland) Order 1996 and the Commissioner for Complaints (Northern Ireland) Order 1996, as amended, fulfil the same function. Both offices were established in 1969 as separate bodies but since the early 1970s the same office-holder has held both posts simultaneously.

The Ombudsman is appointed by Royal Warrant and is wholly independent of Government. He reports annually to the Northern Ireland Assembly on the work of the Office and also has authority to make additional reports in respect of any matter, which is of concern to him. The Ombudsman is an Officer of the Assembly.

### 3.2 The Ombudsman's Role

The role of the Ombudsman is of a quasi-judicial nature. Essentially it is:

- to investigate and report on complaints from members of the public who allege that they have suffered injustice as a result of maladministration by a Northern Ireland Government Department or a Cross Border Implementation Body or a public body and since 1997, the actions of Health Service professional staff were brought within the Ombudsman's remit;
- where he considers it appropriate, to seek to effect a settlement, or to state in his report what he considers as a suitable remedy in the event of his finding maladministration.

### 3.3 Statutory Provisions on the Ombudsman's Salary

The current legislative provisions<sup>1</sup> for each office state –

*"There shall be paid to the holder of the office .... such salary as the Department may by order determine".*

The relevant Department is OFMDFM. The Ombudsman's salary is a charge on the Northern Ireland Consolidated Fund.

### 3.4 Status of the Ombudsman's Office

The Central Personnel Group of the Department of Finance & Personnel (DFP) assisted us with the research on the status of the Ombudsman's Office.

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The early policy intention was quite clear. In his Second Reading speech on the Parliamentary Commissioner for Administration Bill on 23 April 1969 the Minister said:

*"...Clauses 1 and 2 provide that the Commissioner is to be appointed by the Governor, that he is to hold office during good behaviour and that his salary – which is to be the same as that of a Permanent Secretary – and superannuation shall be payable out of the NI Consolidated Fund".*

Later in 1969 during the Second Reading of the Commissioner for Complaints Bill in 1969 the Minister said<sup>ii</sup>

*"May I also make clear that we envisage the two posts<sup>iii</sup> as being posts of equal status, commanding the salary of a Northern Ireland Permanent Secretary, that is £6550."*

The Notes on Clauses to the Parliamentary Commissioner for Administration Bill also state:

*"This is the current rate of salary for Permanent Secretaries of departments (other than the Permanent Secretary of the Ministry of Finance) and for the Comptroller and Auditor-General".*

In December 1987 the then recently appointed Ombudsman queried with DFP why the salary for his office had not kept pace with recent variations in the salaries of Permanent Secretaries (there had been a recent restructuring exercise). DFP corresponded with HM Treasury (HMT) during 1988 and argued that whilst the 1969 legislation did not set a statutory pay linkage, subsequent practice had been to adjust the Ombudsman's salary to enable him to maintain the same level of remuneration as a Permanent Secretary. This represented a clear policy line and there was no evidence for breaking the link. It appeared to be the view of DFP officials that to some extent the grading and salary of the office of Ombudsman should reflect the status of the office rather than the application of straightforward civil service grading criteria.

HMT responded firmly that the status of the post rested in the appointment – not the salary or grade and stated that the Ministerial statement had no legal standing in itself and simply recorded the position at that time. It was also considered that there would be no breach of contract issue either. A key HMT principle was that the salary should be no more than the appropriate rate for the job. A personal to holder arrangement was proposed by HMT and accepted by DFP and the Ombudsman and it was agreed that the Ombudsman's future salary would move exactly with the top discretionary point of the Civil Service Grade 3 scale, again on a personal to holder basis.

In 1996 the newly appointed Ombudsman was informed that the salary for the office had been previously linked to the salary of a Civil Service Grade 3. With the introduction of new Senior Civil Service arrangements from 1 April 1996 a personal to holder salary arrangement was agreed with the office-holder whereby he would receive an annual increase of 5 per cent per annum.



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In late 1999<sup>iv</sup> the post was publicly advertised for the first time and was described in the following terms –

*“The person appointed must be seen as impartial and will require excellent intellectual, judgemental and decision-making skills. He/she will have the ability to act under the pressure of a heavy throughput of detailed casework and must have a customer-focused approach to the service provided. Good organisational and managerial skills are important, together with the ability to negotiate and network with organisations and individuals. Public and international relations also form a significant part of the work.*

*The office-holder must be able to maintain the confidence of the public and Parliament (or following devolution, the Assembly) and the respect of bodies within the Ombudsman’s jurisdiction. An understanding of the workings of Government is desirable as is previous knowledge of the National Health Service.”*

The post was advertised with a salary in the range £60,000-90,000, in effect at Northern Ireland Deputy Secretary level although this was not explicit in the recruitment papers – the outgoing post-holder was paid £84,483. The salary was based on the then Senior Civil Service (SCS) Payband 4, which from 1 April 2000 was £57,367-95,625.

In conclusion therefore the research shows that the comparability of the Office of the Ombudsman to the status of Permanent Secretary and the Comptroller and Auditor General continued from 1969 until it was replaced in 1988 with a linkage to the Civil Service Grade 3 and latterly to the Senior Civil Service grade of Deputy Secretary.

### 3.5 The Ombudsman’s Present Salary and Determination

The present Ombudsman’s salary on commencement in September 2000 was £92,000. In determining a salary increase each year OFMDFM has applied the average pay increase for the SCS. Both parties have accepted this as an interim arrangement pending a formal review. The Ombudsman’s salary has increased as shown in Table 3.1.

Table 3.1  
Ombudsman’s Salary September 2000 to Date

	£
1 September 2000	92,000
1 April 2001	96,416
1 April 2002	100,755
1 April 2003 <sup>v</sup>	106,196

In addition the post-holder receives a travel allowance<sup>vi</sup>, currently £10,000 per annum. The allowance, approved by OFMDFM<sup>vii</sup>, is personal to the present post-holder and is payable for four years from the date of his appointment.



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## 4. PAY DETERMINATION IN THE SENIOR CIVIL SERVICE

### 4.1 Pay in the SCS

The Review Body on Senior Salaries (SSRB) provides independent advice to Ministers on the remuneration of holders of judicial office, senior civil servants, senior officers of the armed forces and other specified public sector posts<sup>viii</sup>.

In relation to the SCS the SSRB recommends annually on the uplift for the overall pay structure and also in contributing to ensuring the fair and effective operation of the structure by monitoring its processes and outcomes.

The arrangements for the pay of the SCS were revised with effect from 1 April 2002. For Deputy and Assistant Secretaries (Grades 3 and 5 respectively) the main features of the new arrangements saw a move from six to two paybands and the introduction of a new performance management system where staff are assessed in relation to each other. SCS members are allocated to one of three tranches as a result of the relative assessment and these are further divided into zones for the purpose of determining the annual pay increase for individuals.

The new system also provides for the payment of non-consolidated bonuses separate from the annual pay award and related to the achievement of short-term priority objectives.

### 4.2 Deputy Secretaries

Since April 2002 posts at Deputy Secretary level are placed in SCS Payband 2. Present pay rates are shown in Table 4.1.

Table 4.1  
SCS Payband 2 (1 April 2003)

	£
Minimum	72,316 (the minimum pay level for staff in Payband 2)+
Progression Target Rate (PTR)	97,470 (the effective maximum for most staff)
Higher Progression Target Rate (HPTR)	116,335 (only performers in the top 25% each year can progress beyond the PTR)
Recruitment and Performance Ceiling (RPC)	151,969 (the band maximum)

### 4.3 Permanent Secretaries

Since April 2002 the pay of Permanent Secretaries in Northern Ireland is also determined in a similar fashion. The current Payband is shown in Table 4.2.

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Table 4.2  
Permanent Secretaries – Payband (1 April 2003)

	£
Minimum	87,407
PTR	126,816
HPTR	148,825
RPC	188,651

### 4.4 Job Evaluation in the SCS

Job Evaluation in the SCS is conducted through JESP (Job Evaluation of Senior Posts) and is a measure of the size and weight of a job. The evaluation of a post requires an accurate and verified job description, scoring by a trained analyst and the consideration of the proposed score by an evaluation panel. There is an appeal process for the post-holder if there is a dispute on the proposed score.

The five factors considered in a JESP evaluation of a post are Managing People, Accountability, Judgement, Influencing and, where appropriate, Professional Competence. Scores for each of the first four factors range from 0-7 and for the latter, 0-3. JESP provides guidance on the factor levels.

The grade of Deputy Secretary (Grade 3), the current analogue for the Ombudsman, is in the JESP score range 13-18. The office of Ombudsman has never been evaluated under JESP and it would not be possible to do so on the information presently available. We would also question the validity of applying this method of evaluation for the SCS to the quasi-judicial and independent office of Ombudsman. There are other evaluation methods that are more appropriate to such posts and we return to this later – see Section 6.1.

### 4.5 Salary Linkage to the SCS

If the present method of pay determination for the Ombudsman (using the average pay increase for the SCS) is retained the probability is that the salary for the office could move up Payband 2 each year to the HPTR level, currently £116,335, or higher. In such circumstances the Ombudsman's salary would equate to the highest performing Deputy Secretaries in the SCS, but without the application of the appraisal and performance measurement processes.

The basis for pay decisions in the SCS relate to job evaluation and performance appraisal. The mechanisms for determining actual pay for each person and whether or not a non-consolidated bonus should be paid involve line managers and a structure of regulatory pay committees.

We believe that such an approach is not relevant to the independent office of Ombudsman. Our conclusion is that the Ombudsman's present salary linkage to the SCS is inappropriate.

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## 5. SALARIES IN OTHER PUBLIC SERVICE POSTS

### 5.1 Other Ombudsmen in the British Isles

The **Parliamentary Ombudsman (who also holds the post of Health Service Commissioner)** is paid as a High Court Judge (Judicial Group 4). This is agreed by the parties concerned as satisfying the statutory requirement in section 6 of the Parliamentary & Other Pensions and Salaries Act 1976 that the salary of the office-holder should be *“the same salary as if he were employed in the civil service as a Permanent Secretary”*.

The **Chairman of the Local Government Commission** is remunerated as a High Court Judge (Judicial Group 4) and the **Local Government Ombudsmen** are on the Circuit Judge level (Judicial Group 6.1) and this is specified in their terms and conditions of employment.

The **Irish Ombudsman’s** salary is that of High Court Judge and is specified as such in section 3 of the Ombudsman Act 1980.

The remuneration of the **Scottish Public Services Ombudsman and her deputies** is determined by the Scottish Parliamentary Corporation as provided by section 1 of, and Schedule 1 paragraph 7 to, the Scottish Public Services Act 2002. There is neither specific linkage to a judicial salary nor reference to a senior civil service salary and the amounts are determined in their terms and conditions of employment. The relatively low level of remuneration (£72,000) for the Ombudsman and her deputies, who work part-time (£25,000 pro-rata an annual salary of £50,000) is currently under discussion.

The **Local Government Ombudsman for Wales** is paid the rate of a Circuit Judge (Judicial Group 6.1) and this is specified in his terms and conditions of employment. It is anticipated that a similar arrangement will apply to the new office of Public Services Ombudsman for Wales.

### 5.2 Comparison of Workload

In reviewing comparative workloads we are conscious that such a comparison can only be of broad interest given the different scale, jurisdiction and complaints processing models utilised by the various organisations. We have assumed that the recommendations in our Part 1 Report will be accepted and that in general they will not add significantly to the Ombudsman’s caseload, budget responsibility or staff numbers in the short to medium term.

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Our research is summarised in the Table 5.1.

Table 5.1  
Comparison of Workload etc of Public Service Ombudsmen – 2002/03

Ombudsmen	Number of Enquiries	Number of Formal Complaints Received	Annual Budget	Staff Numbers wte
Local Government – England	15,000	17,610	11.67	209.3
Parliamentary Ombudsman – England	14,381	2,015	6.45	79.5
Health Service Commissioner – England	102	3,999	8.87	58
Republic of Ireland	8,501	3,209	€2.2	31.5
Local Government – Wales	941	931	1.04	17.1
Northern Ireland	2,658	663	1.04	20

Information on Scotland is not available in this form.

Source: British and Irish Ombudsman Association

We conclude from this information that the workload, budget responsibility and management task of the Northern Ireland Ombudsman are significantly less than that of other Ombudsmen in the British Isles, with the exception of Wales.

### 5.3 The Comptroller and Auditor General for Northern Ireland

The Northern Ireland Comptroller & Auditor General's (C&AG) salary and pension are provided for in Article 4 of the Audit (Northern Ireland) Order 1987 and are a charge on the Northern Ireland Consolidated Fund -

*"There shall be paid to the holder of the office of Comptroller and Auditor General such salary, not exceeding the maximum salary for the time being payable to any person in the civil service of Northern Ireland, as may from time to time be determined by or in pursuance of a resolution of the Assembly, ....."*

The Assembly is unable to reduce the salary payable to the C&AG – section 65(6) of the Northern Ireland Act 1998.

The Assembly Audit Committee (or in its absence the Public Accounts Commission at Westminster) approves the C&AG's salary in consultation with the Department of Finance & Personnel (a function performed by the Central Personnel Group). The benchmarks are the Northern Ireland Permanent Secretary scale and the Judicial Salary Group 5<sup>ix</sup> (the C&AG at Westminster is linked to Judicial Salary Group 4). The C&AG's salary from 1 April 2003 is estimated at £119,000.<sup>x</sup>

The Northern Ireland Audit Office has 150 staff, a budget of £7 million and audits accounts in all public bodies in Northern Ireland. It has close and regular contact with the Assembly's Public Accounts Committee (or in its absence the Westminster Committee). We consider that the C&AG's responsibilities are of greater weight than those of the Northern Ireland Ombudsman.

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### 5.4 Ombudsman's Salary Relative to Other Public Service Posts

Our research on the relativity of the Northern Ireland Ombudsman's salary to other public sector posts in the British Isles is summarised in Appendix I. The main conclusions to be drawn are:

- with the exception of Scotland, all other Ombudsmen in the British Isles have a salary link to judicial offices and their salaries are higher than that of the Northern Ireland Ombudsman;
- the salary of the Scottish Ombudsman is significantly out of line and is under discussion at present;
- the salary of the Northern Ireland Ombudsman is currently between the PTR and HPTR points on the Northern Ireland Deputy Secretary Payband and within the pay range of Northern Ireland Permanent Secretaries;
- the Northern Ireland Ombudsman's present salary is less than that of the C&AG for Northern Ireland;
- the Northern Ireland Ombudsman's salary is similar to the Judicial Group 6.2 salary.



## **6. A LINK TO JUDICIAL SALARIES**

### **6.1 Judicial Salaries**

The Review Body on Senior Salaries (SSRB) has devised the present nine salary groups for members of the judiciary. Each member of a salary group is paid the same spot rate. The SSRB is required to maintain a broad link with the salaries of the SCS and senior members of the armed forces. It is normal for Government to accept and implement the Body's recommendations on judicial salaries.

The SSRB carried out a fundamental review of judicial salaries and relativities in 2002 when PriceWaterhouseCoopers evaluated all posts and the present judicial group structure was confirmed by SSRB and accepted by Government.

### **6.2 Judicial Independence**

Tenure, remuneration and conditions of service are of considerable importance to judicial independence. If judges are not confident that their positions are secure and that pay will be determined on a fair basis according to objective considerations, then there is a danger of them being open to influence by the executive.<sup>xi</sup>

Apart from Scotland, where a review is likely, the salaries of other Ombudsmen in the British Isles are linked to judicial salary groups. The rationale flows from the quasi-judicial nature of the work of an Ombudsman, the need to ensure that the independence of the post is not compromised and the availability of an independent pay review mechanism.

Our research suggests that a link to a judicial salary group could be an appropriate mechanism for determining the salary of the Northern Ireland Ombudsman in future.

### **6.3 The Ombudsman and a Judicial Salary Group**

If the principle of a linkage to a judicial salary group were accepted then the question arises as to which particular group would be appropriate for the Northern Ireland Ombudsman. One option would be for OFMDFM to invite the SSRB to evaluate the post under its established criteria and advise on an appropriate linkage given its detailed knowledge of the judicial group structure.

We have already demonstrated however that there is a hierarchy of Ombudsmen with salary linkages to Judicial Groups 4 and 6.1. We note that the Ombudsman's present salary at 1 April 2003 is in line with a Judicial Group 6.2 salary and we believe such a link could be justified on the workload comparison with other Ombudsmen (see 5.2).

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We recommend in our Part 1 Report a rationalisation of the work of the Ombudsman and suggest additions to the present jurisdiction. When the imminent changes are implemented (ie the inclusion of registered housing associations and the Assembly Standards Commissioner role) we believe that the Local Government Ombudsman for Wales, who is linked to Judicial Group 6.1, could be an appropriate benchmark for the Northern Ireland Ombudsman. This would put the Northern Ireland Ombudsman's office in the same judicial group as County Court Judges and the Presidents of the main Tribunals in Northern Ireland.

In the medium term we consider that an appropriate linkage to a judicial salary group would be a more defensible basis for determining the Northern Ireland Ombudsman's salary. It would also cap the salary for the office at a spot rate and maintain relativity with the C&AG and other Ombudsmen.

The decision on the future pay arrangements for the present office-holder will be a matter for resolution between OFMDFM and the present Ombudsman. We would however draw attention to the probability that the Ombudsman's present linkage to the SCS would enable the salary for the office to increase over time close to the Judicial Group 5 salary. This would narrow the relativity with the C&AG and place the Northern Ireland Ombudsman in a higher salary group than the Local Government Ombudsmen in England and Wales, a position not supported by workload comparisons.

### 6.4 Further Measures

We recommend in our Part 1 Report a number of measures on the independence and accountability of the post of Ombudsman. In relation to salary we conclude that this should be a matter for resolution by the Assembly (or in its absence the UK Parliament) and that the Assembly should be prohibited from reducing the Ombudsman's salary.

We also believe that any advice to the Assembly on the determination of the Ombudsman's salary should come from the Central Personnel Group of the Department of Finance & Personnel, which also advises on the salary of the C&AG. This would ensure a common approach on matters of public pay policy.

**APPENDIX I**  
**SALARY ARRANGEMENTS**  
**IN OTHER PUBLIC SERVICE POSTS**



## Salary Arrangements in Other Public Service Posts

Judicial Salary <sup>ii</sup>	Northern Ireland Judicial Post/ Judicial Group	Northern Ireland Permanent Secretary 1/4/03 <sup>iii</sup>	Northern Ireland Deputy Secretary 1/4/03	Ombudsmen 1/4/03	Comptroller And Auditor General 1/4/03
£		£	£	£	£
181,176	Lord Chief Justice – Group 1.1	RPC 188,651	+		
166,394	Lord Justice of Appeal – Group 3		RPC 151,969		
147,198	High Court Judge – Group 4	HPTR 148,825  PTR 126,816		Linked to High Court Judge PCA/HSC, London Chairman of Local Government Commission, London Irish Ombudsman	Linked to High Court Judge  C&AG, London
119,160	Recorder of Belfast <sup>iii</sup> Northern Ireland Chief Social Security Commissioner Group 5		HPTR 116,335		Linked to Northern Ireland Perm Sect C&AG Northern Ireland 119,000
110,362	County Court Judges <sup>iv</sup> President Northern Ireland Industrial Tribunals & Fair Employment Tribunals President Northern Ireland Appeals Tribunals President Lands Tribunal Group 6.1		PTR 97,470	Linked to County Court (Circuit) Judge  Local Government Ombudsmen, England  Ombudsman Wales	
106,195	Member, Lands Tribunal Vice President. Industrial Tribunals & Fair Employment Tribunals Group 6.2			Linked to Northern Ireland Deputy Secretary  Northern Ireland Ombudsman 106,196	
88,546	Resident Magistrates District Judges Supreme Court Masters Chairman - Industrial Tribunals & Fair Employment Tribunals Group 7	Minimum 87,407			
			Minimum 72,316	Scottish Public Services Ombudsman £72,000 Deputy Ombudsman, Scotland – £25,000 (i.e. pro-rata £50,000 per annum)	

<sup>i</sup> Article 5 of The Ombudsman (Northern Ireland) Order 1996 and Article 4 of The Commissioner for Complaints (Northern Ireland) Order 1996

<sup>ii</sup> House of Commons Hansard, Col. 391

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<sup>iii</sup> The Parliamentary Commissioner for Administration and the Northern Ireland Commissioner for Complaints

<sup>iv</sup> Public Advertisement for the post issued by Central Secretariat in September 1999

<sup>v</sup> SR (NI) 2003 No. 382

<sup>vi</sup> See Note 2D in The Ombudsman's Resource Accounts for Year Ended 31 March 2003

<sup>vii</sup> The allowance was approved by OFMDFM in Terry Smyth's letter of 31 July 2000 to The Ombudsman

<sup>viii</sup> For terms of reference see the Foreword to the 25<sup>th</sup> Report of the Review Body on Senior Salaries Cm 5718

<sup>ix</sup> See Assembly Audit Committee – meeting 22 September 2000

<sup>x</sup> The C&AG's last reported salary is £105,893 at 1 April 2001 – an increase for two years is under consideration and the estimated salary at 1 April 2003 is £119,000

<sup>xi</sup> Review of the Criminal Justice System in Northern Ireland – paragraph 6.135

<sup>xii</sup> 25<sup>th</sup> Report of the Review Body on Senior Salaries Cm 5718

<sup>xiii</sup> Information on SCS salaries provided by Central Personnel Group, DFP

<sup>xiv</sup> The Recorder of Belfast has a salary lead of 8% to reflect his position as Presiding Officer of the County Court

<sup>xv</sup> Existing County Court Judges in Northern Ireland are paid at Group 5 rate as long as they are required to carry out significantly different work from their counterparts elsewhere in the United Kingdom – this refers mainly to the arrangements for the trial of those charged with scheduled (or terrorist) offences

# Law Commission Public Services Ombudsmen Summary of Consultation Paper No 196



**Law  
Commission**  
Reforming the law

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## **Public Services Ombudsmen Summary of Consultation Paper No 196**

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02 September 2010

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## **PUBLIC SERVICES OMBUDSMEN SUMMARY OF CONSULTATION PAPER**

### **INTRODUCTION**

- 1.1 This summary sets out the main points made in our consultation paper on the public services ombudsmen.<sup>1</sup> It includes all of our consultation questions and provisional proposals, with cross-references to the appropriate paragraphs of the consultation paper.

### **SCOPE OF THIS CONSULTATION PAPER**

- 1.2 The term ombudsman has come to be applied to a large number of bodies. These range from those bodies that an observer would naturally consider to be ombudsmen, to others where the application of the term may be less appropriate. We suggest that there are four key features of ombudsmen which, taken together, help differentiate them from other mechanisms for dispute resolution.
- 1.3 First, the ombudsman process is *investigatory*. This, to us, is key to understanding ombudsmen. Their investigatory process allows for different practices to be put in place than those available to the courts.
- 1.4 Second, ombudsmen are *independent*. Ombudsmen need to be seen as independent arbiters of the complaints put to them. They should not be seen as beholden to the bodies over which they have jurisdiction.
- 1.5 Third, ombudsmen make *recommendations*. An ombudsman's report, or similar publication, does not have the force of law and does not coerce, at least in a strict legal sense, the body complained of into a particular course of action. This is not to say that the ombudsman approach is ineffective.
- 1.6 Fourth, and this is specific to ombudsmen investigating the activities of public bodies, the focus of an ombudsman's investigation is on *administrative processes*, the maladministration of which may have led to an individual suffering injustice.

### **The public services ombudsmen**

- 1.7 Our consultation paper focuses on what we have termed the public services ombudsmen. This follows from our original focus on remedies from public bodies in our administrative redress project, of which this is the last remaining part.

<sup>1</sup> Public Services Ombudsmen (2010) Law Commission Consultation Paper No 196 (hereafter CP 196).

1.8 To us, the appropriate bodies to fall within the category of public services ombudsmen are:

- (1) the Parliamentary Commissioner for Administration (the Parliamentary Commissioner);
- (2) the Commissioners for Local Administration (the Local Government Ombudsman);
- (3) the Health Service Commissioners (the Health Service Ombudsman);
- (4) the Public Services Ombudsman for Wales; and
- (5) the Independent Housing Ombudsman Scheme (the Housing Ombudsman).

#### **Further considerations**

- 1.9 There were three further considerations which limited the general scope of the project.
- 1.10 We decided against considering fundamental changes to the institutional design or identity of the public services ombudsmen. Our consultation paper focuses instead on establishing what is at the core of the public services ombudsmen in our jurisdiction and what beneficial reforms could be made within that existing framework.
- 1.11 We can only recommend changes to the law of England and Wales. The Parliamentary Commissioner is a UK body. It follows that in relation to Scotland and Northern Ireland, such provisional proposals as we make in our consultation paper form a commentary, to be taken up if so desired by those who have responsibility for those jurisdictions.
- 1.12 Finally, increasingly intricate relationships are developing between the public services ombudsmen and elected bodies, specifically Parliament and the National Assembly for Wales. This is an area where we need to draw clear lines as to our responsibility. It is our role to propose reform of the law. How Parliament and the National Assembly would choose to administer a statutory function is, constitutionally, a matter for them.

#### **THE STRUCTURE OF THE CONSULTATION PAPER**

- 1.13 Our consultation paper is divided into eight Parts and one Appendix.
  - (1) Part 1 introduces the ombudsmen and defines the scope of the project.
  - (2) Part 2 sets out what we see as the core features of the public services ombudsmen.
  - (3) Part 3 considers the regime for appointing the public services ombudsmen.
  - (4) Part 4 focuses on issues relating to the opening of an investigation by the public services ombudsmen.

- (5) Part 5 looks at the procedures available to the public services ombudsmen when conducting an investigation into an individual complaint.
- (6) Part 6 considers the results of investigations and the publication of individual and general reports by the public services ombudsmen.
- (7) Part 7 returns to the relationship that the public services ombudsmen have with elected bodies.
- (8) Part 8 collates the consultation questions asked in proceeding Parts.
- (9) Appendix A contains an impact assessment for our provisional proposals.

#### **FUNCTIONS OF THE PUBLIC SERVICES OMBUDSMEN**

- 1.14 We suggest that there are three primary functions of the public services ombudsmen. Our assessment of these as primary functions informed our choices as to suitable reforms that would improve the current legislative structure for the public services ombudsmen.
- 1.15 First, they *address individual complaints*. This was the reason for the establishment of the ombudsmen and will, rightly, always be at the core of their work. The public services ombudsmen can be viewed as meeting a demand for an independent review where internal mechanisms have not satisfied the parties. This includes bringing to a close unmeritorious claims.
- 1.16 Second, the public services ombudsmen are in a privileged position to *address systemic failures*. Repeat investigations into the behaviour of public bodies allow them to build up a good picture of that behaviour.
- 1.17 Third, the public services ombudsmen are in a position to *disseminate knowledge across governance networks*. This concerns the dissemination of good practice across the administrative landscape, through reporting on performance, setting out codes of practice, or the creation of principles to aid and inform administrative behaviour.

#### **APPOINTMENT OF OMBUDSMEN**

- 1.18 This is an area in which both the Liaison Committee and the Public Administration Select Committee of the House of Commons have been particularly active. We think that the recent development of pre-appointment hearings is a useful adjunct to the role of Parliament in relation to the public services ombudsmen.
- 1.19 It seems to us particularly important that Parliament is the pivotal institution in the appointment of the Parliamentary Commissioner. Our preliminary view is that the current role of Parliament should be strengthened. We do not think that the case for a strengthened role in the appointment of either the Health Service Ombudsman or the Local Government Ombudsman is as strong.

- 1.20 **We provisionally propose that Parliament nominate to the Queen a candidate for the post of Parliamentary Commissioner for Administration.**<sup>2</sup>
- 1.21 It would be for Parliament to adopt such rules and processes as it thinks fit to achieve the ends encapsulated in any legislative change to section 1 of the Parliamentary Commissioner Act 1967.
- 1.22 There are two further matters which we think it worth commenting on, though we do not see it as appropriate to make provisional proposals. The Housing Ombudsman is not on the list of appointments subject to pre-appointment hearings by select committees. This is despite the fact that it performs a function of comparable public importance to many on that list. Furthermore, the relationship which the Public Services Ombudsman for Wales enjoys with the National Assembly for Wales is one of the more legislatively developed among the public services ombudsmen. Where it departs from reforms currently underway in Parliament is in relation to pre-appointment hearings. We draw consultees' attention to this issue solely in order to raise the level of general discussion on what is an important area.

#### **OPENING AN OMBUDSMAN INVESTIGATION**

- 1.23 There are five issues that we considered here.

##### **Statutory bar**

- 1.24 In all of the governing statutes for the public services ombudsmen there are provisions which have the aim of preventing an ombudsman opening a complaint, where the complainant has previously had recourse to another institution for administrative justice. For instance, the relevant provision for the Parliamentary Commissioner is section 5(2)(b) of the Parliamentary Commissioner Act 1967. These are termed the "statutory bars".
- 1.25 In our consultation paper *Administrative Redress: Public Bodies and the Citizen*,<sup>3</sup> we provisionally proposed their reform. Our original proposal required the public services ombudsmen to consider whether it was "in the interests of justice" to open an investigation. However, we now think that if an ombudsman has jurisdiction, then there is, on the face of it, a good argument for opening an investigation. This would, in effect, reverse the current legal presumption in the statutory bars.
- 1.26 **We provisionally propose that the existing statutory bars be reformed. We provisionally propose that there is a general presumption in favour of a public services ombudsman being able to open a complaint.**<sup>4</sup>
- 1.27 **Do consultees agree that there should be a general presumption in favour of the ombudsman being able to investigate a complaint coupled with a broad discretion to decline to open an investigation?**<sup>5</sup>

<sup>2</sup> CP 196, para 3.34.

<sup>3</sup> *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187, paras 5.68 to 5.75.

<sup>4</sup> CP 196, para 4.42.

- 1.28 **Do consultees agree that in deciding whether to exercise their discretion to decline to open an investigation ombudsmen should ask themselves whether the complainant has already had or should have had recourse to a court or tribunal?**<sup>6</sup>

**Stay of proceedings**

- 1.29 In our consultation paper we provisionally proposed a second mechanism to help the overall landscape of administrative justice work in an effective and efficient manner: a dedicated stay in favour of the ombudsmen available to the Administrative Court.
- 1.30 Our initial thinking was based around the idea that an action may come before the Administrative Court, where at the permission stage it can be seen that there is some underlying illegality such as to justify permission for judicial review. However, the true nature of the claim, taken as a whole, is one properly described as maladministration. Giving the Administrative Court a dedicated power to stay the proceedings would allow the core of the matter to be dealt with in the most appropriate way. If, after the ombudsman had considered the matter, it was still felt necessary to deal with the underlying illegality then the stay could be set aside and the claim's illegality tested in court.
- 1.31 Given consultation responses and a period of reflection, we now suggest that the proper relationship would be for a matter to be transferred to an ombudsman from a court.
- 1.32 The initial decision would be made at the permission stage. As any stay and transfer would be of importance to the parties, we suggest that they should have the opportunity to comment on this procedure. This could be dealt with by a suitable amendment to the Civil Procedure Rules or with a Practice Direction.
- 1.33 Subsequent to this, the public services ombudsman would be obliged to open an investigation. The procedure they adopted in doing so would remain theirs. It would, of course, still be possible for an ombudsman subsequently to abandon an investigation – or to resort to a reporting mechanism of a lesser nature than a full report.
- 1.34 **We provisionally propose that there should be a stay and transfer power allowing matters to be transferred from the courts to the public services ombudsmen.**<sup>7</sup>
- 1.35 **Do consultees agree that the court should invite submissions from the original parties before transferring the matter?**<sup>8</sup>
- 1.36 **Do consultees agree that, in the event of such a transfer, the ombudsman should be obliged to open an investigation?**<sup>9</sup>

<sup>5</sup> CP 196, para 4.47.

<sup>6</sup> CP 196, para 4.47.

<sup>7</sup> CP 196, para 4.76.

<sup>8</sup> CP 196, para 4.77.



- 1.37 **Do consultees agree that the ombudsman should also be able to abandon the investigation should it – in their opinion – not disclose maladministration?**<sup>10</sup>

#### **Alternatives to investigation**

- 1.38 We consider a power to use alternative dispute mechanisms to be useful and appropriate, especially considering the expanding role of alternative dispute resolution in other contexts. Though the ombudsmen do have recourse to alternative mechanisms, the powers are drawn differently as between the ombudsmen, with the most specific being that contained in section 3 of the Public Services Ombudsman (Wales) Act 2005. We suggest that all of the regimes would benefit from having specific powers allowing for recourse to such alternative mechanisms as the ombudsman thought appropriate.
- 1.39 **We provisionally propose that the Parliamentary Commissioner, the Local Government Ombudsman and the Health Service Ombudsman be given specific powers to allow them to dispose of complaints in ways other than by conducting an investigation.**<sup>11</sup>

#### **Requirement that a complaint be in writing**

- 1.40 This is important as a requirement for a complaint to be written potentially disenfranchises certain individuals, particularly those who are uncomfortable with writing or whose first language is not English.
- 1.41 The governing statutes contain a variety of approaches to the requirement that a complaint be written. For both the Parliamentary Commissioner and the Health Service Ombudsman, a complaint must be in writing – there is no discretion. The Public Services Ombudsman for Wales has the power to investigate a matter even if the formal requirements are not met, if it thinks it reasonable to do so.
- 1.42 The most flexible of the statutory requirements is that in section 26B of the Local Government Act 1974 which provides a specific discretion to waive the formal requirements for particular complaints. There are no statutory requirements for the Housing Ombudsman.
- 1.43 We suggest that the provisions in the Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993 are unacceptable in modern terms.

<sup>9</sup> CP 196, para 4.78.

<sup>10</sup> CP 196, para 4.79.

<sup>11</sup> CP 196, para 4.85.

- 1.44 **We provisionally propose that a discretionary provision relating to formal requirements, similar to section 26B(3) of the Local Government Act 1974, be inserted into the governing statutes for the Parliamentary Commissioner and the Health Service Ombudsman, excluding the Housing Ombudsman. This would allow them to dispense with the requirement that a complaint be in writing.**<sup>12</sup>

#### **MP filter**

- 1.45 The MP filter is unique to the Parliamentary Commissioner. Section 5 of the Parliamentary Commissioner Act 1967 requires that a complaint should be "duly made to a Member of the House of Commons" who can then refer it to the Parliamentary Commissioner.
- 1.46 There seem to be two possible approaches to reform: outright abolition of the requirement or the "dual track" approach.<sup>13</sup> By dual-track, we mean that individuals would have direct access to the Parliamentary Commissioner. However, it would still be possible for Members of Parliament to forward complaints to the Parliamentary Commissioner where they consider this appropriate.
- 1.47 There does not seem to us to be any valid argument in favour of retaining an exclusionary bar to the opening of an investigation by the Parliamentary Commissioner. However, we remain of the opinion that there is value in maintaining a direct link with individual Members of Parliament.
- 1.48 Therefore, **we provisionally propose that a dual-track approach to reform of the MP filter be adopted by Parliament.**<sup>14</sup>

### **OMBUDSMEN INVESTIGATIONS**

#### **Closed nature of ombudsmen investigations**

- 1.49 One particular feature that we wish to explore is the closed, confidential nature of ongoing ombudsmen investigations. We are aware how important this issue is to the public services ombudsmen. There is an argument that the closed nature of the process protects the ombudsmen's flexibility in choosing their investigatory technique. Also, the closed nature of investigations reduces the risks to the reputation of the public body in cases where the complaint is subsequently found to be unsubstantiated. Finally, it is arguably the case that the closed nature of the process makes it more likely that the public bodies being investigated will share documentation.
- 1.50 There are, however, countervailing public law requirements. We suggest that the default position is that an administrative process is conducted in as open and transparent a manner as possible. This acknowledges that the need for openness

<sup>12</sup> CP 196, para 4.91.

<sup>13</sup> These were considered in our original consultation paper. See *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187, paras 5.76 to 5.88. There we favoured the dual-track approach.

<sup>14</sup> CP 196, para 4.106.

and transparency is not absolute and that there are benefits to certain processes that mitigate against exposing them to public scrutiny in all circumstances.

- 1.51 There is also a significant issue in relation to the Freedom of Information Act 2000. Under their governing statutes, ombudsmen investigations are to be conducted in private. Consequently, such information as relates to the investigation falls within section 44(1) of the Freedom of Information Act 2000, which grants an absolute exemption to disclosure where publication is prohibited by statute. The creation of a more general power to release information during investigations would mean that the public services ombudsmen would lose the absolute exemption available to them.
- 1.52 Our general strategy is to allow the ombudsmen wider powers relating to disclosure, not to impose additional burdens on them. In order to avoid creating additional burdens, we suggest that it may be necessary for there to be specific exemptions from section 1 of the Freedom of Information Act 2000 for investigations by the public services ombudsmen.
- 1.53 Alternatively, all of the public services ombudsmen could be given a similar power to that held by the Public Services Ombudsman for Wales, who can decide that information should not be disclosed if such disclosure would "prejudice the effective conduct of public affairs".<sup>15</sup> This acts as a qualified exemption to the section 1 duty to disclose.
- 1.54 Given the quasi-judicial nature of the work of the ombudsmen, we suggest that of these two options, the creation of new absolute exemptions for information relating to investigations would be more appropriate. The effect of our provisional proposal would therefore be to encourage and allow for transparency during investigations without imposing it.
- 1.55 **We provisionally propose that there should be statutory discretion for the public services ombudsmen to dispense with the requirement that an investigation be conducted in private in situations where they see this as appropriate.**<sup>16</sup>
- 1.56 **Do consultees think that, if such discretion were created, the public services ombudsmen should be protected from additional burdens?**<sup>17</sup>
- 1.57 **If so, would consultees prefer a more general exemption from the duty contained in section 1 of Freedom of Information Act 2000 in relation to investigations, as is currently the case? Alternatively, would consultees prefer a more limited exemption modelled on section 36(5)(ka) of the Freedom of Information Act 2000?**<sup>18</sup>

<sup>15</sup> Freedom of Information Act 2000, s 36(5)(ka).

<sup>16</sup> CP 196, para 5.33.

<sup>17</sup> CP 196, para 5.34.

<sup>18</sup> CP 196, para 5.35.

**Reference on a point of law**

- 1.58 In our consultation paper *Administrative Redress: Public Bodies and the Citizen* we provisionally proposed that the public services ombudsmen be given a power to refer a question to a court on a point of law.<sup>19</sup>
- 1.59 In doing this, we suggested that the ombudsmen should consider the following factors before making a reference. First, the ombudsman must consider that the determination of the particular legal question is necessary for it to make a finding of maladministration. Second, the legal question should only be referred if it is contentious or unresolved. Third, a reference should not be made where it is more appropriate for the whole dispute to be dealt with by a court.<sup>20</sup>
- 1.60 In response to our provisional proposals, certain consultees suggested that though the basic idea was sound, we had not considered the practicalities in sufficient detail. Given the opportunity afforded by the preparation of a second consultation paper, we have been able to develop our mechanism further.
- 1.61 There is a question as to whether a reference needs to be made. We suggest that the public services ombudsmen should be able to seek the opinion of counsel before making a reference to a court on a point of law. There seem to us two ways in which this could be carried out. First, the public services ombudsmen could be given the equivalent of a "QC clause" such as exists in certain insurance agreements. Alternatively, seeking the advice of a QC could be seen as a specific form of arbitration and be governed by the Arbitration Act 1996 and Part 62 of the Civil Procedure Rules. The second option has the significant disadvantage that it would be considerably more costly than the "QC clause" approach and may even cost the same as a reference to a court.
- 1.62 We are aware that the public services ombudsmen, and on occasions the complainant and public body complained against, already seek advice from counsel. Consequently it may be that an imperative to seek counsel's advice before making a reference to the court is not necessary.
- 1.63 In relation to representation, we suggest that there are two options. The ombudsman could instruct a single counsel to put both sides of the question to the court. This has advantages in terms of efficiency and cost. The alternative would be for the ombudsman to instruct two counsel, with each representing different sides of the question. This would suit the adversarial nature of the courts in England and Wales. We also suggest that this would improve the quality of the decision, and be more acceptable to the judiciary. We can see benefits to both options, hence we have asked an open consultation question.
- 1.64 We think that it would be appropriate to allow intervention by interested parties subject to the normal case management powers of the court.
- 1.65 We suggest that costs in relation to instructing counsel either on the basis of a "QC clause" or as an arbitrator should be met by the public services ombudsmen.

<sup>19</sup> *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187, paras 5.43 to 5.46.

<sup>20</sup> *Administrative Redress: Public Bodies and the Citizen* (2008) Law Commission Consultation Paper No 187, para 5.46.

- 1.66 Where a reference is made to a court then those counsel instructed by the public services ombudsmen should be paid for by the public services ombudsmen. Subject to costs orders by the court, where others chose to intervene then they should be responsible for their own costs.
- 1.67 **Before making a reference to a court on a point of law, should there be a requirement that the public services ombudsmen seek either the opinion of or arbitration by an independent counsel?**<sup>21</sup>
- 1.68 **We provisionally propose that the counsel's fees should be met by the public services ombudsmen.**<sup>22</sup>
- 1.69 **We provisionally propose that there should be a mechanism allowing a public services ombudsman to ask a question of the Administrative Court.**<sup>23</sup>
- 1.70 **We provisionally propose that such a reference should not require permission.**<sup>24</sup>
- 1.71 **We provisionally propose that the decision of the Administrative Court on such a matter should be considered a judgment of the Court for the purposes of section 16 of the Senior Courts Act 1981 and, therefore, potentially subject to appeal to the Court of Appeal.**<sup>25</sup>
- 1.72 **We provisionally propose that the public services ombudsmen should notify the complainant and the relevant public bodies of their intention to make a referral on a point of law, invite them to submit their views and/or to intervene before the court should they wish to.**<sup>26</sup>
- 1.73 **We provisionally propose that the final decision whether to refer a question to the court should be solely that for the public services ombudsman.**<sup>27</sup>
- 1.74 **Should the ombudsman routinely instruct one counsel to put both sides of the question or should two opposing counsel be instructed?**<sup>28</sup>
- 1.75 **We provisionally propose that other interested parties may intervene, subject to case management decisions of the court.**<sup>29</sup>

<sup>21</sup> CP 196, para 5.83.

<sup>22</sup> CP 196, para 5.84.

<sup>23</sup> CP 196, para 5.85.

<sup>24</sup> CP 196, para 5.86.

<sup>25</sup> CP 196, para 5.87.

<sup>26</sup> CP 196, para 5.88.

<sup>27</sup> CP 196, para 5.89.

<sup>28</sup> CP 196, para 5.90.

<sup>29</sup> CP 196, para 5.91.

- 1.76 **We provisionally propose that, subject to the use of costs orders for case management purposes, the default position should be all parties or interveners – including the public services ombudsmen – should meet their own costs.**<sup>30</sup>

#### **REPORTING**

- 1.77 Here we consider the final stage of the ombudsman process, reporting the results of an investigation. This includes the communication of a decision not to open an investigation or to abandon an existing one. We also consider wider powers allowing the ombudsmen to issue reports on more general matters, such as principles of good administrative practice.

#### **Types of report**

- 1.78 There is no single approach to reporting across the public services ombudsmen. Whilst all of the statutory regimes, except that for the Housing Ombudsman, allow for issuing different types of report, these are also different and there is no common system of terminology. The most developed, we suggest, is that for the Public Services Ombudsman for Wales.
- 1.79 It is important to have a clear set of rules relating to the type of report issued, or a statement explaining the ombudsman's reasoning if the ombudsman is not opening an investigation. The decisions and reasoning of the public services ombudsmen should be available in an easily accessible manner to those affected by a complaint, interested in the workings of public bodies, or watching the ombudsmen.
- 1.80 Therefore, we suggest that for the Local Government Ombudsman there would be three types of report. The least intrusive approach would be to issue a simple "short-form report". The middle type would be the normal approach, and would be known as a "report". The final type would be reserved for failure by the public body to implement an original report. These would be known as "special reports".
- 1.81 This approach should also be adopted for the Parliamentary Commissioner and the Health Service Ombudsman, with three types of report being available. However, the ability to lay reports before each of the Houses of Parliament should be retained in relation to both "reports" and "special reports".
- 1.82 The position for the Public Services Ombudsman for Wales would remain as is currently the case, with a slight change in terminology. Reports issued under section 21 of the Public Services Ombudsman (Wales) Act 2005 would be recast as "short-form" reports.
- 1.83 In relation to the Housing Ombudsmen, given the specific relationship that the Housing Ombudsman enjoys with social housing providers, it only needs one type of report.
- 1.84 Whilst we suggest that greater transparency has value, we are mindful that this should not supersede the complainant's right to anonymity. Consequently, individual identities should only be revealed with specific consent.

<sup>30</sup> CP 196, para 5.92.



- 1.85 Do consultees agree that adopting a graduated approach to three different types of report, based on that already in place for the Public Services Ombudsman for Wales, would be desirable for each of the public services ombudsmen except the Housing Ombudsman?<sup>31</sup>
- 1.86 Do consultees agree that these should be known as “short-form report”, “report” and “special report”?<sup>32</sup>
- 1.87 We provisionally propose that in order to ensure greater transparency, where the public ombudsmen decline to commence an investigation, or decide to abandon an existing investigation, there should be a statutory requirement to publish a “statement of reasons”, setting out clearly the reasons for their decision.<sup>33</sup>
- 1.88 We provisionally propose that the Housing Ombudsman’s determinations should be recast as reports where they relate to social housing.<sup>34</sup>
- 1.89 We provisionally propose that ombudsmen should routinely ask complainants whether they want to be anonymous.<sup>35</sup>
- 1.90 We provisionally propose that the ombudsmen should not be able to identify a complainant or other individual without their consent.<sup>36</sup>

#### Findings and recommendations

- 1.91 In recent case law, and in academic literature, a distinction has been drawn between the findings and the recommendations of an ombudsman. Findings, here, includes those of fact and whether maladministration or injustice had occurred. Recommendations are the steps suggested to remedy the injustice and, where this is felt necessary, to prevent the same occurring in the future.
- 1.92 We think that the distinction between findings and recommendations is a useful one. Therefore, we provisionally propose that subsequent amendments to the statutes use these terms.
- 1.93 Do consultees agree that the governing statutes should draw a distinction between findings and recommendations and use those terms?<sup>37</sup>
- 1.94 We provisionally propose that there should be a statutory definition for findings. This should include findings of fact and whether there was maladministration and injustice.<sup>38</sup>

<sup>31</sup> CP 196, para 6.82.

<sup>32</sup> CP 196, para 6.83.

<sup>33</sup> CP 196, para 6.84.

<sup>34</sup> CP 196, para 6.85.

<sup>35</sup> CP 196, para 6.86.

<sup>36</sup> CP 196, para 6.86.

<sup>37</sup> CP 196, para 6.89.

<sup>38</sup> CP 196, para 6.90.

### **Status of findings and recommendations**

- 1.95 The statutory regimes which underpin the actions of the ombudsmen are similar in one particular way. They rely on publicity, whether in Parliament, the National Assembly for Wales or local press, as the primary mechanism with which to encourage the implementation of reports. Within the bare statutory schemes, the final weapon available to any of the ombudsmen is not a binding order or a declaration that the public authority had acted in an illegal manner. Rather, it is discussion of their reports in the public sphere.
- 1.96 Recent case law follows this basic principle and effectively leaves courts outside any debate on the merits of recommendations of the Parliamentary Commissioner. In relation to findings, the Government should only reject the Parliamentary Commissioner's findings when it gives "cogent reasons" for doing so.<sup>39</sup>
- 1.97 The position in relation to the Local Government Ombudsman is very different. Here the findings of the Local Government Ombudsman are effectively binding unless successfully challenged by way of judicial review.<sup>40</sup>
- 1.98 The implementation of any recommendation would almost always have an effect on the distribution of public resources. The proper place for such discussions is not in a court or similar body, which would be the ultimate effect of giving them a binding quality. To make recommendations binding would change the nature of the relationship between ombudsmen and those they oversee, removing the proper discussion and the collaborative approach that the original drafters saw as part of the ombudsman process.
- 1.99 Concerning findings, however, we think that the position is slightly different. The finding of maladministration should be, primarily, the role of ombudsmen and a judgment that Parliament has entrusted to them through their governing statutes. This is different from the current situation. The mere necessity to find "cogent reasons" before being able to reject the findings of the ombudsmen does not really protect the core competence of the Parliamentary Commissioner.
- 1.100 The argument put forward in recent case law is that the consideration of findings is located better in terms of the relationship that the Parliamentary Commissioner has with Parliament.<sup>41</sup> However, past practice shows that it is in fact quite likely that the Government will be able to reject the Parliamentary Commissioner's finding of maladministration and that Parliament will be unable to force the Government, which through its majority effectively controls the House of Commons, to accept the ombudsman's view.

<sup>39</sup> *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin), (2009) 159 NLJ 1514.

<sup>40</sup> See: *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114 and *R v Local Commissioner for Administration for the South, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire, ex parte Eastleigh Borough Council* [1988] QB 855.

<sup>41</sup> See: *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114; and, *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin), (2009) 159 NLJ 1514.



- 1.101 We prefer the position in *ex parte Eastleigh*,<sup>42</sup> which concerned the Local Government Ombudsman. This, essentially, protects the ombudsman in relation to findings unless illegality in an administrative law sense can be shown – which would include coming to a conclusion that no rational ombudsman could come to.
- 1.102 In respect of the Housing Ombudsman, Health Service Ombudsman and the Public Services Ombudsman for Wales, there is no governing case law. Therefore, we suggest that the situation in relation to these public services ombudsmen should also be clarified in statutory provisions.
- 1.103 **We provisionally conclude that the proper approach to recommendations is as part of the political process.**<sup>43</sup>
- 1.104 **We provisionally propose that a public body should only be able to reject the findings in a report of a public services ombudsman following the successful judicial review of that report.**<sup>44</sup>

#### Issuing general reports

- 1.105 We think that recent developments, such as publishing general principles and examples of best practice, ought to be encouraged. As we stated above, the public services ombudsmen are in a unique position as an independent redress mechanism with the capacity to produce such material. This is something that a court could not do, nor could individual tribunals.
- 1.106 It is anomalous that some public services ombudsmen's statutes confer a specific power to publish such documents, while others do not. It may be that a specific statutory provision is strictly unnecessary – publication might properly be seen as incidental to an ombudsman's core statutory responsibilities. Nevertheless, we think it would be clearer and more satisfactory if all the statutes had similar provisions.
- 1.107 **Do consultees agree that there should be a specific statutory power for each of the public services ombudsmen to publish guidance, principles of good administration and codes of practice?**<sup>45</sup>

#### RELATIONSHIP WITH ELECTED BODIES

- 1.108 Here we consider the ability of a public services ombudsman to lay reports before an appropriate elected body. It is not our place to make provisional proposals to reform the internal rules for elected bodies.
- 1.109 Following recent changes to the Local Government Act 1974, the current situation is that the Housing Ombudsman is now the only one of our public services ombudsmen that does not have to lay its annual report before an elected body. Given that the work of the Housing Ombudsman is likely to be of interest to

<sup>42</sup> *R v Local Commissioner for Administration for the South, the West Midlands, Leicestershire, Lincolnshire and Cambridgeshire, ex parte Eastleigh Borough Council* [1988] QB 855.

<sup>43</sup> CP 196, para 6.95.

<sup>44</sup> CP 196, para 6.107.

<sup>45</sup> CP 196, para 6.115.

Members in their constituency work – or in general – then we suggest that this is, at best, anomalous.

- 1.110 **We provisionally propose that a duty is placed on the Housing Ombudsman to lay its annual reports before Parliament.**<sup>46</sup>
- 1.111 Even where there is an existing relationship with an elected body, there is no consistency between those public services ombudsmen. The Local Government Ombudsman's relationship with Parliament is of a very different nature to that of the Parliamentary Commissioner and the Health Service Ombudsman.
- 1.112 We accept that there may be valid reasons for this, such as the fact that the Parliamentary Commissioner – in particular – can be seen as a tool of Parliament. However, publicity is at the core of the work of all of the public services ombudsmen. It is undeniable that having access to elected bodies is one of the ways of achieving this. Therefore, we think that the position of the Local Government Ombudsman and the Housing Ombudsman should be strengthened, so as to give them similar access to this valuable resource as enjoyed by the other public services ombudsmen.
- 1.113 **We provisionally propose that the governing statutes for the Local Government Ombudsman and the Housing Ombudsman be amended to allow them to lay the full range of their reports resulting from investigations before Parliament, in a similar manner to the Parliamentary Commissioner or the Health Service Ombudsman.**<sup>47</sup>

<sup>46</sup> CP 196, para 7.33.

<sup>47</sup> CP 196, para 7.36.

#### HOW TO RESPOND

The consultation paper may be found on our website at:

[www.lawcom.gov.uk/ombudsmen.htm](http://www.lawcom.gov.uk/ombudsmen.htm)

The Law Commission would be grateful for comments on our provisional proposals by 3 December 2010.

Comments should be sent either –

**By email to:** [ombudsmen@lawcommission.gsi.gov.uk](mailto:ombudsmen@lawcommission.gsi.gov.uk)

or

**By post to:** Keith Vincent  
Law Commission  
Steel House  
11 Tothill Street  
London SW1H 9LJ  
Tel: 020 3334 0262/ Fax: 020 3334 0201

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