

Ombudsman Northern Ireland



Briefing Note on Evidence to Welsh Assembly – 5 March 2015

1. INTRODUCTION AND PREAMBLE

I am grateful to the Finance Committee of the National Assembly for Wales for this opportunity to comment on the inquiry into the potential legislative changes to strengthen the role of the Public Services Ombudsman for Wales (the Ombudsman). I welcome the proposals to strengthen the Ombudsman's role. That is because ombudsmen play an important role in the Administrative Justice Landscape providing redress for the citizen who suffers injustice and improving public administration through their recommendations and insights. The pillars of Administrative Justice for the citizen in Wales (as in Northern Ireland) comprise the decision making of public bodies (including their complaints handling processes), tribunals, the Ombudsman and the courts. It is interesting to note that the Finance Committee's inquiry spans major elements of this unique justice system (public sector complaints handling, ombudsmen's powers and the links with the courts). The importance of this inquiry therefore for the citizen and for the delivery of public services in Wales should not be underestimated.

As Northern Ireland Ombudsman, I enjoy a strong working relationship with the current Ombudsman, Mr Nick Bennett, and fully support his office in seeking to update the Public Services Ombudsman (Wales) Act 2005. I have enjoyed a similar working relationship with his predecessor, Mr Peter Tyndall (the current Irish Ombudsman and Information Commissioner), and with the Scottish Ombudsman, Mr Jim Martin. The strength of the ombudsmen community through the Ombudsman Association network should not be underestimated. This has enabled me and my staff to work closely and learn from devolved ombudsmen in Scotland and Wales as well as the Parliamentary and Local Government ombudsmen in England. When developing the policy platform for the changes in my own legislation, I was supported by this strong network and, in particular on the issue of an own initiative power, I was informed greatly by Mrs Emily O'Reilly (the former Irish and now European Ombudsman) in her approach to this important investigatory power.

Finally, this inquiry is timely as my own legislation is currently subject to deliberation by the Committee of the Office of the First Minister and Deputy First Minister (OFMDFM) of the Northern Ireland Assembly. My comments on the specific areas to be debated by the Finance Committee make reference to the OFMDFM Committee's deliberations on these issues and I attach a link to these legislative proposals:

<http://www.niassembly.gov.uk/assembly-business/committees/office-of-the-first-minister-and-deputy-first-minister/legislation/northern-ireland-public-services-ombudsman-bill/>.

At present, I await the introduction of a Bill into the Assembly to amend my existing legislation. I hope therefore that the Committee will find my evidence useful in their project to strengthen the Ombudsman's powers. It may be helpful to contextualise my views by explaining my current role and remit.

2. THE ROLE OF THE NORTHERN IRELAND OMBUDSMAN

In my role as Northern Ireland Ombudsman, I hold two statutory offices; Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints. In the former role, I investigate complaints of maladministration about Northern Ireland Departments and their statutory agencies. In the latter role I can investigate complaints of maladministration about local government, health and social care, housing and education. My remit in health permits me to investigate complaints relating to the clinical judgement of health professionals in health and social care trusts, general health service and independent health services providers. In May 2014, I was given powers to investigate complaints about alleged breaches of the Local Government Code of Conduct for Councillors (the Code); and I have power to adjudicate or sanction where the Code has been breached. I have a statutory bar in both pieces of legislation underpinning my Office Article 10(3) of the Ombudsman (NI) Order 1996 and article 9(3) of the Commissioner for Complaints (NI) Act 1996. Currently, I can only investigate a complaint made

to me in writing and I have no power to commence an own initiative investigation.

Since 2009 complaints to my office have been increasing annually. The initial rise in complaints in 2009 was a result of the removal of the middle tier of complaints handling for health and social care (HSC) complaints. As a result of this change, complaints about HSC bodies are made to my office after a one stage complaints procedure. In the first year when this change occurred, there was an increase of 120% in complaints about HSC bodies. This upward trend has continued each year since and last year while complaints to my office increased overall by 31%. That upsurge was driven by a more than 46% increase in health and social care related complaints which include complaints about clinical judgment of health professionals. For the period 2011 to 2014, while complaints overall to my office have increased, complaints about central government departments in particular have decreased. Further, during the same period, I have upheld or partially upheld complaints about public services in Northern Ireland (on average) in 55 % of cases.

3. OWN INITIATIVE POWER

I have invited the OFMDFM Committee of the Assembly to include this power in the new legislation which is currently under development. The proposal for my Office to have this power was first initiated as a result of the independent review of my Offices (the Deloitte Review 2004). That review included an examination of other ombudsmen's jurisdictions internationally such as Canada and New Zealand where the ombudsmen traditionally have been provided with this power. It is interesting that the Irish Ombudsman has enjoyed this power since its inception in 1980 and the European Ombudsman utilises this power to effect administrative improvements.

Having regard to its effectiveness in other jurisdictions, I strongly believe that this will be an important power in the Ombudsman toolkit. I am therefore pleased to record that the OFMDFM Committee has included this proposal in their draft Bill.

It is an important power in circumstances where an individual does not have a voice or cannot complain due to vulnerability or a misgiving as to how they will be treated. I have given evidence to the OFMDFM Committee to the effect that this power should be exercised sparingly at the ombudsman's discretion and that decisions should be evidence based. In Wales, the Ombudsman currently has power to publish his reports in the public interest. My office has undertaken research on the international experience of own initiative investigations. That research demonstrates that these inquiries will often be matters of public interest that demand a level of public scrutiny.

I note the Committee is interested in views as to how this power can be managed in order to avoid duplication and overlap with the role of other oversight bodies. The Deloitte review of my office recommended that a decision to commence an own initiative investigation should be made after consultation with the Comptroller and Auditor General for Northern Ireland so as to ensure that there was no overlap in remit. It is important that this power should not be exercised where another oversight body has a similar remit without prior consultation and liaison with that body. It is for that reason that the OFMDFM Committee are proposing consultation and information sharing powers with other devolved Ombudsmen and commissions in Northern Ireland as well as the Irish Ombudsman to avoid duplication. I note that the Ombudsman has a Memorandum of Association with the Children's Commissioner and the Older Person's Commissioner for Wales. This is an example of good practice and I consider the use of such Memorandums of Understanding promote more effective working relationships among scrutiny bodies and help ensure more efficient use of investigation resources.

Research has highlighted a number of potential models for Own Initiative investigations and my Office has shared its research on this issue with the Ombudsman and his staff. In Ontario for instance the Own Initiative model of SORT (Special Ombudsman Response Teams) was created by the Ombudsman to carry out investigations of **serious, systemic** issues that are matters of significant public interest. SORT investigations involve extensive field work,

interviews and evidence gathering, and generally result in a published report. Individual complaints are also investigated and if a complaint raises a serious issue that complaint may be a trigger for a SORT investigation.

The extent of cost savings and financial resources depends on the particular model to be adopted by the Ombudsman. A decision making tool can be developed to assist in deciding whether there is evidence of systemic maladministration based on a single or multiples complaints. An own-initiative model that permitted joint investigations with ‘specialist’ scrutiny bodies such as a Human Rights, Children’s or Older Person Commission could save on the costs of investigation for the offices concerned. Joint working is often a more effective model as it could permit the Ombudsman to have the benefit of specialist expertise in cases involving a particular group such as children or the elderly. An alternative model could be developed that would focus on the body or bodies seeking to resolve existing complaints as part of its internal complaints procedure on foot of an Own Initiative report. This model could save the additional costs of the Ombudsman investigating individual complaints on the same issues as the Own Initiative investigation and save costs to the public purse overall. The latter model has the advantage of encouraging bodies to seek early resolution of complaints and take ownership of issues, an approach which I will return to later in my evidence to the Committee.

4. ORAL COMPLAINTS

Currently, I can only accept a complaint in writing. It is important that the Ombudsman has a discretion to accept a complaint in any form and any barrier to communicating a complaint can be an access to justice issue, particularly for those with literacy difficulties.

As highlighted previously, the OFMDFM Committees proposals to change my legislation do include provision in the draft Bill for the acceptance of oral complaints. However, I am mindful of the practical challenges of this inclusive approach. In particular it is important that at some point the Ombudsman’s

staff will have to commit an ‘oral’ complaint to writing. This is essential in order for staff to clarify issues of complaint with the complainant so as to enable the Ombudsman and his staff to decide the issues that he will investigate.

An interesting trend that is currently emerging in Northern Ireland is the use of social media to ‘tweet’ complaints to bodies in my jurisdiction. I have already had a request from one public body for advice as to how to deal with this emerging issue. I would urge caution in this regard although I am aware that in seeking to provide our services to children and young people, the ombudsmen community should be aware that social media is the preferred mode of communication for today’s youth.

My personal view is that the use of social media to make a complaint does raise issues of privacy and confidentiality. Presently my Office accepts confidential complaints in writing, by email, in person or through my website by use of an online complaints form only. My office does not have a Facebook or Twitter account at present. There is a risk attached to the acceptance of complaints through these social media mechanisms because they are not confidential.

5. COMPLAINTS HANDLING ACROSS PUBLIC SERVICES

At present there is no Complaints Standards Authority (CSA) in Northern Ireland as there is in Scotland. The OFMDFM Committee did consider this additional role for my Office as part of its development of the new legislation and decided it was not an appropriate model at this time.

The addition of a CSA type role for my office was raised as part of the public consultation on the proposals for legislative change in September 2010. The OFMDFM Committee did consider the responses to that consultation and my views and decided that this was not an appropriate model. In the absence of support for this model in Northern Ireland, an alternative approach has been developed. Building on the work of the PHSO on the Principles of Good

Complaint Handling, and in particular the Welsh model complaints policy, my Office produced a guide to effective complaints handling entitled 'Rights, Responsibilities and Redress' which can be found at the following link: <http://www.ni-ombudsman.org.uk/niombudsmanSite/files/94/94a67a87-bb5d-4392-9e6a-359a438596b6.pdf>.

I am pleased to record that the Principles of Good Complaint Handling and good practice in other jurisdictions reflected in my publication were adopted by the Northern Ireland Civil Service (NICS) for all Northern Ireland government departments and their statutory agencies in 2014. This work has resulted in standardised complaints policies across NICS Departments and agencies. The 'softer' approach than that of a complaints enforcement body is of benefit as in my view it encourages bodies to take ownership of the complainants issues. As a result of this NICS initiative, led by the Head of the Civil Service in Northern Ireland, Dr Malcolm McKibbin, there has been a reduction in complaints about government bodies to my Office.

However, I do see merit in a model complaints procedure and the sectoral approach. The CSA model supported by training for bodies in remit has been an undoubted success in Scotland. That model has achieved much uniformity in approach across sectors with a small but dedicated team of SPSO officers. It is noteworthy that the Scottish model has been successful at low cost. However, there remains an issue of how far the enforcement model can extend in the event of non-compliance. It may be that ultimately the Parliament or Legislative Assembly is the forum for ensuring compliance with the CSA model. The power of the political process to support the Ombudsman in carrying out his statutory functions is an important theme that I will return to later in my evidence.

It is my view that there are financial savings to be achieved in adopting a common streamlined model of complaints handling. A multi-tiered complaints handling procedure can be costly to maintain for the public service provider, it is resource intensive and can be overly bureaucratic. Ultimately this can lead

to the complainant feeling overwhelmed and not pursuing the complaint further.

6. OMBUDSMAN’S JURISDICITON IN PRIVATE HEALTH CARE

I consider that currently the Ombudsman has a wide jurisdiction to investigate complaints of maladministration about public services, including private services commissioned by the NHS. I have a similar jurisdiction as the principle of ‘follow the public pound’ applies. However, unlike the Ombudsman, I do not have jurisdiction to investigate complaints about privately funded social care.

Where the service to the citizen is paid for by the public purse then, in my view, a Public Service Ombudsman should investigate complaints about the publicly funded service regardless of the identity of the provider. However, I do not consider that the Ombudsman’s jurisdiction should extend to privately funded health care. That is because the individual has other routes to remedy though consumer advocacy groups such as the National Consumer Council and through the courts by way of an action for damages for negligence or breach of contract. Further, the ADR Directive that will be transposed into UK law later this year does make specific provision for an ADR mechanism for consumer disputes. I consider therefore that this aspect of redress for the citizen who exercises the choice to utilise private health care provider as opposed to a public health care provider is not disadvantaged because he/she cannot have recourse to a public services ombudsman.

There is also an issue about the public purse resourcing the ombudsman to investigate complaints about the private sector in the context of a shrinking public sector budget. If the Welsh Assembly were to adopt the proposal for the Ombudsman to have this public and private sector dual function, how will this be reflected in government accounting terms if the private sector element of the Ombudsman’s work were to be paid for on the ‘polluter pays’ principle by way of levy to the sector or the service provider.

Public Service ombudsmen recommend remedy where they find maladministration or service failure. This mode of redress is largely successful within the public sector because of the power of the political process to ensure compliance through holding public bodies to account. The power of ‘moral suasion’ operates effectively in this context but may not be as effective in the private sector context as compliance may be harder to secure. It is important to note that private sector ombudsman such as the Financial Services and Pensions ombudsmen’s decision are legally binding perhaps for this reason.

7. LINKS WITH THE COURTS

In 2011, the Law Commission for England and Wales identified a number of areas for legislative change. These recommendations included the removal of the statutory bar on alternative legal remedy; a power of the Administrative Court to stay cases and refer them to the Ombudsman with a discretion on his/her part to accept a case for investigation; and the ability for the ombudsman to refer a case to the court on a point of law.

As part of the development of my new legislation in Northern Ireland, these proposals were considered by the OFMDFM Committee and by myself. That Committee did not consider that the Law Commission proposals were suitable in the Northern Irish context. I personally take the view that it is important that there is a clear demarcation between the work of the ombudsman and the courts. I consider that in the new Northern Ireland legislation the statutory bar should remain with the existing proviso which allows the ombudsman to consider a case where a legal remedy exists but it is not reasonable to expect a complainant to pursue or have pursued that remedy. Case law suggests that in circumstances where the complainant cannot pursue a legal remedy because of the issue of resources that the ombudsman can accept a complaint for investigation.

In addition, in Northern Ireland a number of pre-action protocols have been developed for the courts informing the parties of the existence of my office and other ADR mechanisms. This practice allows the parties to choose to

which forum to bring their administrative dispute, the court or the ombudsman. There is more generally a trend in Northern Ireland supported by the courts to encourage mediation to resolve disputes. It is important to view this change in approach to dispute resolution having regard to the cuts in legal aid budgets and overall pressures on the public purse.

In relation to the suggestion that the Ombudsman should have power to seek a declaration of illegality from the courts, this can be a useful mechanism to resolve issues of legal interpretation. My only concern is who in the present economic climate will meet the costs of this litigation

I am happy to expand on these views at the evidence session on 5 March 2015.

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

Dr Tom Frawley CBE

2 March 2015