



Northern Ireland
Assembly

**COMMITTEE
FOR THE OFFICE OF THE
FIRST MINISTER AND DEPUTY
FIRST MINISTER**

**OFFICIAL REPORT
(Hansard)**

**Legislation to Reform the Office of the
Northern Ireland Ombudsman**

29 June 2011

NORTHERN IRELAND ASSEMBLY

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FOR THE OFFICE OF THE FIRST MINISTER AND
DEPUTY FIRST MINISTER**

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Northern Ireland Ombudsman

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Members present for all or part of the proceedings:

Mr Tom Elliott (Chairperson)
Mr Chris Lyttle (Deputy Chairperson)
Mr Trevor Clarke
Mr Colum Eastwood
Mr Alex Maskey
Mr Francie Molloy
Mrs Sandra Overend
Mr George Robinson
Ms Caitríona Ruane

Witnesses:

Dr Tom Frawley) Northern Ireland Ombudsman
Mrs Marie Anderson) Office of the Northern Ireland Ombudsman

The Chairperson:

The Committee discussed a number of issues coming out of the consultation on the reform of the Office of the Northern Ireland Ombudsman and subsequent research papers at last week's meeting in closed session. You will find a preliminary readout paper listing the decisions made. That paper will be superseded by the Hansard record of the decisions made, when that record is available. The session moved on a number of issues and the ombudsman's office has been made aware of the decisions made in principle. I stress again that the Committee has not signed off on anything and the process is still in its early stages. In addition, the ombudsman has provided the

Committee with papers on public awareness of his office and his outreach strategy, as requested by members.

The Committee has asked the ombudsman and deputy ombudsman to come to today's meeting to discuss specific issues, which are highlighted in the decisions paper in green. They are questions 7, 13, 15 and 30. I ask the ombudsman to deal directly with those questions. I believe that Dr Frawley wishes to touch on another couple of issues, but I stress that discussion outside the four questions highlighted will be limited, as the Committee has already indicated its thinking, and the purpose of this session is not to provide an opportunity to revisit those other areas. I remind members that the session will be recorded by Hansard.

Dr Frawley and Mrs Anderson, you are welcome here today. I note that you smiled at some of the comments, but we are trying to move this process along as swiftly but as reasonably as possible. We are trying to make progress. I know that you have a number of issues to address. Please give an outline of your thoughts on the four questions.

Dr Tom Frawley (Northern Ireland Ombudsman):

Thank you for that. I am conscious of your potential reprimand if I vary from your position. *[Laughter.]* I am grateful for the opportunity to respond to the questions that you have asked me to comment on. Before moving to those questions, I will make a couple of points. I am very conscious that the Committee had a very detailed and extended discussion last Wednesday; therefore, I am conscious that you are beginning the process of finalising your thinking before briefing the legislative draftsmen.

For my part, therefore, I ask you to consider two issues: first, the implications of not including, alongside my current authority to examine professional decisions of doctors and nurses, the authority to examine the professional decisions of social workers. Such a limitation would work against the interests of older people, children, people with learning difficulties, people with physical disabilities and, in particular, the mentally ill. They are the most vulnerable and marginalised, and their care is directly affected by social work decisions. Secondly, although I completely acknowledge that my core business is investigating citizens' complaints, it would be a wasted opportunity and a waste of scarce resources if the learning and insights developed out of individual investigations were not distilled and organised to facilitate the development of guidance and advice that could improve the wider public service. I am conscious that you are

pressed for time today, so, with your permission, I will make a number of other points available to you in writing over the next few days, before you reach your final decisions.

The first question that I was asked to address relates to staffing:

“Should the Ombudsman be able to employ staff directly to his Office and also to provide for secondment in his/her Human Resources Strategy?”

There are 30 staff in my office, in addition to me.

The Chairperson:

For members’ information, that is question 30 in our paper.

Dr Frawley:

There are 30 staff in my office. In Wales, there are 50 staff, as is the case in Scotland. Twenty staff here deal directly with investigations; in other words, casework and complaints. In addition to my deputy, I have nine staff who provide a range of skills and services covering finance, legal advice and administrative support for the office. When the office was first established it was considered that there was a need to staff it quickly and efficiently, because of the circumstances and context in which that was done. That was done through secondments from the Civil Service. That practice has continued, and, currently, most of the staff I have described are secondees from the Civil Service, but there are also a number from the wider public service.

Although I recognise that it is important to ensure independence, I ask that that be balanced with practicality. In its review, Deloitte envisaged a workforce of secondees and permanent staff, offering flexibility and the ability to access a range of skills. In a small organisation such as the ombudsman’s office, it is essential to have that flexibility, to achieve value for money and effectiveness. That is my overall response to question 30. Do you want me to go on, or do you want to take questions?

The Chairperson:

While it is fresh in our minds, do members have specific questions on the employment issue?

Mr A Maskey:

I have seen the same mix in other organisations, and I understand the need to get access to other skills and the need for flexibility; however, it can also lead to difficulties, because you end up

with people in the same office with different terms and conditions. Has that impacted in any way on your office, or do you see potential problems in the future?

Mrs Marie Anderson (Office of the Northern Ireland Ombudsman):

We recognise that, and equality issues could arise from differentials in pay and terms and conditions. Therefore, we set up a HR strategy group to actively look at those issues. At one point, the question of whether we could employ directly was posed. We have now received legal advice that confirms our view that, under existing legislation, we can employ directly. I can reassure you that we are working through the other issues to do with terms and conditions.

Dr Frawley:

The next question is on the acquisition of cases:

“Should a definition be written in the legislation to specify that electronic submissions by email and website form and text messages may be used to submit a complaint?”

From my 11 years of dealing with complaints, I consider it essential for the ombudsman to retain discretion in relation to the form of submission, because, as I think members will acknowledge, unfortunately, some individuals have literacy difficulties and, indeed, many complainants have problems expressing themselves. At present, there is a requirement for complaints to be submitted in writing. However, my office operates flexibly, accepting complaints over the phone, which are then followed up with face-to-face interviews with investigating officers to establish the facts of the complaint and to record them in a way that is consistent with our templates and guidance.

An issue has arisen about the use of electronic media, particularly with the use of text messaging to submit complaints to my office. I do accept complaints that are submitted online via the office’s website. In principle, complaints submitted in the form of text messages should be accepted, particularly if we are to facilitate access to the office by younger people. We all realise that that is the way in which young people communicate today. They do not pick up a pen and write a letter, and, if we expect them to do that, they will just not contact or connect with us.

To follow up on a text message, a written record of the specifics of the complaint is agreed by my staff, in the same way as it would be had the complaint been made by phone. However — I emphasise this to members — I recognise that care needs to be taken to ensure that there is no leading in the design or description of complaints. In my view, it is essential that the office

proactively addresses the accessibility issue in a way that recognises the different circumstances and literacy levels of a wide and diverse range of complainants. Therefore, I put it on record that I believe that it is vital to have discretion in relation to the manner in which a complainant may contact the office.

The Chairperson:

Last week, this matter caused quite a bit of discussion, particularly around text messaging. There was a concern that a complainant could not get into the detail of a subject by text, because it would take too long and some phones send only a limited amount of text. Will you explain how that will work in practice? I would not dare to try to lead you, but, for example, would a simple text saying, “I have a complaint about the Health Department” suffice, and would you then follow that up with a phone call or message?

Mrs Marie Anderson:

There would be some data protection concerns around the submission of information, particularly with more sensitive complaints containing health information. Therefore, it is important that any text should be brief, perhaps with some contact details to allow follow-on contact with that individual, to allow our staff to establish their identity and the full nature of their complaint.

I thought about this question yesterday when I was at a GP’s surgery to arrange an appointment for my son. I noticed that GPs now invite patients to indicate whether they want text alerts in relation to appointments. As you will appreciate, a cancelled or failed appointment is an opportunity missed. Already, in the health sector, this medium is used. However, I accept that it is of limited use, and the detail has to be followed up at a later stage.

The paper on communication and electronic media goes into some detail on this. We have been fortunate to receive additional funds to improve our existing case management system. We envisage a system that allows — if individuals choose — for text alerts on the achievement of milestones in relation to their complaints and online tracking of the case. I appreciate that that will not suit everyone, but it is just to let you know that, in this respect, we seek to be innovative and look for continual improvement.

The Chairperson:

I assume that you would follow up, as you do with e-mail, with a phone call to arrange a meeting,

or possibly write to the person if an address is given. I guess that is the way you would do it.

The second point, the one that started the debate, was the issue of the wording of the legislation. Will the wording specify certain areas? Will it say that complaints may be made by telephone, letter, e-mail or text? Or would you use a broad wording, to the effect that one could contact you by any acceptable form? I cannot remember the exact wording that we talked about.

Mr Eastwood:

To allow for technological advances.

The Chairperson:

The wording was to read something like, “in an acceptable form”.

Mrs Marie Anderson:

We should keep the wording as broad as possible to ensure discretion and to allow for further advances, rather than having wording that is too specific. Who knows what the future will bring with technology? On that point, I have to say that some of the consultation responses, and one in particular, were very helpful. We were reminded that, under the Interpretation Act (Northern Ireland) 1954, “in writing” has a very broad meaning. I have referred to that in the paper; time is short, so I do not want to rehearse it. A broad wording in the legislation can then be captured by the provisions of the 1954 Act. However, that is a matter for the draftsmen.

The Chairperson:

I am pleased to hear that some people still follow 1954 legislation so carefully.

My other point was that, if someone sends a text, it is your responsibility to follow that up with a telephone call, a letter or a meeting?

Mrs Marie Anderson:

Absolutely. Our preference is to follow up in writing, to ensure that the contact has been captured. Nevertheless, we record telephone contacts on our systems.

Dr Frawley:

I think that a whole generation of citizens, younger people, are impeded or inhibited from

contacting us because they cannot do it by text. I had a conversation with some young people who said that they had lots that they wanted to comment on, complain about and indicate feelings on, but they communicate via text messaging. In a modern environment, where we are trying to get young people to articulate their experiences and be open, if they have disappointments or concerns about services, they have as legitimate a right to articulate them as anyone else. Texting, followed up exactly as you suggest, allows them to access it. I also say, to reassure you, that I am not saying that, in every case, we will accept the complaint. We will have to be satisfied. There are issues there, but it is important to recognise that medium now.

Mr Eastwood:

Believe it or not, we had a very detailed discussion about this last week, and I do not intend to drag it out any further. I have just one point. You are right; it is important that people feel that they can access your service. Will you have a five-digit number that people can text? Will it be free? If you are going to do it, it is important to put the means in place.

Dr Frawley:

We already have a free telephone service; that would just be extended to texting. We would have to create the facility of a standard number that they could text us on. We have a manned telephone and, out of hours, a machine with a recorded message is used. Clearly that does not have a cost to it, because we pick that up the following day or after the weekend. All of that gives us 24-hour access and seven-day-a-week access, and it complements the idea of openness.

Mr Molloy:

The concern was about mentioning only text messaging, because variations may still come into operation, so the legislation has to be open enough to allow other forms of communicating messages. The important thing is that people are able to get through with their complaints.

Dr Frawley:

We acknowledge that, and I think that Marie has captured that in her response to the Committee. As with phone calls, or even letters, we may need to see complainants who send us text messages. Some of our complainants have limitations, such as mental health problems, and find expressing themselves quite difficult. For example, I am very conscious of people with learning disabilities who everyone assumes do not have voices at all, unfortunately. They have every right to express their experience of public services. We have to find ways to connect with all of those people.

Texting is a particular model that now allows us to make ourselves more accessible to younger people.

The Chairperson:

OK; let us move on to the next question.

Dr Frawley:

The next question is number 15 in your paper:

“Should bodies within jurisdiction be able to refer a complaint to the Ombudsman and if so under what circumstances?”

In responding, I suggest that such a facility is not appropriate, except in very limited circumstances, which are helpfully outlined in the Scottish legislation referred to in question 16 of the consultation document that you have circulated. Those circumstances are where there has been a public allegation of injustice caused by a public authority and that body had unsuccessfully attempted to resolve the matter, either because it did not have sufficient authority or sufficient reach in relation to the nature of the complaint.

In that circumstance, I would say that acceptance of such a referral should lie within the ombudsman’s discretion. Nevertheless, if an impasse like that has been reached, you will want the individual citizen to have the right to recourse. I refer the Committee to Jim Martin’s evidence to you on 15 June, to the effect that those should be the only circumstances in which a complaint should be referred to the ombudsman by a body in jurisdiction, as it is for the body to seek to resolve the issues raised by any complaint in the first instance and not just to pass the issue to the ombudsman and say, “I really do not want to do anything more with this; you take it on from here”. That is not acceptable either. One of things that would also worry me, if it is not properly drafted, is that I do not want to be the referee in a match between two public bodies.

The Chairperson:

Why not?

Dr Frawley:

You get into that world of pass the parcel sometimes.

The Chairperson:

But sometimes it does need an adjudicator.

Dr Frawley:

I have a terrible problem with you calling me an adjudicator, and I do not want to take you there at this early hour on a Wednesday. *[Laughter.]* This is not an adjudication, Chairman; we are a decision-maker. You do this to provoke me.

The Chairperson:

Not at all. *[Laughter.]*

For clarification, you are basically saying that, under limited circumstances, a public body could have the right to refer a complaint to you.

Dr Frawley:

Absolutely.

Mr A Maskey:

I presume that the context of that will be that most public bodies have a lead Department, so there is somewhere else to go if a complaint is made against that body.

Dr Frawley:

Absolutely. They would have other places to go. For example, if it were a complaint regarding a health body, it would go to the Health Department. However, that is still within the arena, and, obviously, that Department is within my jurisdiction. If the complainant was not happy with that, they could still come to my office. But I do not want bodies not finalising their positions and just telling the complainant to take the matter to the ombudsman.

Mr A Maskey:

They would have to exhaust all other remedies first.

Dr Frawley:

Absolutely.

The Chairperson:

If no other members have any questions on this matter, we will move on.

Dr Frawley:

Question 7, which comes under the heading “Powers”, is important in the current context of public service delivery. The question is:

“Should the broad principle of ‘following the public pound’ be the basis on which bodies will be included within the Ombudsman’s jurisdiction?”

As members will know, my legislation sets out the type of bodies that may become listed in the schedules pertaining to the ombudsman or commissioner for complaints, and those can be summarised as bodies that carry out public functions. However, I am mindful that the legislation is reflective of a time when only public bodies charged with statutory functions delivered those functions. Today, it is quite common for public bodies to outsource delivery in the interests of efficiency and effectiveness and of developing local services.

When public services are delivered by a voluntary or private sector body, it is important that the citizen has the same rights to remedy and redress as those that apply when the service is provided by a public body. In other words, it would not be acceptable if it were just moved outside. Therefore, there is no redress if it is not an appropriate or acceptable service. A good example of that is the inclusion in my jurisdiction of housing associations, all of which are charitable organisations, but they deliver public services and were put into my jurisdiction in 2004. Therefore, in my view, voluntary bodies that deliver a public service funded from the public purse should be included in a list of bodies within the jurisdiction of the ombudsman.

Members might remember that the Deloitte review 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 the ombudsman’s oversight to voluntary bodies in receipt of grants or limited funding.

One possible alternative and more easily measured test is set out in section 29(3)(c) of the Public Services Ombudsman (Wales) Act 2005, 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 funding. When Peter Tyndall, the Welsh Ombudsman, gave evidence to you on 15 June, he commented that he was following the Committee’s debate on the issue with interest. He suggested a different approach, which is reflected in the United Kingdom equality legislation, namely that public bodies are listed in jurisdiction but can also be in jurisdiction if they are not on the list but fit the

description of the type of body permitted. The Committee will probably not find that helpful, and I certainly wrestled with what was meant there, and I think that there are issues around the clarity that that would bring.

He further commented that the 50% approach can present difficulties where bodies have sections that provide a public service, but have a whole lot of other things that are not involved with public service at all. One suggestion was to have a formula along the lines of a public service that is funded by the state, and I commend such an approach. I will leave the challenge of how that might be phrased in legislation to the Bill team and legislative counsel, but I want to make the point that a lot of public services are provided by organisations that are not public bodies. They are voluntary or community based, and they get contracts and service level agreements: for example, meals on wheels services, domiciliary care services, night sitting services, and so on. There is a wide range, and it is a diverse and mixed economy, which is a good thing, because, in areas such as your constituency of Fermanagh, there is now a huge amount of community infrastructure. That is very helpful, and it provides localised and tailored services to individuals. Therefore, it has very much become part of the landscape.

The Chairperson:

It has. However, to be fair, by and large, they all get public funds and provide a public service. The issue that we were more concerned about is the small voluntary groups that get small grants, but for which most of the money comes from the public purse. It may be quite difficult to legislate for them. For example, if a small welfare group or community group were getting somewhere in the region of £30,000 a year from the Community Relations Council or another organisation, they may come under that remit, particularly in light of the 50% that you mentioned.

We have a concern about getting the balance right. I felt from the meeting last week that we would like to encompass as much as possible of the public funds without hitting the voluntary groups that do a lot of community and voluntary work on a smaller scale than others.

Dr Frawley:

We could certainly work at that. We have time to develop that thinking and the form of words. It is a tricky alignment of words to capture. The 50% is a fairly stark number, but it takes us into most of the territory that we would want to be in. You are right: if 50% of £60,000 is £30,000, it becomes very limited in its focus. I take the point: we need to qualify that a little bit. I am sure

that we could work at that without taking up time today, but we understand the spirit of your concern.

Mr Eastwood:

My point is brief and is probably dealt with in other areas. We need to be cognisant of other commissioners, such as the Children's Commissioner. We need to be aware of the relationships between you and them and where the boundaries are, going forward. If we are talking about taking in many more possibilities, we need to be aware of that.

Mr A Maskey:

Returning to the issue of who might be defined as "within jurisdiction", I can see the tension. If you follow the logic of the example of the housing associations, there is a tension because they would argue that they are voluntary organisations as opposed to public bodies. However, most people on this side of the table probably think that the housing associations get quite a considerable amount of public money to provide a public service, and so they want to have a say in how that is done. There is no doubt that there is a tension, but you could see an avalanche if you open that up to every organisation that is in receipt of public funding. I tend to think that the balance will be about who is the parent funder. They obviously have a remit and responsibility to discharge to ensure that any moneys that they are paying out are discharged appropriately. In other words, they must ensure that whatever outcomes they were providing money for are delivered. There is a balance to be struck.

Most of the voluntary organisations that you are referring to, Chairman, receive a cocktail of funding. It could be a quagmire. You could get every person who may have a legitimate grievance, but where would that end? To my knowledge, even the best community or voluntary organisations do not always satisfy everybody, even in their sector or their local community. Everybody here knows that every residents' association will have critics, no matter how good they are. There would potentially be problems if we widened "within jurisdiction".

Mrs Marie Anderson:

I will deal with some of that. You may recall from Jim Martin's evidence that the 50% rule did not really work for him. I think that he said that the University of Edinburgh receives 30% funding. If students have complaints or grievances, it is important that they have somewhere to go other than to seek a judicial review in court. We saw that recently when a student brought a

case because he did not get a 2:1. At the end of the day, that is where having a list is beneficial. There must be some control over that list and some debate as to whether people are included. That debate or the control over that list could start with the parent Department or the funder, as you said, Alex. There will be some debate as to whether you are included in the list rather than having a formula that says that you are in. Some of that can be worked through by clarifying who is in the list, who is out of the list and who is going to have control of the list. I believe that the consultation document suggests that OFMDFM have control over that. There will be further information about the types of organisations that would be included in the list. Those decisions are for another day. It is about getting the formula right, and I appreciate that that is difficult.

Ms Ruane:

It may be a hard one, but you could set a percentage or a ceiling amount of money because, as Tom said, you do not want small organisations getting caught in a net that they do not particularly want to be in. They have enough bureaucracy to deal with.

Mrs Marie Anderson:

On an earlier point that was raised about the other commissions, the Equality Commission, in fact, looks to the existing list of bodies within our jurisdiction when designating bodies under section 75.

Dr Frawley:

The list is shared across a range of agencies. This goes back to Colum Eastwood's point. It is not just our list. Once a body is on the list, it comes under the jurisdiction of a range of other bodies.

On Marie's point, the list is also helpful to the public, because if bodies are not on it, people cannot complain about them. So people do not waste a lot of energy pursuing something only to be told at the end of a long journey, "By the way, that body does not come under the jurisdiction of the ombudsman, so there is really nothing that can be done about it". If the list is explicit and if whoever is responsible for it maintains it and keeps it up to date, there will be a definitive list and people will know what does and does not come under the ombudsman's jurisdiction.

The Chairperson:

Are members content with that?

Members indicated assent.

The Chairperson:

Dr Frawley, before you took questions from the Floor, you mentioned the issue of social care. For members' information, I think that you were referring to question 10. Am I right in saying that?

Dr Frawley:

Yes, but because that was not in your list of questions for today and because I was, as ever, accepting your direction at the outset, I just introduced it in my preliminary remarks.

The Chairperson:

That is fine; there was no issue with that. I just want to make you aware that members felt strongly that, because other bodies, in particular the Regulation and Quality Improvement Authority (RQIA), normally deal with aspects of social care, and because health and social care is a much more professional business, it may not be appropriate to include those bodies. I just want to put on record the Committee's feelings. If you have any other comments, we would be happy to hear those.

Dr Frawley:

Thank you for that. It is helpful to get an insight into the Committee's concerns. I would like to develop my thinking on that. Doctors and nurses are also covered within the serviced provided by the RQIA, so that would apply to them as well. I am not going to rehearse that issue now: we will commit something to paper and send it to you.

The Chairperson:

That will be useful. We obviously have a pretty strong view on that.

Dr Frawley:

I sense that, Chairman.

Mr A Maskey:

Is there a typo in question 14 where it reads:

“the definition of a person's aggrieved representative”?

The Chairperson:

No, I think that that is right. Although I am not sure what the definition of a person's aggrieved representative is.

The Committee Clerk:

When we approached this, we found that there was a complication around the use of the word "aggrieved". The way in which the question was set out in the consultation caused confusion about what exactly was meant. I had the opportunity to talk to the ombudsman's office about that. It draws a distinction between a complainant having someone represent their views, and a person who is not connected to the complainant making a complaint that they feel someone else should be making. The consultation did not separate those two out entirely. So, we are going to deal with that on paper by setting out exactly what the difference is. That is something that we still need to get pinned down.

The Chairperson:

One of the examples was whether, if somebody was continually parking a Department's vehicle outside your neighbour's property and you felt that it was blocking their way, you had the right to complain on their behalf if you felt that they were not going to complain.

Mr A Maskey:

Thank you.

The Chairperson:

Tom and Marie, thank you very much. This has been most helpful. I am sure that we will have further discussions.

Dr Frawley:

Thank you. Have a good summer.