



Ad Hoc Committee on the Northern Ireland Public Service Ombudsperson Bill

OFFICIAL REPORT (Hansard)

**Public Services Ombudsperson Bill:
Mr Mike Nesbitt and Mr Alyn Hicks**

12 May 2015

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Lord Morrow (Chairperson)
Mr Pat Sheehan (Deputy Chairperson)
Mr Cathal Boylan
Mr Leslie Cree
Mr David Hilditch
Mr Trevor Lunn
Mr Alban Maginness
Ms Maeve McLaughlin
Mr Gary Middleton
Mr Jim Wells

Witnesses:

Mr Alyn Hicks	Bill Team
Mr Mike Nesbitt	Chairperson of the Committee for the Office of the First Minister and deputy First Minister

The Chairperson (Lord Morrow): I welcome Mike Nesbitt, Chair of the OFMDM Committee, and Mr Hicks. I invite them to make their presentation. You are very welcome, gentlemen.

Mr Mike Nesbitt (Chairperson of the Committee for the Office of the First Minister and deputy First Minister): Chairman, thank you very much indeed. I begin by thanking you and your Committee members for making themselves available for this important bit of work.

By way of background, this goes back to 2004 when not the Committee but the Department initiated a review of complaints procedures through, I think, Deloitte. There was a desire and a clear recommendation for change. However, because of logistical issues regarding legislative time and so forth, it was not done, and that is why the Committee has picked it up and brought it to this stage. I am not sure how much detail you want, but, at this stage, I will probably err on the side of too much, Chair. Please feel free to foreshorten me, if that is your desire.

The Chairperson (Lord Morrow): We assure you that we will.

Mr Nesbitt: In very simple terms, if you are a member of the public and you think that you have been badly served by a public authority, you could end up, under the current regime, in front of somebody calling himself the ombudsman or ombudsperson or in front of somebody calling himself the Commissioner for Complaints. However, it is actually the same person, Tom Frawley, who has two

sets of powers depending on which hat he wears. I hope that we all agree that it makes sense to merge and reform those two offices and make an office called the Northern Ireland Public Services Ombudsman (NIPSO). It will continue, in our plan, to maintain the principle purpose of investigating maladministration in a number of specified bodies listed in the Bill.

Beyond that, another key element is the power to investigate complaints of injustice arising from the exercise of clinical judgement in the area of health care. We would retain that. The current offices are not authorised to question the merits of a decision taken without maladministration by a listed authority in the exercise of its discretion. That would continue to be the case, the only exception being narrow categories of professional judgement in health and social care. Investigations will continue to be conducted in private, and the investigation report would normally be shared only with the person aggrieved, the listed authority and the relevant staff, so, normally, it would remain confidential.

In investigating a complaint, the NIPSO will have the same powers as the current offices to compel the attendance of witnesses and the production of documents. That is a very strong power; it is the same power as the High Court possesses. Where the NIPSO upholds a complaint, he or she may recommend action be taken by either party; they may recommend that the listed authority make a payment to the aggrieved person. The recommendations of the ombudsman and commissioner are not legally binding, and it is our proposal that that will remain the position for the ombudsman. In the vast majority of cases to date, a listed authority respects the statutory authority and independence of the office of the ombudsman or commissioner and complies with the recommendations. We fully expect that that will continue.

The next point is the relationship of NIPSO with the Assembly. That is the first of the major changes. We envisage a new closer relationship between the ombudsman and the Assembly; with the legislature rather than with the Executive, which is the case at the moment. At present, the Assembly has no role in the appointment of the Assembly Ombudsman or the Commissioner for Complaints. OFMDM initiates the recruitment and puts forward a candidate for formal appointment; it has the power to approve the expenses and the staffing complement of the ombudsman. At the same time, the ombudsman can investigate complaints of maladministration by OFMDM. There is no suggestion that OFMDM has ever sought to exert influence, but members will appreciate that there is the potential for conflict of interest, or a perception of such.

The Assembly Commission, in our proposals, will undertake a fair and open competition to identify a candidate for nomination. A formal appointment by Her Majesty will follow the nomination of the Assembly. The Assembly Commission will set NIPSO's salary by order, subject to an upper limit, and will also set other terms and conditions. The NIPSO's budget will be submitted to the Assembly's Audit Committee, which will have the power to lay the NIPSO's estimate. For reference, the Audit Committee currently does that for the Comptroller and Auditor General. The removal of the NIPSO on grounds of health or misconduct will require a motion of the Assembly, and such a motion must have the approval of at least two thirds of Members. The NIPSO will lay an annual report in the Assembly, as at present, but there is greater clarity and power to report to the Assembly in a variety of circumstances.

I move on to simplifying access to NIPSO. As you will be aware, at the moment, to gain access to the ombudsman, a member of the public must come through an MLA. It is our proposal that an aggrieved person can approach the NIPSO directly in future.

I now move to social care, professional judgement and clinical judgement. There is a range of social-care professionals, including those with formal social work and other qualifications: social workers, social-work students, managers in homes, and care assistants. We believe that a complaint about the exercise of professional judgement in the field of social care must correspond to the qualifications in question. The qualifications, training and experience of the member of staff whose action is being considered is absolutely central. There can be no question of judging a care assistant by the standards applicable to a qualified social worker.

Another major change is own-initiative investigations. We believe that, where the ombudsman believes that there is a systemic problem in a listed authority or across a number of authorities, he or she should have the power to initiate their own investigation. We believe that that would be very cost-effective, as, otherwise, you could have the ombudsman investigating a series of 10, 20, 30 or 40 — who knows how many — individual cases, all highlighting the same maladministration issue.

The Bill will bring some new listed bodies within its remit: Queen's University and Ulster University, further education institutions and grant-aided schools; the Comptroller and Auditor General for Northern Ireland; and the Northern Ireland Assembly Commission.

There will be one area that will be removed, which will be in regard to public-sector employees. At present, public-sector employees can complain to the ombudsman about the conclusion of their own internal grievance or disciplinary proceedings. The public-sector employment remit was introduced in 1969, specifically to provide a mechanism for dealing with complaints of discrimination.

We noted that the public-sector employment remit provides redress for staff providing public services, rather than the citizen who is in receipt of the service and, as such, it sits rather oddly with the role of a public service ombudsperson. Given the range of alternative modes of redress available to both public- and private-sector employees these days, it is difficult to justify an additional level of redress for public-sector employees. Accordingly, the Bill proposes to remove the public-sector employment remit.

There is an issue with regard to the Secretary of State. It is within the rules, at present, that Secretaries of State can caution about the release of information on grounds of national security and other such factors. As the Secretary of State pointed out, given that she would not have sight of papers being released by a devolved Department, how could she exercise that function? The resolution was reached whereby we recommended that, in the event of the Bill becoming law, the ombudsperson and the Secretary of State should engage in discussions about a memorandum of understanding on how this will operate.

If you are content, I will leave it there — if that is sufficient detail to get on with. I would like to conclude on a more personal basis. I acknowledge that, while all parties want to see the ombudsperson in place, and all the five parties of the Executive are represented on the OFMDFM Committee, Sinn Féin has ideological difficulties with some parts of the process, such as the Queen having a role in the appointment of the ombudsperson. I want to acknowledge that they have managed to get the Bill to this stage without compromising their republicanism, but, at the same time, without feeling that they had to try to block the Bill itself. That reflects a mature politics.

The Chairperson (Lord Morrow): Thank you, Mr Nesbitt. That was succinct and brief. I have a couple of names here, but if anyone wishes to ask a question, please indicate to the Clerk. The first name that I have here is Cathal Boylan. Mr Boylan.

Mr Boylan: Thank you, Chair. Thank you for your presentation. You have clarified the point in relation to clause 41 non-disclosure. I have a couple of points. The intention of the signposting is to allow direct and easier access for people. Does the responsibility for signposting to the ombudsperson lie with the public bodies? How will you roll that out?

Mr Nesbitt: In the past, with the ombudsman, it has been the case that you must exhaust all internal processes with the relevant listed body, be that a health trust or an education and library board. You have to go full term with that before you go to the ombudsperson.

We are saying two things. First, if you think that it would be more efficient to cut to the chase and go straight to the ombudsperson, you should be able to do that. For example, it may be clear that the internal processes will not satisfy the complainant, and if the complainant and the public body both say "There is no point in doing this because you are going to end up with the ombudsman anyway", we might as well cut to the chase and do that.

Secondly, if you go through all the processes with the listed body and, at the end of the final appeal, you are still not satisfied, there is a legal obligation on the listed authority to say "You can now go to the ombudsperson. Here is how you get in touch with the ombudsperson. Here is the time limit in which you must contact the ombudsperson". Even at that, if you exceed the time limit, we allow for exceptional circumstances whereby the ombudsman can say that he or she will look at the case anyway because he or she is satisfied that there is an exceptional circumstance.

Mr Boylan: Public-sector employment cases were raised in the Chamber yesterday, but you propose to take those out. Is it the case that there will be opportunities to go through the Equality Commission or the Labour Relations Agency? Is that the reason behind it?

Mr Nesbitt: Yes, because there are other avenues. The second reason is that you would be investigating a complaint on behalf of somebody delivering public services to the citizen, whereas the primary role of the ombudsperson is for the citizens.

Mr Boylan: Finally, there is an extensive list in schedule 3 in relation to the listed bodies. Is there an opportunity to add to that list in future if required?

Mr Nesbitt: It would fall to OFMDFM to keep the list current. For example, when the education and library boards become the Education Authority, there would be an obligation on OFMDFM to revise the list. If a new body were created, it would fall to OFMDFM to update the list. It is an organic list.

The Chairperson (Lord Morrow): I will ask Alban Maginness to come in because he has a question about what has been raised here.

Mr A Maginness: It arises out of Mr Boylan's question about the procedure cutting to the chase, as it were. Is that done with the consent of the public body?

Mr Nesbitt: It would have to be.

Mr Alyn Hicks (Bill Team): The mechanism is a referral by the public body to the NIPSO. If the public body's perception is that the aggrieved person will not be satisfied because, perhaps, of a breakdown of trust or confidence and will only be satisfied by an independent view on the issue, the body can refer it to the NIPSO.

Mr Lunn: Thank you, Mike. I see in the notes that at least a couple of Ministers have raised concerns about how the new regulations might compromise a situation. In particular, I see that the Minister of Education is concerned that the role of the Special Educational Needs and Disability Tribunal could be undermined by the role of the NIPSO. On the issue of public procurement, the previous Minister of Finance and Personnel — I am not quite sure which one it was — raised concerns about the NIPSO's remit. Can you confirm that the Bill addresses the concerns that they, and perhaps other Ministers, have raised?

Mr Nesbitt: It is our understanding that the Minister of Education is now content with the proposal to bring schools within the NIPSO's remit.

Mr Hicks: The Minister of Education raised concerns about whether the inclusion of schools would have an impact on tribunals that operate in the education sector. We had a meeting with his officials and with the ombudsman's office, and the ombudsman's office provided quite a lengthy letter, which is in the Committee's report. The Minister understands the position and is content with schools being within the NIPSO's remit.

Mr Lunn: Is he content specifically that the Special Educational Needs and Disability Tribunal will not be undermined in any way by the ombudsperson's new role?

Mr Hicks: My understanding is that he is content and reassured in that regard. The SEN tribunal appointments are made by the Northern Ireland Courts and Tribunals Service, which is an agency of the Department of Justice. There is specific reference in the Bill to tribunals where the members are appointed by the Department of Justice. The staff in those tribunals are regarded as members of the Department of Justice for the purposes of a complaint about them in the exercise of their administrative functions, such as sending out letters and notices of hearings and other purely administrative work. That can be looked at by the ombudsman and could be looked at by the NIPSO.

However, the decisions of the tribunal in relation to special educational needs provision are not subject to the NIPSO. When a member of the administrative staff does something at the direction of the tribunal member or the judge, that is not capable of investigation by the NIPSO. A wrong notice of hearing date or a wrong address on a letter can be looked at but not the substantive decisions of tribunals.

Mr Lunn: Can we take it that, in general, any issues that have been raised by individual Ministers have been dealt with in the Bill and we do not expect further challenges to it from them?

Mr Nesbitt: I would be surprised, given the time that the Bill has been in gestation, but —

Mr Hicks: Maybe I can provide some clarification. The OFMDFM Committee has been in correspondence with the Health Minister. His response has come back to the Committee, which the Chair referred to yesterday, but the OFMDFM Committee has not yet considered it. I have met the Minister's officials to discuss concerns, and I think that they and the Minister are assured, to some extent. We will see what the Committee decides when it considers the Minister's letter this week. However, it seemed reasonably positive and constructive.

I think that you referred also to concerns raised by the Finance Minister some time ago about public procurement. The Minister had referred to a case that suggested that the courts were the appropriate mechanism for dealing with procurement complaints. The Committee raised that with the ombudsperson. At the minute, there is a distinction between the commissioner, who looks at procurement decisions from beginning through to the decision to award and the ombudsman, who does not. He looks just at the preliminary procedure and not at the decision to award. The Finance Minister's letter did not indicate that there was a problem with the commissioner approach; it did not seem to have created any difficulties. On that basis, the Committee was content to go with the commissioner approach for all listed authorities.

Mr Lunn: OK. Sorry, Chair, I had not been privy to any of this until now, so I may have been asking questions about matters that had already been decided by the Committee.

The Chairperson (Lord Morrow): I have a question about Ministers. I think that you said that you were reasonably content —

Mr Hicks: In relation to the Health Minister's concerns —

The Chairperson (Lord Morrow): Yes, but what about all the Ministers? Are you absolutely content that they do not have a problem here or are cooperative or supportive?

Mr Hicks: We had responses from the Education Minister recently to indicate that he was content. The Finance Minister gave his consent to the Bill being introduced, or gave his recommendation, sorry. The Health Minister's response will be considered by the Committee this week, and the Committee may decide to take further action on foot of that. Those are the Ministers who have been actively engaged.

The Chairperson (Lord Morrow): Anything from the Justice Minister?

Mr Nesbitt: The Justice Minister was keen to put the Northern Ireland Judicial Appointments Commission (NIJAC) into the ombudsperson Bill. I suppose that there were two issues for us to make sure that there would not be a conflict of interest. What if the ombudsperson were a judge, for example? You can square that by referring it to another senior member of staff in the ombudsperson's office or by bringing in someone external. The other issue was cost. We did not want simply to absorb costs that we believe lie with the Department of Justice rather than with OFMDFM.

Mr Cree: Arising from that, I assume that any Minister who was not satisfied would be happy to give evidence to the Committee. We thought that we would clarify that position. Is that correct?

Mr Nesbitt: Yes. I would be surprised that if there is a Minister who has a substantive issue with it, they have not already raised it —

Mr Cree: And they have this opportunity now, obviously, to some to us.

Mr Nesbitt: They have had that opportunity over the past number of years. However, I suppose that this is their last chance so to do.

Mr A Maginness: In relation to NIJAC, there is a Judicial Appointments Ombudsman. Would that office be subsumed by the —

Mr Hicks: Yes, it is the Office of the Northern Ireland Judicial Appointments Ombudsman (NIJAO).

Mr A Maginness: Yes. Would that office be subsumed?

Mr Hicks: The statutory framework, with some amendments, would remain in place. The person appointed as Northern Ireland Public Services Ombudsman will also, by virtue of that, be appointed as the Judicial Appointments Ombudsman. So, the ombudsman will have an office, and all the housekeeping details can be attended to by the NIPSO. He will have all that sitting there, ready to receive complaints.

Mr A Maginness: But the NIPSO would be the ombudsman for judicial appointments.

Mr Hicks: Yes.

Mr Nesbitt: Sorry, I did not explain that accurately.

Mr A Maginness: No, it is just for clarification. The office would remain, but it would simply be integrated into the office of ombudsman.

Mr Hicks: Yes, the ombudsman would put on a judicial appointments hat to deal with those complaints.

Mr Lunn: Is there any area of this where we are breaking new ground and going beyond the remit or powers of ombudspersons — as we have to call them now — in the other jurisdictions or in the Republic?

Mr Nesbitt: I do not think so. I think that we have just benchmarked. What we are doing is a modern, progressive and much more easily understood regime, which is more user-friendly for the citizen who brings forward a complaint, but I am not sure that we are doing anything that is a first.

Mr Hicks: We are retaining something, which does go slightly further than other ombudsmen in the UK or Ireland: the County Court enforcement mechanism, which predates our Bill. The consultation responses tended to suggest that it should be removed; however, the Committee deliberated and decided to retain it. They were loath to lose a potential power for —

Mr Nesbitt: Where there was a difference between the powers of the ombudsman and the Commissioner for Complaints, we took a position of levelling up in favour of the complainant or the citizen. If you go to the ombudsman, he may rule in your favour and give you a report that says that you are right, but nothing happens. For example, the neighbour who built the shed that blocks your kitchen light does not have to demolish it. However, if you go to the Commissioner for Complaints and he rules in your favour wearing that hat, you can take that to a County Court. Our proposal is that the ombudsman's reports will have that validity so that you can take it to a County Court and say, "I want recompense, and this is a ruling notwithstanding". It will be up to the listed authority to disprove what the ombudsman has put in the report. It will be considered as fact to be disproved.

Mr Lunn: For clarity, the consultation responses offered one opinion, but the Committee has gone a different way.

Mr Nesbitt: The Committee has, yes.

Mr A Maginness: In relation to the County Court, did the Committee consider that the ombudsman himself could determine an enforcement mechanism and/or damages?

Mr Hicks: The ombudsman may make a recommendation for, say, an apology and an amount of money to be paid by way of consolatory payment, as I think it is referred to as. Normally, in 99.9% of cases, the public listed authority will comply with the ombudsman's recommendation. Where that does not happen, as the Chair illustrated, it is up to the County Court. The ombudsman's report is taken as evidence, unless it is disproved. That is the mechanism.

Mr A Maginness: So going to the County Court is really the last resort —

Mr Nesbitt: Enforcement.

Mr A Maginness: — in terms of enforcement, so, if I am the complainant, I can go to the County Court if the public authority has refused to do whatever the ombudsman has recommended. If the County Court agrees with my grounds, it can implement the recommendation.

Mr Nesbitt: The way I would describe it is that, when you go to the County Court, you do not have a case to make. It has already been made for you by the ombudsperson, and it is up to the listed authority to disprove it.

Mr Lunn: Chair, may I — ?

The Chairperson (Lord Morrow): Is it on the same issue? If it is, go ahead.

Mr Lunn: Yes, it is on the same point. If the ombudsman orders an amount to be paid by the offending authority — and I think that you said, Alyn, that 99.9% of the time the authority would just pay and be magnanimous — and the authority refused to pay, could the complainant take that decision to the County Court to try to enforce the payment, in the unlikely event that that happened?

Mr Hicks: Essentially, yes. The court is not bound by the ombudsperson's recommended payment. Currently, the Commissioner for Complaints makes a recommendation, so the courts are not bound by that. It is for the courts to assess damages, and clause 44(2) states that the assessment of damages is up to the courts.

Mr Lunn: The ombudsperson's report can be used as evidence in the County Court.

Mr Hicks: Yes.

Mr Hilditch: Thanks for the presentation. Are there any issues that we should know about concerning the extension of the remit to include universities? Did anything have to be taken on board with regard to the Bill in relation to that consultation?

Mr Hicks: Trevor asked me about Ministers earlier. The DEL Minister requested a postponement of the commencement of bringing universities under the remit of the NIPSO because there was an ongoing review of complaints handling in the universities. The Minister was hoping to complete a standardisation.

While the Committee welcomed that, that was two years ago. The Bill has now been prepared, so the Committee's view is to go ahead with this. If some improvement happens in the meantime, we will no doubt hear what it is from the Minister, but the Committee's view was to press ahead and bring the two universities — UU and Queen's — within the remit of the Bill.

Mr Nesbitt: You might have heard one Member in the debate yesterday say that it did not go far enough in terms of universities, and that it was only complaints by students. He seemed to take issue with the role of the visitors and to their being too closely tied to the universities. The Committee did not go with that, did it?

Mr Hicks: I think that it is a perception. Visitors are legally independent; they are appointed by the Privy Council, as I understand it. They tend to be a High Court or Court of Appeal judge. The Committee's view was that students did not perceive them to be independent. Therefore, external access for them about complaints of maladministration to an obviously independent person was the essence of what was being sought.

The Chairperson (Lord Morrow): I thank the two gentlemen for their presentation and for answering questions. Thank you very much.