



British and Irish  
Ombudsman Association

## Workshop Reports

Conference 26–27 April 2007

# bioa

The biennial Conference of the British and Irish Ombudsman Association was held at Scarman House, University of Warwick, Coventry on 26 and 27 April 2007. In addition to several plenary sessions, there were twelve workshops on topical subjects. A delegate at each workshop was invited to prepare a report on the workshops to provide a record of the presentations and discussion, and these reports are published here.

Workshop Title	Workshop Number	Page
<b>26 April</b>		
<b>Complaint handling and the media</b>	<b>1</b>	<b>3</b>
<b>Long-term care issues</b>	<b>2</b>	<b>5</b>
<b>Shared services/service delivery and partnership working</b>	<b>3</b>	<b>7</b>
<b>Training, accreditation and CPD</b>	<b>4</b>	<b>9</b>
<b>Capacity and proportionality</b>	<b>5</b>	<b>11</b>
<b>Freedom of Information Act</b>	<b>6</b>	<b>13</b>
<b>27 April</b>		
<b>Principles of good governance</b>	<b>1</b>	<b>15</b>
<b>Risk management</b>	<b>2</b>	<b>17</b>
<b>Ombudsman innovations in the private sector</b>	<b>3</b>	<b>20</b>
<b>The Ombudsman and young persons' and children's rights</b>	<b>4</b>	<b>22</b>
<b>Equality and diversity</b>	<b>5</b>	<b>24</b>
<b>Judicial Review</b>	<b>6</b>	<b>25</b>

## Complaint handling and the media

Chaired by: Shelley Radice, Removals Industry Ombudsman

Introduced by: Matti Alderson, Press Complaints Commissioner

Philip Yelland, Senior Director of Regulation, Law Society of Scotland

Report by: Andrew Bradley, Communications Manager, The Ombudsman Service Limited

The majority of those present in the audience had handled contact with the press and media.

### Matti Alderson

#### The reinterpretation of SPIN

**S**trategy – a decision should be made as to whether to stay in the media or out of it

There are risks involved with both options. If we wish to stay in the media there must be sufficient staff and adequate systems in place to handle an increase in contacts. If the decision is to stay out of the media our processes should be sufficiently robust to react to unexpected media contact with care, clarity and consistency.

- The medium must be suitable for the message
- There should be a simple memorable message
- Stick to your agenda and don't be deflected
- Be sensitive to other points of view and be aware of what the media might do with the information you give to them

**P**redict, Pre-empt and Produce – we should remember that we know more about the issues being raised by the journalist so we should take the lead

- Pick fights with care! If the decision is to fight we must make sure that we are right
- Presentation is paramount – not just the substance of what we say
- Press releases are not the only vehicle. If you do use press releases they should be targeted. For example, rather than aiming to have something published in the National Press, we should dissect the medium and write a piece about an issue which will be of particular interest to the readership of a certain type of newspaper i.e. 'red-tops', 'broadsheets', using the same style, tone and length as that newspaper uses.

**I**nheritance – we should accentuate the positive and explain how we have learned from a problem and changed for the better. Give good news stories and never lie. Journalists have excellent records and can check the accuracy of our statements.

**N**ewsworthy – the press and media are only interested in a good story which is fit for publication

- No such thing as, 'off the record'
- Never say, 'no comment' as someone else will.

### Philip Yelland

The media drives public opinion. There are differences between public and private sector Ombudsman services but we all face the potential problem that we can be perceived to be too close to the organisations about which we handle complaints.

To overcome this we should take the time, using plain English, to explain processes and procedures. In particular we should:

- Explain what we do and how we do it at a general and high level. If we talk about the specific details of a particular case or issue we run the risk of this example being used to generalise.
- Aim to educate the journalist about our role and why we may have taken a particular action or decision. It is unlikely that the journalist will know the environments in which we operate and the boundaries and limitations we work within.
- Explain what our powers are and where they come from. There can be an assumption that we, 'make it up as we go along'.
- Set aside time to say 'come in and talk to us'. Some will, others may see this statement of openness as a disincentive to continue.

There must be a clear strategy which aims to set a positive message. The use of the phrase, 'no comment' should not be part of this strategy. If we don't comment our side of the story won't be heard.

If there is a specific issue that is likely to gain press attention it is worth deciding upon a particular strategy for handling the issue. In this circumstance we should meet as a team to discuss the issue and to formulate an approach. This discussion should include the person who will be speaking to the press/media. Also, a statement should be prepared for distribution if this person is unavailable or for use on the website. Ideally the person who speaks to the press/media should be the Chief Executive, Principal Ombudsman or other senior person within the organisation rather than a PR Agency.

It is likely that there will be situations where we will have to react to unexpected press attention. We are more likely to have a successful outcome in these situations if we have taken the time to develop relationships with journalists. Journalists who know us are also more likely to be willing to help us to get a message across when we want to talk about something important to us.

## Points arising from the open discussion

- Journalists must take care when using direct quotes to ensure that they are completely accurate, but we must be aware that while the quote may be accurate it could be used out of context.
- As Ombudsman services/dispute resolution organisations we must set a high standard by always telling the truth and always giving the facts as they are, when we are able to do so. We must also be willing to face any consequences.
- The press/media and the public have become savvy to 'spin' and though it is beneficial to accentuate a positive message, attempts to manipulate will be easily spotted and will cast you in a poor light.
- The process for handling the press/media should be clearly communicated to everyone who works within the organisation.
- There should be clear responsibility as to who is empowered to speak for the organisation. This should be the head of the organisation (office holder), not a PR agency. If a journalist has to go through too many hoops to get information he or she can become suspicious and this can cast the organisation as inaccessible or as having something to hide.
- Encouraging intermediaries such as MP's and advice agencies to speak on our behalf can have a good effect.
- If it is clear that a story will come out, it is beneficial to prepare a statement. This can help to minimise difficulties that may arise as journalists prepare copy for the Sunday papers.
- The decision about whether to fight or not to fight if an inaccurate report is given in the press/media must be taken with care. We must make a judgement about the seriousness of the problem. Only if it is a major issue or inaccuracy should we take the decision to react. For less serious occurrences, though we lose the opportunity to set the record straight, we should let the matter go. We should never react aggressively as we risk appearing to be too defensive and this could cause the problem to be exacerbated. We should contact the journalist concerned to point out the inaccuracy of the report in order that it is not repeated. If a particular journalist continues to give inaccurate reports it can be useful to speak to his or her editor. We should never fight in the media.
- Instead of a press release we could use a 'news release', missing out the middle-man by targeting and sending information straight to interested stakeholders such as MP's, advice agencies etc.
- It is important to build positive relationships with the press and media and to work together where it is possible to do so. If a press release is issued it should be sent to all interested journalists and we should always be willing to answer questions when we are able to do so. The manner in which we respond to the press/media directly reflects on the organisation we represent.
- When we are involved in a broadcast interview it can be advantageous to speak last. This will maximise the opportunity for the speaker to give a calm, dignified response.
- Some press/media are powerful and can have a considerable influence on public opinion. Other press/media have a lesser voice. For these it is acceptable for a designated member of staff, who is not the head of the organisation, to handle the contact.
- We should try to find win-win situations by bringing our stakeholders and adversaries on-board, involving them in the process and respecting their position. In this way everyone pulls toward the same goal and there is a reduced risk of negative coverage.
- The Press Complaints Commission (PCC) should be stronger and provide greater protection for people who work in public roles. Nuala O'Loan, Police Ombudsman for Northern Ireland was invited by Matti Alderson to write to the Chairman of the PCC to express this view.
- Media training for those members of the team who deal with the press/media can help to build confidence but it is important for us to develop our own approach.
- Before speaking to the press/media it can be useful to consider what we don't want to say and to consider how we would respond to the questions which make us feel most uncomfortable. We should always be prepared to answer some surprising questions!

## Long-term care issues

Chaired by: Lewis Shand Smith, Deputy Scottish Public Services Ombudsman

Introduced by: Dame Denise Platt, Chair, Commission for Social Care Inspection (in England)  
Kerry Barker, Complaints Investigator, Scottish Public Services Ombudsman  
Patsy Fitzsimons, Investigator, Office of the Ombudsman, Ireland

Report by: Mike Boyall, Ombudsman, Financial Ombudsman Service

### 1. Introduction

The framework for providing long term care is complex and difficult for all to navigate.

The contributors were at the workshop to provide an insight into the difficulties they faced in their fields.

### 2. Presentations

#### Dame Denise Platt

The Commission for Social Care Inspection is the single inspector for adult social care in England. The Commission registers, inspects, regulates and reviews all public, private and voluntary care to national standards. It cannot deal with individual complaints but can inspect where alerted to poor practice. Local Authorities (LAs) are included and, from 1 January 2008, all councils will be rated under a star system.

The objectives of the CSCI include to promote improvement and stamp out bad practice. People and, in particular, users are at the centre of their processes and the objectives. The work involves being at the interface between social care and health provision with over 27,000 providers, mainly in the private sector. This can be contrasted with the health care sector where 95% of provision is public.

The NHS is free, but social care is means tested and most users make some financial contribution against a background of rising eligibility criteria. There is no clear distinction, the lines of demarcation being vague.

To LAs, health care is incidental, and the NHS will only fund an amount of care above a lower limit. This results in a gap in provision where the NHS will pay above a certain amount but the LA will only pay at a lower rate. This causes postcode lotteries and disagreements over what should be provided and by whom. There is also a need for decisions to be explained and supported with clear appeals processes. Currently any appeals are long and complex.

Where care is LA-provided, complaints are referred to the provider, then to the LA, then to the LA Ombudsman. Where the care is self-funded, the complaint can only be referred to the provider. The present system causes many who have valid complaints about care to give up. Overall, the CSCI would support the establishment of a Social Care Ombudsman.

The current system is unsustainable, difficult for users, unfair and opaque. There is a real problem of lack of communication and explanation. There is however, a consultation exercise continuing at present (the National

Framework Consultation for Continuing Care) which has not yet reported.

The CSCI in its report 'The State of Social Care' concluded that a new contract was needed. The present position is that the criteria for state help are constantly rising with more and more people having to turn to their family's resources to fund care.

There also needs to be a better way of resolving disputes and the impact on people of those disputes needs to be taken into account in the process. In short, a new balance needs to be struck taking into account, among other things, the Human Rights effect of decision making and care provision.

#### Patsy Fitzsimons

The workshop then heard about complaints received by the Irish Ombudsman. The vast majority of the complaints received related to:

- funding long-term private nursing home costs
- long-term care issues which have recently arisen relate to the accessibility of respite care in public nursing homes
- the quality of respite care afforded to public patients

Approximately 22,200 older people are in long-term residential care which represents about 4.6% of the over-65 population. It is anticipated that the proportion of older people needing such care will fall to just 4% in the coming years. The Irish Government has invested heavily in community support systems in recent budgets, and it is anticipated that older people who require low or moderate care will be able to stay at home for longer. Surveys have shown that the vast majority of older Irish people want to remain in their own homes, and to be cared for in the community.

Long-term care is provided primarily in public and private nursing homes. Every person over the age of 70 is entitled to a medical card which confers eligibility for public nursing home care with a maximum contribution of towards public care of €120 pw. Because of the shortage of public nursing home places available, however, some people on low incomes (particularly those suffering from high dependency illnesses) are effectively being forced to seek care in private nursing homes. Typically, private nursing home fees amount to €800 pw or more, and the maximum state contribution (means tested) amounts to €300 pw. There is often, therefore, a significant shortfall between a person's pension, the state contribution and the fees, which has to be met by the patient or the family.

Many complaints have been received from families who are struggling to meet private nursing home costs, in situations

where there are no public nursing home facilities available.

One recent complaint was made by a daughter who was distressed because she was unable to meet her mother's private nursing home fees. Her mother could not obtain a place in a public nursing home, despite being a medical card holder. She had no savings or assets. Even with state contribution, it was a struggle to meet private nursing home fees. Substantial arrears had built up.

In exceptional cases like this, the state may provide what is known as a contract bed, or pay a discretionary allowance known as an enhanced subvention, which is an additional payment allowing a patient to remain in private nursing home care. Following a request to have this case reviewed, the Health Service Executive (State provider of health services) agreed to pay an enhanced subvention in respect of this patient, with arrears.

Without families, the community care system for older people would have collapsed a long time ago. Families in Ireland provide extremely high levels of care, even for relatively less dependent older people. The key to maintaining the commitment of families in the longer term is to ease the restrictions on eligibility for the Carer's Allowance, and to increase resources for community and respite care.

One such complaint arose in relation to the accessibility of public respite care following a patient's hospitalisation. The complainant's elderly mother, a medical card holder, lived at home with her son, with help from the Community Rehabilitation Team. The son applied to have his mother admitted for two weeks public respite care, following her hospitalisation, but was refused. There were two respite beds available which were reserved for patients coming directly from the community. Patients requiring respite following hospitalisation were generally referred to local private nursing homes. This woman's son felt that two weeks respite care would greatly benefit his mother, as he knew that he could not provide her with the level of care required for that period.

Such requests are referred to an Admissions and Discharges Committee which bases its decision on various assessments of the patient. In this case, the Committee refused the request for respite because the assessments were positive.

It deemed her suitable to return home with the continued help of the Community Rehabilitation Team. The complainant was annoyed because the Committee had not involved him or the other family members in the decision-making process, and had not considered the reasons for his request. The decision to refuse his request had been handed down to him, and there was no avenue of appeal.

The complainant had no option but to source respite care in a private nursing home, difficult at short notice. He complained that while his mother paid for this care, the two public beds had remained vacant in the Community Nursing Unit.

The Ombudsman felt that there should have been flexibility over the usage of the public respite beds, and that applicants for respite should be invited to put their request in writing for consideration by the A & D Committee, along

with the various other multi disciplinary assessments. The Health Service Executive accepted that view and, in addition, agreed to put an appeals mechanism in place.

Ultimately, if long-term care is to be successfully provided by relatives, the public respite system should be accessible to them, and flexibility afforded whenever possible.

Another serious complaint related to the quality of respite care which the complainant's elderly mother received during one week's respite care in a public nursing home. The mother had suffered a stroke and the complainant, a nurse, had cared for her since then with assistance from a home help. During that time, her mother never suffered from pressure sores. Due to her mother's swallowing impairment, the complainant fed her mother by syringe at home. However, when her mother received care in a public nursing home, a number of inadequacies arose during her stay which caused her daughter to take her home prematurely.

The complainant said that her mother had not received adequate nutrition and hydration. Her mother was also not taken out of bed. Her mother's medication had not been taken because she was refusing all food from a spoon. As a result, the complainant noticed deterioration in her mother's condition.

The complainant decided to take her mother home. When she did her mother had developed pressure sores which had blistered on her sacrum and heels. The injuries did improve apart from one blister on her mother's right heel which tested positive for MRSA and she subsequently died. The complainant blamed herself for placing her mother in respite care and nursing staff for their failure to inform her of the deterioration in her mother's condition.

The existence of blisters was initially denied by the nursing home but had been seen by the Home Help and the Public Health Nurse. This complaint is currently the subject of a formal investigation by the Ombudsman's Office.

The whole area of continuing care is now the subject of proposed legislation by the Irish Government.

### **Kerry Barker**

The workshop then heard about the system in Scotland. The sources of funding in Scotland are:

- From Local Authorities under the Social work (Scotland) Act 1968 (fully funded but means tested), and the Community Care and Health (Scotland) Act 2002 (partly funded)
- From the NHS as described in the NHS MEL (1996) 22 (a directive to the NHS in Scotland setting out how it should deal with such issues) which is fully funded and not means tested
- From self-funders

Free Personal Care (FPC) and Nursing Care was introduced 1 July 2002 by the Community Care and Health (Scotland) Act. This Act brought in free personal care for people at home. There is (theoretically) no limit on the amount FPC at home.

Social work departments charge for non-personal care

services, such as day care. They will also still financially assess patients to work out how much they can afford to pay for this 'paid for' care. In respect of free personal (and nursing) care for people in long stay care homes, the local authority will pay any contribution for personal or nursing care direct to the care home, not to the resident. From 1 April 2002, residential and nursing homes are both known as care homes, and registered by the Care Commission.

In summary, the individuals need to be assessed if they want to claim free personal or nursing care. If they are over 65 and need personal care they will get £145 per week. If they need nursing care they will receive an extra £65 (under 65 and need nursing care – £65 per week). All self-funders continue to pay the rest of their fees, covering accommodation etc.

Personal care consists of personal assistance – which includes a wide range of activities including help with dressing and personal hygiene.

Nursing care consists of interventions requiring a registered nurse.

In respect of NHS Long Term Care (also known as Continuing Care), the relevant legislation says that the NHS should:

“...arrange and fund an adequate level of service to meet the needs of people who, because of the nature, complexity and intensity of their care needs, will require continuing in-patient care arranged and funded by the NHS in hospital, hospice, or in a nursing home.”

Particular areas for complaint are:

Disputes over eligibility for care: Reports had been produced on the subject and comment made in particular on the lack of local criteria. This area is still far from clear however.

Assessments: They were often inadequate with no family involvement and no reasons given. In addition, they were at times, non-existent, patients being admitted to a Care Home from the community with no NHS involvement

Appeals: Often parties were not advised of any right to appeal or the appeal was wrongly dealt with.

The SPSO had a starting point of treating such complaints as maladministration. Decision-making criteria were often not clear, any assessment was not appropriately evidenced and appeal process lacked clarity. There were also no proper entry or exit points to the process. The view of the Ombudsman is that these are examples of service failure.

These issues have resulted in discussions with the Scottish Executive Health Department (SEHD) who agreed on the need for change. No complaints have yet been substantially upheld because usually any failure was in the MEL and not the Health Board concerned.

So far there has been one complaint against SEHD and one published case so far (five in draft form)

### 3. Summary

Overall, the workshop concluded that this was an area where the arrangements were complex and lack cohesion and fairness. This gave rise to a considerable amount of unfairness and distress.

---

## Workshop 3: 26 April 2007

# Shared Services/Service Delivery and Partnership Working

**The sharing of common services, either administrative or investigative, to run more than one Ombudsman scheme and, secondly, the working in partnership with one or more other schemes to investigate complaints or produce reports.**

Chaired by: Pat Whelan, Director General, Office of the Ombudsman, Ireland

Introduced by: Christopher Hamer, Ombudsman for Estate Agents  
Richard Brown, Chief Operating Officer, The Ombudsman Service Limited  
Carolyn Hirst, Deputy Scottish Public Services Ombudsman

Report by: Nigel Karney, Deputy Chief Executive and Secretary, Commission for Local Administration in England

**Chris Hamer** opened the session covering the topics of 'outsourcing', off-shoring' and 'partnering'.

### Outsourcing

Concerning outsourcing case-handling and front end activity:

- It seems to be counter culture for an Ombudsman to pass on complaints made to him to another body to investigate.
- But outsourcing of organisational functions is particularly appropriate where specialist and occasional support is needed. The estate agents scheme has only 20 staff; it

purchases all its IT support externally.

- A well prepared service level agreement is key to providing protection. It should cover contract duration, responsibilities, reporting mechanism, dispute resolution and costs.

### Off-shoring

- This had generally achieved a bad name in terms of what it says about 'customer service' in an organisation.
- Major international banks tried various measures to try to ▶

give the impression to customers of a 'local service' when calls were actually handled in India. No-one believed it and it caused a lack of credibility which affected the whole business.

- Don't be driven by cost; think about the impression on customers and what is likely to be acceptable to them.

## Partnering

- The Insurance Ombudsman Bureau (IOB) used to operate under LAUTRO using a form of service level agreement (SLA). Subsequently found out that LAUTRO were not using half the information generated by IOB enquiries required under the SLA.
- A tenant's disputes service is operating under the auspices of the Estate Agents Ombudsman. This is a small part of their business and they realise they have not been giving it enough attention.
- If work is handed over to another body there needs to be clear standards, transparency for the customer and careful thought about the impact on the customer. Customer needs not organisational convenience should be the deciding factor.

**Richard Brown** spoke about the organisation of The Ombudsman Service Limited (TOSL) which provides the operating service for Otelco (the Telecommunications Ombudsman) and the Energy Supply Ombudsman. There are plans to extend this service to the Royal Institute of Chartered Surveyors' (RICS) complaints (the new Surveyor Ombudsman Service).

- There were four main areas for consideration – governance, staffing, ICT and finance.
- Under the arrangements each ombudsman service has its own 'brand' and board. TOSL provides multi-skilled investigative staff to deal with complaints investigation. The majority of complaints are about customer service matters, so specialist knowledge is not key.
- The structure provides economies of scale to the participant bodies.
- ICT is contracted out to 'NViron', including an externally located server. The agreement is 'future proofed' by the definition of clear standards, notably a 12 week rule for deciding telecoms and energy supply complaints.
- As more schemes join the arrangement there may be complications with governance (the governing council may become unwieldy) and with multi-skilling on investigative work (some specialism may be needed). Also accommodating remote working and branch offices may present issues (the RICS scheme is based in Scotland).

**Carolyn Hirst** explained the background to the joining up of the various Scottish public service ombudsman bodies into a single body (SPSO), and the resulting organisational arrangements.

- Complaints investigators were inherited from a range of successor bodies.
- One organisation's IT case handling system was successfully developed with a partner organisation and is

now used by other public sector schemes in Britain and Northern Ireland.

- The new organisation was too small to engage a qualified accountant and so services were contracted out. Subsequently other small public sector bodies in Scotland have joined under the arrangement. This is facilitated by a common public sector accounting framework.
- Payroll was outsourced but, on reflection, this was done too quickly to a large firm and there were problems with the contract. It has just been re-let to a small firm.
- HR: the SPSO has its own HR manager. This is considered very important for identification with the organisation's needs, particularly in terms of staff development.
- Co-location with other bodies was considered (the office is not co-located). There were concerns about indicating independence to the public but also a government imperative to disperse public sector staff around Scotland and to utilise surplus buildings. New communications technology provides greater scope for flexibility on location.
- Partnership in delivery of front line services: the new service is well aware of the mixture of service delivery in the public sector including public, private and voluntary bodies. The SPSO and others have produced a route map to help complainants. The SPSO also has a 'Valuing Complaints' initiative to encourage and develop best practice in complaint handling and has developed Memorandum of Understanding with a wide range of audit, inspection and regulatory bodies.
- SPSO is promoting common approaches to investigations. It has developed a training module in conjunction with Queen Margaret University in Edinburgh. All new investigators in SPSO will be required to undertake this.
- The constraints on shared services are:
  - legal
  - structural
  - administrative
  - confidentiality
  - appropriateness.

In the subsequent discussion the following points were raised:

- The regional structure of the PSOs in Britain may be a barrier to shared activity and provision. But in Scotland the different government structure and legislation made this appropriate.
- The PHSO and LGO did their utmost to cooperate on producing simultaneous reports on the Balchin case, but the new Regulatory Reform Order (due in June) should make this more straightforward
- The PHSO Director of Finance said that outsourcing and shared services were features of the Gershon agenda in the public sector. From his discussions with the directors of similar sized public sector bodies there were a number of key issues identified from experience:
  - Cultural barriers, linked to attitudes towards the public sector and unwillingness to consider some services for outsourcing. Overcoming these barriers needs leadership from the top.

- In deciding what you should and should not outsource the selection should be customer driven – ‘what do they need?’.
- The scale of the body/function and the scale of the contractor. If you are not large enough to have a ‘voice’ with your contractor, don’t proceed.
- Don’t under-estimate the contract management time and skills needed to run the contract.
- Other participants commented that you should consider ‘will shared/outsourced front line services be better for your customers?’, and ‘will there be clear lines of accountability’

- when problems occur/complaints are raised by customers?
- In terms of multi-purpose investigators, this is limited by the amount of knowledge that can be obtained from a database and how much needs to be drawn from the training/skills/experience of the investigators.
- In summarising the session, Pat Whelan suggested that the main themes that had emerged from the workshop:
- focus on the service delivery to the customer.
  - be careful how far you go.

---

## Workshop 4: 26 April 2007

---

### Training, Accreditation and CPD

Chaired by: Tony Redmond, Commission for Local Administration in England (Local Government Ombudsman), BIOA Chair

Introduced by: Phil Mansell, Training Officer, Financial Ombudsman Service  
 Rita Crawshaw, HR Manager, Local Government Ombudsman  
 Niki Maclean, HR Manager, Scottish Public Services Ombudsman  
 Mike Reddy, Deputy Ombudsman & Chief Executive, Office of the Independent Adjudicator for Higher Education  
 Emma Francis, Head of Learning & Development, Parliamentary & Health Service Ombudsman

Report by: Jane Hannah, HR Manager, The Ombudsman Service Limited

---

**The Chair** introduced the session by explaining that the aim of the workshop was to further the debate about the potential for an accreditation scheme for investigations staff, and the involvement of BIOA. This issue had been considered in the past, but there was now a real impetus to move this strategy forward.

**Phil Mansell** outlined the fact that Ombudsman schemes represent:

- Quality
- Excellence
- Credibility
- Reputation
- Confidence and Consistency

These aspects demonstrate to the wider audience that the public can have the confidence to entrust Ombudsman Services with their complaint.

In order to build and maintain confidence in Ombudsman Services it is now appropriate to validate the quality of our people, to further raise the profile of Ombudsman Services.

**Rita Crawshaw** summarised progress made so far by the HR Interest Group, established in 2004.

A working group identified the potential scope to develop a generic training programme for investigators, by examining the following:

- Were there common skills for all schemes?

- Were there common competencies?
  - Was there sufficient commonality to design and deliver a joint accredited training programme?
  - Could other schemes join existing programmes or develop a new programme under a BIOA umbrella?
- A number of ideas were explored, for example a BIOA qualification based on NVQ level 4 or a BTEC modular approach, and core areas were agreed which formed the basis for the SPSO complaints handling accreditation scheme:
- Complaint assessment and alternatives to investigating
  - Effective investigation
  - Reaching and acting on findings
  - Providing a high impact service that is responsive, transparent, empathetic, authoritative, standards based and proportionate
  - Operating within legal and procedural frameworks
  - Communicating effectively
  - Producing clear, unambiguous written documents
  - Effectively managing data
  - Researching, managing and presenting knowledge and information from a variety of sources
  - Maintaining personal security and safety and being alert to the security of others
  - Managing your own resources and professional development
  - Working together and promoting diversity

**Niki Maclean** outlined the key drivers for the introduction of the complaints handling accreditation scheme at the SPSO, which had taken place against the backdrop of recent expansion, a degree of staff turnover, recruitment of employees with diversity of skills and knowledge, and increasing numbers of challenges to the decisions taken by the investigations team:

- Staff development
- More consistent approach to development of investigation skills
- Enhanced credibility of investigators and the organisation to 'sit in judgement'
- Ability to benchmark staff to a standard that can apply to other complaints handling bodies
- The limited availability of relevant programmes in the market

In researching the programme the following criteria were established:

- It was based on the identified shared BIOA competencies
- Appropriate for graduate level entrants
- A Certificated scheme
- Directly relevant to work
- Work time light
- Links easily with existing training programmes and a future emphasis on CPD
- Flexible enough to be relevant for both new and experienced staff
- Meets the SPSO competency of self development
- Sustainable and value for money
- The accreditation partners had to be credible/recognised as experts in the field, experienced at programme development, have systems in place for validation and be prepared to share development costs

The following Module Outline was achieved with Queen Margaret University:

- Masters level module, certificated in own right (worth 15 points that are transferable as part of relevant masters programme)
- Potential to become optional module of an Executive MBA Public Services Management Programme
- 100% coursework based
- 150 learning hours, including three contact days
- Mix of learning methods including face to face, work and web based, formal lectures, directed and independent learning, critical reflection and academic report writing
- Study based on a Learning Agreement signed off by QMU and SPAO stating aims and outcomes
- Assessment requires participant to study portfolio of evidence e.g 2,000 word study or presentation, plus a written account of learning relating to a particular skill (1,000 words)
- Option to deliver by distance learning (material available on WebCT)

The aims are to enable students to critically engage with a range of contemporary issues and debates underlying the study of customer complaints handling and to enable them

to plan, implement and critically evaluate a professional development initiative in order to advance practice in the workplace.

The content of the course includes managing customer complaints and work based learning and the pilot programme commences June 2007, at a cost of £700-£900 per participant.

**Mike Reddy** summarised his report to the BIOA Conference regarding the International Ombudsman Association accreditation scheme for individuals and organisations.

They have a certification process, run by IOA volunteers to promote a higher quality of employees through a two stage programme. Each stage requires service level criteria, attendance on training courses is assessed through examinations. All examinations are overseen by a committee.

The administration and costs of running the programme are believed to be outweighed by the higher quality of employees that are accredited.

**Emma Francis** summarised the presentations by outlining five options for moving this project forward:

### **1. Work with a Higher Education Institution**

This would involve finding a suitable HE partner, developing the content and process of a postgraduate certificate based on the BIOA common themes, agreeing an assessment methodology, confirming the duration, and piloting the scheme with a small number of BIOA members. The costs, based on the SPSO experience would be approximately £800 per person.

### **2. Adopt an NVQ route**

This route would require an NVQ partner/awarding body. All elements, and required levels of performance would need to be identified and agreed. Existing NVQs could be adapted to meet the BIOA common themes (customer service/complaints handling/investigations). The costs are estimated, as assessment and verification costs vary, at £700-£800 per person.

### **3. Work with AN other private training provider**

Providers would need to be identified, and their programmes adapted to meet the common themes of BIOA. The duration of the training programme, method of assessment and costs would also have to be determined, and are estimated to be £2,000 per person.

### **4. Individuals work with individual providers**

BIOA members adopt one of the above routes to suit their individual needs.

### **5. Do nothing**

BIOA members continue their own approach to training and development with internal or external provision.

The following points arose from the group discussions:-

- There was support for the work achieved to date, with BIOA coordinating efforts to move it forward
- BIOA members expressed a desire for the HR Interest Group to formulate a strategy to raise the quality of investigations staff, as an accreditation process would provide the platform for good practice
- There was concern about the costs involved if organisations were already committed to investment in their own training and development schemes
- The money to develop a strategy encompassing all the core

skills of all the different schemes was also a concern

- An accreditation scheme would provide 'professionalisation' and greater credibility, thereby raising the status and profile of Ombudsman schemes outside BIOA
- A two tier approach would be the most effective approach e.g. An NVQ approach for the first level and a Higher Education route for the second level, as there is significant diversity amongst the schemes' investigation teams
- There was great interest in the SPSO pilot scheme and its progress would be monitored closely.

---

## Workshop 5: 26 April 2007

---

# Capacity and Proportionality Workshop

Chaired by: Jerry White, Local Government Ombudsman

Introduced by: Phil Latus, Case Director, Independent Case Examiner  
Paulyn Marrinan Quinn, Ombudsman for the Defence Forces, Ireland  
Trish Longdon, Deputy Ombudsman, Office of the Parliamentary and Health Service Ombudsman

Report by: Peter Hinchliffe, Lead Ombudsman, Financial Ombudsman Service

---

**Jerry White** introduced the speakers by explaining that they were all to comment on the 'balancing act' that ombudsmen need to perform between the complainant's desire for exhaustive investigation and the Ombudsmen's finite capacity to investigate.

### Ombudsman Experience

**Paulyn Marrinan Quinn** began by explaining that she had experience of different roles in the ombudsman world. She first attended a BIOA conference in 1993 when she was establishing the new role as the first Insurance Ombudsman in Ireland. She is presently establishing her role as the first Ombudsman for the Defence Forces. This had given her different perspectives on the need to decide upon an appropriate process and an appropriate resolution to complaints that she has received. This had led her to also consider the distinction between remedy and redress when considering how to respond to people bringing complaints. In the insurance world, complainants had generally a clear idea of what they were entitled to and that financial redress was a significant part of this. As Insurance Ombudsman she had the power to make binding awards and provide specific answers to individual complaints. As Ombudsman for the Defence Forces, she was aware of responding to dissatisfaction with the system and of the very strong power of investigation that she had been given, which could be invoked after what had already been a thorough complaints process with several levels and with access to expertise and legal advice. In her new role she could not act until the full internal process had been resolved in the Defence Forces but then, if no redress was offered within 28 days, she could begin an investigation immediately.

It is a difficult task to decide on budget and resources. She was aware that in her role in insurance the caseload that had emerged was larger in quantity, but smaller in the size of the dispute, than she had expected. In the Defence Forces role it appeared that the need for her was to be able to conduct a few potentially very detailed reviews of what may already have been a detailed and meticulous internal decision process. Her conclusion was therefore that one of the key judgements that an ombudsman has to address is the appropriateness of the resource as well as the size of the resource. Her other general conclusion from both roles was that an ombudsman should not underestimate the power of an apology or the difficulty of giving it.

**Trish Longdon** then spoke regarding the review of capacity that the Parliamentary Ombudsman had had to conduct in October 2005. At that time the office had 2,500 investigations in hand, with a wait of up to one year for some investigations to start and a position that was deteriorating. Whilst the Parliamentary Ombudsman has huge power and discretion in the operation of their process, the first consideration had always been to maintain their own standards and confidence in the outcome of their investigations. With this in mind they developed a practical action plan to address their difficulties with volume and timescales. One key decision was to identify categories of cases that had such close similarities that there was an opportunity to investigate and consider them on a collective basis in a new process and then to issue individual responses. This was thought (and proved to be) proportionate and was successful in efficiently producing individual answers whilst maintaining standards and quality. She noted that there ▶

had been no more complaints about the outcome of cases dealt with in this way than in those individually investigated. By April 2006 there were 1,800 investigations in hand and the number of very old cases was reducing. The next big decision they made was to manage demand. The fundamental principle was to recognise when they were acting as the last resort to a complainant. They decided to identify key sources of complaints and to work with them to improve the review of the case by these sources at an early stage to ensure that competent complaints handling took place prior to their involvement. This enabled the Ombudsmen to focus on the quality and timeliness of their remaining work. This was successful but was still not enough.

The next step was to look at strategic management of demand, a new process that involved a weekly panel meeting, with either the Ombudsman or Deputy Ombudsman as chair, to look at all requests for investigation and/or review and to decide not only whether the Ombudsman *could* investigate, but also whether they *should*. The involvement of the most senior staff added to the boldness with which this approach could be adopted. All requests for investigation were considered and the process emphasised the need for good judgement in deciding whether the Ombudsman should investigate such cases. As a result of this new process only half of the requests for investigation are being accepted. The major criterion that has permitted them to decline to consider a complaint remains that the Ombudsman should be the last resort. In these circumstances cases are entitled to thorough investigation. The final practical measure was to create a category of 'associate investigators' who could be brought in to deal with peaks in demand. The result has been this year that the Ombudsman will meet its service standards, and there are only 617 investigations outstanding at the end of March 2007.

**Phil Latus** then spoke and also took us back to a time when the Independent Case Examiner (ICE) realised that their limited resources were able to cope with a rise in volume and in the expectations of those bringing complaints. One issue they had to face was the time it takes to increase capacity through recruitment and training. They had taken the view that proportionality meant that one size need not fit all of their cases. There was a demand for a faster, better service. They were also aware of demands for cost cutting in their organisation and all parts of the DWP.

In 2001 the ICE was providing a high quality of service which they were not prepared to compromise on. However, 60% of cases were requiring a final report and only 40% were resolved prior to that stage. Criticism of delay and concern over resources led them to conduct an operational review with a view to increasing output whilst maintaining quality and satisfaction. From 2002 onwards they were able to achieve a modest increase in staff but a very significant improvement in productivity and efficiency. There were four major initiatives that led to this improvement. Firstly, they developed a practice of always speaking to the client to clarify what was required. They would then consider whether some initial action would

satisfactorily resolve the case without a detailed review. Where appropriate they would pursue this with the relevant agency. This has been enormously successful and the proportion of cases resolved without investigation and a final report is now 60%. The second step was to examine the evidence whilst an investigation is being conducted in order to see if resolution is possible during this stage of their work. As a consequence 16% of cases are now resolved during the course of the investigation. The balance of the cases are fully investigated and a final report is issued. The ICE has therefore produced the same number of final reports over each of the last few years but, as a proportion of their workload, these have dropped from 60% to 24%. This proportionate approach has maintained satisfaction whilst reducing timescales and cost per case. As a result of this increase in efficiency and maintenance of standards, in April of this year they have been asked to extend their service to cover all business and agencies of the DWP. Phil believes that a proportionate response has helped not only their existing customers but has led to a greater benefit being extended to others.

## Questions and general discussions

Three principle themes emerged:

### 1 "Should we" consider a case rather than "could we"?

A number of those present sought to clarify this approach to deciding whether to investigate a case. Trish Longdon suggested a three point test could be applied:

- Is there evidence of unremedied injustice?
- Can it be addressed through proportional intervention short of investigation?
- Can a worthwhile outcome be achieved?

**David Laverick** suggested that it might be appropriate to add another consideration – is it in the public interest for a finding to be reached (even if there can be no worthwhile outcome)?

There was some concern at restricting access. Margaret Doyle thought that the importance of the issue to the complainant should not be underestimated, Whilst Paulyn Marrinan Quinn thought this concern made it essential that the decision to not proceed with a case had to be made at a very senior level. Philip Giddings raised the issue of whether it could be delegated at all as some statutory schemes are drafted so as to suggest that the Ombudsman's jurisdiction is a personal one. Jane Hingston explained the FOS approach of proportionate approach to all cases with some being dismissed as having no reasonable prospects of success, most being settled by discussion before an investigation and only 10% going to an ombudsman for a formal decision.

### 2 Standby Investigation/Casework/Adjudication Resource

In dealing with peaks in demand it became clear that many schemes relied on being able to call in skilled investigators on an occasional basis and that most saw the benefit of this

approach to resources and capability. Interestingly, there was a clear consensus that the key attribute of such staff was experience in conducting investigation and ombudsman work rather than specialist technical knowledge and experience. The lead time for new recruits to learn how to effectively carry out investigation/adjudication work was too long to assist in a practical way with peaks and troughs in demand.

The Pensions Ombudsman, Northern Ireland Ombudsman, Local Government Ombudsman and Prisons Ombudsman in Northern Ireland all indicated that they used recently retired ex-staff from their scheme or related schemes in this capacity. Problems in keeping such individuals up to date and involved were recognised. On some occasions such experienced staff were best used to deal with time-consuming exceptional cases rather than new processes designed to speed up an appropriate part of the workload. This still left a significant management issue in respect of consistency and quality.

Some schemes, including the Independent Adjudicator for Higher Education, said that this would be helpful but such staff were hard to find, whereas the Waterways Ombudsman indicated that she saw no great difficulty with such an arrangement from her experience.

It was suggested that BIOA might consider a role for itself

in administering a list of experienced ombudsman staff whose availability and knowledge could enhance the capacity of schemes whilst also bolstering their independence. However, special consideration would be required to see if such resource could be made accessible to those needing to satisfy public appointment processes in Ireland or UK.

It was also suggested that the BIOA role in co-ordinating the availability of skilled resource might extend to identifying appropriately experienced individuals who could consider complaints about schemes.

### 3 Detailed reasoning

The discussion also considered whether decisions had to include reasons and how detailed these might be. A proportionate approach may be less effective if detailed reasoning was required in all cases. Some schemes had little flexibility on this aspect and others were conscious of the threat of judicial review and envisaged that legal advice might be necessary before deciding not to proceed to fully decide a case, or to do so without offering full reasoning in any decision or opinion. The opportunities to improve capacity by adopting a proportionate approach would therefore have to be assessed scheme by scheme.

---

## Workshop 6: 26 April 2007

---

# Freedom of Information Act

Chaired by: Elizabeth France, Telecommunications Ombudsman and Energy Supply Ombudsman

Introduced by: Richard Thomas, Information Commissioner (England & Wales)

Kevin Dunion, Scottish Information Commissioner

Fintan Butler, Senior Investigator, Office of the Information Commissioner, Ireland

Report by: Margaret Hepburn, Principal Investigator, Housing Ombudsman Service

---

## Richard Thomas

The FOIA became effective over 2½ years ago and since then opinion has been polarised. The legislation has had an impact across the UK with lots of media attention.

October 2006 :ICO FOI progress report indicated that: it had received 5,000 complaints since 2005 and had closed 4,000 complaints with the publication of 500 decision notices.

The Act has had resource implications. ICO FOI budget for 2007/2008 is £1 million less than last year.

The Government commissioned Frontier Economics to report on the impact of the FOIA and a review of the charging regime. The annual cost to the public sector was estimated to be £35 million, which is not high, for example the Royal Parks have similar costs.

The breadth and complexity of cases varies. One quarter of cases appealed to the Information Tribunal.

The appeal is free to the Information Tribunal, which sits 1–2 days. One-quarter of cases appealed upheld.

The democratic benefit of FOI is that there is a

presumption of disclosure unless there is a genuine reason to withhold information.

A small number of requests have a disproportionate affect in terms of the burden they place on public authorities.

Freedom of Information reinforces good government. There is a fear that FOI can have a 'chilling effect' in that nothing gets written down. The FOIA, in fact, encourages a record of full accurate and impartial advice from civil servants and supports the principal that officials advise and ministers decide.

At the upcoming FOI live conference the Commissioner will challenge the fears that FOI undermines government and will recognise and address the anxieties expressed.

Cases referred to in Workshop

- Information Commissioner's Website [www.ico.gov.uk](http://www.ico.gov.uk)
- Ofcom and Mobile Telephone Masts; Decision notice 11 September 2006 FER0072933
- MPs travel expenses; House of Commons Decision Notice 22 February 2006 FS50083372
- HM Treasury and Pension funds/taxcredits 7 June 2006 Decision Notice FS50088619

- Board of Governors BBC: Decision Notice 15 February 2006 FS50073129
- DfES Minutes of Senior Management setting budgets for schools; Decision Notice 4 January 2006 FS50074589 (full details available on ICO website)

## Kevin Dunion

2005: Receive twice as many appeals pro rata as the Information Commissioner.

Breakdown of appellants:

- Public 55%
- Media 8%
- Lawyers 12%
- Politicians 6%

Are they justified complaints? Three-fifths wholly or partially upheld. System not abused. Therefore, justification for majority of appeals made.

Challenges to the Commissioner's decisions are made to the Court of Session. 10 out of 420 appealed; two withdrawn and three upheld in Commissioner's favour.

It is only to be expected the Commissioner will lose some cases. However, it is good to test the boundaries in court rather than be restrained and too cautious.

Application of the concept of 'dire consequences' in that the effect of disclosure outweighs the need for that disclosure.

## What learnt?

Public authority overstating degree of potential harm in some cases – the threat of dire consequences – which not justified on investigation

Investigations are taking too long for a variety of factors – volume of appeals; first time consideration of arguments; changing basis of position on disclosure in course of investigations. Often this involves the authority submitting new exemptions, submitting that documents are outside the scope of the request, or submitting that the cost of dealing with the request exceeds the maximum. Where new reasons for withholding are made SIC often had to secure further details in justification.

Commissioner is now pressing authorities to make full argument in first submission.

At a crossroads, the immediate task of successfully implementing the Freedom of Information Act has now been met – now the real challenge of converting from compliance to culture change is underway.

Cases referred to in Workshop

- Scottish information Commissioner's Website: [www.itpublicknowledge.info](http://www.itpublicknowledge.info)
- Investigation into the death of Kevin McLeod; Mr Alan McLeod and Northern Joint Police Board 003/2007
- Mortality rate of surgeons since 2000; Camillo Fracassini of Sunday Times and the Common Services Agency for the Scottish Health Service 065/205
- Costs of providing company cars for Senior police officers; John Robertson Aberdeen Journals Ltd and Chief Constable of Northern Constabulary 066/2066

- David McLetchie's travel expense, taxi journeys since 1999; Paul Hutchison The Sunday Herald and the Scottish Parliamentary Corporate Body 033/2005

## Fintan Butler

Freedom of Information Act 1997, came into operation in 1998 following a lead in period of one year.

FOI has now become quite politicised.

FOI Act 1997 introduced by a Coalition Government which came into power in the context of openness and transparency. By 1998, when the Act commenced, the Government had changed and 10 years later same government.

The present government, whilst in opposition, argued that the FOI Act was too weak but now says it is too strong. In 2003 the FOI Act was amended. One of the amendments related to access to Cabinet Papers. Prior to the amendment, Cabinet papers were potentially releasable after five years; following amendment, such papers are protected for ten years after which they may be released.

Other amendments included the imposition of fees for requests and appeals:

€15 for a request

€75 for an internal appeal

€150 for appeal to the Information Commissioner.

This has caused a substantial drop in FOI requests and a general dampening of the status and public perception of the FOI. It has had a 'chilling' effect.

Prior to the changes the personal and non-personal information requests were 50:50; now 3:1 in favour of personal requests. For example, in 2002 almost 8,000 requests made for "official" records; by 2006 this had dropped to 3,500 even though more public bodies had become subject to the Act in the meantime. The extent of FOI usage by the media has also declined; in 2002 there were approx. 2,000 media requests whereas in 2006 there were only approx. 1,000 media requests, more than 50% drop.

After 10 years there is a deep distrust and suspicion of FOI in some quarters; for example, within the Department of Justice. The police force (An Garda Síochána) is not yet subject to the FOI Act. However, implementation of FOI by the civil service in general is fine.

New Commissioner for Environmental Information effective from 1 May is the current Information Commissioner, although two separate legal entities. The Environmental Information Commissioner will deal with appeals made from requesters using the EU Directive on access to environmental information. Unfortunately, the environmental information side of things not properly promoted or resourced; the Information Commissioner would have preferred if, as in the UK, the access regime under the EU Directive, were merged with the FOI Act.

## Question and answer session.

Information Commissioners are in fact political creatures in 52 countries of the world. It is right that they are there to play a new role in exposing what is happening to public money?

Not democratically elected, although neither are judges, although they have a quasi-judicial function.

### Can Human Rights Act be used to access information?

Under current ECHR cannot access official information. Council of Europe is developing a treaty to allow access to documents information. The question of MEPs expenses, particularly around information on housing allowances, is a live issue with the European Ombudsman. The upcoming conference of FOI Commissioners including those from Europe, will be discussing the practical purposes of releasing information as it does involve public expenditure.

### What is a public authority?

The FOI has a specific schedule which specifies what constitutes a public authority. Any information held by a public authority is at risk of a FOI request.

### Concept of 'dire consequences'?

Sometimes there are reasonable arguments for the 'dire consequences' argument. Then of course the Commissioner would uphold the refusal of the information. Public authorities' biggest concern is the risk to reputation. Therefore, the argument would be why not release the information without waiting for a FOI decision. The resistance is much less at regional and local levels. Perhaps uncertainty is one of the drivers. Although orders for

disclosure get more publicity than no disclosure.

The DEFS case in which the minutes were innocuous but on principle defending the lack of disclosure.

Encourage a proactive release of information with a publication scheme on a voluntary basis.

In Ireland hospital resources which are now publicly funded, are subject to the FOI and it is likely they will find it difficult to accept scrutiny.

A clearer purpose clause in the legislation would be helpful. However, there is a presumption of disclosure in s1 of the Act, which is the starting point, then only if exemption argued does it engage.

### When is a request a request?

Sometimes it is difficult to distinguish when a request is actually being made and the Act is engaged. For example someone writes and requests the opening times of the local swimming pool. This in fact is an information request within the meaning of the Act. However, you could be excused for mistakenly believing it is not. The Commissioner takes a common sense approach to such cases. There are consequences if refuse request but the refusal should be accompanied by the caveat can go to the Commissioner.

There needs to be a culture shift. The guiding rule is that if refusing a request, explain why.

More work is being done to inform by Commissioners.

---

## Workshop 1: 27 April 2007

---

## Principles of good governance

Chaired by: Caroline Mitchell, Lead Ombudsman, Financial Ombudsman Service

Introduced by: Mike Biles, Housing Ombudsman  
Jim Dyer, Scottish Parliamentary Standards Commissioner

Report by: Caroline Gill, Deputy Financial Services Ombudsman, Ireland

---

**Caroline Mitchell** explained that the BIOA Executive Committee set up a working group in 2006 to examine good governance in the context of Ombudsmen and complaint handling schemes. The terms of reference given to the working group were:

- To identify the general principles of 'integrated governance' relevant to Ombudsman and complaint handling schemes. 'Integrated governance' is where positive corporate governance is a value embedded throughout the organisation.
- To draw up a statement of principles which underpin the BIOA criteria of independence, fairness, effectiveness and accountability
- To publish a high-level statement of guiding principles regarding good governance to be used by Ombudsman and complaint handling schemes

Governance in the context of ombudsman schemes was taken by the working group to mean the governing structures and

processes that enable organisations to deliver their functions in the most appropriate and effective way.

### Elements of good governance

Caroline Mitchell stated the working group examined six elements of good governance. They were the purpose and objectives of the scheme, function and role of the office holder, function and roles of the governing body, appointment and remuneration of the office holder, funding arrangements and accountability to stakeholders.

The working group's preliminary findings were then introduced.

### Purpose and objectives of the scheme

**Mike Biles** stated it was necessary to make explicit the purpose and scope/limitations of the scheme to define the extent of the scheme's role in improving procedures/standards, to explain the independence of the office holder, to explain ►

the scheme's financial viability, to demonstrate fairness of procedures, to outline service standards and to explain how service is reviewed against standards and to demonstrate effective management.

### **Function and role of the Office Holder**

Mike Biles set out the function and role of the office holder. He highlighted the need for a proper appointment process and said that the person appointed should be a publicly named, known, accountable individual who made independent decisions, kept clear records, and worked to appropriate standards.

Mike Biles said the office holder, or in certain circumstances the CEO, was responsible for jurisdiction, process, out-puts and putting in place a process for dealing with escalated complaints. There should be a clear definition of authority, explicit circumstances in which a dismissal could take place and a clear distinction made between judicial and executive functions.

### **Function and role of the Governing Body**

Mike Biles then discussed the governing body and outlined its function and role. The governing body must make explicit its accountability and that of the scheme's executive. The governing body ensures alignment of scheme effectiveness with purpose, it facilitates transparent accountability, it delivers explicit allocation of roles and responsibilities with the governing body and executive and ensures it is fit for its purpose.

The governing body owes its primary responsibility to the scheme. Fundamental to good governance and at the heart of the success of the scheme is an effective board of directors (this is the governing body) a majority of whom should be independent.

The governing body approves corporate objectives, sets strategy and allocates resources to achieve them. It ensures the scheme conducts its affairs in an ethical, legal and responsible manner. The governing body reviews the effectiveness of internal controls, supports the independent decision making role of the office holder in the exercise of investigatory powers and establishes formal and transparent arrangements for presenting the annual report.

### **Appointment and remuneration of the Office Holder**

Jim Dyer discussed the appointment and remuneration of the office holder. He said the appointment procedures should follow principles for public appointments in a proportionate way which is open, transparent, and made on merit.

He stated those making the appointment should be independent of those under investigation (or at least a majority should be). The term of office should be at least five years to guarantee independence (currently three years in the BIOA criteria), effectiveness and efficiency. Remuneration should be linked to an independent index.

Renewability of contract has some advantages but might also constrain independence. A single term may be preferable, especially if those appointing are not independent of those under scrutiny.

The grounds for reappointment should be clearly stated and any performance review should not encroach on the office holder's decisions, although it might inform reappointment. Grounds for dismissal should be clearly laid out e.g. inability, neglect, misconduct, bankruptcy.

### **Funding arrangements**

These should be robust and not impinge on the independence of the office holder. The full remit of the office holder should be reflected in adequate funding arrangements.

Adequate funding must demonstrate the independence of the office holder. The office holder should have his/her own staff and premises. The office holder should be accountable for proper use of funds.

Jim stated that the Cadbury principles on governance are helpful in indicating that, for example, an independent audit should be carried out. He added that the annual publication of accounts is necessary and so is an annual report.

### **Accountability to stakeholders**

The office holder must be aware of his accountability to stakeholders. The governing body should identify the stakeholders. Stakeholders should have a strong representation in the governing structure, with an independent majority

The scheme has to balance the needs of different stakeholders, and ensure there is a complaint system with a clear point of contact. The scheme must have a strategy for communication with stakeholders.

### **Points arising from the Open Forum**

During the question and answer session following the three presentations a number of points were made.

It was noted that the governance document must reflect the diversity of ombudsman schemes and that the document should be discursive rather than didactic. There are many different schemes which vary in size and structure. Although it is possible to draw general conclusions about the composition of good governance, there is no intention to be prescriptive as one size does not fit all.

The importance of retaining the integrity of an ombudsman scheme was highlighted. It was recognized that the board/governing body had responsibility for the reputation of the scheme. It was argued that the board should have discussions with the ombudsman regarding the work carried out. A majority of members from the floor stated that the decision making has to be taken by the ombudsman and that the governing body must not get involved in individual decisions. A board member argued that it was legitimate, that after a decision was arrived at, to discuss what principles were used in the decision making and what were, for example, the boundaries used regarding the balance of probabilities and what proofs were necessary in concluding a case.

Members from the floor expressed a general consensus that it was essential that there was a clear separation of responsibilities between the governing body and the office holder and that there was 'proper' dialogue with ombudsmen. The ombudsman must be independent.

It was noted that it is important to have respect between the governing body and the ombudsman. It was stated that where there is a regulator the governing body should have a relationship with the regulator. The governing body should publish a statement making its accountability to the various stakeholders clear and transparent.

Discussion centred on the composition of the governing body. The chairman should be independent and there should be an independent majority; industry members could also serve on the governing body but once on this body they were responsible to the scheme, not the sectoral interest they represented.

Discussions then moved to whether the ombudsman should take responsibility as CEO also or should there be split roles. Governance should be clear regarding the roles whether they were separate or joint roles. There was a strong sense that where ombudsmen have the joint role that it works well.

The group then discussed terms of appointment of the office holder. It was argued that five years was an appropriate term, but that it could be longer. Anything shorter can

interfere with the office holder's independence.

The consensus was that a governance statement should emanate from all organisations setting out the governance structure and laying out its accountabilities. It was recognized that the structure underpinning ombudsman schemes can come from, inter-alia, different statutes, company law, terms of reference etc; whatever basis it has the governing body must make a clear statement on the structure and principles underpinning its governance.

It was agreed the Working Group would meet again to continue its work. The intention was to pull together the work done so far to produce a draft for the Executive Committee in the first instance and to be circulated to BIOA members for consultation in the next year. The chair circulated a questionnaire to the group; feed back will be circulated through the working group.

The Chair summarised the key points of the working group's presentation and thanked everybody for their contributions to the successful workshop.

## Workshop 2: 27 April 2007-06-06

### Risk management

Chaired by: Suzanne McCarthy, Immigration Services Commissioner

Introduced by: David Thomas, Principal Ombudsman, Financial Ombudsman Service  
Nigel Karney, Deputy Chief Executive and Secretary, Commission for Local Administration in England

Report by: Elspeth Cooper, Operations Director, Independent Complaints Examiner

Figure 1

Risks					Risk management				
Area of risk	Specific risk	Impact			Risk management strategy	Effectiveness			Net risk
		Significance	Probability	Gross risk		Strength	Further action required	Risk owner	
BIOA workshop	David Thomas may be boring	L	H	M	Clear instructions	W	Skilful chairing	Suzanne McCarthy	M

H = High M = Medium L = Low S = Strong M = Medium W = Weak

Copyright BDO Stoy Hayward 2003

The first speaker, **David Thomas**, outlined how the FOS approaches risk management

He warned the group that there was a real risk that many people in an organisation can see risk management as boring, but it is actually a very important management tool. He shared with the group his risk assessment of his contribution, using the model employed by the FOS, as shown in Figure 1 above.

David explained that the net risk remained medium, because once he started there was little the chairman could

do. He went on gave a brief description of an approach that might be adopted.

#### Identification of Risk

This involves identifying: the internal and external risks; their probability; and their impact. A framework for this might look at:

- workload risks (e.g. too much / too little work)
- people risks (e.g. competence, succession planning)

- system risks (e.g. IT security, IT breakdown)
- premises risks (e.g. fire, terrorist action)
- financial risks (e.g. income too low, overheads too high, fraud)
- legal risks (e.g. judicial review, employee claims)
- reputational risks (e.g. public criticism of delay / mistakes)
- regulatory risks (e.g. what 'your' regulator, if any, does)
- political risks (e.g. constituent issues, amalgamation / abolition)

David thought that reputation has to be the biggest risk faced by any complaints/ombudsman service.

Once the risk is identified then consideration has to be given to the Management of the Risk

### Management of the Risk

- avoid (e.g. stop the activity which creates the risk)
  - eliminate
  - control (e.g. quality / financial audit)
  - mitigate (e.g. contingency plan)
  - transfer (e.g. insurance)
  - tolerate (e.g. small risks, risks that cannot be dealt with)
- David discussed the people management aspect of Risk eg
- audit committee
  - board/council (e.g. especially valuable for the external risks perspective)
  - risk champions (ideally someone senior who ensures that risk management becomes embedded in the organisation)
  - internal stakeholders (who are responsible for identifying risk in key areas)

David identified the key issues that surround the management of Risk which are

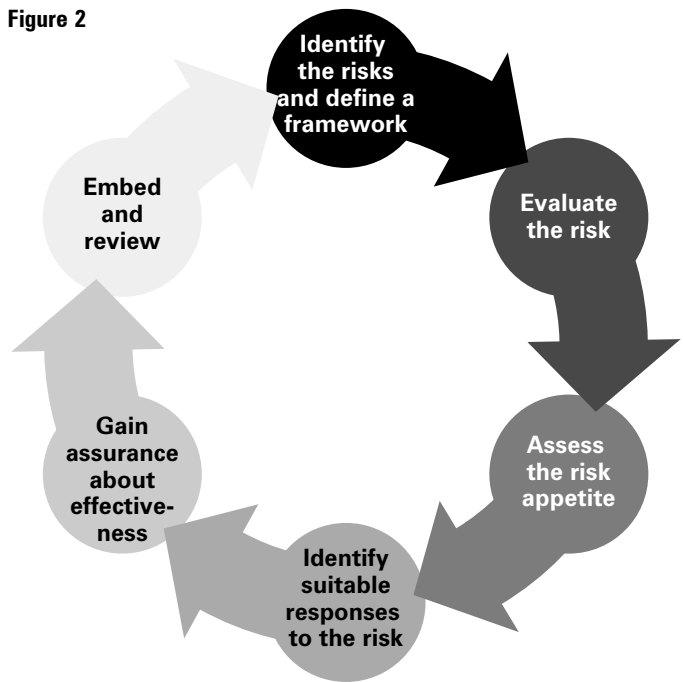
- Communication and buy in – every one needs to be involved
- Link to strategic objectives – need to marry up risks or there is a danger of a proliferation of action lists
- Monitoring and regular review – manage risk into individual projects

David also shared with the group a method employed by a University that he works with. This combines probability and impact arithmetically in order to produce an overall financial value.

Financial value = Impact	Score	Frequency = Likelihood
Under £500	1	Over 20 years
£2,000	2	Over 5 years
£8,000	3	Over 1 year
£40,000	4	4 months
£120,000	5	1 month
£500,000	6	1 week
£2,000,000	7	2 days
Under £10,000,000	8	Under 2 days
Under £40,000,000	9	
Over £40,000,000	10	
<b>Risk score = Impact score x Likelihood score</b>		

In conclusion David discussed the challenges to Ombudsman

Figure 2



services in guarding against becoming risk averse. Risk management can inhibit experimentation and it is very helpful to organisations to look and see how the world in which they operate has changed since the first snapshot was taken six months previously when identifying the risks.

Nigel Karney, delivered a short presentation about his organisation's (the Local Government Ombudsman) approach to strategic risk management.

Nigel explained that all well run organisations need to have in place effective measures to identify risk, and manage it if it is realised in order to avoid disruption of daily activities and development projects, and to take advantage of opportunities.

Nigel outlined the risk management cycle. Risk arises from the day-to-day conduct of the LGO's activities to deliver their objectives, and from the changes arising from developing projects (see Figure 2).

A model for managing Strategic Risk has been developed around three elements that relate to the LGO's vision and values. These are:

- Maximising value and impact on local government services
- Accessibility and customer focus
- Quality and efficiency

If the LGOs performance weakens in any of these elements then the reputation and justification of the LGO as an organisation entrusted with providing its public services is brought into question. So it is very important for the risks to be well managed. A register of Strategic Risks is maintained for each element a page of which is illustrated below. The risk level is evaluated in the light of the SWOT analysis that appears below the table (Figure 3).

Nigel discussed the importance of embedding risk management across the organisation and described how this was achieved at the LGO. This is done in a variety of ways including incorporating risk management into job competencies, business and project planning. He also outlined the five key aspects to

Risk area	Owner	Impact	Controls	Likelihood of failure	Residual Risk		Further controls planned
					Previous Nov 2006	Current March 2007	
<b>Accessibility and Customer Focus</b>							
Stakeholders: the public; advisory sector; central government; media; the courts; our staff-							
1. The public are aware of us when they need our services, and consider us worth using	DCE DO's	3	11	3			
2. Our services are widely accessible	DO (D)	4	11, 16	2			
3. Our services and employment practises respect diversity and address needs appropriately	DO's DCE	3	5, 16	1			

#### Current threats and Opportunities

- Backlog issue is causing delay in decisions and may impact on quality.
- Ombudsmanwatch acts as a focus for critics of our independence fairness and thoroughness.

#### Current response(including major development projects)

- The Access and Advice project is a key development in this area

#### Key

DCE = Deputy Chief executive DO's = Deputy Ombudsman DO (D) = Deputy Ombudsman with lead responsibility for service diversity

managing risk in order to constrain threats and take advantage of opportunities should the risk be realised

- **Tolerate:** The level of risk may be tolerable without any special measures to manage it
- **Treat:** The risk is controlled to constrain the likelihood of it being realised
- **Transfer:** the risk may be eliminated or mitigated
- **Terminate:** Some risk may be only be tolerated by ceasing an activity or finding another means of achieving the desired outcome
- **Take the opportunity:** not an alternative to the others but reflects the appropriate response when a potential benefit is presented.

Nigel discussed the risk appetite of the LGO and admitted like all complaint handlers/ombudsman organisations the LGO's are relatively risk averse in relation to the processing and maintenance of their case records. But they have to be risk tolerant in other areas, for example the level of incoming complaints which is very difficult to predict. The real challenge for managers he said was engaging staff and senior managers alike to embed risk management within every tier of the organisation. He was confident that he was well on the way to achieving this goal within his organisation.

The discussion following the presentations centred round how other organisations embedded a Risk Management process within their organisations. The consensus was that to achieve a process that enabled organisations to identify risk, to engage staff at all levels was key, but all recognised that this was not as easy as it sounded. Some organisations found that monitoring Risk Registers was a complete turn off to staff and the

danger was that it could induce a mild form of paralysis. There was wide agreement to the opinion that where staff become very aware of inherent risk they can loose a sense of freedom, experimentation and innovation suffers. The group agreed that it was important not to see risk as always identifying the bad things i.e. things that can go wrong.

A discussion around the processes adopted by some ombudsman services to introduce risk management of cases identified the potential to enable staff to mitigate risk at an early stage in the process. The major benefit appeared to be that it allowed cases to be dealt with by staff with the appropriate skill set. The experience of one organisation that identifies cases considered to be of High Risk and uses a register to plot their outcome gave colleagues food for thought especially as it ensures the organisation is able to keep cases 'on the radar' of senior managers. In addition it was suggested that each organisation should consider having a Critical Incident Process in the event that something goes wrong then it can be put right quickly.

The group was in general agreement that Strategic Risk Management was less troublesome than Operational Risk. There was general consensus that staff tend to view Risk management as a 'turn off'. The group also discussed the difficulty of gaining consistency across several sites. Senior management it was agreed have a key role in ensuring that risk was kept on the agenda and robust monitoring was also essential. Having a 'no blame' culture, it was agreed, helped operational staff to identify risk and the reporting of a near miss, could ensure that next time round the risk had been mitigated.

Suzanne McCarthy thanked everyone for their contribution and commented that it was a very stimulating workshop.

## Ombudsman innovations in the private sector

Chaired by: Walter Merricks, Chief Ombudsman, Financial Ombudsman Service

Introduced by: Robert Behrens, Complaints Commissioner, Bar Standards Board  
Frances Williamson, Industry Relations Manager, Energy Retail Association  
Ian Smith, Surveyor Ombudsman

Report by: Jane Hingston, Lead Ombudsman, Financial Ombudsman Service

### Introduction

The workshop heard from the emerging and pilot schemes covering energy suppliers, barristers and surveyors. We then opened up the discussion to explore whether recent developments of the complaint schemes in the private sector represented a sensible progression of ADR, recognise potential pitfalls and identify possible benefits.

### Scheme-specific points made by the introducers

#### Robert Behrens

Legal services legislation currently before Parliament is based on a seminal report by Sir David Clementi. The Bar Council – in advance of legislation – has now drawn the distinction between responsibility for representation (Bar Council) and regulation (Bar Standards Board). Against a historical background of Bar self-regulation, the government had a strong ‘consumer comes first’ agenda in proposing Regulated Self-Regulation.

The challenge for the Bar Standards Board is how to ensure exemplary regulation until the new arrangements are introduced sometime after 2010. Towards this end, qualitative and quantitative research had been commissioned, to be published shortly. This identified that complainants in the sector were not representative of the general population; they were largely from groups that reflected some social or other disadvantage.

As the complaints were being brought against a profession that is a highly educated elite schooled in an adversarial approach, there was a substantial disparity in the relative power and cultural positions of the parties. It was important for this feature to be taken into account.

The research identified that most complainants in the sector were not motivated to bring or pursue a complaint by a desire for compensation. More common was the wish to obtain acknowledgment and recognition of their concerns, or an apology. Many wanted the court decision in their case to be overturned.

Most complainants wanted a personal hearing of their complaint, seeing that as perhaps the most important thing. The early management of complainant expectations was recognised as a basic requirement to achieve acceptable outcomes.

In drawing up the shape of any interim arrangements, complainant wants and needs both had to be taken into

consideration. Needs or mediated wants were seen as key. The challenge was to balance available resources with optimum service outcomes. Costs were always an issue, but it was essential that any amended scheme should succeed – given the significant potential for consumer detriment if they did not.

#### Frances Williamson

The Energy Retail Association (ERA) is the dedicated trade body for the energy industry that supplies the domestic market. It also seeks to identify areas of good practice and to elicit consumer views.

A super-complaint made to Ofgem by the Gas and Electricity Consumer Council on billing processes, although not upheld, identified that there was a role for an independent dispute resolution body and recommended that this be put in place by July 2006.

ERA was tasked with establishing what consumers and the industry wanted from the scheme. It was important that the scheme be free to complainants, independent and binding on the industry.

The telecoms model appeared to be the best ‘fit’ for the energy industry, and so it was decided to use The Ombudsman Service Limited (TOSL). Having access to the existing infrastructure and processes of TOSL was particularly useful, given the very tight timescales that had to be met.

It has been difficult accurately to predict complaint numbers, and so flexibility was important. There were also challenges around culture change within the industry and in the way it handles complaints. Sharing TOSL may help to raise complaint handling standards both for telecoms and for energy.

The Consumers, Redress and Estate Agents Bill would extend ombudsman coverage to all aspects of energy complaints, including doorstep sales. Network providers should also have in place schemes (for example, to cover problems with power lines). There will be stakeholder involvement in discussions going forward, and it is recognised that there could be gains for stakeholders from the creation of a ‘one-stop shop’ for energy dispute resolution.

#### Ian Smith

The Royal Institution of Chartered Surveyors (RICS) accepted that it should make provision for alternative dispute resolution. There was considerable scope in the profession

for service failure, with the potential for consumer detriment. Consumer experience of the profession was changing, and legal remedies or arbitration were not seen as readily accessible. Self-regulation was no longer sustainable for them.

The Surveyor Ombudsman Scheme was launched as a pilot scheme in Scotland in 2004. The different property sales process in Scotland, and the more conservative structure of the surveying industry there, made the pilot easier to establish and monitor.

The scheme is available to private clients only, which arguably creates hardship for some small business clients, and covers 'surveying services' only – though this is drawn quite widely. It can consider complaints of service failure, with awards up to £25,000. Arbitration is available for larger claims. The scheme's findings are also intended to assist surveyors with continuous improvement.

There is evidence that the scheme has caused surveyors to take internal complaint procedures more seriously, and to settle more complaints themselves.

Following the success of the Scottish pilot, the RICS is going to roll out nationwide dispute resolution from June this year. Of the organisations able to bid, the RICS chose The Ombudsman Service Limited (TOSL). Timescales have been tight, and the infrastructure and skills available within TOSL were seen as a good fit for the needs of the RICS.

Going forward, the RICS recognises that although it is an important player in the property sector, it is not the only player. There is interest by stakeholders and government in the availability of dispute resolution in the wider property services area, and recognition of the advantages that could be achieved by the creation of a single portal to give consumers access to advice, signposting and dispute resolution for property services issues.

### Point arising from open discussion

- There is a lot of activity and many different innovations in the area of private sector dispute resolution – great care needs to be taken to ensure that this is joined-up. Lessons can be learned from the HIP experience; mistakes can be difficult to remedy.
- The complainant wants-v-needs issue is an interesting one. Most schemes had to address it in some form. We all operate at a distance from the parties, and there was a desire to avoid reducing the complainant to a file and number. Complainants' reasonable wants should be accommodated where possible, including the desire for a 'day in court'. A hearing could help redress the imbalance between the parties. However, hearings were also resource-hungry and not always a practical option. But there are alternatives – many complainants are happy simply to be listened to in person, rather than to have a full hearing.
- The difficulty in extracting a genuine apology appears common to most schemes – and particularly frustrating, as this is often what the complainant seeks. This may arise from cultural disinclination to accept fault, or from the pressure exerted by professional indemnity insurers.
- Those schemes that could not accept complaints from businesses saw the potential for significant detriment – many small businesses are just as needy of dispute resolution as are private individuals. They do not necessarily have access to better resources. For example, non-household users had not been consulted in respect of the new arrangements for energy disputes, and this would now be addressed.
- Given the importance to the private sector schemes of access to adequate resources, it was necessary to safeguard against the industry affecting the scheme's independence. Governance structures were key, particularly at times of industry re-structuring or volatility in complaint numbers. Schemes must have an effective means of standing firm – for example, a publicity option. It was recognised that professional institutions were vulnerable to changes in the mood of the membership, and schemes that were funded through case fees could suffer concerns about security where there was a downturn in the income streams of the industries they cover. TOSL had some experience of that.
- 'Super Ombudsman' schemes for the private sector can be popular. This raised issues around skills and knowledge sets for investigators in such schemes, particularly where there are cross-sector investigations. The Financial Ombudsman Service (FOS) model was considered – there is a common way into the scheme for consumers, but behind that there are specialised teams to deal with different types of product. Although there is cross-training and transfer of staff at the FOS, this is gradual and subject to careful quality checks. The common portal arrangement for consumers is attractive for many private sector schemes, and can allow different schemes covering aspects of the same sector to operate synergistically without having to transform into super schemes.
- The Consumers, Redress and Estate Agents Bill appears to provide the potential for competing ombudsman schemes in the same sector. This was generally considered a poor idea and unlikely to be a helpful model for stakeholders. However, we can distinguish the arrangements that may have to be put in place for very complex markets (such as mail services) where there are many different forms of ultimate consumer who may require access to different types of dispute resolution and different remedies.
- The proliferation of diverse and hybrid products and services provided by the private sector has already begun to produce overlap of coverage by existing schemes. This emerging feature is likely to become more marked in the future, and must be taken into consideration when establishing new schemes or extending the coverage of existing ones.

## The Ombudsman and young persons' and children's rights

Chaired by: Adam Peat, Public Services Ombudsman for Wales

Introduced by: Rob Williams, Chief Executive, Children's Commissioner, England  
Emily Logan, Children's Ombudsman, Ireland  
Elizabeth Derrington, Independent Complaints Adjudicator for OFSTED

Report by: Rafael Runco, Deputy Ombudsman, Housing Ombudsman Service

### Rob Williams

- Drew examples and themes from his work including for child relief in Africa.
- Young people are in a special situation; they are vulnerable, developing, human beings – and impressionable.
- Children have the same rights as adults and extra ones: 1989 UN Convention on the Rights of the Child. Convention set up a Committee, based in Geneva.
- All countries are signatories to the Convention expect two: Somalia and USA.
- Signatory countries have a person or office to deal with children's rights. In the UK there are four Commissioners: England, Wales, Scotland and Northern Ireland. Each has different powers and remits. Only Wales and NI can take complaints from an individual young person. Their role is more as an advocate for children generally.
- English Commissioner has the status of a Non Departmental Public Body, and reports to the Department of Education & Skills. The other three report to their respective parliaments. English Commissioner more like a Human Rights Commissioner, having the job of promoting awareness of children's rights, including issues concerning health, safety, and economic wellbeing. His remit does not meet the Paris Principles; the other three Commissioners do.
- Recent research showed that 22% of children in England know their rights. However, it is not clear how many of them know about Ombudsmen or other complaints procedures they can access directly – for example, to deal with bullying, which ultimately involves writing to the Department of Education & Skills! There is, clearly, a need to make this particular procedure better at school level.
- There is a confusing picture for young people as to where they can go to complain about their rights. The Commissioner in England will carry out a review on this subject and report in 2008.
- Do Ombudsman schemes have in their own systems special procedures for young people to access their services?

### Emily Logan

- Office has been in operation in Ireland for three years, following the implementation of the Ombudsman for Children Act 2002. It is a statutory body, and the Commissioner was appointed by the President. Its finances are scrutinised by the Public Accounts Committee. Its determination of complaints are subject to Judicial Review.

It liaises with the UN Committee on the Rights of the Child, in Geneva.

- The first Ombudsman for children in Europe was set up in 1981 in Norway. There are now 27 such Ombudsmen in the continent, and a European Network of Ombudsmen for Children [ENOC] as well as a British & Irish Network of Ombudsman & Commissioners for Children. ENOC has an annual thematic approach; for 2006 it was "the rights of un-accompanied children".
- The UN Committee reviews every five years what each signatory state has done to progress children's rights.
- Irish Ombudsman main role is to promote the rights and welfare of children [section 7(1) of the Act]. Her functions are: independent complaints handling, promotion of children's rights, and monitoring and "child-proofing" of legislative change.
- Public bodies are investigated if it appears that their actions have or may have adversely affected a child, and/or are contrary to sound administration.
- Ombudsman has extensive powers, including compellability of witnesses, access to information, reporting on findings [including special reports], and recommendations for remedy or improvements. Ombudsman may use her own initiative to investigate, as well as responding to a complaint by a child or an adult on her/his behalf. Her role is impartial; she does not advocate for the child as a complainant, but listens to her/his views as part of her enquiries into a problem. She can also undertake and publish research and policy papers on any matter germane to the rights and welfare of young people, and give advice to government ministers.
- Ombudsman was appointed through a process which included interviews by children.
- There are just under 5,000 children in care in Ireland.

### Elizabeth Derrington

- She has no special remit to deal with children's rights but in her two areas of work she covers issues which have direct relevance to them: as Independent Complaints Adjudicator for OFSTED and as an Independent Complaints Reviewer for the Northern Ireland Youth Justice Agency [jointly with Jodi Berg].
- Her guiding principles in dealing with casework are: clarity of purpose, flexibility in access, and accountability.
- Main areas of work include complaints about school inspections, about early years providers [child minders,

nurseries], regarding children homes inspections, and more recently from parents against schools [but not by children directly].

- She has never received a complaint against OFSTED by a child, but several by parents – for example, claiming that inspectors didn't spot an issue like bullying.
- There is a problem with enabling access by children to OFSTED, and she is going to continue to work on this issue.
- There is also a problem, largely unattended, as to how OFSTED work can affect children, for example class disruption [particularly in a small school].
- In the case of child minders and nurseries, often the problems raised by parents are better dealt with by Social Services or the Police, because role of OFSTED is very limited over early years providers.
- Dealing with problems in children's homes is a new area of work and it is not known yet the extent of parent's concerns, although it is clear that there is a need for more clarity in the information provided by homes and authorities, easier access, and better understanding of the issues.
- The work in Northern Ireland with the Youth Justice Agency was launched in October 2006 but no specific complaint has been made to the Reviewers so far. So, currently the focus is on explaining the role to staff of the Agency, its stakeholders, and children, as well as on development and implementation of a clear and accessible complaints procedure, and making reports child-friendly. One possible difficulty is the remoteness of the relationship, particularly with Northern Irish Children, because the Reviewers are based in London.

## General discussion

A number of issues were raised as comment or questions-and-answers following the presentations – including:

- Communication with young people: need to speak their own language; perhaps younger members of staff can help.
- Young people don't usually write letters, let alone letters of complaint with long stories. They prefer new technology: emails, SMS.
- Children's pace is faster. They expect results quicker or they are not interested in the solutions on offer. Public bodies do not operate at that speed.
- They are more informal than their parents.
- How to deal with charities who are not public bodies, thus operate under less regulation, but nevertheless carry out considerable work with children? There is, for example, no Ombudsman for charities. [In Wales, Commissioner has a wide remit and may intervene with bodies other than public ones – is that the case elsewhere? In England, Commissioner can put child in touch with other agencies.]
- Children in the juvenile justice system do not trust any institution. They are savvy, and know how to play the system, but still very vulnerable. They are excluded from important aspects of the process.
- There is evidence that schools often investigate allegations

of bullying, particularly if made by parents, but they don't talk to the children affected.

- How many Ombudsman complaints procedure are really child-friendly?
- The Local Government Ombudsman has a special procedure for children's complaints and a special website section, and it is now getting more cases as a result from the target group. Nevertheless, the profile of the LGO among children is very low, despite the fact that they are affected directly by actions of local authorities.
- The Children's Commissioner in England would like 100% of young people to know about the office, but its current target is that 50% should do so. Has done as much work as possible to achieve this, including involving children in the design of the offices and the website.
- In Wales, Commissioner tries to work to the child's timescales, but he is not an Ombudsman [although may refer cases to the Ombudsman; sometimes parents approach both offices at the same time].
- In Ireland there is a referral system between the Ombudsman and the Children Ombudsman.
- When is a child to be treated as an adult? In Scotland, even when children are over 12 years old permission has to be obtained from parents or guardian to deal with a complaint on their behalf. We should ask children more what they want.
- At the Office of the Parliamentary & Health Service Ombudsman there is awareness that the time scales are excessive, particularly with the problem of the MP filter. Also, that there may sometimes be a conflict between the interests of the parents and of the children on whose behalf they are supposed to act, so – whose complaint is it?
- Perhaps we can work more with youth organisations, locally and nationally. They are generally trusted by children.
- Another issue is the question of individual redress and systemic lessons. Is this more acute in cases involving children, because of the few opportunities to consider complaints from them even though there may be a large number of individuals affected by the problems?
- There was an inquiry into sex abuse some time ago. Necessarily, few cases were considered, but the publicity generated brought up many more and the lessons were applied extensively.
- Some government departments and agencies use slogans like "children first" and "end child poverty", but they make no clear link between individual cases and wider objective.
- Some people may have an exaggerated perception of children's rights. Some public bodies get it wrong, and act more out of political correctness than of awareness of young people's needs and expectations. Sometimes they don't intervene for fear of "trampling" on children's rights. Some adults feel apprehensive about children, and think they are getting out of control. They are worried of being accused of child abuse if they try to help children in trouble. Training, therefore, is very important for all involved.

## BIOA Conference – Workshop report

### Equality and Diversity

**About the equal and fair treatment of all complainants and staff, and also particularly about accessibility to schemes by those with particular accessibility issues.**

Chaired by: Zahida Manzoor, Legal Services Ombudsman

Introduced by: Anne Seex, Local Government Ombudsman

Greg Mullan, Director of Policy and Practice, Police Ombudsman for Northern Ireland

Jon Ward, Director of People and Organisational Development, Parliamentary and Health Service Ombudsman

Report by: Jackie Feeney, Head of Communications, Local Government Ombudsman

#### Anne Seex – setting the context

Anne Seex provided an overview of the national context in which equality and diversity is placed, then looked in more detail at what this means for Ombudsmen generally and more specifically for the Local Government Ombudsman.

There are 15 pieces of legislation relating to various aspects of E&D such as race, gender, disability etc, which public bodies are increasingly having a duty to promote. The Government's Equalities Review showed that despite some successes there are still areas of inequality some of which can only be described as intolerable.

Although the review doesn't have the answers for us as Ombudsmen it does have a set of heavyweight issues to consider. It proposes a definition of an equal society:

- An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish.
- An equal society recognises people's different needs, situations and goals and removes the barriers that limit what people can do and can be.

The review identifies a framework for measuring inequality that is based on ten dimensions and urges for them all to be examined. It states that the equalities agenda has been held back by a lack of understanding about what equality means, how it relates to what organisations do, what is required or permitted under the law, and who is responsible for delivering on this. It has not been a central part of leadership in organisations.

Two recommendations in the review were relevant for Ombudsmen schemes:

1. Introducing a framework of measurement for public institutions – a toolkit with an Equalities Scorecard to measure progress on the ten dimensions
2. That the Commission for Equality and Human Rights (CEHR) develops a performance assessment framework for private and voluntary sector organisations, based on the Equalities Scorecard.

One of the principles of good complaint handling, launched at the conference, was accessibility. As BIOA members, it commits us to that principle in the way we provide our

services – 'free, open and available to all who need it'. It is important for ombudsmen schemes to seek to do more than simply meet legal requirements. It is about proactively 'opening up' – widening access, literally and metaphorically – for all kinds of people who might not otherwise have the knowledge, confidence or ability to complain.

Complaints received by the Local Government Ombudsman are only a tiny part of the transactions that take place in local government. The LGO aims to make sure that its messages are widely accessible. Work is being developed through intermediaries such as voluntary and community organisations that encourages them to be a channel for individuals to reach the LGO. A project that focuses particularly on children and young people is an example of this. A new access and advice service is being developed that will be mainly telephone based and aims to increase access.

#### Greg Mullan – outlining an equality scheme

The Police Ombudsman for Northern Ireland already has a statutory duty to promote equality of opportunity and good relations, and has made this central to policy development. As part of this it has to publish an equality scheme including efforts made to consult the community, which makes it different to UK legislation. The scheme also has to be approved by the Equality Commission.

In terms of practical application, this means the police complaints system must be accessible to and serve all individuals and groups equally within its society. Examples of putting this into practice include training for all staff, a statement on this commitment in all job advertisements and press releases, information about different communities on the website so anyone can access it, and an extensive outreach programme.

Research is a big area of activity focusing on police accountability in relation to different groups – young people, lesbian, gay and bisexual communities, and black and minority ethnic communities. This reflects the Ombudsman's commitment to good practice. Monitoring is another key area of commitment as well as being a legal duty. Everyone who makes a complaint is given a monitoring form which

includes the standard categories such as age and gender but also political opinion.

Looking to the future, the Police Ombudsman for Northern Ireland plans to continue with these programmes but the impact of devolution will need to be assessed as it progresses. On a wider note, there is a need to make a real commitment to equality; it's not enough to have a scheme and think that you act fairly. That commitment needs to be demonstrated proactively.

### Jon Ward – focus on a case study

A case study from the Parliamentary and Health Service Ombudsman looked at access to employment. Behind it is PHSO's focus on 'valuing differences' and the benefits that a positive approach to diversity can bring when recruiting. It improves the reputation of an organisation, better reflects the society served and helps to reduce turnover.

During a recruitment exercise for a senior investigation officer, which involves a rigorous assessment centre, an application was received from a deaf candidate. PHSO has a guaranteed interview scheme and is committed to making reasonable adjustments, so met the candidate to discuss the person's needs during the selection process and in the role if she was recruited. A separate assessment centre was organised and she was successful. External funding was secured to make adjustments in the workplace, one to one training was

provided as required and a special telephone service provided. Colleagues were keen to adapt.

Greater awareness among staff of disability issues has resulted through the appointment and a positive image for PHSO as complainants can see that the organisation values diversity.

Key learning points from the exercise are that it is important to gain information and to develop an understanding of the issues. Never make any assumptions, ask. The guaranteed interview scheme worked in this situation. A lesson for us all it to increase our knowledge and understanding of different people's needs, and actively promote inclusiveness. Everyone can contribute to creating a supportive working environment.

### Zahida Manzoor – summing up

Equality and diversity is not a one-off activity or an add-on area. Therefore leadership is essential on this issue. It needs to start at the top but be owned throughout an organisation. Monitoring and measuring is important but shouldn't be an end in itself – take time to gather feedback and use it to learn and improve. Organisations need to think about the whole range of E&D areas from the more obvious ones such as race and gender to the less obvious ones such as people with learning disabilities and carers.

Above all, 'make it real'.

---

## Workshop 6: 27 April 2007

---

### Judicial Review

Chaired by: John Tate, Director of Legal Services, Independent Police Complaints Commission

Introduced by: Mike Reddy, Deputy Adjudicator and Chief Executive, Office of the Independent Adjudicator for Higher Education  
Tony Boorman, Principal Ombudsman, Financial Ombudsman Service  
Eric Drake, Deputy Scottish Public Services Ombudsman

Report by: Felicity Mitchell, Assistant Adjudicator, Office of the Independent Adjudicator for Higher Education

---

**John Tate** introduced the session and the speakers and thanked **Tony Boorman** for agreeing to replace, at the last minute, his colleague **Paul Bentall** who was unable to attend.

**Mike Reddy** presented the provisional results of the Judicial Review Survey sent out to members and collated and analysed by John Tate and his team.

The raw data suggested the following:

- a rising trend for judicial review claims;
- 50% of respondents said that the threat of judicial review affected the way schemes operated. For example, many schemes had procedures which involved decisions being checked by a "second pair of eyes".
- 45% of respondents said that the process was "too easy". It was suggested that the system lacked a proper gateway to screen out hopeless cases. Many felt that legal aid was

too readily available. One respondent suggested the use of lodgements of bond and civil restraint orders.

Respondents expressed concerns over the financial and time costs of dealing with claims. Nevertheless, most felt that it was right that schemes should be held accountable in this way.

### Open Forum:

The following comments were made in open discussion:

- There were concerns over both the time spent responding to claims and the costs of preparing the response. Senior staff are required to spend time preparing a response from the Pre-action protocol stage onwards.
- A view was expressed that the prospect of judicial review should be regarded as a strength not a threat, and it was important that schemes could be judicially reviewed and

there are benefits to being reviewed.

- John Tate, whose organisation had been subject to 75 challenges, said he strongly agreed that it was right to hold the IPCC to account and acknowledged that in a proportion of the cases the decision might be wrong.
- The strategy of one organisation was to use civil restraint orders.
- There was discussion regarding the Bradley case (R v Secretary of State for Work and Pensions ex parte Bradley and Others [2007] EWHC 242 (Admin)), and the Eastley case R v Local Commissioner for Administration ex parte Eastleigh Borough Council [1988] 1 QB 855).

**Mike Reddy** then gave the second part of his presentation, on the experience of the OIA. He outlined the background: 40% of school leavers now go to university; new legislation on discrimination has an impact on resources; tuition fees mean that students are paying for a service. The OIA receives 500 complaints a year. There are two million students.

The OIA became the “designated operator” of the complaints scheme under the Higher Education Act. The Act sets out very few statutory requirements for the scheme. The OIA has the widest remit of any ADR scheme. It is required to “review” complaints. Many of the complaints could be taken through the courts – and students can still go to court if they are dissatisfied with the outcome of the OIA review. The OIA does not decide legal rights. The usual remedy is to refer the complaint back to the HEI.

The OIA has a public function and is arguably susceptible to judicial review. So far the OIA has had eight judicial review applications and there are two cases where leave has been granted. Possible reasons for the high percentage of judicial reviews are:

- The OIA is new
- The issues concern the student’s future.
- All students are members of the NUS – an organised group.
- Students are likely to be eligible for legal aid.
- Some law firms tour campuses looking for clients.
- A judicial review application costs only £50.
- Some law students view judicial review as “part of the experience”.
- The legislation does not define the OIA’s role.

The courts are more willing to look at errors of law or fact than they were in the past. The idea of judicial deference to expert bodies is being eroded by proportionality and human rights issues. Furthermore the test of “irrationality” has become closer to general reasonableness. Is there still a “substantial prejudice” test? Quotes from judgments involving the OIA indicate that the judges may be willing to dig quite deeply into the merits of the cases. There is very little empirical evidence of the consequences of judicial review decisions.

## Open Forum:

- It was suggested that it was unwise to participate in judicial review proceedings and that the parties should be allowed to fight it out for themselves unless there was a jurisdictional issue. It was unwise to put in a detailed response on the merits of the claim or the judges would think that there must be something in it. There was no point in responding to the Pre-Action Protocol (PAP) letters because the decision had already been taken.
- Mike Reddy pointed out that according to the survey, 66% of cases where there had been a PAP did not proceed to judicial review.

**Eric Drake** then gave his presentation from the point of view of a non-lawyer in the middle of his organisation’s first judicial review.

The Scottish judicial review principles are the same but the procedures are different. There is no time limit for bringing a claim and there is no Pre-Action Protocol. Petitions are brought to the Court of Session. The incidence of judicial review is lower in Scotland; Scotland tends to be less litigious.

The SPSO was set up in 2002 when four separate schemes, three of which were statutory, merged. It now covers HEIs and FEIs as well. The legislation involved is unwieldy. The SPSO operates differently to its predecessor schemes. Some of the predecessor schemes could only look at maladministration. One could look at maladministration or service failure.

The judicial review case concerns a Scottish council. In 2002 legislation was brought in to require local authorities to provide free personal care. This was a flagship policy of the Scottish Executive. But councils are having problems funding the care. The complaint to the SPSO concerned the funding of free personal care to an elderly person leaving hospital and moving to a care home. The council told the family that its annual budget for personal care had been used up and that the family would have to pay for the care until the following year. The SPSO upheld the complaint and decided that it was not open to the council to refuse to fund a service which had been assessed as a requirement. The council brought judicial review proceedings against the SPSO claiming that it had misunderstood the law and its decision was irrational.

So far the hearing has taken two days and a third day is listed for later in the year. Junior and Senior counsel are involved on both sides. The council is claiming that the SPSO has misunderstood the council’s legal duties and that it should have looked at whether the Scottish Executive had provided adequate funding. Counsel for the council criticised the SPSO’s report sentence by sentence, even word by word. The reports are not designed to be like a court judgment but are for a lay audience. The process is frustrating and there is a misunderstanding of how ombudsman schemes work. Also there has been a misunderstanding of the decision, which was based on service failure not on maladministration.

The process is a huge drain on resources (which would be disproportionate for a small scheme). In principle schemes should be susceptible to judicial review, but the current process is neither sensible nor productive.

**Tony Boorman** then spoke about the FOS's experiences of judicial review, also from a non-lawyer's perspective. The FOS is a very large scheme and so dealing with judicial review claims does not have a disproportionate impact. There are 1,000 staff, 30 ombudsmen and 100,000 cases. 10,000 of those cases go to a final decision issued by one of the ombudsmen. There are 50 applications for judicial review of which six have been to full hearing.

When the FOS was set up the advice was that the FOS would have to have numerous hearings to satisfy the Human Rights Act. In fact the FOS has about six hearings a year.

Judicial review claims tend to come from determined complainants – applicants in person. Sometimes the FOS's Independent Assessor becomes involved but that route is usually unsuccessful. The FOS does not determine the customers' rights and the customers should sue the firms and not the FOS: it is a waste of time to sue the FOS.

Some claims are brought by firms. Claims mainly come from small firms – the larger firms are more easily managed.

The FOS process is to refer the claim to its administrative law counsel who assesses the merits. If the assessment is that the FOS is likely to lose the claim, the decision is remitted back to the FOS. That requires the consent of both parties. The customer sometimes refuses to consent but such a refusal might have costs implications for the customer if the judicial review claim goes ahead. Counsel's advice is to put in as full a response as possible at the early stage.

One judicial review hearing involved a predecessor scheme's decision on interest rates. In outline the decision was based firstly on the interpretation of the Banking Code and secondly on the ombudsman's general approach to what was fair and reasonable. The judge found in the FOS's favour. He said that the interpretation of the Code was wrong and the scheme had misdirected itself, but the ombudsman's decision was reasonable on the "fair and reasonable" ground. The unintended consequence of that decision is that it encouraged ombudsmen to avoid interpreting the law and base their decisions on what is fair and reasonable, but the second case illustrated the dangers of that approach too.

The second case involved the sale of a financial product which was wholly unsuitable for the customer. In summary, unbeknown to the firm, the investment was run by fraudsters who absconded. The ombudsman decided that the customer's investment should be refunded because of the poor advice. The firm brought judicial review proceedings on the basis that its poor advice was not the cause of the customer's loss. The judge found in favour of the FOS on the basis that it had based its decision on what was fair and reasonable and not on the law. That decision generated bad headlines for the FOS ("Ombudsmen can do anything they like").

Tony concluded that there are significant dangers of being frightened of judicial review. Schemes must live with judicial review but should not listen too much to the advice of counsel or to the judges or they will end up instructing counsel to draft all decisions. Schemes must maintain a prompt and informal service.

## Open Forum:

- John Tate summarised how the IPCC has used judicial review on five occasions against police forces and the Home Office. It has also issued directions to police forces which, if not complied with, would lead to judicial review.
- A delegate said that he was in favour of judicial review. The first claim against his organisation found the procedures to be robust. He said it was important not to be afraid of judicial review.
- A delegate said that judicial review was an important check on whether schemes were doing their job properly.
- Eric Drake said that the problem was with the process and the time taken to deal with claims, and the threat that the presentation of decisions would have to change, making them more legalistic.
- A delegate said that case law says decisions should not be read like a court judgment. Judges are reasonable in their approach. He has had 30 to 40 challenges and it is enormously costly. Most cases do not come to hearing and are rejected on the papers. If the decision is indefensible his organisation will reopen the case. The costs in time and money are outweighed by the benefits of being accountable.
- Tony Boorman said that the availability of judicial review solves the problem of Human Rights Act compliance. The risk is that schemes will become too nervous.
- One delegate said that she has the authority to launch an investigation where a complaint has not been made – a public interest remit. John Tate said that the IPCC also has that authority.
- Mike Reddy said that the OIA, as the designated operator of an ADR scheme, is accountable to the Department for Education & Skills. If it is not doing its job its designation can be removed. The role of the courts in relation to the OIA needs to be clarified.
- An Irish delegate said that judicial review is used infrequently in Ireland. He asked about the FOS's practice of referring complaints back to itself and what the status of the new decision was. Tony Boorman said that the FOS works on the basis that the final decision is final and binding but can be reopened by the FOS if both parties agree – and that position has not been challenged. Other schemes are permitted to reopen their decisions.
- A delegate said that the SPSO case decision would be of crucial importance to the constitutional conversation over funding and policy. It will affect high cost drug treatment cases.
- There was a debate over the meaning of the Bradley case: whether it decided that the findings of ombudsmen are binding; that a finding of maladministration must be accepted unless it is judicially reviewed – but it is still open to parties to reject a recommendation; or that a finding is binding unless it is unreasonable, and cannot be rejected because it is "wrong" – but there was no requirement to judicially review the finding. The decision is being appealed.

John Tate thanked the contributors and concluded the workshop.



**British and Irish  
Ombudsman Association**

PO Box 308  
Twickenham  
Middlesex  
TW1 9BE

020 8894 9272  
secretary@bioa.org.uk  
www.bioa.org.uk

July 2007