

Address on Fortieth Anniversary of N.I. Ombudsman

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In 1973, when I was leaving after a stint as Director in the combined office of Northern Ireland Parliamentary Commissioner for Administration and Commissioner for Complaints, my colleagues, as was the civil custom of the time, made me a small presentation. For reasons best known to themselves, they chose the one volume version of the *Shorter Oxford Dictionary* – which I much valued, and which I use to this day. I mention this merely to record that this, the latest edition of the dictionary, did not include the word *Ombudsman*.

It is a sign of the spread and development of the concept over the years that there should now be a proliferation of Ombudsmen – for almost everything from endangered animals to municipal zoos. It is also one of the few innovations which have spread from the public to the private sector when the tide of ideas was flowing steadily in the other direction. At one level this might be regarded as a tribute to those who laboured to set up offices and to serve the public interest, to protect the rights and privileges of citizens against encroachment or abridgement by the state. At another more practical level excess use of the term might merely represent a debasement of the currency and a dilution of status in both the public and the private sector.

There was, at one time, as I remember, discussion in the International Association about securing statutory protection for the title as applying to what we rather sniffily regarded as “classic Ombudsmen” – appointed by statute, independent, having powers of discovery, reporting to parliaments, enjoying tenure and able to effect redress. This was done, I believe, in New Zealand, but nowhere else to my knowledge. And now every agony aunt in a tabloid newspaper can call herself an Ombudsman.

Not the term was common currency in these islands in the seventies either. The Republic did not have such an office, and the United Kingdom rather prissily insisted on Parliamentary Commissioners, and the term Ombudsman was discouraged as verging on vulgarisation.

The first reference to the Ombudsman in a Northern Ireland parliamentary setting was in the Senate in 1960 by a slightly eccentric, but extremely well read Senator Paddy McGill, who edited a local weekly newspaper in Omagh. It has to be said that he was on the ball quite early after Stefan Hurwitz, the Danish Ombudsman had started his campaign to spread the concept. During the 1960s, and especially following the setting up of the New Zealand office, and later the Whyatt Report, the idea was espoused by Sheila Murnaghan, a Liberal member returned on the university vote by the graduates of Queens University. These pleas fell on stony ground – Stormont administrations were not into trendy ideas (or indeed any ideas at all) and certainly not into those which would shine a light into dark places. One can only speculate how many lives might have been saved and how much misery, had they been listened to.

The main injustices cited as requiring redress were appointments by local authorities, politicised decisions in the administration of planning, pensions and unemployment benefits, the need to protect small farmers from bureaucrats, the need to curb the power of a political machine that was growing daily, the unfair allocation of houses, discrimination in employment, questions surrounding judicial decisions and police investigations, the activities of state agencies, the growing power of the modern state and the powerlessness of opposition members of parliament.

When the office of Parliamentary Commissioner for Administration was set up in 1967, attempts to have Stormont departments brought within the scope of the Act were rejected on the grounds that they were not within Westminster jurisdiction, and that in any case, in the regional assembly, there was such easy access to Ministers as to render the office unnecessary. However his writ still ran for those exercising in Northern Ireland functions which had been reserved under the 1920 Government of Ireland Act, mainly Inland Revenue and Defence.

The burgeoning Civil Rights campaign forced the hand of the Northern Ireland government, and Terence O'Neill (prodded by Wilson and Callaghan) announced the decision to establish a PCA office for Northern Ireland Departments early in 1969. Civil Rights campaigners argued in vain that since the main causes of complaint, housing and employment, lay with local authorities, these too should be brought within jurisdiction.

The NIPCA office was set up following the Act and Sir Edmund Compton, the UK Commissioner, was appointed to the post. Sir Edmund, as in England, took a very narrow non-interventionist view of his role – What ever was best administered was best, regardless of outcome. In his first Report, despite having found elements of maladministration in two cases (out of 100) he was able to declare that “there was not a single instance of culpable action, that here had been only two allegations of religious discrimination, that the quality of administrative performance compares well with other parts of the United Kingdom, and the individual citizen frequently gets a better service in Northern Ireland.” Unsurprisingly this failed to impress Civil Rights activists and opposition politicians, especially when he went of in a television interview to describe Northern Ireland administration as “meticulous to a fault”. This was not very reassuring for the citizenry who saw their appointed watchdog purring like a cat in the company of his fellow mandarins.

This is the same Sir Edmund, who, pressed into service to investigate allegations of ill-treatment of internees under investigation in 1971, was able to dismiss hooding, sleep-deprivation, spread-eagling, white-light and noise as “ill-treatment falling short of torture because there was no intent to cause pain”.

Following further trouble on the streets, and another visit from the avuncular Jim Callaghan, the Stormont Government finally agreed to establish the office of Commissioner for Complaints, to deal with complaints against local authorities and other public bodies (excluding the police and army). This was the first such office in the UK, the first to have direct access, and the first where reports could be taken to the courts for

enforcement. As part of the same package, another Act set up a Community Relations Commission, of which both Commissioners were ex-officio members.

The first Commissioner of Complaints was Dr John Benn, previously Permanent Secretary of the Ministry of Education, who must be regarded as the founding father of Ombudsmanship in Northern Ireland, and he is unequivocally the hero of this story. Since his remit included the Health and Social Services Boards (and their predecessors) he was also the first Health Services Ombudsman in the UK.

Compton had set up an office with Ivan Woods as Director who had been liaison officer for the Northern Ireland government in the Home Office. Benn's operation was grafted on, with both Commissioners served by the same office, but run in separate divisions. Benn brought in Frank Sullivan, a solicitor in the Ministry of Development as Deputy Director and the rest of the staff were all drawn on secondment from Northern Ireland government departments.

It was Benn, however, personally, who set about creating a new institution, and one which, he asserted from the start, would be characterised by independence and even-handedness. He started with the Act and used it not only to create the office but to clarify functions and devise working practices. More importantly he also endued this skeletal structure with his own strongly held ethos of fairness and concern for the weak and under-privileged.

The Act, criticised by some academics at the time for not defining "maladministration" was all the better for not doing so – leaving room for context, for changes in practice and culture in administration, and for sensitive extension by successive Commissioners.

In the Second Reading speech, the Minister, Dr Robert Simpson, had invoked what was called the "Crossman catalogue" – the term used by Richard Crossman in introducing the original legislation in Westminster "bias, neglect, inattention, ineptitude, perversity, turpitude, arbitrariness and so on" – adding that in Northern Ireland, "bias" included discrimination.

Benn however set about creating his own definition fashioned to the reality of contemporary circumstances in Northern Ireland. In his version, "maladministration may be taken to cover administrative action (or inaction) based on or influenced by improper considerations or conduct. Arbitrariness, malice or bias, including discrimination are examples of improper considerations. Neglect, unjustifiable delay, failure to observe relevant rules or procedures, failure to take relevant considerations into account, failure to establish or review procedures where there is an obligation to do so are examples of improper conduct."

Good administration, on the other hand, meant doing more than the strict letter of the law required: it meant above all fairness, it meant taking care and trouble, it meant good communication.

The office had been set up at the same time as the Community Relations Commission and was presented as part of a programme of conciliation and mediation. The Commissioner sat on the CRC and was able to consult it on cases and to seek help in securing settlements. He used the first power only once, in relation to the letting (or refusal) of public halls for political meetings. Ironically, in what would now be seen as a denial of free speech, the CRC advised that the protection of council property from possible damage was the higher priority. He used the second power to involve the Chairman of the CRC, who also happened to be President of the Town Clerk's Association – both of whom happened to be me – in an attempt to put a bit of back bone into a council clerk who was reluctant to persuade his council that they should accept a settlement proposed by the Commissioner.

However the Act did give him the power to seek settlement of a complaint, where appropriate. There was some academic quibbling that he was obliged first to find maladministration before he could begin to seek or to recommend a settlement. Benn had no doubts. He preferred a settlement in the interests of the complainant in relatively uncomplicated cases. He reckoned that if Mrs Jones complained about a failure to provide a service, what she wanted was to have the service provided or restored, not a long report in a year's time explaining why the agency had failed her.

A serious case, one raising serious issues or identifying a serial offender, would always be fully investigated, and there was no suggestion that a body could plea-bargain themselves out of a finding of maladministration by offering a settlement. But Benn had a nose for settlement and this set the tone of the office.

In 1972 Compton retired and Benn took over both the Northern Ireland posts. Although the office continued to be run in two sections, there was obviously more cross-fertilisation at the top.

The main differences remained – open access to the Commissioner for Complaints and the MP filter for the other; settlement could be sought in the courts following a CforC report. Things were made even more complicated by the radical restructuring in 1973 which stripped local councils of functions: housing, which went to a new Housing Executive, health and education which went to agency boards, and water roads and planning to a government department. The introduction of Direct Rule in 1972, the temporary devolved regime in 1973/74 and the return to Direct Rule all created new layers of complexity.

I joined the office as a Deputy Director in 1972. As a Town Clerk, my horse had been shot from under me by local government reform, and the remaining functions, derogatorily referred to as bins, bogs and burials, provided little challenge, and appointment to the Commissioner's office provided me with entry to the civil service at a senior level. I was the first non-civil servant on the staff, the first from local government, and, having been in the field I was able to reflect the reality of life in the trenches and the pressures under which people had to work and to make decisions.

I think it is important for the credibility of such an office that those being regulated have faith in it too, and that somebody there can appreciate the practical difficulties they face in providing services.

Soon after this Ivan Woods retired and Frank Sullivan and I became joint-Directors. John Benn told me afterwards that this arrangement suited him well – Frank, the lawyer was holding on to his coat-tails while I was pushing him over the cliff, achieving, in the end, a sort of equilibrium. About this time too, John Benn and I were invited to Dublin by Declan Costello, then Attorney General, and a young Senator Mary Robinson to advise on the possibility of an Ombudsman office in the Republic. If any seed were planted, it took a long time to germinate. Much later I was asked to the Isle of Man on a similar exercise, but it seems that as long as they had the birch they did not need an Ombudsman.

It always surprised me that although business was brisk, in the middle of civil disorder and mayhem, we were dealing mainly with comparative pinpricks and had no power to investigate much less resolve the issues which mainly bothered people – policing, security and taxes..

We did, perhaps, help to preserve some semblance of normality. I would like to take the opportunity to reflect on the contribution (not always recognised) of the thousands of civil and public servants who kept the place going by maintaining essential services, especially to the old, the poor, the ill and the weak in the face of attacks, intimidation, and in some cases death itself.

On one occasion only we had a complaint from a prisoner. He clearly came within jurisdiction. His initial letter, smuggled out of the gaol by some means, came directly to the Commissioner. An MP, Paddy Devlin, was persuaded to sponsor it, and we began an investigation. As this was the first such case, there was complex preliminary work in establishing protocols which would meet the Commissioner's requirement for confidentiality and the Governor's concerns for security and prison regulations.

In the end a *modus vivendi*. A letter to the Commissioner from a prisoner would be transmitted unopened by the prison authorities. The Commissioner's response, along with paper for a reply and a franked envelope would be delivered unopened to the prisoner.

Unfortunately by the time all this had been sorted out, responsibility for prisons had transferred to NIO under Direct Rule and out of the jurisdiction of the Northern Ireland PCA. Hopefully the transfer of political responsibility for policing and criminal justice will bring prisons and prisoners and their complaints back within the jurisdiction of Dr Frawley. There is no need for a proliferation of Ombudsmen, and much more danger of agency-capture when the Ombudsman has a wide remit.

Almost ludicrously, too, the prisoner had been complaining that he had not been allowed to write a letter on a non-political matter for publication in the *Irish News* – which most would regard as a fairly minor incursion on his civil liberties. He made no complaint whatever about the massive encroachment on his human rights which had him locked up indefinitely without trial as a political prisoner/internee.

There were occasions too when the language of the times caused difficulties. On one occasion a man who had squatted in a Housing Executive house in Derry complained at their attempts to regain possession. Included in his complaint was a statement that he had been allocated the tenancy by an Official. The Commissioner was justifiably concerned that the Executive should honour an undertaking given by one of its officers, and was about to find maladministration until it was pointed out that the capital “O” indicated that he had been put in by an Official IRA man rather than a provisional.

The Commissioner held a sworn inquiry in order to examine councillors in a case of alleged discrimination in a nursing appointment, when, invoking the requirement for confidentiality, he excluded a local MP from the hearing.

Another hearing involved a local council which had failed to enforce the public health acts in granting an entertainments licence to an Orange hall. The Commissioner had made a provisional finding of maladministration, and rather foolishly, the Council had asked for a hearing. It was the stuff of farce.

The requirements of confidentiality, which John Benn took seriously (as any Ombudsman should) made it difficult to give the office a public face. The only time cases could be discussed publicly was in the annual report, and then in an anonymised form. Another difficulty was the inability to take an initiative, to investigate in the absence of a specific complaint from one who had suffered injustice as a result of maladministration, or to take general or class actions.

Benn was concerned that the legislation did not give him clear authority to make a monetary award or compensatory payment, or to do more than put the person in the position he would have been in had there been no maladministration. He was also concerned that it was not clear that a Commissioner’s award was a sufficient authority for a council to pay, and was proof against surcharge.

Unlike Compton who was reluctant to stray into the policy area, or to question discretionary decisions, however bizarre, Benn was anxious to push out the edges of his jurisdiction. Inability to question taken without maladministration was to him an invitation to push in where he suspected maladministration in the taking of the decision – failure to consult or take proper advice, disregard of salient facts, bias, or simply a decision so perverse that no reasonable person could have taken it.

He found maladministration in a council policy to build only three-bedroom houses and not to permit over-occupancy, as discriminatory in having a disproportionately adverse effect on Catholics who tended to have larger families.

In this he set a trend for successive Northern Ireland Ombudsmen. McGonigle argued that it was open to him to conclude that a discretionary decision was so bad and improper as to constitute maladministration in itself. And then there was Hugh Kernohan's decision in the Craigavon case which deserves special consideration as a particular landmark.

Benn was succeeded by Stephen McGonigle, a Trade Union official, followed by Hugh Kernohan, a Director of an Employers' Federation, Maurice Hayes, a former Permanent Secretary, an academic lawyer, Jill McIvor, Gerry Burns, a local government officer and Tom Frawley, a senior health services administrator.

Few remember the appointment, and the rapid non-appointment of a distinguished Director of Education to succeed McGonigle. When the appointment was announced a former complainant wrote to the papers that he had "won" a case in which there had been a finding of maladministration against the Director of Education, and that he was not a proper person to hold office. I thought it regrettable at the time that the Secretary of State should have caved in. The maladministration was of the most technical order which John Benn had done his best to avoid finding. In the event, it was necessary to call in Sir Cecil Clothier, the UK Ombudsman to act in both Northern Ireland offices for an interim period.

Hugh Kernohan's great case, which did wonders for the office and for Ombudsmen generally, concerned the protracted delay of Craigavon Borough Council to transfer some acres of waste ground to a local GAA club for development as a playing field.

Having suffered years of delay before being refused permission to purchase, the club complained to the Commissioner. After showing that the reasons advanced by the Council for their decision were entirely spurious, the Ombudsman found maladministration and recommended that the land be conveyed to the club at a price already agreed by the District Valuer – a consideration of £14,000. The Council accepted the report without asking for a hearing. However, four years later the Council having failed to act, the club took the issue to court on the basis of the Commissioner's report.

The court not only ordered the council to complete the transfer of land without delay, but awarded the club £12000 by way of compensation. The total cost to the council was of the order of £240000 (By which time, it should be noted, the council had gone through three solicitors). To compound the agony for the council, the Local Government Auditor surcharged the councillors responsible for the costs incurred in their rearguard action from the date of acceptance of the Commissioner's report which they then failed to implement. This was upheld in a further appeal to the courts, and nine councillors were surcharged in a total of £90000 and disqualified from holding office.

The case therefore established that a court would act on a Commissioner's report as a having established the facts, and that the auditor would use his powers to back the Ombudsman.

I returned to the office in 1987 as Commissioner. My first priority was to give the office a public face and to establish the title of Ombudsman. This we did was by putting both titles on the letter heading to satisfy the purists. Gradually the type-face for Ombudsman became bigger and bigger as that for Commissioner diminished. We also combined the two functions to run the office as a single unit.

I was also anxious to make the Ombudsman an identifiable figure and to get as much publicity as possible, consistent with protecting the confidentiality of investigations. I set a pattern of taking the office out of Belfast, going round district towns, meeting councillors and officials and voluntary bodies to explain the role, and holding open days in local libraries where anyone could approach the Ombudsman for advice.

I was anxious too that public bodies should develop effective in-house systems for dealing with complaints in the first instance which would be regarded as a domestic remedy to be exhausted before bringing a case to the Ombudsman. It is an essential function of management in any service to be able to deal with and learn from customer complaints. Not to do so produces flabby management, and a tendency to simply tell the client that they could go to the Ombudsman (or wherever) if they were not happy.

My procedure would see the public body having to satisfy the Ombudsman that they had such an effective system for dealing with complaints, which he could periodically audit and test for effectiveness, with the complainant always having the right to complain to the Commissioner.

This worked extremely well with housing complaints, most of which involved delay in carrying out repairs, and amounted to 40% of the complaints coming in. The Housing Executive produced an effective complaints service, and this freed the backlog in the office, allowed cases to be completed more quickly, and allowed the Ombudsman to concentrate on serious cases or those which broke new ground.

Like John Benn, I also tried to push out the edges a bit by applying principles that were being developed in European law, like proportionality and legitimate expectations. There was also much to be gained by invoking the recommendations of the European Committee of Experts in Administrative law as a benchmark of what was expected of public bodies, and something their governments had signed up to through the Council of Ministers.

In a case illustrating proportionality, a taxi driver who had a short verbal exchange with a vehicle examiner was peremptorily disposed of his licence and thereby his livelihood. A court had restored his licence but had not compensated him for loss of earnings while the car was off the road. Despite his having gone to court, I took the case and established that the licence had been confiscated because of discourtesy to the examiner. I held that it was disproportionate to deprive a man of livelihood for impertinence to a civil servant, and he was compensated for loss of earnings.

A case involving legitimate expectations arose when the Department of Agriculture arbitrarily withdrew provisional approval of a land reclamation scheme after a farmer had already committed himself to expenditure of £80000. In this the Department had acted entirely out of character (and, I suspected in response to a Ministerial whim) and entirely without precedent. In the end, they reinstated the grant.

In another case, Belfast City Council, to protect themselves from a charge of discrimination, had adopted a policy of only advertising in papers which circulated in three-quarters of Belfast. When asked what this meant, they were unable to explain, so I concluded that the policy itself was discriminatory.

At this time too, the office took the first case in Irish – the first agency in Northern Ireland to do so. Although there was no maladministration we were able to effect a settlement which enabled the complainant to educate his children at home through the medium of Irish.

Another interesting issue at the time involved the invoking of Public Interest Immunity certificates by some employing authorities in order to resist investigation of complaints by the Fair Employment Agency. These cases generally arose when a contractor was refused permission, on grounds of risk to national security to employ named individuals in work at a power station or on police premises. Once such a certificate was issued, the FEA could not proceed. Some complainants, in these cases brought their complaint to the Ombudsman, either for discrimination in employment or for seeking Public Interest Immunity. An Ombudsman could not be prevented from investigating, although he could be restricted in what he could publish in a report.

I took the approach that while the Ombudsman could not investigate police or security matters, he was entitled to satisfy himself that the body had sought appropriate security advice, that it was a sufficient basis for a reasonable decision, also that they had systems in place to minimise the risk of error or guilt by association, and that the decision not to employ was taken at an appropriately senior level in the organisation.

It is interesting that in a recent case arising out of the interrogation of a suspected terrorist in Guantanamo, the House of Lords appears to have suggested that the public interest and national security are not necessarily synonymous.

I think the office established by John Benn and developed by his successors has served the public well. It has also served the public service well by ensuring the maintenance of standards. It would do so better if more use was made of reports in case studies in civil service training – which tends to emphasise managerial efficiency more than customer service. A Committee of the Assembly to which the Ombudsman could report, and which could call officials to account as in the public Accounts Committee would also strengthen the office.

I am a great believer in the Ombudsman as a single person of integrity, able to discover the facts and to deliver a fair judgement. I have difficulty with the concept of

Ombudsmen acting in committee, or trinities of Ombudsmen, and I think that in a small jurisdiction, the temptation to have separate Ombudsmen for everything should be resisted. As I have said before, Ombudsmen attached to a single function run the risk of locking horns or of agency capture. A further risk is the tendency to outsource the delivery of services and functions for delivery by private sector contractors. Such contracting-out of public functions should not take them out of the remit of the Ombudsman, thereby depriving the citizen of an important safeguard and allowing Ministers and departments to evade responsibility.

As Hanna Arendt has put it “Bureaucracy, the rule of an intricate system of bureaux in which no man, neither one nor the best, neither the few nor the many, can be held responsible, could be properly called rule by M Nobody. If we identify tyranny as government that is not held to give an account of itself, rule by Nobody is clearly the most tyrannical of all since there is no one left who could even be called to answer for what is being done”.

To which the appropriate answer is that of Milton in *Areopagitica* “For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth, that let no man in this world expect; but when complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty maintained that wise men look for.”

Now there’s a mission statement fit for any Ombudsman.