

# **The Ombudsman and Information Commissioner - Righting Wrongs and Protecting the Public's Right to Know**

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Thank you for inviting me here today to talk to you as part of your deliberations on the context for public interest law and litigation in Ireland. I have long been an admirer of FLAC's human rights work, its dedication to the ideal of equal access to justice for all, and of its efforts to eradicate social and economic exclusion.

Public servants ought to serve the public interest and part of my job is to ensure that they do so. The Roman satirist Juvenal's phrase "quis custodiet ipsos custodies?" ["Who guards the guardians?"] is sometimes used by commentators to describe the Ombudsman's role as watchdog ensuring that the public interest is protected in the actions of Ministers and public servants. What most of these commentators do not quote is the rest of that rather misogynistic extract from his 6th Satire. Juvenal applied the phrase to women and questioned the reliability of guards placed by a husband on a wife to frustrate a lover. I prefer a more mundane description of my role.

As Ombudsman, my job is to vindicate the rights of those who may have been adversely affected by the wrongful action or inaction of the public service and to recommend appropriate redress. In the 21 years of its existence, the Office of the Ombudsman has dealt with over 68,000 complaints and has managed to ensure some form of redress in almost 40% of those cases. My role is also to contribute towards the achievement of a service which is fair and accountable and I work with public bodies to help them change the way they do business so as to provide better service to the public.

As Information Commissioner, I decide appeals in cases where freedom of information requests have been turned down or only partly granted. My role is also to promote good freedom of information practice and to monitor implementation of FOI by public bodies. As Information Commissioner my decisions are binding but

subject to appeal to the High Court. As Ombudsman, my recommendations are not binding but carry a persuasive authority. I report in both roles directly to the Oireachtas on an annual basis but may also report separately on matters relating to the performance of my functions.

1969 was a significant year both for FLAC and for the institution of Ombudsman in Ireland. When FLAC opened its doors for the first time in April of that year, it was just four months after the idea for a free legal advice centre had been conceived (by David Byrne, together with Vivian Lavan, Denis McCullough and Ian Candy). The labour which eventually produced the Office of the Ombudsman was also in progress at the time but was to prove much more painful and protracted - it was not until 1984 - a full 15 years later, that the Office opened its doors.

In 1966, the then Minister for Finance (and subsequently Taoiseach!) remarked in the Dáil: "We don't need an Ombudsman because there is hardly anyone without a direct personal link with someone be he Minister, Dáil deputy, clergyman, county or borough councillor, who will interest himself in helping a citizen to have a grievance examined and, if possible, rectified ...The basic reason therefore why we do not need an Ombudsman is that we already have so many unofficial but effective ones." This attracted an acidic reply from the doyen of Irish constitutional lawyers, the late Professor John Kelly: "... in the large perspective of European social and legal history, this utterance is a fascinating testimony to the survival in 20th century Ireland of the primitive system of clientship and patronage. This phenomenon was, in the distant past, a sure sign of a society where a weak man had no hope of justice without the aid of a strong one, and its general replacement in civilised countries by a regular, strong, and impartial process of law is a major social milestone. It is disheartening to find this primitive doctrine being not alone practised, but also blandly preached from the topmost minaret of the Irish administrative structure."

In the meantime, the institution of Ombudsman had been taking hold in other countries. From its inception in Sweden in 1809, it spread to Finland in 1919. The Danish Office was founded in 1957. The first common law jurisdiction to establish an Ombudsman was New Zealand in 1962. By 1967, the United Kingdom established an Ombudsman, but in the words of the former Northern Ireland Ombudsman, Maurice Hayes: "... with typical insularity, the British rejected the title [of Ombudsman], preferring instead the cumbersome and unclear Parliamentary Commissioner for Administration". By 1969, the Ombudsman for

Northern Ireland had been appointed, partly in response to civil rights protests. In the 1969 Devlin report, the question of providing a system of administrative justice had been considered but the creation of an Ombudsman was not recommended. In 1977, an All-Party Committee on Administrative Justice recommended the establishment of an Ombudsman. By 1980, the Ombudsman Act was on the statute books and the first Ombudsman was finally appointed in 1984.

In a commendable exercise, the Department of Justice, Equality and Law Reform recently sought public submissions on outline policy proposals for an Immigration and Residence Bill. In my submission, I pointed out that the Ombudsman Act prevents the Ombudsman from investigating actions taken in the "...administration of the law relating to aliens or naturalisation...". I am one of the few Ombudsmen in Europe whose jurisdiction is restricted in this way. I believe the restriction is unwarranted and that the full range of administrative actions in the immigration and residence area should be subject to investigation by me. My Office receives a small but growing number of complaints in this area; it seems as if the number of such complaints received in 2005 may be double the number received in 2004 (note: 23 in '04). Typical complaints relate to failure to give reasons for refusal of a visa application, or being given only partial reasons. Complainants rightly point out that this seriously hampers their capacity to mount an effective appeal against the decision. I have also received complaints involving claims of discrimination on race or age grounds. Other decisions are simply arbitrary.

In one case, an immigrant couple, legally resident in Ireland, were planning a holiday with their Irish-born son and two Nigerian-born daughters, aged 9 and 11. They applied for re-entry visas for their daughters. Both applications were refused. On internal appeal (there is no provision for appeal to any independent body in such cases), the 11 year old's application was granted but her younger sister's was not. It seemed to me that this was an apparently arbitrary decision. It was only after the intervention of my Office that the Department conceded a re-entry visa for the younger girl. Some of the complaints involve in my view unfounded assumptions on the part of officials that the complainants or their dependants may be a burden on the state. The complaints also cover the usual range of "customer service" issues, for example failure to reply to correspondence or delays in replying and inability to contact either the officials or the section dealing with the case.

Despite the bar on investigating complaints actions relating to the administration of the law in this area, my Office conducts a preliminary examination of each complaint in co-operation with the Department. While public assurances have been given that the purpose of this restriction on the Ombudsman's jurisdiction is only to ensure that there is not a duplication of the actual process of administration of the law, and that the jurisdiction of the Ombudsman does extend to areas other than the final decision in the case, there is evidence that the provision has caused confusion both among officials and potential complainants. People have been deterred from approaching my Office and have thereby been deprived of a remedy against maladministration which is widely available to other users of public services.

According to the Department, the overall objectives and principles which will underpin the future immigration system include:

- the protection of human rights;
- ensuring the fair treatment of persons;
- the achievement of reasonable standards of clarity and transparency,
- and
- the provision of satisfactory standards of service.

I warmly welcome these commitments; my Office is experienced in each of these areas and can contribute to ensuring that the future system upholds these principles. The Department aspires in its Statement of Strategy: "To provide the framework for ensuring that asylum, immigration and citizenship policies respond to the needs of immigrants, asylum seekers and our society and are in line with the best international practices and standards in this area." Best international practice demands the scrutiny of an independent Ombudsman in this area.

Finally, I noted in my submission to the Department that it is proposed that the Bill will respect the principle of Ministerial discretion. Discussing review mechanisms, the outline policy document stated: "The requirements of transparency and fair procedures indicate that there should be a process whereby persons aggrieved by adverse immigration decisions should have the opportunity to have those decisions looked at afresh. It has been suggested by some commentators that review mechanisms should operate by way of appeal to an independent body. However the nature of immigration is that it is ultimately a matter for the discretion of the Minister whether or not a non-national is permitted to enter or be in the State. In

such circumstances, appeal to an independent body would be inappropriate."

I do not agree. I repeat that it is fundamental to fair and sound administration that discretionary decisions be subject to independent review. The restriction on my jurisdiction in this area was enacted in a very different Ireland. We were inward looking; we exported our people and saw homogeneity as a benefit rather than as a disadvantage. One of the most significant changes we have seen in recent years has been the vibrancy, excitement and diversity in all its forms which people - and predominantly young people - both from Europe and farther afield have brought to Ireland. The Ombudsman Act 1980 specifically excluded the laws in this area from the Ombudsman's remit on the grounds that at the time this was mainly a security issue. Despite the best efforts of the Office, and of successive Ombudsmen, this has remained unchanged. I strongly believe that, given its relative accessibility to complainants and its predominantly informal working relationships with public bodies, the oversight of administrative action, which is desperately needed today in this area, is best provided by the Office of the Ombudsman.

I know that many of you here today are primarily focused on use of the legal system and the courts. Only the courts can administer justice, in the full sense of that term. Like the courts, the Ombudsman is concerned with the administration of justice in the broadest sense. The Ombudsman's remit is narrower than that of the courts - confined to complaints made against the public service - and my mode of operation is different to that of the courts - usually inquisitorial rather than adversarial. Many of the issues raised with my Office could, in principle, be taken before the courts. In practical terms, before my Office opened in 1984, such cases were not to any great extent being taken to court. This may be a reflection of cost considerations, access, the need for professional advice and, indeed, the procedural complexities associated with using the courts.

My Office differs from the courts in a number of important respects. Perhaps the main differences are:

- the Ombudsman's method is usually inquisitorial rather than adversarial.

- the Ombudsman's service is relatively informal and there is no charge for the complainant (or, indeed, the public body).

the Ombudsman is often able to invoke a wider set of decision-making criteria, and may often have more flexibility and discretion, than is the case with the courts.

my investigations must be conducted "otherwise than in public", whereas justice must be publicly administered.

the Ombudsman's recommendations are not legally binding but they have a strong moral and persuasive status; in addition to redress for the complainant, they often focus on procedural changes within public bodies and can as a result improve conditions or services for many people.

The Office of the Ombudsman can therefore act to promote social inclusion and can benefit marginalised and vulnerable groups in society and will complement the public interest law approach. You may see the fact that my recommendations are not binding as a weakness. In fact, it is a major strength of the Office. In making recommendations, I rely on persuasion, criticism, publicity and moral authority to have them accepted. This allows me to operate pragmatically and flexibly and to avoid the legalistic and adversarial approach of the courts and, unfortunately, of many administrative tribunals. We are able to recommend remedies which would not have been given by a court and to hold bodies administratively liable even where there is no legal duty of care or statutory liability. Another important aspect is that the majority of legal claims taken to court are settled out of court without any admission of fault or explanation. There is no assurance to the plaintiff that any action has been taken to prevent recurrence of the adverse action although this is often a matter of great concern to complainants. Many of the Ombudsman's recommendations are aimed at improving procedures and systems.

I accept the reality that rights to housing, healthcare and education may be subject to resource constraints. And, of course, if I am not satisfied with the response of a public body to a recommendation, I may make a special report to each House of the Oireachtas. Thus, the matter comes for resolution before the democratic political process and not the courts.

The process was seen to good effect when my predecessor submitted his special report "Redress for Taxpayers" to both Houses following the rejection by the

Revenue Commissioners of a number of his recommendations in an investigation report. The matter was considered by the Joint Committee on Finance and the Public Service which convinced the Minister for Finance that equity required the implementation of all the recommendations despite the not inconsiderable cost claimed by Revenue. There were two very positive outcomes to the process, It demonstrated parliamentary support for the Ombudsman and the effectiveness of parliamentary scrutiny of administrative actions.

My Office's report on Nursing Home Subventions described how the Department of Health and Children, when faced with resources constraints, had imposed obligations on individuals in an illegal manner and without legal authority. The Department of Health and Children was in turmoil last year as the consequences of its illegal actions became obvious. I hope that these cases and their aftermath will have focused the minds of public servants on the necessity to act within the law and with proper authority. My Office has received complaints from people with disabilities who have been refused grants, on grounds of age, to modify their homes to cater for their needs, even though the relevant scheme contained no age restriction. We are successful in resolving these cases to the satisfaction of the complainants, but they surface time and time again when resource constraints lead public bodies to ration entitlements in a manner which is not in keeping with the regulations. An investigation concerning tax reliefs for passengers with disabilities resulted in thousands of cases being reviewed by the Revenue Commissioners and payments of approximately €900,000 being made to some 100 carers.

My Office will continue its work in these and other areas. I look forward in particular to the impending extension of jurisdiction to all health agencies and to the disability area. I also hope to continue to develop relations with legal practitioners in the public interest law area. We have much to learn from each other.