

TYNWALD COMMISSIONER
FOR
ADMINISTRATION

SECOND ANNUAL REPORT

July 2019

1. Introduction

My predecessor, Malachy Cornwell-Kelly, produced the first Annual Report by the Tynwald Commissioner for Administration in July 2018, in which he alluded to the time taken by the three-stage Departmental internal complaints procedure which was necessary before the Commissioner could consider investigating a complaint by a dissatisfied complainant. In the first 12 months of the operation of the *Tynwald Commissioner for Administration Act 2011* ("the Act"), namely the calendar year 2018, the Commissioner registered 24 complaints, but that figure is misleading because, in some cases, the internal complaints procedure had yet to be exhausted and in others the Commissioner was precluded from investigating because the case fell outside his jurisdiction or the complainant did not satisfy the conditions set out in section 10 of the Act.

Mr Cornwell-Kelly's term of office expired on 31 December 2018 and I was appointed as his successor by Tynwald on 19 February 2019. I have continued to apply the procedure outlined in the letter to Departmental Chief Executives dated 6 February 2018 which was appended to the First Report and also set out on the Tynwald website. Since my appointment I have registered only six cases, not all of which have fallen within my statutory remit. A more detailed analysis of these cases appears in Appendix 1.

2. Developments in the establishment of the office

As my predecessor indicated, office accommodation was initially provided in the Offices of the Port Erin Commissioners, together with some secretarial support. The use made of the accommodation did not justify continuing the arrangement, particularly as arrangements to interview individuals were also provided, and indeed continue to be provided, within Legislative Buildings in Douglas by the Clerk of Tynwald, who has been very helpful, as have his staff, in facilitating this arrangement.

The operational role of the Cabinet Office has also ceased. The budgetary support for the Commissioner now comes from the Legislature, recognising that I am an officer of Tynwald, rather than a government contractor, although, for this year only, the sums expended on the office are being recovered from the Cabinet Office.

We are, however, still trying to make a realistic assessment of the number of hours which the Commissioner needs to spend upon complaints each month. The budgetary estimates have been made on the basis of an average of 10 hours per month. In most months that does cover the basic work, but it allows nothing for

educating officials and potential users about the Commissioner's functions or promoting awareness of the office's existence, both of which I see as proper and necessary developments of the role.

Furthermore, under the Appointed Day Order, the Commissioner is at present empowered to investigate complaints only against Government Departments. If the jurisdiction of the Commissioner is to be extended to the Statutory Boards and other bodies referred to in paragraph 1 of Schedule 2 to the Act., the estimate will obviously need re-assessment.

3. Proposals for further development

The Minister for Policy and Reform, the Hon. C. C. Thomas. MHK made a statement to Tynwald on 19 June 2019 indicating an intention to extend the Commissioner's jurisdiction in two stages. Subject to the results of consultation, the proposal is to extend jurisdiction to all the Boards and Offices of Government listed in Schedule 2 to the Act from 1 January 2020 and to include all local authorities from 1 July 2020. This is an ambitious timetable, and I shall need to work closely with officials in the Cabinet Office, the Department of Infrastructure and the bodies in question in order to ensure that it is deliverable.

4. Complaints outside jurisdiction

As indicated in the introduction, there have been a number of complaints which it has not been possible to investigate. I am satisfied, from the cases which I have seen, that Departments do inform complainants of their right to complain to the Commissioner in the final letter which they send to complainants (at the end of the third stage). However, on a number of occasions, the complainant has "jumped the gun" and complained to the Commissioner before the third and final stage of internal procedure has been reached. Sometimes this has been because of informal attempts by a Department to resolve the problem before it is registered as a complaint, and some Departments have reviewed their processes to make it easier to understand which stage a complaint has reached. Nevertheless, it can take time to interview the complainant only to find, when seeking answers from the Department complained about, that the request for information is technically premature: however, the time spent is rarely wasted because in many of these cases the complaint is revived properly after a final decision is received. There have also been cases where a complainant has lost faith in, and given up on, the internal complaints procedure before Stage 3 has been reached. I have had to explain in these circumstances that, because of the failure to complete the internal processes, I cannot investigate. For these reasons, I think that it is important for complainants to understand, at the outset of the investigation of their internal complaint, the stages

involved and the need to complete all of them before the Commissioner can pursue the matter, subject to the point which I make in the following paragraph.

5. Delays in internal complaints procedures

I remain concerned at the time which internal complaints are taking to be determined, sometimes to the prejudice of complainants because the potential remedies available are reduced by the effluxion of time. I believe that there may be a solution to this problem in section 10(1)(c). As an alternative to sub-paragraph (i) of that paragraph, which requires the listed authority to have taken all those steps which are in its view reasonable to deal with the matter alleged by the complainant, sub-paragraph (ii) permits the Commissioner to investigate in cases where the listed authority has not conducted a proper investigation into the matter and reported its conclusions to the member, within 28 days of the objection [i.e. by the member of the public as mentioned in section 10(1)(b)], or in exceptional cases, within such period not exceeding 3 months as appears to the Commissioner to be reasonable. That sub-paragraph clearly permits the Commissioner to investigate in cases where there has been delay even though the Department's internal investigation has **not** been concluded. To date, I have not been requested by a complainant to intervene on this basis, but, were such an application made, I would be minded to intervene, particularly if the Department were procrastinating and there was evidence of potential prejudice to the complainant as a result. There has been some scepticism as to whether it is possible to complete the complaints process within 28 days, but it is my understanding that this is achieved in other jurisdictions, and it may be useful to compare their internal processes with those adopted by the Departments here.

6. Cabinet Office review of the first full year's operations

The Cabinet Office has conducted a review of the first full year's operations, and we have discussed some of the issues which have arisen. One of these is the procedural difficulty which is referred to by my predecessor in paragraph 17 of the First Report, and the need for reports on cases to be formally laid before Tynwald in order to attract the absolute privilege in defamation conferred by section 23 of the Act. Another is the legal capacity of Departments to make *ex gratia* payments of compensation where the Commissioner so recommends it having found that maladministration has caused actual loss to a complainant. To date neither I nor my predecessor have had to address this issue, but it has been suggested to both of us by some Departments that the fact they are creatures of statute precludes them from so doing, and that they have been so advised by the Attorney General's

Chambers. I confess that I find this proposition surprising: in my experience, Government Departments and other statutory bodies in England routinely make such payments *ex gratia* and these are expressed as extra-statutory. If, in the future, a cases arises in which financial redress is appropriate, it will be necessary to discuss further whether a Department does in fact have the powers (or *vires*) to make such payments or whether express statutory provision is required to enable them to be made. There are some other minor issues with the Act, and it would be sensible to amend it in due course to iron them out. Many derive from the fact that the Act was closely modelled on a Scottish precedent, which does not altogether fit the model of complaints handling that is evolving on the Island.

7. Current workload

- a. My predecessor reported on the case of Mr. H, on whose behalf his daughter, Ms. H, acted, who complained about the persistent failure of the Department of Environment, Food and Agriculture (“DEFA”) to take enforcement action in respect of breaches of planning control. The Report was laid before Tynwald at the October 2018 sitting of the Court. Since then Ms H has made a further complaint, and I anticipate reporting on it in the Autumn.
- b. My predecessor also lodged a statement under section 14 of the Act in respect of a complaint by Mr. R that the arrangements operating in DEFA in respect of planning approval were unlawful because the Planning Committee and decisions taken by it had no legal basis. Although he refused to investigate that complaint, he did agree to investigate a further complaint that Mr. R should have been granted “Interested Party” status in respect of a planning application and that report should be concluded in the autumn. Mr R has now submitted a further complaint about the felling of trees on the same development site and my report will also cover that complaint.
- c. There are a number of complaints where investigations are nearing completion and I anticipate reporting on them before the end of the year. One is another case involving DEFA concerning refusal of “Interested Party” status on which I have now received a related complaint concerning enforcement.
- d. There is an ongoing investigation in relation to a complaint against the Treasury concerning National Insurance contributions and another against the Department of Infrastructure about enforcement of penalties in cases of obstruction of the highway, both of which I

anticipate concluding this year. In addition, I intend to lodge a section 14 statement in respect of complaints made by Ms J against the Department of Health and Social Care.

- e. In addition, there are two ongoing investigations into complaints against DHSC. The first complaint relates to delay by the Independent Review Body for Health in investigating a complaint. That complaint is of some significance because the then Chief Executive of DHSC accepted that the Board was administered by Departmental staff and that the Commissioner had jurisdiction to investigate administrative failures such as delay, although not the clinical decision-making by the Body itself and its convenors. The other case involves the amount of social care provided to an elderly woman by the Social Care Directorate. I set out in Appendix 1 a breakdown by Department of the 30 cases received since the office of the TCA came into being. The breakdown is surprising, not in showing that DEFA (and Planning in particular) received the greatest number of complaints, but in indicating how few Departments have been the subject of complaint. Further analysis of the outcome of internal complaints in the Departments may provide some useful data for predicting the level of complaints which are likely to arise from the extension of my jurisdiction.

8. Membership of the Ombudsman Association

In the First Report, my predecessor alluded to the Ombudsman Association and the appropriateness of participation in the exchanges and comparisons which the Association undertakes. I had the opportunity of meeting the Director, Donal Gallagher, when he visited the Financial Services Ombudsman Scheme, which is a member, last year.

There would certainly be advantages in terms of networking and, going forward, in developing best practice, but the membership fee would take a disproportionate amount of the existing budget. The membership is broad and I was told that there was 1 singleton ombudsman, the Waterways Ombudsman whom I understand works 1 day a week, There are also some with large numbers of employees and whose concerns are very different from those of the TCA. The Association requires all its members to conform to its Rules, so if membership is to be a possibility in the future, it will be important that the office of the Tynwald Commissioner for Administration, as it develops, ensures that its structure is compatible with the Association's Rules.

9. Horizon Scanning

For the next 12 months, the first priority must be to conclude and report on the outstanding cases. Then, upon the assumption that there is no alteration to the timetable set out on 19 June 2019 following consultation, I shall need to ensure that there is capacity to handle complaints brought against any of the Departments or Statutory Boards and the Offices of Government listed in Schedule 2 to the 2011 Act from January 2020 while still handling any new complaints in respect of the Departments which are already within scope. The extension to jurisdiction will involve dialogue with the bodies which are to be brought within scope, in order to increase mutual understanding, and, in particular, so that I can have an idea of the number and type of complaints which I am likely to receive. In conjunction with the Clerk of Tynwald, I shall need to consider what, if any, additional staff are required (and the associated on-costs including those for accommodation) and develop budget forecasts. These will also need to address the proposed further extension to the Commissioner's jurisdiction to cover local authorities from July 2020. Work with the smaller authorities may be extensive and I shall certainly discuss this in detail with the Local Government Unit at the Department of Infrastructure.

I have expressed my surprise at the paucity of new cases so far this year. One reason for this may be lack of public awareness. There are risks in any publicity campaign, since it may well increase the number of complaints which do not fall within jurisdiction. Alternatively, it may generate a number of proper complaints without resources to investigate them. Nevertheless, I believe that the extension of jurisdiction provides an opportunity to increase awareness, perhaps with posters in GP surgeries, Post Offices, Commissioners' Offices and the like. I am also conscious that the TCA webpage is not easy to find and that to a computer-literate generation, it is not user-friendly. I should like to have a website which was easy to navigate, with good signposting and hyperlinks. There are a number of excellent examples from other Ombudsmen's sites, but developing such a site would require expertise which comes at a cost.

10. Conclusion

There is no doubt that there are genuine areas of concern which have been brought to the attention of both my predecessor and myself, and we have investigated and continue to investigate those falling within jurisdiction. It is

however noticeable that in the main the complainants have been articulate and more than capable of pursuing a complaint. Whilst I am very happy to investigate those within my jurisdiction, I am anxious that the more vulnerable should have similar access. I would have expected to see complaints in respect of social security and inadequate housing. Whilst the local authorities are responsible for some of the latter, so of course are Infrastructure, but there have been no complaints. There has not even been a complaint about the regular grumble over bus timetabling. I would hope that with publicity and consequently greater awareness, a broader cross-section of people would feel able to complain. The extension of jurisdiction to the Statutory Boards, such as that Manx Utilities Authority, may also help the process.

Angela Main Thompson

30 June 2019

APPENDIX 1

BREAKDOWN OF EXISTING COMPLAINTS BY DEPARTMENT

DEPARTMENT	TOTAL NUMBER OF COMPLAINTS	OUTSIDE JURISDICTION
DEFA	7 ¹	1
DOI	3	2
DHSC	6	3
Treasury	3	2
Cabinet Office	4	2
DESC	1	1
DHA	1	1

A further five complaints were received and rejected because they did not involve a Government Department.

¹ There were only four complainants, but three of these raised subsequent complaints about related enforcement issues

APPENDIX 2

COMPLAINTS BROKEN DOWN BY SUBJECT AND OUTCOME OR CURRENT POSITION

The complaints listed below are in chronological order of receipt.

Department (or other proposed respondent)	Subject-matter	Outcome or current position
DEFA	Planning enforcement	Report laid October 2018
Cabinet Office	Government tendering	Outside jurisdiction
Marown Commissioners	Commissioners' failure to object to a planning application	Outside jurisdiction
DHA	Complaint about parole evidence	Outside jurisdiction
DOI	Complaint about parking prohibitions	Complainant and Department resolved the issue
<i>Ditto</i>	Refusal of Manx driving licence	Outside jurisdiction: complainant not resident on the Island
Courts	Alleged judicial misconduct	Outside jurisdiction
Tynwald	Complaint about procedure	Outside jurisdiction
DHSC	Complaint about medical treatment	Outside jurisdiction because more than 6 months since last complaint dealt with by the Department
DHSC	Complaint about childcare policies	Outside jurisdiction: internal complaints procedure not pursued.
<i>Ditto</i>	Complaint re clinical care	Complainant did not respond: closed
Treasury	Complaint about public sector pension	Outside jurisdiction
<i>Ditto</i>	Complaint about failure to pay benefit	Outside jurisdiction: SSAT had determined appeal.
Cabinet Office	Complaint about re-zoning of land	Outside jurisdiction

Financial Supervision Commission	Complaint about failure to investigate	Outside jurisdiction
DEFA	Complaint about refusal to grant interested party status and subsequent complaint about enforcement	Ongoing
Cabinet Office	Complaint about immigration status	Not pursued by complainant
Courts	Complaint about bias by court	Outside jurisdiction
DEFA	Complaint about— (i) legality of planning committee; (ii) failure to grant interested party status	Section 14 report lodged re (i), (ii) ongoing.
<i>Ditto</i>	Complaint about environmental failures	Outside jurisdiction: complainant no longer resident on the Island
DHSC	Complaint about Noble's Hospital	Outside jurisdiction: historic complaint.
DEFA	Complaint about failure to take enforcement action in respect of breaches in planning consent	Ongoing
DOI	Complaint about failure to take enforcement action in respect of traffic violations	Ongoing
DHSC	Delays of the Health IRB in dealing with complaints	Ongoing
DEFA	Failure to take enforcement action re unlawful felling of trees	Ongoing
Cabinet Office	Failure to respond to correspondence	Ongoing
Treasury	Complaint about National Insurance	Ongoing
DHSC	Complaint about provision of care	Ongoing
DESC	Complaint about school provision for child with special educational needs	Outside jurisdiction: historic complaint.

