

PP No 2020/0153

TYNWALD COMMISSIONER
FOR
ADMINISTRATION

THIRD ANNUAL REPORT
JULY 2020

1. Introduction

This is the third Annual Report by the Tynwald Commissioner and my second. This Report covers the second half of the 2019 calendar year and the first half of 2020. It is, however, important to consider calendar years as well, particularly when looking at trends.

I have changed the methodology for registering cases. In 2018, where all 24 complaints were registered, only 8 were within the Tynwald Commissioner for Administration's jurisdiction and only 6 of these were pursued.

In 2019/20, I did not register any case which was obviously outside my jurisdiction, either because the body complained of was not within my jurisdiction or the complainant was not Isle of Man resident. This filtered out cases at the outset and a further five out of the nine registered cases were rejected as outside my jurisdiction either because they were out of time or because the department's complaints policy had not been followed. I give a more detailed breakdown of the cases rejected in Appendix 1

2. Developments in the establishment of the office

As I indicated in my last Report, the operational role of the Cabinet Office ceased at the end of the 2018/19 financial year, although they 'owned' the budget for 2019/20 so the administrative staff in Tynwald recorded sums expended on my office but the payments were authorised by the Cabinet Office. The Clerks of Tynwald have now negotiated a more realistic budget for me which they are administering. In anticipation, it was agreed that I should advertise for an assistant to undertake much of the basic administrative work but also with the ability to sift through the large amount of paperwork and digital files I receive, much of which is not germane to the investigation. They would also have a role to play when I am interviewing complainants, some of whom are vulnerable. An advertisement appeared on the government website. I received some expressions of interest but before the deadline for applications, the State of Emergency was declared and I agreed with the Clerks of Tynwald that the recruitment process should be suspended. It is hoped to re-advertise in the autumn, if circumstances permit.

I am also very conscious that the Tynwald Commissioner for Administration's website is in need of a serious revamp, which I hope will be possible to get done out of this year's budget. The lockdown has delayed enquiries about costings.

I referred, in my last Report, to proposals for further development. Since 1st January this year, many more of the boards and offices of government listed in Schedule 2 to

the Act now come within my jurisdiction¹. The local authorities, joint boards and joint committees established under local government legislation did so from 1st July.

At the time of writing, it is impossible to predict the number of complaints against local authorities but, not surprisingly, Douglas Borough Council have already contacted me to discuss future working relationships and some joint Boards have supplied me with details of their complaints procedure with suggestions for amendment to allow for my future involvement. In the six months since I assumed jurisdiction over the boards and offices of government specified in Schedule 2, I have not received any valid complaints about them. I did receive a complaint about the Financial Services Authority, but the complainant was resident in California and so outside my jurisdiction. I wrote to the Authority suggesting that the standard wording informing a complainant of their rights to complain to me be amended to make clear that this only applies to those who are Manx resident.

I had expected to receive complaints in respect of the Manx Utilities (MUA) and the Post Office but following discussions with both, it is clear that most of the complaints received are treated as business as usual and the MUA estimated that less than five cases a year are treated as formal complaints.

3. Cabinet Office review

I reported last year that Cabinet Office had carried out a review of the first full year of operation by the Tynwald Commissioner for Administration. A number of minor issues with the legislation as currently in force were raised and I understood that the Cabinet Office were considering some amendments to the legislation to rectify the perceived problems. I have not seen any draft and assume that other more urgent priorities have prevented them taking this forward at this stage. One of the consequences is that I continue only to have the protection of privilege in respect of Reports² filed during the period when Tynwald is sitting so that Reports which are not lodged for the July sittings of Tynwald have to wait until October to be lodged.

¹ Statutory Boards, the Manx Museum and National Trust, the Public Services Commission, the Attorney General's Chambers, the General Registry and the Industrial Relations Officers were brought within my jurisdiction on that date.

² s. 23 Tynwald Commissioner for Administration Act 2011

4. Preliminary observations on maladministration

Before I turn to specific matters and review the recent caseload, it may assist if I set out my understanding of what amounts to maladministration, since there seems to be a belief that it is enough that a Department has “got it wrong”. In many cases a Department has discretion. If its officials exercise it properly, considering relevant factors and disregarding irrelevant ones, it does not matter that I or anyone else might have come to a different conclusion. If the decision falls within a range of reasonable responses it is *not* maladministration. I cannot substitute what my decision might have been. It is a high threshold and rightly so.

Tynwald has determined that Ministers and, by delegation, officers can act in a particular way and I cannot interfere with decisions about what services will (or will not) be provided by a listed authority [see section 9(1) of the Tynwald Commissioner for Administration Act 2011]. If mistakes are made, the internal complaints procedure, which has to precede my involvement, should rectify it. If it does not and, particularly if attempts are made to justify them or otherwise obfuscate, that may well amount to maladministration. Administrative or public law has evolved over the years and has been the subject of many decisions, particularly in England, which whilst not binding on Isle of Man Courts will, in many cases, be persuasive. As a general rule, the Manx Courts will tend to follow decisions made in England or Scotland if they relate to the construction of Manx statutes or principles of law which are clearly based upon ones elsewhere³. As the 2011 Act is modelled on the Scottish Public Services Ombudsman Act 2002 (asp 11) decisions relating to the construction of that Act will be particularly relevant, although the Courts here may also have regard to the general context of the Parliamentary Commissioner for Administration Act 1967 (which established the UK Parliamentary Ombudsman’s office) for general principles.

5. Completed cases

In this year to 30th June 2020 I have lodged two Reports and two section 14 statements.

- a) I lodged a section 14 statement with Tynwald in November 2019 setting out my reasons for refusing to investigate a complaint by Mrs J challenging actions taken by the Children’s Centre as agents for DHSC. Mrs J was a registered foster carer from whom DHSC removed foster children and the foster panel subsequently de-registered her and her husband. I concluded that Mrs J did not meet the requirements of section 10 because, although she did lodge a complaint with the Department, she failed to co-operate with the Independent Reviewer who was unable to complete Stage 2 of the Complaints Procedure.

³ For a comprehensive review of the status of English authorities in a Manx context, see the judgment of Lord Ackner in *Frankland v. R* [1985-87] Manx LR 65 at 80.

- b) In his first Report, my predecessor reported that he had received three complaints from Mr R, two of which he rejected. He had, however, accepted for investigation a complaint that Mr R was refused Interested Party Status ('IPS') in respect of a development in the proximity of his home. He was one of 26 households refused IPS (11 were granted such status) and was the furthest from the development site. His complaint was about the noise and dirt the development would cause. Mr R resides on a main road over 50 metres from the site and I concluded that he would suffer no greater inconvenience than other properties on that road and less than properties situated on side roads leading to the site. In my Report lodged for the May Tynwald I rejected his complaint.
- c) Mr R also made a complaint about DEFA's failure to enforce the Tree Preservation (Amendment) Act 2009, which creates an offence if any person cuts down, uproots or intentionally or recklessly destroys a tree without a permit. The trees concerned are 32 *Leylandii* which were removed by the developer of the site which was the subject of the previous complaint. The same Act provides a defence to any prosecution if the work undertaken on trees, without a licence, is required to facilitate approved development operations. The Department, whilst accepting that the legislation required amendment, adopted the approach that if the Planning Committee's approval in a given instance constituted "written consent" to the tree work, taking account of the wording of the approval and of the planning application and its accompanying documents, then it will not require the person concerned to submit a separate application under section 5 of the Tree Preservation (Amendment) Act 2009.

I was not satisfied that the Department had the *vires* to adopt this pragmatic approach, but Mr R had to satisfy section 10 of the Tynwald Commissioner for Administration Act 2011 for me to investigate. He needed to have sustained injury. I concluded that he had to show some personal connection between himself and the act of which he complains and he had not done so. I therefore declined to investigate but lodged a section 14 statement with Tynwald in May 2020, making clear that if a complainant brought himself within section 10 of the Act, by demonstrating a sufficient connection between himself and the injury sustained, I would investigate.

- d) I also lodged a Report on the complaint made by Mr S that the Department for Infrastructure ('DOI') had not painted double yellow lines on the adopted back lane behind his house and had not issued Fixed Penalty Notices ('FPNs') when he had complained to them about a contractor working on a neighbouring property who parked his van in the back lane, thereby causing an obstruction. The works lasted some time and Mr R was inconvenienced by their service failure. In the event, I rejected Mr R's complaint. DOI has a wide discretion as to issuing FPNs. They had responded to Mr R's frequent complaints, attending the back lane over 50 times over a six week period.

Further double yellow lines would not have resolved the problem because there are exemptions for loading and unloading vehicles and also for trade vehicles outside a property where building work is being undertaken. DOI had not acted unlawfully or unreasonably in exercising their discretion.

6. Current workload

(a) Since I reported last July I have only received two valid new cases, both involving Department of Environment Food & Agriculture ('DEFA') and the grant or enforcement of planning. My investigation into one of the cases, where the complainant is unhappy that the Department failed to take action in respect of building works undertaken by a neighbour, which has adversely impacted his property, is complete and I hope to circulate the draft report in August or September with a view to lodging it for the October 2020 Tynwald. The other was received in February and is less advanced. I had intended to see the complainant in April but this was postponed because of Covid 19. I intend to see him on my return to the office although this is unlikely to be before August.

(b) In my last Report, I mentioned Ms H's further complaint on which I had hoped to report. I saw Ms H and the friend who accompanied her in September. Her concern continued to be that the wall separating the two properties was unsafe. I thought that Ms H had accepted that exploratory holes could be dug on her property to check the construction of the wall, provided that she was not responsible for the cost of such work. It cannot be done on the side of the adjacent property because of the earth that has been piled against the wall as part of the landscaping of the garden. I relayed this information to DEFA whom I understood were taking matters forward. I asked for an update.

The Department have responded that they have written to the builder responsible for the next door works. In the meantime Ms H has contacted me. She stated that there had been no progress since our meeting last Autumn and whilst she was prepared to allow access on her land, she believed all remedial work should take place on the next door property. The prospect of finding resolution to the problems is not looking promising and this may be a case where it will be necessary to consider whether the Department should be responsible for the cost of investigating and arranging any remedial works which may be necessary.

(c) Last year, I mentioned another case involving DEFA and refusal of Interested Party Status on which I had hoped to report. The complainant has continued to raise issues but a draft Report will be circulated over the summer to be lodged for the October sitting of Tynwald.

(d) The investigation in relation to a complaint against the Treasury was, I thought, completed and I had started writing the Report. However in March,

the complainant asked to see me again with further information. I had agreed to see him after Easter but was prevented by the lockdown. I intend to see him before finalising the Report but hope to lodge it before the end of the year.

- (e) In my last Report, I referred to a Department of Health and Social Care ('DHSC') complaint involving delay by the Independent Review Body (IRB) for Health in investigating a complaint. The Chief Executive of DHSC had agreed that it fell within my remit because DHSC were responsible for funding the IRB and provided and funded the administrative staff who remained their employees. I investigated on that basis with the full co-operation and assistance of his successor, the then Acting Chief Executive. At the end of last year, I had completed my enquiries and was in a position to report when I received a separate complaint about the IRB for Health. The complaint had initially been made to the Cabinet Office and there was correspondence between the Chief Secretary and the Acting Chief Executive who had agreed that the complainant should be advised to complain to me. By the time I received the complaint, the Acting Chief Executive was on long-term sick absence and in her place another Acting Chief Executive had been appointed. She responded to my request for information by stating that the IRB for Health was a body entirely independent of the Department and was outside my jurisdiction. I questioned this, pointing out the position taken by the previous Chief Executive and the Acting Chief Executive. I was told that she had received advice to that effect from the Attorney General. She offered to obtain formal advice and, when she had done so, she waived privilege and provided me with a copy. The advice did not address the points I had made and did little more than set out the legislation. It certainly did not explain why an experienced Chief Executive and the previous Acting Chief Executive had accepted that the IRB's delay in concluding investigations could be attributable to inadequate funding by the Department and therefore fell within my remit. Nevertheless, being pragmatic, I concluded that I could not investigate without the Department's co-operation and I had to write to the complainant explaining why, despite the information he had received from Cabinet Office, I could not investigate.

This creates a problem in respect of the case on which I was about to report. Either I have or have not got jurisdiction to investigate the cause of delay by the IRB for Health and, in particular, to ascertain whether it is caused by departmental failure to provide adequate resources. My jurisdiction cannot differ according to individual circumstances or who is the Acting Chief Executive in any particular week. For that reason, I have decided that it is not appropriate to report in respect of the initial complainant but I will lodge a section 14 statement, on the basis that I do not have jurisdiction, setting out my findings without recommendations and leave it to Tynwald to consider whether the situation is satisfactory or whether any amendment to the Tynwald Commissioner for Administration Act 2011 should deal with this.

- (f) In my last Report, I mentioned another case which involved DHSC, where the complaint concerned the care of an elderly lady. In that case, the Department asked that I investigate, rather than the case being referred to the IRB for Social Care because the IRB would not be regarded as independent! That Report will be lodged in the autumn.
- (g) The other outstanding case is one of the two complaints I received about DEFA in February this year. It is another planning matter. I have initial information but have yet to see the complainant so it is at an early stage.
- (h) Appendix 2 shows the current caseload, while Appendix 3 shows those cases which were registered in the 12 months since the last Report.

7. Cases rejected in last 12 months

As will be seen from Appendix 3, it is not always clear whether a case is within my jurisdiction. Three of the cases accepted and registered within the last 12 months were subsequently rejected for the reasons shown in the appendix.

8. Other matters

In my Report last year, I mentioned a number of issues which can be conveniently dealt with together.

- a) Complaints outside jurisdiction and delay in internal procedures
In view of the limited number of complaints received in the last 12 months, it may be premature to reach conclusions on this but the two DEFA cases accepted for investigation were dealt with by the Department more speedily than other earlier cases. I rejected two cases (one DEFA; one Department of Education Sports and Culture ('DESC')) because the complainant had not complained to the relevant Department first. Certainly one was aware of the rights of internal complaint, but may not have understood the need to exhaust that process first.
- b) The Ombudsman Association
I have not pursued membership of this, because I am not satisfied that the benefits justify the costs for such a small organisation as the Tynwald Commissioner for Administration. Looking at its constitution and requirements, it seems unlikely in any event, that my office would meet the criteria for membership because we have not followed the model constitution to which its members are expected to adhere. If, in the future, the post of Tynwald Commissioner for Administration is being redefined, consideration of the Association's model might be useful but, at present, it seems wrong to alter the structure in order to meet an external body's requirements.

9. Conclusion

I remain surprised at how few complaints are made to me, the figure being further reduced by the number of complaints which are outside my jurisdiction. This may be testament to the seriousness with which complaints to Departments are treated and the efforts made to resolve them. The other possibility is that some are defeated by the stages of the internal process and although I have noted that there have been real attempts by Departments to simplify and accelerate the process. It may be that a survey of Departments will give me some indication of how many formal cases were received and with what result in a given period.

I should mention that I have spent the last two months in hospital and do not expect to be operating fully until August. I am very grateful to those MHKs who have been understanding of the reason for the delay and managed their constituents' expectations. I have managed to produce this report and deal with day-to-day correspondence because of the resourcefulness and imagination of staff in Ward 8 at Noble's Hospital and the Martin Ward in the Ramsey and District Cottage Hospital who have gone to some trouble to provide me with office facilities. But most of all my thanks go to the Clerk of Tynwald and his superb staff who have fielded calls and queries and provided me with additional administrative support.

Angela Main Thompson
Tynwald Commissioner
6 July 2020

APPENDIX 1
CASES REJECTED WITHOUT REGISTRATION

DEPARTMENT OR OTHER PROPOSED RESPONDENT	SUBJECT-MATTER	REASON FOR REJECTION
DHSC	Complaint about personnel matter	Outside jurisdiction, historic complaint
Cabinet Office	Failure to appoint consultative body	Political decision: outside jurisdiction
3FM	Complaint about reporting of court proceedings and naming of juvenile defendant	Outside jurisdiction
Office of Human Resources	Complaint by government employee about bullying at work	Outside jurisdiction
Douglas Borough Council	Complaint by employee about treatment	Outside jurisdiction
DHSC	Complaint originally initiated in 2018, but no further information provided by complainant until December 2019	Failure to provide information timeously means now out of time
IOMFSA	Complaint about IOMFSA	Complaint outside jurisdiction because complainant not resident on the Island
Courts	Complaint about difficulties of service of documents for non-residents	No jurisdiction over the courts. Court procedures are a judicial matter. In any event complainant is not resident on the Island.

APPENDIX 2
CURRENT CASELOAD AT 30 JUNE 2020

DEPARTMENT (OR OTHER PROPOSED RESPONDENT)	SUBJECT-MATTER	CURRENT POSITION
DEFA	Complaint about refusal of interested party status and subsequent complaints about enforcement	Draft Report to be circulated July/August
DEFA	Complaint about refusal to take enforcement action re breach of planning consent	Ongoing discussions to find resolution
DHSC	Delays of Health IRB in dealing with complaints	Section 14 statement to be lodged in October
Treasury	Complaint about National Insurance and consequent failure to pay pension supplement	Ongoing
DHSC	Complaint about provision of care	Ongoing
DEFA	Complaint about failure to enforce planning regime	Ongoing
DEFA	Complaint about grant of planning consent	Ongoing

APPENDIX 3
REGISTERED CASES 1 JULY 2019 – 30 JUNE 2020

DEPARTMENT	CASE NO.	SUBJECT-MATTER
DESC	TCA 1907	Complaint re de-registration of pre-school facility Rejected because no formal complaint made to Department
DHSC	TCA 1908	Complaint re Health IRB Rejected because DHSC denied that IRB was part of the Department
DEFA	TCA 1909	Ongoing complaint re failure to monitor neighbouring building works
DEFA	TCA 2001	Ongoing complaint about grant of planning consent
DEFA	TCA2002	Premature complaint re grant of planning consent. Complainant has not pursued Department's internal complaints procedure