

TYNWALD COMMISSIONER
FOR
ADMINISTRATION

FIRST ANNUAL REPORT

July 2018

Introduction

1 The Tynwald Commissioner for Administration Act 2011 Appointed Day (No 1) Order 2017 brought the 2011 Act into force generally with effect from 31st December 2017, but with respect to the departments of central government only.

2 The Order specifically disapplied section 29 of the Act (which would have allowed the Commissioner to consider any complaint in respect of which a final decision had been made by a department within the preceding 12 months) with the result that only those complaints which have been the subject of a final decision on or after the commencement date have been within my remit.

3 This, as was intended, has allowed the Ombudsman's function to come into force in a controlled manner and without an immediate backlog of cases being eligible for investigation. Given that the departments all have a three-stage internal complaints system, it also means that it is taking some time for existing complaints to reach the point at which, if the complainant is still not satisfied with a department's response, they can even be considered for investigation by the Tynwald Commissioner. Consequently, it likely to be some time before very many reports of investigations reach the stage of being laid before the Court, as required by the Act.

Setting up

4 In December 2017, I wrote to the Chief Secretary setting out the basis of the procedure I proposed to adopt in dealing with complaints, modelled on the procedure used elsewhere. I reproduce the relevant part of that letter as Appendix 1. In order to make sure that I did not commence enquiries into complaints prematurely, and use up scarce official resources unnecessarily, I wrote to all Chief Executives on 6th February 2018 asking for details of their Departments' complaints procedures and drawing attention to the duty to inform complainants of their right to complain to the Commissioner. The text of that letter is at Appendix 2.

5 As will be seen from that letter, section 27 of the 2011 Act requires authorities making a final decision in a complaint to notify the complainant of his or her right to refer the matter to the Commissioner. This is the basic publicity given to my role and it should ensure that matters coming to me are normally within my remit and can be looked at on their merits. In addition to this, a specific page of the Tynwald website offers general guidance about the Commissioner's role and powers; it can be seen at Appendix 3.

6 In spite of this guidance on the Tynwald website, it will be seen from Appendix 4 that I have had a number of approaches or enquiries with regard to matters which are outside jurisdiction. In principle, there appears little reason for this to happen, but in practice filtering complaints initially is part and parcel of the Ombudsman function and, to my knowledge, the need for it is encountered by both the Parliamentary Commissioner for Administration at Westminster and the Commission for Local Administration in England & Wales. While I understand that it is intended to re-charge the costs of investigations to the Department concerned, there will therefore inevitably be costs which cannot be brought within this regime.¹

7 The Selection Panel which sat last year to recommend the appointment of a Commissioner invited Angela Main Thompson OBE to undertake the functions provided for by paragraph 13 of Schedule 1 to the Tynwald Commissioner for Administration Act for the appointment by the Commissioner of a person “to assist and advise the Commissioner”. Ms Main Thompson accepted this invitation and I was glad, with the approval of the Tynwald Management Committee, to make the appointment accordingly. This appointment has in the event proved very useful and I am grateful to the Selection Panel for their initiative.

8 I wish to record that the staff of the Cabinet Office, the Tynwald Office and Port Erin Commissioners’ Office have been very helpful in providing the basic support and facilities needed. At Port Erin, office accommodation and some secretarial support have been made available, and technical and IT support have been forthcoming from the Cabinet Office and the Office of the Clerk of Tynwald, together with interview space. While at all three places the staff have gone out of their way to be supportive of this new role, it might enhance the public’s perception of independence from government if the budgetary support of the Commissioner - who is an officer of Tynwald – is seen to be with the expenses of the legislature.

Relations with Departments

9 It would be difficult for a department, having thoroughly examined a complaint itself and having decided to reject it, not to regard a decision by the Commissioner to investigate the same complaint as an unwelcome challenge. I am happy to report nonetheless that I have received helpful cooperation from those Departments which I have had to approach on such a basis, and an acceptance that both they and I are seeking to work together in the public interest.

¹ The UK Parliamentary Commissioner has an additional filter in that the complaint has to be made first to a Member of Parliament, but it was decided not to include a comparable filter here.

10 There will be occasions when it is unclear whether everything relevant has been taken into account in the internal complaints procedure, or where the basis for the decision is unclear, and where it is therefore right that the Department's decision should be tested. I reiterate the comment which appears in the 'ombudsman' section of the Tynwald website that there is no presumption that the commencement of an investigation will lead to a finding adverse to a Department – it may only be necessary for a verification of matters in doubt and the investigation may be discontinued early on, or it may run its full course and yet produce no adverse conclusion.

11 One difficulty which has occurred in practice is that it is not always evident, either to a department or to a member of the public, when a complaint exists and needs to be treated as such. There may be simply an indication that a matter needs to be pursued further, or it may be that the potential complainant's degree of dissatisfaction should make it plain that the department should register a complaint and initiate its formal procedure for complaints handling. Another difficulty appears to be that some departments have an informal practice of handling complaints prior to the institution of the formal process, whereas complainants may believe that the formal process has already commenced.

12 The Cabinet Office has in hand a review of departmental complaints procedures, and I and the Assistant Commissioner have been able to feed into it our experiences to date. It is important that Departments establish clear practices in this area, so that both officials and the public know where they are at any given moment in their dealings. I note that my counterpart in Scotland spent some time establishing standardised complaints handling procedures for each of the sectors for which the office of the Scottish Public Sector Ombudsman is responsible: it may be that such an exercise should be undertaken in the future, depending upon the results of the Cabinet Office review.

Policy issues

13 I was concerned initially that there could be instances where I would encounter situations mixing political issues with those of administration. In the context of my previous experience of ombudsman work it would have been unusual, though not unknown, for the political direction of a Department to be involved in the nuts and bolts of administration. Tynwald should be aware that there is the possibility here for something of a double exposure in so far as the Minister is concerned, being both answerable to this Court and in the Keys, but also potentially within the scope of any criticism which an investigation by the Commissioner might give rise to.

14 It is of course for the Minister and the Members of Departments to judge when it is appropriate for them to address matters of pure administration, but in so far as they do the likelihood of their falling within the scope of the Commissioner's remit is increased. The possibility becomes particularly likely to occur where members of the public choose to escalate administrative complaints to the political level, as almost a first reaction.

15 There can be a difficult area where political level involvement has a specifically policy making character to it. So long as a political level decision is within the limits of any discretion conferred by the relevant statute, and is not taken on the basis of inaccurate or irrelevant considerations, I would be wary of doing more than noting that it had been made and leaving it to the parliamentary process to review it, if so desired.

16 Section 6 of the Tynwald Commissioner for Administration Act provides for directions to be given by Tynwald to the Commissioner in general terms with regard to investigations (though not of course in individual cases). Although directions as to procedure and as to reports are particularly envisaged by the section, the power is wide. So far, there is nothing that I wish to suggest to be the subject of such directions.

17 One procedural difficulty has, however, emerged which Members should be aware of. It concerns the need for reports of investigations to be formally laid before Tynwald in order to be covered by the absolute privilege from suits in defamation provided by section 23 of the Act. This means that they cannot just be circulated to Members when they are ready, but must await the publication of the Order Paper containing a report. In many cases this delay will not be significant, but during the summer recess it may amount to the better part of two or even three months. I am advised that a brief technical amendment to the Act would cure this problem.

Workload to date

18 At the time of writing this report, I have one full investigation in hand, where I expect to lay my report before the Court at its sitting in October, and I have completed, and reported on to the May sitting, one case which turned out to be outside jurisdiction, but which required initial enquiries of the Department to establish that; it appeared, in any event, that the Department in question – Infrastructure – had acted correctly.

19 In all the other cases I have looked at, apart from those listed at Appendix 4, matters are still at the stage where complainants have had to be advised that they have not exhausted departments' complaints procedures; these cases are therefore pending as possible investigations.

Good administration

20 I am sometimes asked what principles or rules an ombudsman should work on when approaching claims of maladministration. To this question the basic answer, which every ombudsman gives, is that each case has to be looked at in its context. To say that may seem to some an evasion of the question, but it is widely recognised in the ombudsman world that it is important not to try and establish some kind of case law of decisions; ability to deal with realities as they occur, and new situations not before envisaged, is essential.

21 That said, however, there is an obvious need for consistency in decisions and there are some basic or core principles which will come as no surprise to anyone. For example:

- Operating within the framework of legislation and case law.
- Knowing when to seek legal advice.
- Taking only relevant facts and considerations into account.
- Obtaining the necessary evidence before making a decision.
- Treating members of the public courteously.
- Dealing with similar cases on a similar basis.
- Applying statutory discretions in accordance with politically approved guidelines.
- Keeping proper records.
- Avoiding delay.
- Recognising that inaction may be as harmful as wrong action.
- Considering the proportionality of action.
- Being alert to conflicts of interest.
- Soundness of reasoning.
- Giving reasons for decisions.
- Avoiding bias or political opinion.
- Acknowledging errors and putting them right.
- Taking account of the rules of natural justice.

22 One could add more, and various ombudsmen publish a similar list of *desiderata*. There is now indeed a wealth of literature on the ombudsman function and good administration, both within the British Isles and further afield, and the subject has become one for serious academic study.

23 At the latest count, there are 73 national ombudsman institutions, as well as numerous sector ombudsman establishments. As the office of Tynwald Commissioner for Administration develops, it will no doubt be appropriate to participate in the exchanges and comparisons undertaken by the Ombudsman Association, which brings together all those exercising this function in the British Isles.

Malachy Cornwell-Kelly
30 June 2018

APPENDIX 1

Extract from letter to the Chief Secretary of 12th December 2017

Following my appointment by Tynwald at its November sitting, I am trying to put arrangements in place in the time available before the Act comes generally into force on 31 December. For that purpose I am writing to you - perforce at the moment from my home address - to outline what I see as the main structure appropriate to my functions in so far as the Departments are concerned.

In doing so, I have followed fairly closely the way in which matters are dealt with by the Parliamentary Commissioner for Administration at Westminster (whom I used to work for earlier in my career). On that basis, I expect that what follows will be uncontroversial, but nonetheless I would be grateful to be aware of any concerns that you may have.

Basic procedure

The normal routine I would expect to follow would be this.

If I consider that there is a case to answer following the receipt of a complaint, and the complaint otherwise satisfies the preliminary criteria laid down in the legislation, it would be forwarded to the Chief Executive Officer of the Department concerned. This means that the Chief Executive is immediately aware that a complaint is under investigation, and secondly he or she can identify whether the complaint raises wider questions within the Department. These of course are matters for the Department internally, and the complaint itself will be passed to whatever level the Chief Executive considers appropriate for the next stage.

When transmitting the complaint, I will aim to identify the main issues which appear to require clarification. It may sometimes be possible, following the Department's reply, to proceed straight to the preparation of a report on the case. More often, it is likely that there will be follow-up enquiries needed and the Act gives the Commissioner power to seek the production of papers, or the attendance of witnesses, as the case may require. If appropriate, a site inspection may also take place. This phase I think has to be marked by flexibility, and involve as little or as much as the case requires.

After enquiries are complete, a draft report will be prepared and checked with the Department and the complainant for factual accuracy. That done, if it appears that a remedy for any service failure or maladministration identified is appropriate, that can take place in correspondence between me and the Chief Executive and, hopefully, agreement would be reached quickly.

[. . .]

Published guidance

As a separate matter, I attach a draft of the text I propose using as general guidance on the functions of the Tynwald Commissioner for Administration.

I hope it is clear that it is drafted as a layperson's guide to what, for most people, will be a novel concept and I am anxious therefore to avoid over-complicated and legalistic language. I appreciate that this inevitably comes with some loss of precision and that there are gaps in the coverage; but I see it as better that an expanded explanation should be given in individual cases where necessary, rather than that the text should risk becoming impenetrable to the general reader.

Section 10

I think, again, that the text that relates to this is uncontroversial, but I draw attention to one feature which we need to be clear about. My understanding of it is reflected in the draft guidance for publication which is attached.

Section 10(1)(c)(ii) of the Act I read as precluding an investigation by the Commissioner if an investigation has already been carried out by the authority in question. The policy of the legislation seems to be that there should not be two investigations into the same matter; thus, section 7(1)(c), precludes an investigation by the Commissioner where there is already one being carried out by Tynwald, and section 7(6)(b) shows the same concern where there is another investigator potentially in the field.

This is subject, however, to the requirement in the subsection that an authority's investigation must have been a "proper investigation". Thus, if it has not been a "proper investigation", the way is then open in principle for an investigation by the Commissioner. Given that section 7(3) provides that "It is for the Commissioner to decide whether to initiate, continue or discontinue an investigation", I conclude that it is for the Commissioner to decide whether or not an investigation by a Department has or has not been a "proper investigation", and therefore whether it is open in principle for the Commissioner to investigate the complaint.

Inevitably, this means that in practice there would be some measure of review by the Commissioner, even where the Department in fact has carried out a proper investigation, because it first has to be decided whether the condition of the subsection is satisfied.

[. . .]

APPENDIX 2

Letters to Chief Executive Officers of 6th February 2018

I understand that all Departments have internal complaints procedures already in place and I am writing to ask if you will kindly confirm those which are established in your Department.

The reason for my request is that, under the terms of sections 10 and 13 of the Tynwald Commissioner for Administration Act 2011, I am only entitled to investigate a complaint from a member of the public once the internal complaints procedure of the Department has been exhausted and a final decision has been given. In other words, Departments should if possible deal with complaints themselves and, only if the complainant remains dissatisfied, does the Commissioner's jurisdiction potentially come into play.

To avoid my taking up complaints prematurely and troubling you needlessly, I will be grateful if you will let me have the following information:-

- (i) How many stages does your internal complaints system have?
- (ii) How and when are persons making complaints informed of it?
- (iii) What indicates that the Department's decision on a complaint is the final one i.e. that the internal procedure has been exhausted?

May I take this opportunity to draw attention to section 27 of the 2011 Act, which requires a Department making a final decision on a complaint to alert the complainant to the right to raise the matter with the Tynwald Commissioner for Administration. Evidently, this would be at the stage reached at point (iii) above.

APPENDIX 3

Guidance published on the Tynwald Website

Who is the Tynwald Ombudsman?

The formal title of the Tynwald Ombudsman is the Tynwald Commissioner for Administration, who is appointed by Tynwald under the Tynwald Commissioner for Administration Act 2011.

Malachy Cornwell-Kelly was appointed to the office by Tynwald in November 2017. Malachy is a former Clerk of Tynwald and in his earlier career spent five years as a Director of Investigations for the Parliamentary Commissioner for Administration at Westminster; his last job was as a tax appeal judge in London, before retiring in 2016.

What does the Tynwald Commissioner do?

The Commissioner's function is to investigate complaints from members of the public who claim to have sustained injustice or hardship as a result of service failures by, or the administrative actions of, the Government Departments (including action taken on their behalf).*

The 2011 Act and the Appointed Day Order made in June 2017 lay down what Tynwald has decided that the Commissioner can do and what the powers and duties of the office are. The Commissioner must operate within this framework. What follows is a general explanation of how the 2011 Act works; it is not intended to be definitive or exhaustive, and reference must always be made to the legislation itself.

Who can make a complaint?

A complainant must normally be someone who is resident in the Isle of Man. Under the Appointed Day Order, matters are only eligible for possible investigation if they relate to complaints to the Commissioner the basis for which has arisen on or after 31 December 2017 (see below).

There is no prescribed form for complaints to the Commissioner, but the complaint must be made in writing by an identifiable person, or body of persons, or be made by a person authorised in writing by the complainant(s) to make the complaint. Anonymous complaints will not be accepted.

What is the procedure?

Any complaint must first be made in writing to the Department concerned and they must be given an opportunity to take what they consider to be all reasonable steps to deal with the complaint; if the complainant remains dissatisfied, she or he may then complain to the Commissioner within six months of the Department's *final decision*.

The complainant may choose to request the Department to conduct an investigation into the matter complained of and report their conclusions within 28 days (or up to three months if the Commissioner agrees). If they don't do so, or if the investigation is not considered by the Commissioner to be a "proper" investigation, the complainant may complain to the Commissioner within six months of the Department's *final decision*.

The fact of a complaint being accepted for investigation does not necessarily mean that fault will be found with the actions of a Department; the Commissioner may conclude that the Department has not been at fault, or that the complainant has not suffered injustice or hardship.

What can the Commissioner not investigate?

There are certain things which the Act inhibits the Commissioner from investigating. They include:

- Police investigations or public security matters generally.
- An investigation by a specially authorised investigator.
- An issue already being investigated by a committee of Tynwald.
- The taking or pursuing of proceedings before a court or tribunal.
- Action in the court or tribunal administrations by a person acting under judicial authority.
- Actions taken under the Criminal Injuries Compensation Scheme.
- Personnel matters generally.
- Teaching and related matters in schools.
- Contractual or commercial issues, except those relating to the compulsory acquisition of land, or where the procedures prescribed in law have not been complied with.
- Issues where there is by law a right of review or appeal such as to a tribunal or adjudicator, or a right to take proceedings in court, unless in any case the Commissioner considers it unreasonable to expect such a right to be exercised.

The Commissioner cannot look at proceedings of the Council of Ministers or its committees, or have access to documents in the custody of a Member or officer of Tynwald, the House of Keys or the Legislative Council.

How does an investigation take place?

All investigations must be in private and the procedure is, broadly, within the Commissioner's discretion and will fit the needs of the case: face to face interviews may take place, site visits may be required or matters may be dealt with in writing.

The complainant will be kept informed about the progress of the investigation. Both the Department being investigated and the complainant will be given an opportunity to comment on the Commissioner's proposed findings of fact.

The Commissioner is empowered to require the production of documents and the attendance of witnesses to the same extent as the High Court. There are strict provisions about the disclosure of confidential information, especially that relating to a person's tax or customs affairs.

Does an investigation stop the contested decision going ahead?

Not automatically, but the Commissioner may request the Department to put it on hold if satisfied that the decision is likely to cause serious harm to the complainant. The Department then has a discretion whether or not to do so.

What happens if hardship or injustice to the complainant is found by the Commissioner?

After the full facts of the case have been established, the Commissioner will consider whether any remedy for hardship or injustice is appropriate if there has been a service failure or maladministration. The Commissioner will, after discussion with the Department, recommend whatever remedy the Commissioner considers is called for.

Has the Commissioner got power to enforce the remedy recommended?

No. But, in parliamentary ombudsman jurisdictions throughout the British Isles, it is rare for an investigated authority to refuse to accept such a recommendation. If a Department does refuse, then it is a matter for Tynwald to decide whether or not to take the case further.

What happens after the investigation?

The Commissioner's report is finalised and anonymised, so that it discloses neither the identity of the complainant nor that of any official involved in the case. It is then sent to the complainant, the Department and the Council of Ministers, and it is laid before Tynwald and made available publicly.

What if the Commissioner refuses to investigate a complaint?

The Act of Tynwald prescribes that accepting a complaint for investigation, refusing to investigate it or deciding to discontinue an investigation, is a matter for the Commissioner's discretion. In the case of a refusal to investigate or a decision to discontinue an investigation, the Commissioner will give reasons. An anonymised summary of such cases, and of the reasons given, will be laid before Tynwald.

How do I contact the Commissioner?

Complaints have to be in writing, so you should use either of these methods to make contact:-

By email ombudsman@parliament.org.im

By post PO Box 2, Port Erin, Isle of Man IM99 8JQ

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- * The Departments of Central Government are:
- The Cabinet Office
 - The Department of Education, Sport & Culture
 - The Department for Enterprise
 - The Department of the Environment, Food & Agriculture
 - The Department of Health & Social Care
 - The Department of Home Affairs
 - The Department of Infrastructure
 - The Treasury

APPENDIX 4

Complaints Not Investigated

TCA1802 – complaint related to commercial tendering by a government department – preliminary enquiry by complainant, and not pursued.

TCA1803 – enquiry whether issues in a live planning appeal could be investigated – outside jurisdiction.

TCA1804 – complaint related to the conduct of a public inquiry – outside jurisdiction.

TCA1807 – complaint relating to alleged judicial misconduct – outside jurisdiction.

TCA1808 – complaint relating to proceedings in Tynwald – outside jurisdiction.

TCA1810 – various complaints relating to matters prior to 31st December 2017; complaints procedures not exhausted – outside jurisdiction.

TCA1812 – statutory appeal available.