

Peter TYNDALL\*

## THE OMBUDSMAN AND THE FAMILY

### Streszczenie

*W artykule rozpatrzona jest rola Rzecznika Praw Obywatelskich w sprawach dotyczących rodzin. Autor korzysta z własnego doświadczenia z okresu pełnienia funkcji Rzecznika w dwóch porządkach prawnych common law Zjednoczonego Królestwa Brytyjskiego: obecnie Irlandii, a wcześniej Walii. Artykuł identyfikuje pozycję i działania Rzecznika Praw Obywatelskich tych krajów wśród szerszej społeczności Rzeczników, ze szczególnym uwzględnieniem działań promujących dobrą administrację poprzez zwalczanie niewłaściwych działań administracji. Analizowany jest wpływ działań Rzecznika na różne aspekty interwencji państwa w sprawy życia rodzinnego, na przykład w zakresie pieczy zastępczej, wsparcia dla dzieci z niepełnosprawnościami czy prowadzenia postępowań w przypadku doniesień o przemoc seksualnej wobec dzieci. Artykuł opisuje szerokie spektrum działań Rzecznika – od dochodzeń w sprawach indywidualnych po dochodzenia prowadzone z własnej inicjatywy w zakresie systemowych problemów dotyczących ochrony praw dziecka w Irlandii.*

**Słowa kluczowe:** *Ombudsman, niewłaściwe działania administracji, piecza zastępcza, ochrona dzieci.*

### Introduction

In introducing this paper drawing on my current work as Ombudsman in Ireland and my past experience as Public Services Ombudsman of Wales in cases concerning family matters, I want first to set out briefly the nature of the two

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Offices' jurisdiction and put this in the wider context of the diverse range of Ombudsman models which have developed since the creation of the original Office in Sweden in 1809.

Both the Irish and the Welsh Offices are within the English speaking tradition of the Ombudsman. It is often said that the particular model flows from the Danish Ombudsman which was established in 1955. This is principally because the Offices in the English speaking world generally deal with complaints from individuals, and do not have the wider supervisory role which characterised the original Swedish model. However, I think it is more helpful to consider their origin in the light of the New Zealand Office, established in 1962. This is because the Danish Ombudsman is primarily concerned with the legality of the actions of the public administration, while the Ombudsman Offices in the English speaking world are concerned with securing good administration.

The essential characteristic of the work of Offices in this tradition is that they investigate complaints about maladministration. There are many definitions of maladministration but the fundamental characteristics extend beyond just compliance with the law to include the consideration of fairness. The failure to comply with the law or the requirements of administrative procedures can undoubtedly constitute maladministration, but equally, a legally compliant process which results in an unfair outcome can be maladministrative.

In the UK maladministration is not defined in legislation but can be surmised as the actions of a government body which can be seen as causing an injustice. The definition of maladministration can include:

- delay
- incorrect action or failure to take any action
- failure to follow procedures or the law
- failure to provide information
- inadequate record-keeping
- failure to investigate
- failure to reply
- misleading or inaccurate statements
- inadequate liaison
- inadequate consultation
- broken promises.

This list is not exhaustive. The Irish legislation (Ombudsman Act 1980) defines maladministration as action which adversely affects an individual when "the action was or may have been:

- taken without proper authority,
- taken on irrelevant grounds,

- the result of negligence or carelessness,
- based on erroneous or incomplete information,
- improperly discriminatory,
- based on an undesirable administrative practice, or
- otherwise contrary to fair or sound administration”.

Many countries in central Europe and Latin America have created combined Ombudsman Offices and National Human Rights Institutions. While dealing with individual complaints, these bodies are typically more legalistic in their approach and often employ only lawyers as investigators and bring many cases to the courts.

The Ombudsman Offices in English speaking countries are seen as an alternative to the courts. Indeed, they often cannot become involved with a case once court action has been instigated, although usually there is some discretion to make an exception to this rule.

They usually make recommendations, which are not binding. However, in practice, this does not lead to ineffectiveness. This is because of the respect for the institution and their ability to engage with their Parliaments to hold Government and service providers to account.

The Welsh Ombudsman has jurisdiction over all services devolved to the Welsh Government. In the particular context of this paper, this includes health, social care, social services including child protection and services for people with disabilities. The Irish Ombudsman has a broader jurisdiction across most public services but there is a separate Ombudsman for Children dealing with complaints made by or on behalf of young people under 18. Both Offices oversee services provided by Government, by local authorities, by public bodies and by agencies contracted to provide public services including private companies and NGOs. Both also have private nursing/social care homes in their jurisdiction.

Finally, by way of context, both Offices seek to resolve cases where possible, rather than undertake a detailed investigation. Where a failure is obvious, this will often be addressed by way of a phone call or email exchange, so that the matter is resolved promptly to the satisfaction of the complainant.

### **Complaints involving families**

In developing this paper, I have drawn extensively on case work. The work of the Ombudsman is best understood through the consideration of examples, rather than through a purely theoretical approach. This paper draws on the published quarterly Case Books which can be found at <http://ombudsman.ie/en/Publications/Casebook/> and <http://www.ombudsman-wales.org.uk/en/publications/The-Ombudsmans-Casebook.aspx>. It also draws on the major published reports of the two Offices. Both

Offices deal with complaints from individuals but also look at systemic complaints where there is evidence that the failures in one case are such as to have been likely to have caused similar injustice to others. As Irish Ombudsman I can also conduct own-initiative investigations where I have evidence of maladministration but have not received a complaint.

The first series of cases I will consider are drawn from my time as Ombudsman in Wales and look at issues concerning fostering. Where the birth family, for whatever reason, cannot care for a child then the local authority will arrange and pay for fostering. The Ombudsman may receive complaints from the families of children who have been fostered, from foster carers about support, funding or communication, from people who applied to be and have been turned down as foster carers and from people who have been removed from the list of approved foster carers.

Foster carers often provide support for children who present considerable challenges because of their health, behaviour or disabilities. Their work is vital in providing alternative accommodation for children in need so that institutional care is not utilised. Social Care and Children's services are provided by local authorities in Wales.

### Case 1

In this first case, Mrs. A was a foster carer with a Council in Wales. She had three foster children in her care who made allegations about the standard of care that she provided to them. She complained about the manner in which the Council had dealt with the allegations. Specifically she was concerned about the manner in which they had removed the children from her care and that the allegations against her had not been investigated properly or promptly. She also complained about the decision of the Fostering Panel that she should be deregistered so that she was no longer able to foster children. She felt that the panel process was flawed. She also complained about the payments that she had received whilst the investigations into the allegations were ongoing.

I found that the Council had failed to investigate the allegations in line with child protection procedures. Their investigation was inadequate and delayed. I also concluded that it was reasonable for the Council to remove the children from Mrs. A so that the allegations could be investigated, but the reasons for the move and the fact that it was intended to be permanent should have been properly explained to Mrs. A and the children before they moved. The Council did not do this and this caused confusion and distress for all concerned. There was also an unacceptable delay in collecting the children's remaining belongings from Mrs. A.

I did conclude that the Fostering Panel process was appropriate and the decision that it reached concerning Mrs. A's registration as a foster carer was reasonable. There was, however, delay in informing Mrs. A of the Fostering Panel decision. I was also critical of the fact that the Council stopped Mrs. A's interim fostering payments before it notified her of its decision to deregister her.

I recommended that the Council apologise to Mrs. A and make a payment to her of £750 to reflect the additional uncertainty and distress that the identified maladministration had caused her. In addition, I recommended that the Council should pay her interim fostering fee up to the date that it notified her of its deregistration decision. I also recommended that the Council should ensure that its procedures in respect of investigating allegations made by children complied with Child Protection guidelines.

## Case 2

Ms. J complained about the Council's lack of response to her concerns about her son's treatment when in foster care. She said that her concerns were dismissed because of her mental health problems. She also said that there had been a lack of support from her son's social worker when he was rehabilitated to her care. When the placement broke down Mrs. J said that the Council ignored the recommendation of a psychiatrist that her son should remain at home.

I upheld Mrs. J's complaint. I found that there was no evidence that her concerns about the foster carer had been properly investigated by the Council or that appropriate enquiries had been made into child protection matters. Neither was a strategy meeting held or any record kept explaining why it was not felt appropriate to make such enquiries. The overall impression was that Mrs. J's concerns had been dismissed and were not taken seriously.

The investigation also found that there were other fundamental shortcomings. There was no record of any visits or support offered by the social worker concerned when Ms. J's son returned home. This was of particular concern because the Council was required to carry out regular statutory visits to a child in its care. The social worker's shortcomings had also not been highlighted under the Council's supervision process. I concluded, however, that after the case was taken over by another social worker, there was no evidence to suggest that the decision to end the placement was flawed.

I recommended that Mrs. J should be paid £250 for her time and trouble in submitting the complaint. She should also be compensated for loss of benefits, when not supported by the social worker. The Council was also asked to provide evidence of staff training about the importance of investigating the concerns of

birth parents and the need to keep case recordings. Audits were also to be provided on statutory visits, the supervision process and child protection referrals.

Family disputes occasionally lead to complaints. In one instance in Wales, the grandparents of a child had agreed to foster her when the birth mother was unable to look after her. The family were told that there would be a foster carer's allowance which they needed because of their low income to meet the additional costs associated with fostering. Once they had accepted the child, the Social Work Department said that they were not entitled to the payment as they regarded it as an informal family arrangement and alleged that in fact no commitment to meet the cost had ever been given. On examination, I concluded that the commitment had indeed been given and recommended that the payment be put in place and backdated.

### **Children with special needs**

In Wales, local authorities provide education services and have a particular responsibility for assessing the needs of children who require support at school including children with disabilities. They are required to provide a statement setting out the child's needs, and to provide services to meet these needs.

Mrs. R complained that the Council failed to carry out a statutory re-assessment of her son David's (not real name) special educational needs. I upheld the complaint on the basis that the Council's failure to action Mrs. R's request was a significant omission and was maladministration which caused uncertainty and anxiety. However I took into account that David's statement of needs was eventually revised and the support which he needed was made available to him under the review process. The effect on David was therefore limited.

The Council agreed to apologise to Mrs. R. It also sent reminders to staff and revised its procedures to ensure that all requests for re-assessment would be actioned promptly.

In another instance, a couple had a severely disabled child who attended a special school. When the child became too old for the school, the promised new arrangements were not put in place, leaving the family to care at home for their teenage child. I recommended that firstly an appropriate programme of activities should be developed and secondly, the parents should be compensated for the period they had to manage on their own by payment of an amount equivalent to a care-worker's salary.

### **Cases in Ireland**

In Ireland, services for children and families are not provided by local authorities, but were until recently provided by the Health Service. It was recognized that a more specialist agency was required, and a new agency, the Child and Family Agency which is known by its name in Irish, Tusla, was established.

#### **Taking Stock - a report into Ireland's Child and Family Agency**

Protecting children is a vital duty for the State. Tusla has the key role, alongside the police in undertaking this work. Tusla is an independent public body established by statute. As well as child protection Tusla also has important duties in other areas including fostering.

In 2017, I published a report of a systemic investigation into the work of Tusla. It can be found at <http://ombudsman.ie/en/publications/investigation-reports/government-departments-other-public-bodies/taking-stock/>. I was prompted to do this because of my concerns that previous interventions by my Office had not resulted in the expected improvements, even though Tusla had agreed to implement my recommendations.

My role is to consider unresolved complaints against Tusla affecting adults and to make sure that they have been treated properly and fairly. The most frequent complaints arise from foster parents, applicants undergoing assessment for the foster parent role, adults who were allegedly abused during their childhood, and individuals currently accused of abuse.

In relation to individuals accused of abuse, the most common complaints that I have received related to the failure of Tusla to follow due process.

“Failure to apply natural justice and fair procedure can give those who pose a risk the opportunity to continue to abuse and those who are falsely accused can have their lives or careers ruined or, at least put on hold for long periods”<sup>2</sup>.

In addressing allegations of abuse, the welfare of the child must be paramount. Accordingly, when allegations of abuse are notified to Tusla they need to be assessed urgently and effectively. This is essential in order to establish the credibility of the allegations at an early stage and to determine what risk mitigation measures, if any, might need to be put in place. A speedy response from Tusla is also essential to ensure that adults against whom allegations are made are treated fairly.

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<sup>2</sup> K. McGrath, Child Welfare Consultant, *Natural Justice and Fair Procedure in Evaluating Allegations and Risk of Child Sexual Abuse*, “Nota News” May/June 2016.

If this is done as it should be, then allegations of abuse against adults, which are not upheld, will also be dealt with swiftly and effectively. To be falsely accused of abuse can have a devastating effect on the individual, and this places a clear onus on Tusla to follow due process to establish the facts and potential risk as quickly as possible.

When adults who claim to be victims of childhood abuse bring this to the attention of Tusla, they deserve to have their cases handled sensitively and effectively, to ensure that any current risk is managed.

In my 2014 Annual Report (page 20) I expressed my concerns about the handling of cases by social workers, particularly those involving historic allegations of abuse. I reported at the time that my Office was working with Tusla in order to ensure that it put in place clear policies and procedures for the handling of such cases. The primary issues of concern included the need to follow fair procedures and natural justice and the need to carry out assessments in a timely, consistent, fair and thorough manner. Two critical court judgements also emphasized the need for this work.

However, despite reassurances, my Office continued to receive a variety of complaints in these areas, which again called into question whether the underlying concerns had been properly addressed. This prompted me to initiate a systemic investigation in June 2016.

The report prepared following the investigation is based around a number of themes which are illustrated by case examples. In preparing it, my Office drew on a sample of nine particularly challenging complaints covering the period 2012-2016, which we had either upheld or partially upheld, and 30 complaint files chosen at random from Tusla's complaints system. While the volume of complaints to my Office was relatively low, the impact or adverse effect on the individuals concerned can be significant. Examples of good complaint handling by Tusla were also referred to in the report.

Complaints provide a valuable source of information for any organisation and it is important that they are embraced so that learning can be derived from them. The way they are handled reflects the culture within that organisation. It is essential that where complaints identify failings which are systemic, and by their nature likely to affect others, that there are systems in place to highlight the need for change. It is also important that there is awareness of these concerns at each level of management and at Board level, and that there are systematic approaches used to identify necessary changes, to make those changes and to monitor their implementation and ensure that the desired outcomes are achieved.

The consideration of the nine complaints considered in the report identified serious administrative shortcomings including the failure to follow due process,

delays in dealing with concerns, poor communication, poor record keeping and other issues. These were suggestive of a service which was over-stretched, which did not have appropriate processes in place in key areas, which could be inconsistent across the country and which had, in the past, been unable to respond with the necessary urgency to allegations of abuse. While Tusla at the time of the report had put a case prioritisation and case management system in place, I stressed that it was important that these should be quality audited to ensure that they were working effectively. I was aware that Tusla had undertaken a number of reviews as part of its quality assurance framework.

I said, however, that it was important that the implementation of all policies be subject to regular audit, including complaint handling, to ensure that the complaints process itself was being properly followed. While pointing out that complaints about children fall properly within the jurisdiction of the Ombudsman for Children, I expressed my concern that the administrative failures which had been identified, if not addressed, were likely to lead to failures in safeguarding the welfare of children at risk.

I welcomed the news that Tusla had received funding to employ additional social work staff. Well qualified, effectively led and managed, and properly trained social workers are at the heart of the service provided by Tusla. I said that they needed to have the time, training and support necessary to deal with the demands placed upon them. This is a vital area of work and places huge demand on those charged with it. Tusla had not up to then, had the level of resource that it required in order to discharge its responsibilities.

The report made a series of recommendations for improvement some of which Tusla had already started to implement. The recommendations were considered in draft by the management of Tusla, and reflected their views. Tusla agreed to implement them and my Office is closely monitoring their progress.

### **Conclusion**

The state plays a vital role in supporting families. It does so in a variety of ways, including through financial supports such as child benefit, through the provision of education and through housing. These are mainstream services and generate complaints for the Ombudsman which are usually straightforward to deal with.

However, when families face challenges, the services required are more specialist, and generate more complex complaints. The areas featured in this article reflect the responses faced by families. They include support for children with special needs including supporting access to education, the provision of

fostering when birth families cannot cope, investigating allegations of neglect or abuse, whether physical, psychological or sexual, and specialist healthcare.

An Ombudsman working in this field, whether the Office is the National Human Rights Institution or not, must adopt a rights based approach to their work. Investigations must centre on the right of each child to grow up as a respected member of their local communities and for their families to have the support they need to ensure that this happens. In the past, far too many children lived in institutional provision. No child should have to do so.

The challenges posed by poverty, by homelessness, by disability can all be overcome if the resources of the state are properly applied. Through their work in addressing complaints or conducting wider investigations, Ombudsman Offices can play a valuable role in securing a better future for all of our families.

### **Bibliography**

McGrath K., Child Welfare Consultant, *Natural Justice and Fair Procedure in Evaluating Allegations and Risk of Child Sexual Abuse*, “Nota News” May/June 2016.

### **Peter Tyndall: The Ombudsman and the Family**

#### *Summary*

*The paper considers the role of the Ombudsman in cases which affect families. It draws on the author’s experience as Ombudsman in two common law jurisdictions, currently Ireland and previously in Wales in the UK. It briefly locates the Ombudsman practice in these countries within the wider Ombudsman community, specifically focusing on the promotion of good administration by tackling maladministration. It examines the impact of the work of the Ombudsman on various aspects of the state’s interventions with families including fostering, support for disabled children and investigating alleged child sex abuse. It covers a range of Ombudsman practice, from individual investigations to own initiative investigations into systemic issues in child protection in Ireland.*

**Keywords:** *Ombudsman, maladministration, fostering, child protection.*