

# The FEFC Ombudsman

## REPORT OF THE FEFC OMBUDSMAN 1999-2000

### Introduction

1. My terms of reference provide that I shall submit an annual report to the Council, which will, in turn, make it publicly available. This report covers the period from 1 August 1999 to 31 July 2000, my fourth year of report.

2. I was appointed on 26 July 1996 for the period to 31 July 2000. On 31 March 2001, the Council will hand over its responsibilities to the newly established Learning & Skills Council. Exceptionally therefore, and by agreement, my appointment has been extended to 31 March 2001, to cover the remaining months of the Council's existence. My appointment was first set in the context of the conduct of the Council's business in FEFC Circular 96/24 (30 September 1996). My terms of reference appear in full in the annex to FEFC Circular 96/25 (30 September 1996), as corrected in a circular letter from the Council (16 October 1996); and again more recently in Circular 99/03 (29 January 1999).

### Support

3. I have continued to receive the assistance of the Council's Secretary on matters relating to the operation of my office. It has not yet been necessary for me to avail myself of the arrangements made for me to have access to independent legal advice.

### Complaints

4. I am empowered to receive and consider two classes of complaint: those from institutions concerned about the Council's administration, and those from the Council's own staff concerned about compliance with the Council's codes of conduct.

#### *Complaints from Institutions*

5. As in previous years, I have received several informal communications during the year about the possible reference to me of a complaint. The nature of some of those enquiries is referred to later in this report.

6. On 27 August 1999 I received a complaint from College G. Since my report on that complaint is now public, the complainant can be identified here as being – at the time of making the complaint to the Council, and subsequently to me, though not at the time most of the relevant issues were first considered by the Council – the non-corporate body consisting of all the previous non-staff governors of Wirral Metropolitan College, who had resigned under pressure from the Council. Throughout its consideration of those issues, the Council had made it clear to the complainant that all the procedures set out in Circular 99/03 were available to them. I therefore accepted the complaint for consideration.

### *The Complaint from the former Board of Wirral Metropolitan College*

7. In summary, the former Board's original complaint to the Council, made on 30 March 1999, was that the Chief Executive of the Funding Council contrived the conditions in which the College could be subjected to a hostile take-over, and that he did so by

- i) exercising covert influence and control over the College and its circumstances;
- ii) denigrating the College and displaying contempt for the commitment and endeavours of the former Board;
- iii) obstructing and negating the College's efforts at recovery both directly and in an underhand manner;
- iv) forming alliances with selected local political interests.

8. The complainant was concerned about "the significance of the alleged misconduct, and the serious consequences of that alleged misconduct for the public purse, the integrity of public life, and the standing of former Board members." The complainant sought to have it acknowledged

- a) that, through the actions of the Chief Executive and the Regional Officer for the North West in particular, the Funding Council's management of the affairs of Wirral Metropolitan College fell below the standards required of a public body;
- b) that the Report of the Funding Council Inspectorate dated March 1999 was published without due regard to objectivity and the rights of the former Board;
- c) that the former Board of Wirral Metropolitan College unfailingly met the standards of commitment and integrity required in respect of the governance of colleges.

9. The complainant went on to allege that the Chief Executive had breached both his duty to ensure adequate and sufficient educational provision for the people of Wirral, and also [the] commonly expected standards of conduct for a public servant.

10. In addition to considering material made available to me by the complainant, and copies of other correspondence provided to me between the college and the Council's officers, together with a considerable volume of supporting documentation, and reviewing all the correspondence relating to the college's use of the Council's internal complaints machinery, I:-

- a) received further specified documentation from the college;
- b) asked for, and received, copies of further specified documentation from the Council;
- c) visited the Council's offices to review the relevant files;
- d) visited Wirral to interview the previous Chairman of the Board;
- e) interviewed Council officers, including the Chief Executive and the Director of Finance and Corporate Services;
- f) interviewed the Chairman of the Council;
- g) asked specific questions in writing of, and received replies from, the Chief Inspector;
- h) asked specific questions separately in writing of, and received separate replies from, two partners of the firm then acting as the college's auditors; and
- i) disclosed this report at draft stage (*i.e.* including my draft findings, but not my recommendations) to the complainant and to the Council, and received and considered their further representations.

11. I am empowered to try to resolve a complaint by agreement. At a certain stage in my investigation of this complaint, this outcome seemed to me to be a possibility, and I explored it with the complainant and with the Council. After consideration, the complainant was not minded to accept the possible resolution of the matter in the way that I suggested, and I therefore continued with my enquiries.

12. My report was provided to the Council and to the complainant in February 2000. By agreement between all the parties, it was made public in April. My findings were:-

**A: I did not uphold the original complaint, or any part of it. Explicitly, I found that the Chief Executive did not contrive the conditions in which the College could be subjected to a hostile take-over.**

**B: In addition, I found that the Chief Executive did not breach his duty to ensure adequate and sufficient educational provision for the people of Wirral, or fall short of the commonly expected standards of conduct for a public servant.**

**C: In relation to the additional matters which the former Board of the college identified in referring the original complaint to me:-**

- a) **I did not uphold the allegation that, through the actions of the Chief Executive and the Regional Officer for the North West in particular, the Funding Council's management of the affairs of Wirral Metropolitan College fell below the standards required of a public body;**
- b) **I did not uphold the allegation that the Report of the Funding Council Inspectorate dated [April] 1999 was published without due regard to objectivity;**
- c) **I found that the Report of the Funding Council Inspectorate dated [April] 1999 was published without due regard to the rights of the former Board, and in this respect I found that there was maladministration by the Inspectorate acting on behalf of the Council.**

13. My recommendations covered my findings on the complaint, and also two general matters which I had identified during my investigation – the release of Council documentation to third parties, and the need for the Council to keep colleges fully informed about action which it is taking. I said that in my view there was a procedural matter for the Council to address; and that the Council would have more fully respected the special character of the relationship which should have existed with the college if it had at all stages informed the Board about the actions it was taking, unpalatable though that would have been, instead of leaving the Board to find out for itself. Accordingly, I recommended:-

**I: that the Council [should] openly accept my finding and offer the former Board an unqualified written apology. [I also recommended that] The Council should also confirm that it was and is its considered view that the former Board of Wirral Metropolitan College unfailingly met the standards of commitment and integrity required in respect of the governance of colleges.**

**II: that the Council [should] ask its Chief Executive to address these matters, with a view to appropriate changes in Council procedures.**

#### *The Council's Response*

14. The Council considered my report at its meeting on 22 March 2000. Its response (which I reproduce here in full) was:-

*The Council welcomes the external scrutiny of its administration provided by the ombudsman. It particularly welcomes the fact that the ombudsman found that there was no maladministration by the Council in respect of the ten allegations comprising the original complaint made to the Council in March 1999 and referred to the ombudsman in August 1999.*

*In responding to the ombudsman's first recommendation, Council does not accept the finding by the ombudsman that there was maladministration by the inspectorate acting on behalf of the Council. A finding of maladministration is inconsistent with the finding that the inspectorate fully complied with its published procedures and conducted the inspection with professional objectivity. Departing from the published procedure for inspection would not have been an appropriate course for the inspectorate to follow. The ability of the inspectorate to continue to execute its statutory duty in scrutinising the providers of publicly funded further education in respect of the quality of the education they provide would be very seriously undermined if it were obliged to inform former postholders of its findings and give them an opportunity to comment. This is particularly so in the light of the ombudsman's view that all principals, senior managers and governors who had been in post over the previous four years would need to be consulted. It is not accepted that in this particular case, or in the context of an inspection generally, that natural justice requires consultation with individuals. The purpose of the inspection is to make a judgement of the performance of the corporation not of the individuals who make up that corporation. The inspection procedure offers opportunity for the chair of the corporation, or the chair nominee, to comment on the findings of the inspectorate. The Inspectorate would, however, wish to make it clear that the comment in the inspection report that "the new corporation members have already demonstrated a commitment to address the issues facing the college" was not meant to imply a lack of commitment on the part of the former members of the corporation.*

*The Council therefore does not accept the ombudsman's recommendation to offer the former Board an unqualified written apology. The Council is, however, happy to confirm that whilst its carefully considered view was that the affairs of the college had been mismanaged and that the former board had failed to exercise appropriate oversight of the college, there is no evidence of a lack of integrity or commitment on the part of the complainants.*

*In relation to the ombudsman's second recommendation, the Council noted that neither of these two matters gave rise to any finding of maladministration against the Council. The Council is satisfied that the release of documentation in this case was appropriate and that the college was kept fully informed about the actions being taken.*

15. Before commenting further, I should emphasise that the Council is fully entitled not to accept my recommendations. Its right to do so is clearly embodied in the procedures laid down for the consideration of complaints.

16. That having been said, I must record here that I find its action in doing so in this instance less than responsible, and its reasoning flawed.

17. In relation to my procedural recommendation about keeping the Board (and, by extension, any Board) fully informed about the actions it was taking, instead of leaving [the Board] to find out for itself, the Council says that it "*is satisfied . . . that the college was kept fully informed about the actions being taken*". From the evidence put before me during my consideration of this complaint, I can say straightforwardly that the college was not, in fact, kept fully informed about relevant Council actions at all stages of the Council's handling of the matter.

18. In relation to my procedural recommendation about the release of Council documentation to third parties, the Council says that it "*is satisfied that the release of documentation in this case was appropriate*". This was indeed my explicit finding in this case, as my report made clear. However, my report also made it quite clear that the Council's procedures in relation to such releases were based on an inaccurate and inappropriate assessment of the Council's duties and responsibilities in regard to them. In essence, the Council believes that if Council documentation is requested by an MP, it is under an obligation to release it to the MP without restrictions.

19. However, the situation is more complex than that statement suggests. While it is undoubtedly good practice for the Council, as a public body, to respond fully and openly to enquiries made of it by

individual local Members of Parliament (among others), it is not, in fact, under any formal obligation to do so. Indeed, it is properly entitled (and possibly required) to consider the nature and circumstances of any such response; and, if it considers it appropriate, to refrain from releasing material – or to provide it on terms as to its use. Obvious examples of matters which might give rise to such considerations are a commercially sensitive transaction (especially if it were to be known that the MP in question had a material interest in the transaction), the position of a named individual, or the active consideration of a matter before the courts. That is why I recommended a reconsideration of the matter.

20. I can only put the Council's response in respect of both these procedural matters down to unwarranted complacency about its own behaviour, and about its responsibilities to colleges in general.

21. The Council's response to my finding of maladministration is more serious.

22. At the heart of the matter is the Inspectorate's (and the Council's) repeated assertion that *"It is not accepted that . . . natural justice requires consultation with individuals."* **It is my considered and formal view that where identifiable individuals are the subject of adverse comment in a public document [such as a published Inspectorate report], which they have not otherwise had the opportunity of seeing before publication, and to which comment they have not otherwise had an opportunity of responding, then natural justice does indeed require appropriate consultation.**

23. The relevant paragraphs from my report read (in full):-

"65. However, those references to the former Board were made in a public document: and at no time did the Inspectorate attempt to inform the former Board of their findings. In evidence to me, the Chief Inspector quite properly pointed out that the inspection team did brief the (then) existing governing body of the college as to their findings; that once governors have been removed from a Board their role within the college ceases; and that the former Board had neither asked to meet the inspection team, nor explicitly asked for an opportunity to comment on the draft inspection report. He emphasised, quite correctly, that the inspectors concerned had very fully complied with normal procedures.

66. I do not find this satisfactory. The quite exceptional circumstances at Wirral had placed a very high level of duty on the Inspectorate to observe due process, of which they had had ample opportunity to be fully aware. In publishing findings clearly and explicitly critical of the former members of the Board without any attempt to inform them of those findings, and to give them an opportunity to comment – whether they had directly asked for it or not – the Inspectorate fell well short of the duty lying on it in this particular case. Their actions did not accord with the principles of natural justice.

67. In further representations to me, the Council has argued that *"The ability of the FEFC inspectorate to continue to execute its statutory duty . . . would be very severely undermined if it were to be obliged to inform former post holders of its judgments in advance of publication and provide them with an opportunity to comment"*; and that *"Special procedures could not be introduced for one inspection alone"*. The Council also states that *"The inspectorate makes judgments on the performance of colleges and the effective execution of functions within them. It does not make judgments about individuals"* and (in that context) that *"It is not accepted that natural justice in the context of inspection would require individuals to be given an opportunity to comment"*.

68. In relation to a routine inspection these statements and arguments might be regarded as being acceptable. However, this inspection was very far from being a routine one. It was the only full inspection that has ever been carried out in the immediate aftermath of the Council-enforced resignation of all the non-staff governors of the college concerned. In this situation, special regard for due process and the requirements of natural justice was required. The procedures that were necessary to ensure that regard should have been introduced. Moreover, the published inspection report says explicitly that *"The new corporation members (n.b. the members, not 'the corporation') have already demonstrated a commitment to address the issues*

facing the college". In the context of the whole of the section of the inspection report dealing with governance, an adverse inference about the individuals who made up the previous board is inescapable.

69. It is important to note that what is at issue here is a matter of due process in a unique situation. The reliance by the Inspectorate on compliance with its normal procedures was not, in this case, sufficient. In this respect, I find that there was maladministration on the part of the Council."

24. The Council quite correctly refers to my views about previous postholders. Subsequent to receiving my report, but prior to its consideration by the full Council, officers of the Council pressed me on this matter. In a supplementary letter laid before the Council (and copied to the complainant) I said:-

"Finally, we discussed the issue of natural justice, which is, of course, the nub of the matter. The Chief Executive asked me whether it was my view that the Inspectorate should invariably approach individuals for comment before publishing judgements critical of them in an Inspectorate report, when those concerned might already have left a college under a cloud. I reminded him that my remit does not extend to the consideration of complaints made by individuals in colleges, and that I had confined my report to the consideration of the complaint that was before me.

Nevertheless, the Council may find it helpful, in considering my report on this particular complaint, to know my view. The question concerns the relatively rare situation in which the Inspectorate has formed, and proposes to publish, judgements which are clearly critical of identifiable individuals (*i.e.* not the mere repeating of judgements already made public by others). In that situation, I confirm that it is indeed my considered view that such publication, without giving those individuals an opportunity to comment and/or to make representations (*e.g.* at 'draft report' stage), is a breach of natural justice. It is also likely to bring the objectivity of the Inspectorate into question. As my report makes clear, I cannot in such circumstances agree with the Council's declared view that "*It is not accepted that natural justice in the context of inspections would require individuals to be given an opportunity to comment.*"

In the end, my finding in relation to maladministration by the Inspectorate in this case is not about some nice point of procedural protocol. It is about a very simple, but quite fundamental, breach of natural justice."

25. I do not think that I can profitably add to what I have already said, save perhaps to observe that at almost exactly the same time that the Council was considering this matter it published and distributed to colleges *The College Governor*, in which the section headed **Fairness in the decision making process** begins with the sentences:-

*"There is an obligation on governors in taking their decisions to act reasonably with regard to natural justice. Whilst such criteria may seem self-evident, there is a risk that on occasion they may be neglected, especially when difficult decisions have to be taken quickly, and when important procedural safeguards could be overlooked and/or full consideration curtailed."*

26. In this case important procedural safeguards were indeed overlooked – and their existence subsequently denied. The Council has wholly failed to understand the fundamentally important point at issue in this case, and the Inspectorate has indeed – by its repeated insistence that identifiable individuals whom it proposes to criticise in a public document have no right to be informed or consulted – brought its objectivity openly into question. This is very much to be regretted.

#### *Related Matters*

27. Subsequent to the delivery of my report to the Council and to the complainant, and prior to its consideration by the Council, its text was leaked to the press. The Council established an informal internal enquiry into the source of the leak. I understand that it found no conclusive evidence as to the source of the leak.

### *Complaints from members of the Council's staff*

28. There have been no enquiries from members of the Council's staff. No complaints from members of the Council's staff have been referred to me during the year.

### **Other Matters**

#### *The Parliamentary Commissioner for Administration [The Ombudsman]*

29. In my last annual report, I referred to the extension of the remit of The Ombudsman. Since the Council issued a general information letter to colleges about the new formal position on 1 April 1999, no further information has been issued.

30. The Council's Secretary has, however, advised me that it is her view that the governing bodies of FE colleges are probably not excluded from making a complaint to the Parliamentary Commissioner.

31. In England, such a complaint must be made through an MP. My report on the complaint made by the former Board of Wirral Metropolitan College shows that active opposition to a college board by a local MP might make such a reference not at all easy.

#### *The Complaints Procedures of the Learning & Skills Council*

32. I am advised that discussions are already taking place about the complaints procedures that might be adopted by the new Learning & Skills Council; and that these discussions include consideration of the possibility of the appointment of a 'genuinely' independent LSC Ombudsman (*i.e.* one not appointed by the LSC). I have not been involved in the discussions, but have asked that the arrangements should also include provision for the possibility that I may be considering an 'active' complaint on 31 March 2001.

33. There are several other issues that also need to be considered in this context. In particular, several of the informal enquiries that I have received (see paragraph 5) have related to what would, if substantiated, be serious complaints against the Council or its officers made by individual senior postholders in colleges. In saying this, I must emphasise that in the absence of proper investigation, there is no evidence one way or the other as to the validity of the concerns identified in the correspondence. Other than by reference to the Courts, to the DfEE (the Secretary of State), or to the Parliamentary Commissioner, there does not appear to be a route by which such complaints can be subject to independent or external examination. It is clear to me from the correspondence that I have received that such a route should exist.

### **Conclusion**

34. During the four years on which I have now reported, I have had to investigate fully only two complaints - both from colleges. In both cases, I found that many of the elements of the original complaint were not made out. It is important to record these facts in order to put into its proper perspective the criticism of the Council which I have had to make in this report. Nevertheless, that criticism had to be made. It is with considerable regret that I have had to make public not only a finding of maladministration by the Inspectorate acting on behalf of the Council, but also my serious concern at the Council's subsequent refusal to accept responsibility, and to take the necessary action.

John Bevan