



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**RESPONSE TO 'A COMMISSIONER FOR OLDER
PEOPLE IN NORTHERN IRELAND'
CONSULTATION DOCUMENT AND DRAFT BILL
WITH EXPLANATORY NOTES**

Summary

In this response to the Office of First and deputy First Minister, the Commission welcomes the opportunity to comment on the policy proposals and draft Bill for the creation of a Commissioner for Older People in Northern Ireland. The Commission supports the commitment to establish a Commissioner and sees the consultation as a positive step towards fulfilling this commitment. A number of provisions are welcomed, such as the proposals relating to formal investigations, specifically the power to require evidence and to enter premises managed by a 'relevant authority'.

There are areas where the proposals and draft Bill should be improved to ensure an effective and independent role for the Older People's Commissioner. Therefore, while the Commission welcomes the reference to the United Nations Principles for Older People ('the UN Principles') and the requirement that the Commissioner will have regard to the UN Principles in carrying out her or his functions, there are other human rights standards applicable to older people that should be referred to in the proposals and in the draft Bill. The Commission also comments on the proposals for the Principal Aim, the Duties, the specific and formal powers of the Commissioner, and the definition of 'relevant authority'. Overall, the Commission's response is aimed at ensuring greater focus on the rights of older persons as well as their interests and that the formative legislation enables the Commissioner to carry out her or his functions effectively and independently.

Introduction

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ advising on legislative and other measures which ought to be taken to protect human rights,² advising on whether a Bill is compatible with human rights³ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁴ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission welcomes the opportunity to provide a response to the proposals and draft Bill. The Commission supports the commitment to establish an Older People's Commissioner for Northern Ireland and therefore views the consultation and draft Bill as a positive step towards fulfilling this commitment. In order to realise this, it is important that the formative legislation enables the Commissioner to carry out her or his functions effectively and independently. The proposals relating to formal investigations: specifically the power to require evidence and to enter premises managed by a 'relevant authority', are to be welcomed. However, as detailed in this response, the Commission is of the view that there are areas where the proposals and draft Bill should be improved to ensure an effective and independent role for the Older People's Commissioner.

Human rights context

3. There is no binding international human rights instrument that refers specifically to the rights of older people. However, potentially, all human rights standards can be relied upon by an older person to enforce his or her rights. The human rights standards that the Commission relies on to inform this response may have particular relevance to the circumstances

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid.*, s.69(3).

³ *Ibid.*, s.69(4).

⁴ *Ibid.*, s.69(6).

of older people and to the proposals and draft Bill. These human rights standards include:⁵

- The European Convention of Human Rights (ECHR), in particular, Article 3 (freedom from torture or inhuman or degrading treatment), Article 8 (right to private life, family life and home), Article 5 (Right to liberty and security of person) and Article 14 (non-discrimination in relation to Convention rights)
 - The International Covenant on Civil and Political Rights (ICCPR), Article 7 (freedom from torture or cruel, inhuman or degrading treatment), Article 9 (right to liberty and security of person), Article 12 (freedom to choose residence), and Article 17 (freedom from interference with privacy and family life)
 - The International Covenant on Economic, Social and Cultural Rights (ICESCR), in particular, Article 9 (right to social security, including social insurance), Article 11 (right to an adequate standard of living including adequate food, clothing and housing), Article 12 (right to health), and Article 2 (2) (non-discrimination in the enjoyment of Covenant rights)
 - The UN Convention on the Rights of Persons with Disabilities (CRPD), Article 16 (freedom from exploitation, violence and abuse), Article 19 (the right of persons with disabilities to live in the community with choices equal to others), Article 22 (respect for privacy), Article 26 (obligation on States to strengthen comprehensive habilitation and rehabilitation services).
4. The Commission welcomes the reference to human rights at paragraphs 3.1 to 3.3. of the document. By requiring the Older People's Commissioner to have regard to the United Nations Principles for Older People ('the UN Principles'), the principles are given a certain status that would not otherwise exist in Northern Ireland and this is a positive measure. However, as well as the United Nations Principles, there are other human rights standards applicable to older people that should be referred to in the proposals and in the draft Bill.
5. The UN Committee on Economic, Social and Cultural Rights General Comment 6 refers to the economic, social and cultural rights of older persons. At paragraph 13, the Committee states that its role in regard to promoting and protecting the rights of older persons "is rendered all the

⁵ See also the Vienna International Plan of Action on Ageing, United Nations General Assembly (Resolution 37/51).

more important by the fact that [...] no comprehensive international convention yet exists in relation to the rights of older persons and no binding supervisory arrangements attach to the various sets of United Nations principles in this area".⁶ For the same reason, the Older People's Commissioner should be required to pay particular attention to the rights of older people and, in so doing, have regard to all relevant human rights standards including (but not limited to) the UN Principles.

The principal aim

6. It is proposed that the Commissioner will have a principal aim. The Commission welcomes the proposal to provide for a principal aim in legislation because the Commissioner will be under a statutory duty to have regard to it. The aim will guide all of the work carried out by the Commissioner in exercise of her or his functions. Consequently, the precise wording of the principal aim is crucial. Clause 2 of the draft Bill states that the principal aim of the Commissioner in exercising her or his functions is to "safeguard and promote the interests of older persons".
7. While the Commission supports the concept of a principal aim, the wording in this instance is of concern because the term 'interests' is not defined. When considering what the 'interests' of older persons are, the Commissioner will be required to have regard to the UN Principles for Older Persons (Clause 3). However, this may not always assist because the Principles do not define what 'interests' mean. On page 41, it is suggested that 'interests' is broad enough to include 'rights' and 'needs'. However, it is the Commission's view that the principal aim should be explicit in its focus on rights. Rights are clearly codified in national, regional and international legal instruments while interests are not. The Commission is of the view that the principal aim should include an explicit requirement to promote and protect the rights of older persons as well as their interests.

⁶ Committee on Economic, Social and Cultural Rights, General Comment No 6: *The economic, social and cultural rights of older persons*, Office of the High Commissioner for Human Rights, 8 December 1995, at paragraph 13.

Duties of the Commissioner

8. Among the duties of the Commissioner, clause 3(7) states that she / he “must advise the Secretary of State, the Executive Committee of the Assembly and a relevant authority on matters concerning the interests of older persons (a) as soon as reasonably practicable after a request for advice and (b) on such other occasions as the Commissioner thinks appropriate”. Whenever the Commissioner is providing advice of her or his own volition, it may prove difficult to demonstrate why the Secretary of State or any other body should accept this advice because this concept of ‘interests’ is not defined or set out in law. If the Commissioner’s duties are linked to the rights of older persons and not restricted to ‘interests’ then her or his advice is likely to be more authoritative. In addition, it would be preferable if the Commissioner’s duty in this respect was to advise “*measures which ought to be taken*” to protect the rights and interests of older people rather than the present wording, which is “*matters concerning*” their interests.

Work with other organisations

9. Page 46 of the proposals asks whether it would be possible or appropriate to have a statutory requirement for collaborative working included in the Bill. It is not clear what such a requirement would look like or how its implementation would be monitored. However, in any case, there is no reason to consider that a Commissioner will work in such a way as to unnecessarily replace or duplicate an existing statutory body or voluntary organisation. Fundamental to the principle of independence, the Commissioner should be free to decide how to work on matters falling within her or his remit. This should include determining whether or not her or his work overlaps with another body. Memoranda of understanding can be developed, if appropriate, with relevant statutory bodies and voluntary organisations. The Commission recognises the benefits of a joined up approach, as ultimately this can better protect the rights of everyone in Northern Ireland and ensure efficient use of scarce resources. However, this is a matter for the relevant organisations to assess and agree on an operational basis.

General powers of the Commissioner

10. Again, the Commission is concerned that the powers of the Commissioner may be weakened due to the absence of any reference to rights within this part of the Bill. For instance, clause 4(6) permits the Commissioner to make representations or recommendations to any body or person about any matter concerning the interests of older persons. These representations or recommendations would be more authoritative and, arguably, more likely to be realised, if they were also related to measures which ought to be taken to protect the rights of older persons.

Mediation / arbitration role

11. It is the Commission's view that a mediation or arbitration role would be likely to conflict with the other functions of the Commissioner. If this role was ever to be considered, stringent safeguards would be required to avoid prejudice to the Commissioner's other powers and to ensure that she or he retains independence. Therefore, for instance, there would need to be a clear division between the Commissioner's investigatory and complaints powers and any role that she or he might have in relation to arbitration.

Specific and formal powers

12. Chapter 11 proposes that the use of the Commissioner's powers are limited if there is another body with responsibility for undertaking a similar function. The Commission asks if this is an appropriate approach. As currently drafted, it would seem that the Commissioner's role in protecting the rights and interests of older people is viewed as a matter of last resort.
13. Therefore, for example, the Commissioner cannot review inspection arrangements unless satisfied that there is no other body or person with statutory power to review the arrangements (clause 6(3) of the draft Bill). The Commission understands that it is important to avoid unnecessary duplication or overlap with the work of another body. However, one of the factors that the Commissioner will naturally consider in deciding to conduct a review is whether, and to what extent, another body is already involved. In any case, the core of the matter should surely be whether another body is actually reviewing the arrangements, not whether another body can potentially do this. It is feasible that, even

though another body has the power to review an inspection arrangement, it cannot do so because, for example, it does not have sufficient resources to undertake a particular inspection review.

14. In relation to assistance with complaints, it is proposed that assistance cannot be given to an older person unless it appears to the Commissioner that there is no other body or person likely to provide such assistance (clause 7(3)). Again, the Commission asks if it is necessary for this to appear in the legislation. The feasibility of another body or person providing assistance, and the suitability of that assistance, is a matter for the Commissioner to assess in the overall determination of whether to assist in any given case. To preserve the independence of the Commissioner, she or he should be free to develop the criteria that will determine when it is appropriate to provide assistance.
15. Clause 8 of the Bill allows the Commissioner to investigate a complaint made by an older person in relation to a “relevant authority”. The Commission notes that, while Clause 8(1) provides a power to investigate a complaint by an older person, it does not refer to complaints made by others on the older person’s behalf. The Commission recommends that the Bill is amended to ensure that the Commissioner can investigate complaints made by an individual on behalf of an older person.
16. Clause 8(2) states that the Commissioner cannot exercise the power to investigate a complaint unless satisfied it does not fall under an existing statutory complaints system. Clause 8(3) states that a complaint falls within an existing system if a statutory provision confers power to make the complaint to a body or person AND (a) that body or person has power to investigate the complaint under a statutory provision, OR (b) they would have the power but for some exclusion or restriction in the statutory provision. The Commission asks for further clarity on the meaning of this latter provision (Clause 8(3)(b)). It appears to prevent the Commissioner investigating a complaint even where a statutory provision excludes the individual from raising it with another body or person. The Commission is concerned if Clause 8(3)(b) permits this interpretation, as it would seem that it is these types of cases (involving complaints that are excluded from other statutory complaints systems) that the Commissioner would wish to pursue.

17. On page 59, views are sought on whether the Commissioner should be given powers in relation to “relevant authorities” who do not follow her or his recommendations following a formal investigation. It is noted that international evidence suggests the absence of punitive powers may be an advantage for ombudsman-type organisations. There is a recommendation from the Parliamentary Assembly of the Council of Europe that neutrality and respect of such an organisation is best preserved by limited enforcement powers (page 59). Similarly, the Ombudsman for Ireland is quoted as stating that the absence of such powers allows work to be conducted on an informal basis (pages 58-59). The Commission has considerable experience conducting investigations and concurs with the view that, where possible, this type of work is conducted on an informal basis. However, where recommendations are made to public bodies for the purposes of protecting human rights, enforcement powers can be appropriate if used as a last resort. This would allow work to be conducted on an informal basis with recourse to enforcement powers only where a body continually refuses to implement recommendations.
18. The Commissioner’s specific and formal powers apply to “relevant authorities”, which are defined in clause 25 and schedule 3 of the draft Bill. It is noted at page 64 of the policy proposals that private and voluntary homes will be included as a “relevant authority” but only in relation to public functions, meaning that private residents (those paying their own fees) fall outside the remit of the Commissioner. It is noted that the relevant body in this instance would be the Regulation and Quality Improvement Authority (RQIA). However, for the most part, the Commission’s understanding is that the RQIA does not assist with individual complaints.⁷ It would be a serious deficiency if the specific and formal powers of the Older People’s Commissioner excluded those who are paying their own fees to live in a residential or nursing home.

Legal proceedings

19. On page 67, it is asked if the Commissioner should have “victim standing” for human rights cases. The Commission has victim standing to take proceedings in its own name and,

⁷ The functions of the Mental Health Commission have been transferred to RQIA; the functions of the Mental Health Commission included investigation of complaints relating to care and treatment under the Mental Health (Northern Ireland) Order 1986.

therefore, could potentially take a case relating to the rights of older people. However, if the Older People's Commissioner is given victim standing then ultimately this will provide greater potential to protect the rights of everyone in Northern Ireland. As the Commission has already stated, the Commissioner's role should be to protect the rights of older people as well as their interests. If an organisation is tasked with protecting rights, it is difficult to understand why it should not be given victim standing.

20. Clause 11(3) provides that the Commissioner may not grant an application for assistance in relation to legal proceedings unless it appears that no other body or person is likely to provide assistance. Again, the Commission asks if it is necessary for this to appear in the legislation. The likelihood of assistance from another body or person and the appropriateness of that assistance is a factor that the Commissioner will consider when deciding whether or not to assist in each case. The Commission restates its view that the Commissioner should be free to develop her or his own criteria for determining the appropriateness of providing assistance.

Appointment

21. Clause 1 states that the Commissioner will be appointed by the First Minister and deputy First Minister acting jointly. Page 72 of the policy proposals indicates that the appointment will be in accordance with the Code of Practice of Public Appointments with selection on the basis of merit, under fair and open competition. It will also be subject to independent scrutiny by the Office of the Commissioner for Public Appointments (OCPA). This is an appropriate approach, provided that the detail of OCPA guidance reflects the principles of section 75 of the Northern Ireland Act 1998. The Commission would welcome the inclusion of a statement regarding the requirements of the appointment process in the Bill.

Other matters

22. **A Bill of Rights for Northern Ireland:** Page 24 of the policy proposals refers to 'relevant evolving initiatives'. While there is reference to the Ministry of Justice Green Paper, *Rights and Responsibilities*, there is no mention of the Commission's

advice on a Bill of Rights for Northern Ireland. The Commission's advice and the Northern Ireland Office consultation regarding this advice is a relevant matter that ought to be referred to within the proposals.

23. **'Who are older people?':** The Commission appreciates that in order to guide the work of the Commissioner it may be helpful to set a minimum age to be used as a guide for persons falling within her or his remit. If a minimum age is established, this should be decided in line with international best practice with discretion to move beyond this minimum in individual cases. The Commission welcomes and supports a mechanism that would allow any age criteria to be regularly reviewed.

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