

**Northern Ireland Ombudsman's comments  
to the Ad Hoc Committee in relation to the  
British Medical Association's submission on  
the Northern Ireland Public Services  
Ombudsperson Bill dated 12 August 2015**

**11 September 2015**

## **1. Introduction**

- 1.1 I welcome the opportunity to provide my comments in relation to the British Medical Association (BMA's) submission on the Northern Ireland Public Services Ombudsperson (NIPSO) Bill (the Bill) dated 12 August 2015.
- 1.2 I have already provided a detailed note to the Committee in May 2015 outlining the background to my Office which I hope has assisted the Committee in having a more complete understanding of my role. In this paper I will focus on the specific issues raised by the BMA regarding the NIPSO Bill in its submission of 12 August 2015.

## **2. JR55**

- 2.1 Given that JR55 has been listed for hearing on 8 and 9 March 2016, I consider it inappropriate to comment on this judgment and the facts of the case. In the circumstances, I am concerned that any comment that I might wish to make in this regard may be sub judice.
- 2.2 Throughout its submission, the BMA has indicated that the Supreme Court hearing will take place in February or March 2016. I can confirm that the case will be heard on 8 and 9 March 2016. It should be noted that it is only when the judgment is received that this case will be decided.

## **3. The impact of the Bill on the scrutiny of doctors**

- 3.1 At paragraph 3 of its submission, the BMA has suggested that the Bill represents an extension of the role of the Ombudsman in relation to investigations regarding medical practitioners.
- 3.2 I consider it is misleading to suggest that the Bill represents an extension in the role of the Ombudsman in relation to medical practitioners. My Office has had the jurisdiction to consider the clinical judgment of medical practitioners for almost twenty years (since 1997). This is before the Regulation and Quality Improvement Authority (RQIA) was created (2005). Moreover RQIA has no role in reviewing GPs in Northern Ireland.

## **4. Recommendations of the BMA**

- 4.1 In paragraph 4 of its submission, the BMA has recommended in particular that three provisions are removed from the Bill. These provisions relate to the power of the NIPSO to recommend a payment; the discretion of the NIPSO to determine whether any person may be legally represented during the investigation or otherwise; and the power of the NIPSO to request information and documentation which is subject to legal professional privilege. I will expand on these issues in section 5 below of this paper.

## 5. Removal of clauses<sup>1</sup> from the Bill

5.1 As indicated above, the BMA has made three recommendations in their submission in relation to the following clauses of the Bill:

- (i) Removal of clause 32(1) and 32(2) of the NIPSO Bill
- (ii) Removal of clause 30(7)(b) of the NIPSO Bill
- (iii) Removal of clause 11(b)(ii)<sup>2</sup> of the NIPSO Bill

For ease of reference, I will deal with each recommendation as they are dealt with in the BMA's submission.

### (i) Removal of clause 32(1) and 32(2) of the NIPSO Bill

5.2 Clauses 32(1) and 32(2) of the Bill relate to the power of the NIPSO to request information which is subject to legal professional privilege:

*32. (1) 'No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or supplied to persons in the service of the Crown, whether imposed by any statutory provision or any rule of law, applies to the disclosure of information for the purposes of an investigation.*

*(2) A listed authority is not entitled in relation to any investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.'*

At paragraph 29 of its submission, the BMA has indicated that these provisions would introduce a new power for the NIPSO to override legal professional privilege.

5.3 I am advised that there is case law which clarifies that legal professional privilege is not lost when it is shared with an ombudsman for the purposes of his/her investigation which are confidential and conducted in private.<sup>3</sup> I note that the Committee has received legal advice in this respect. I am aware that both the Ad Hoc Committee and OFMdfM Committee have obtained and considered legal advice on this issue.

5.4 I can confirm that the policy aim behind the Bill is to merge the jurisdiction of the Assembly Ombudsman and the Commissioner for Complaints and in doing so to ensure powers available to the NIPSO provide him/her with the maximum access to information where relevant in an investigation of maladministration. My current powers in relation to investigations conducted as Assembly Ombudsman under the

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<sup>1</sup> The BMA has referred to 'sections' of the NIPSO Bill in its submission. This is incorrect. The provisions in the Bill should be referred to as 'clauses'. I have therefore referred to clauses in the Bill throughout this paper.

<sup>2</sup> Please note that reference to clause 11(b)(iii) in paragraph 4 of the BMA's submission is incorrect and should read 11(b)(ii).

<sup>3</sup> First-tier Tribunal decision Williams v Information Commissioner & LGO & Sandwell MBC EA 2012 0083 and Upper Tribunal decision Williams v Information Commissioner & LGO & Sandwell (2014) UKUT 0130 (AAC)

Ombudsman (Northern Ireland) Order 1996, permit me access to legal advice held by Northern Ireland Civil Service Departments and their statutory agencies. My practice is to request access to legal advice infrequently and only where is it relevant to an investigation. This legal advice is not shared with the complainant or any other person and is held in confidence by myself and my staff.

**(ii) Removal of clause 30(7)(b) of the NIPSO Bill**

5.5 Clause 30(7)(b) of the Bill relates to the investigation procedure and the NIPSO's discretion to determine whether a person can be legally or otherwise represented:

*(7) 'In particular the Ombudsperson may—  
(a) make such inquiries as are appropriate, and  
(b) determine whether any person may be represented in the investigation by counsel, solicitor or otherwise.'*

At paragraph 35 of its submission, the BMA refers to the opportunity which currently exists in article 12 of the Commissioner for Complaints (Northern Ireland) Order 1996 for the body complained against to request a formal hearing and be legally represented. Under the Bill this provision will be removed but there is to be a right to legal representation at the NIPSO's discretion.

5.6 The BMA are concerned that the removal of the article 12 mechanism will 'remove the protection of an individual's automatic right to representation by counsel and solicitors'. It is important to highlight the inquisitorial nature of my investigation powers. The process is not adversarial in nature and therefore does not require complainants and/or bodies complained of to have a right in every case to legal representation. If this right were available in every case it would increase the costs of NIPSO to the public purse and cause delay in the investigation.

5.7 At paragraph 37, the BMA has indicated that medical practitioners are the only body investigated by the NIPSO in respect of whom the NIPSO can reach an adverse finding without first having made a finding of maladministration.

5.8 This is incorrect, the actions of social care professionals will also be subject to investigation without first having reached a finding of maladministration.

**(iii) Removal of clause 11(b)(ii) of the NIPSO Bill**

5.9 Clause 11(b)(ii) of the Bill describes the purposes of the NIPSO's investigation as follows:

*11. 'The purposes of an investigation are—  
(b) where it appears to the Ombudsperson to be desirable, to bring about a settlement, including by recommending that—  
(i) action be taken by the person aggrieved or listed authority, or  
(ii) that the listed authority make a payment to the person aggrieved.'*

At paragraph 41 of the BMA's submission, it has stated that the Bill will 'expressly' give the NIPSO the power to make a payment. There is no power for NIPSO to 'make' a payment, only to recommend a payment and the body may choose not to accept the recommendation. Although this is an unusual occurrence.

- 5.10 It has been the established practice of my Office, the Health Service Commissioner (HSC) in England and the Public Services Ombudsman for Wales (PSOW) to make recommendations for financial redress arising from maladministration and injustice in relation to errors in clinical judgment.
- 5.11 At paragraph 42 of its submission, the BMA has stated that there is no right of appeal in the Bill against recommendations of payments by the NIPSO and that any challenge to these payments would therefore have to be made by judicial review which can be costly.
- 5.12 Public Service Ombudsmen make non-binding recommendations for payment. Therefore where a GP has insurance or indemnity for such payments such as that provided by the Medical Defence Union (MDU) or the Medical Protection Society (MPS) then any payment may be met by those bodies and not from the GP's funds. An appeal is not the appropriate mechanism for challenging an ombudsman which is judicial review.
- 5.13 At paragraph 43 of the BMA's submission, it states that the Bill does not impose any express obligation on the NIPSO to explain the basis of recommendations made.
- 5.14 An Ombudsman is required to act fairly and in accordance with the rules of natural justice which duly includes giving adequate reasons for his/her decision. It has been my practice to explain in both draft and final reports to all bodies in jurisdiction the basis on which recommendations are made. My practice is to follow the Parliamentary and Health Service Ombudsman (PHSO) Principles for Remedy<sup>4</sup> and the Local Government Ombudsman (LGO) Guidance on Remedy.<sup>5</sup> I should also point out that currently the Ombudsman Association's Legal Interest Group is developing general guidelines for all Public Sector Ombudsmen in the UK and Ireland on remedy and this will include guidelines on remedy by way of financial redress.
- 5.15 At paragraph 44 of the BMA's submission, it has stated that the power of the NIPSO to make such payments lacks 'any of the safeguards open to practitioners in a Court process'. The BMA goes on to list the safeguards it considers to be missing from the Bill.
- 5.16 BMA fundamentally misunderstands the role of the Ombudsman; whose task is to investigate in private and make findings of maladministration. An Ombudsman is not a court and it is important to distinguish the role of the Ombudsman from that of the

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<sup>4</sup> <http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-for-remedy>

<sup>5</sup> <http://www.lgo.org.uk/publications/advice-and-guidance/>

Courts. This was set out succinctly by the former Parliamentary and Health Service Ombudsman Ms Anne Abraham who stated that:

*'The Ombudsman is not empowered to determine whether the law has been breached. The Ombudsman system of justice provides an alternative to taking a case to court but it is not a substitute or surrogate court. The Ombudsman asks different questions from those asked in a court and looks at different issues. While the courts determine whether people have suffered damage as a result of unlawful actions, the ombudsman considers whether people have suffered injustice or hardship as a consequence of maladministration or service failure. If the complaint is upheld and an injustice is unremedied, the Ombudsman will recommend an appropriate remedy for the injustice or hardship suffered by the complainants. The Ombudsman may also recommend changes in practice to prevent the same thing happening again. It is most unusual for these recommendations not to be complied with.'*<sup>6</sup>

- 5.17 In cases relating to maladministration arising from errors of clinical judgment, the Ombudsman's test is whether the care and treatment of a patient was of a reasonable standard. This is a different test to that applied by the Court when concluding a claim for damages for personal injustice arising from clinical negligence on the part of a medical practitioner. The test applied by the Court is the Bolam test.<sup>7</sup>

I will now deal with the remaining issues raised by the BMA in its submission to the Committee.

## **6. Alternative legal remedy**

- 6.1 At paragraph 19 of the BMA's submission, it refers to clause 21 of the Bill which states that the NIPSO must not investigate where the complainant has or had a right of appeal, complaint, reference or review before a tribunal constituted under statutory provisions or by way of proceedings in a court of law. The BMA argues at paragraph 19(c) that one of the potential impacts of this provision is that 'patients can go to the civil court following a successful Ombudsman finding and get additional financial compensation with full legal disclosure.'
- 6.2 As an Ombudsman, I make findings of maladministration. I do not make findings of negligence and if a complainant was seeking to rely on my findings in a civil court, it is still a matter for the court to decide whether the circumstances are such that a medical practitioner has been guilty of negligence. As stated above, ombudsmen and the courts apply different tests, have differing roles and provide differing remedies.

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<sup>6</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/247435/1512.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/247435/1512.pdf) - see page 7

<sup>7</sup> R (Attwood) v Health Service Commissioner [2008] EWHC 2315 – see paragraph 105

6.3 In any event, there is no evidence to suggest that a court would not take into account any payment made by the body concerned as a result of a NIPSO recommendation following a finding of maladministration and injustice.

## **7. The power to lay a Special Report before the Assembly**

7.1 As stated earlier, I refrain from making any comment in relation to JR55 as I have been advised this may be sub judice and it is therefore inappropriate to do so.

7.2 As stated above, an ombudsman is required to act fairly and in accordance with the rules of natural justice, which would in my view, include the need to alert a body to his/her considerations in relation to the making of a special report. In my view, fairness would also require that the body complained of be given an opportunity to comment on the proposal to make a special report and the Ombudsman would in the interests of justice and fairness be required to consider any such submissions in that regard before making his/her decision. The decision to make a 'special report' is like all ombudsmen's decision, amenable to challenge by way of judicial review. In any event, the safeguards needed to ensure procedural fairness in relation to the Assembly's consideration of a special report would be a matter for the Assembly and I cannot comment further.

## **8. The power to apply to the High Court by the Attorney General**

8.1 At paragraph 20.3 of its submission, the BMA refers to the power of the NIPSO to apply to the High Court by the Attorney General. Clause 45 of the Bill states:

*45.—(1) 'This section applies where the Ombudsperson is of the opinion, following an investigation, that—*

- (a) there is systemic maladministration in a listed authority, and*
- (b) that systemic maladministration is likely to continue unless the High Court grants relief under section 46.*

*(2) This section also applies where the Ombudsperson is of the opinion, following an investigation carried out in accordance with section 15(2)(b) or (c), 16(2)(b), or 17(2)(b) or (c), that—*

- (a) systemic injustice has been sustained as a result of the exercise of clinical or professional judgement, and*
- (b) that systemic injustice is likely to continue unless the High Court grants relief under section 46.*

*(3) The Attorney General for Northern Ireland may, at the request of the Ombudsperson, apply to the High Court for relief under section 46.'*

8.2 The OFMdFM Committee has considered it appropriate that this power which has been provided for in the Commissioner for Complaints (Northern Ireland) Order

1996 should remain and be extended to all bodies in the NIPSO's jurisdiction. I cannot comment further.

## **9. Claim for damages in the County Court**

9.1 Clause 44 of the Bill provides complainants with the power to apply to the County Court to award damages to be paid by the listed authority concerned to the person aggrieved only where the NIPSO finds maladministration and injustice. The BMA has referred in particular to clause 44(2) of the Bill which states:

*(2) 'Damages must be of an amount which the court thinks just in all the circumstances to compensate the person for any loss or injury which the person may have suffered on account of—*

*(a) expenses reasonably incurred by the person in connection with the injustice, and*

*(b) the person's loss of opportunity of acquiring the benefit which the person might reasonably be expected to have had but for the injustice.*

*(3) In calculating the amount of damages to be awarded by virtue of subsection (2)(b) the court must apply the same rule concerning the duty of a person to mitigate loss as applies in relation to damages recoverable at common law.'*

9.2 At paragraph 20 of its submission, the BMA states that 'it is clear this definition would allow patients to recover monies in circumstances, in addition to those which may give rise to a civil claim, without the proper safeguards being in place.'

9.3 This is a matter which has been considered by the OFMDFM Committee and the Ad Hoc Committee and legal advice has been obtained. I do not wish to comment further.

9.4 However it should be noted that clause 48(1)(a) of the Bill provides that a report of the NIPSO relating to an investigation is to be accepted as evidence of the facts stated within it, unless the contrary is proven. In my view this clause potentially provides the body complained of with the opportunity to challenge the recommendations of the NIPSO contained in 'a report' as part of its defence to the County Court proceedings.

## **10. The impact of the Bill on the existing legislation**

10.1 At paragraph 24 of its submission, the BMA has stated that the draft Bill would 'replace' the existing provisions of the Commissioner for Complaints (Northern Ireland) Order 1996 and the Ombudsman (Northern Ireland) Order 1996. I would point out that the Bill, if enacted, will repeal and replace both existing Orders.

## **11. Access to justice and cost**

- 11.1 May I take this opportunity to make a general comment that the BMA's submission does not reflect the patient and public perspective and access to justice for those complainants who cannot afford to pursue costly legal proceedings. There appears to be no consideration of the impact to the public purse of defending such legal action which would in my view divert from front line care at a time of austerity. This approach appears to be in direct contrast to previous sentiments expressed by the BMA in relation to a no fault compensation scheme which it argues:

*'helps patients avoid the costs, stress and delays of going through the legal system...Removing the threat of litigation may encourage better communication between doctor and patient in explaining the nature and cause of any mishap to the patient concerned, encouraging accountability by the doctor to his/her patient in accordance with Good Medical Practice guidelines... At a time when major savings are being demanded of the NHS, it is important that any new scheme does not increase costs to the NHS and divert money away from patient care.'*<sup>8</sup>

- 11.2 I would ask that the Committee give consideration to these wider public interest issues in its deliberations.

## **12. Conclusion**

- 12.1 May I thank the Chair and members of the Committee and staff for the opportunity to provide my comments in relation to the issues raised by the BMA and for their continued considerations of the proposed NIPSO legislation.



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<sup>8</sup> <http://www.gov.scot/Resource/0041/00415090.pdf>