

### Briefing Note on the Northern Ireland Public Services Ombudsperson (NIPSO) Bill

---

Judith Cross

Senior Policy Advisor

e: [jcross@bma.org.uk](mailto:jcross@bma.org.uk)

t: 02890269687

Bernadette Maginnis

Political Liaison Officer

e: [bmaginnis@bma.org.uk](mailto:bmaginnis@bma.org.uk)

t: 02890269678

9<sup>th</sup> September 2015



## Executive Summary

### Briefing Note on the Northern Ireland Public Services Ombudsperson (NIPSO) Bill

#### Introduction

1. BMA Northern Ireland is both a Professional Association and a Trade Union which represents the medical profession in Northern Ireland across all Branches of Practice and our mission is, *'we look after doctors so they can look after you.'*
2. BMA has 155,000 members worldwide, and 75% of doctors and medical students are members in Northern Ireland.
3. BMA Northern Ireland welcomes the merging of the offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints into a single office. We believe that such an office should exist with strong investigatory powers as outlined, but we have a number of concerns as to how certain aspects of this draft Bill will impact on individual health care practitioners.
4. Medical practitioners are already closely scrutinised by the General Medical Council, the Regulation and Quality Improvement Authority (RQIA) and adhere to NICE guidance. BMA Northern Ireland is of the view that this Bill, as currently drafted, will have significant negative implications for our members and we are gravely concerned about the professional and financial impact on individual doctors.

#### Key concerns

5. Our concerns can be summarised as following:

- The lack of reference in the evidence presented thus far and the committee deliberations of the implications arising from *JR55 –v- Northern Ireland Commissioners for Complaints* which is ongoing. It is anticipated that the appeal hearing will be in the Supreme Court in February or March 2016. The outcome of this judicial review will have significant implications for the financial payment and special reports provisions contained in sections 11 (b) (iii) and 34 (2) (d) and BMA Northern Ireland strongly believe that the Bill should not proceed until judgement is reached.
- The fundamental derogation from basic legal principles in sections 30 (7) (b), legal privilege and 32 (1) (2) legal representation, are deeply troubling and we believe should be removed from the Bill.
  - 30 (7) (B): It is a fundamental right for anyone to be represented and section 30 gives the Ombudsman the right to deny representation to a doctor to hear from or correspond with their counsel, solicitor, defence organisation or ourselves as their trade union representatives.
  - 32 (1) (2): This is a significant erosion of current safeguards to override legal privilege and is a basic principle in law. It should not be possible to demand documentation that is covered by legal privilege.
- The additional powers contained in Section 11 (b) (ii) for payment. BMA Northern Ireland considers that this is not the role of the Ombudsperson to recommend financial recompense as this is the role for the courts. In addition the lack of appeal mechanisms, the lack of transparency and objectivity in determining payments are of deep concern to our members.
- Schedule 3, Listed Authorities refers to, '*a general health care provider and an independent provider of health and social care*'. BMA Northern Ireland would like to point out that these categories of Listed Authorities in many instances refer to individual general practitioners, dentists, pharmacists, optometrists. Taken with clause 11 (b) (ii): payment and clause 34 (2) (d):

laying special reports will adversely impact on individual health care practitioners. Under the 96' Order, compensatory payments were limited to health care bodies and limited to compensation for out-of-pocket expenses. Sweeping up individual healthcare practitioners under Schedule 3 will have serious financial implications for these individuals.

### **Recommendations**

**BMA Northern Ireland recommends that this legislation should not be progressed until the outcome of the Supreme Court hearing**

**BMA Northern Ireland recommends:**

- **The removal of the following sections from the draft Bill:**
  - i. **Payment: 11 (b) (ii)**
  - ii. **Legal Representation: 30 (7) (b)**
  - iii. **Legal Professional Privilege: 32 (1) (2)**
  
- **Exemptions for individual health care practitioners from 11 (b) (ii) and 34 (2) (d)**

## **Briefing Note on the Northern Ireland Public Services Ombudsperson (NIPSO) Bill**

**9<sup>th</sup> September 2015**

### **Introduction**

6. BMA Northern Ireland is both a Professional Association and a Trade Union which represents the medical profession in Northern Ireland across all Branches of Practice and our mission is, *'we look after doctors so they can look after you.'*
7. BMA has 155,000 members worldwide, and 75% of doctors and medical students are members in Northern Ireland.
8. BMA Northern Ireland welcomes the merging of the offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints into a single office. We believe that such an office should exist with strong investigatory powers as outlined, but we have a number of concerns as to how certain aspects of this draft Bill will impact on individual health care practitioners.
- 9.
10. Medical practitioners are already closely scrutinised by the General Medical Council, the Regulation and Quality Improvement Authority (RQIA) and adhere to NICE guidance. BMA Northern Ireland is of the view that this Bill, as currently drafted, will have significant negative implications for our members and we are gravely concerned about the professional and financial impact on individual doctors.
11. This briefing note provides some background information on the potential implications of forthcoming ruling from the Supreme Court in February or March

2016 in relation to *JR55 v NI Commissioner for Complaints*. We also outline the specific clauses that are problematic and have the potential to undermine fundamental legal principles.

### Background Information

12. It is vital that committee members have access to relevant and up-to-date information when considering the implications of this Bill. *JR55 v NI Commissioner for Complaints [2014] NICA 11* is significant as it calls into question a number of the clauses within the draft Bill. We believe the intention be The following section is a brief outline of this case.

- ***JR55 v NI Commissioner for Complaints [2014] NICA 11***

13. A patient presented to his GP (JR55) with chest pain in 2008 and following referrals for ECGs and other treatment, the patient died. The patient's wife complained to the Commissioner for Complaints. The Commissioner's report was issued in 2011. He determined that the patient should have received better follow up care and considered that the lack of action by a locum doctor in the practice constituted maladministration.

14. The Commissioner recommended that the doctor should pay the patient's wife a consolatory payment of £10,000 in respect of the clearly identified failings in the care provided for the patient and the events which followed. The GP agreed to issue an apology but challenged the Commissioner's power to recommend the consolatory payment and the Commissioner's assertion that he had power to make a special report to the Northern Ireland Assembly in the event of the GP failing to make the payment.

15. The initial judicial review found in favour of the Ombudsman. The judgement stated that the Ombudsman was entitled to state what action in his opinion be taken to effect a fair settlement, including the power to recommend a consolatory payment. JR55 appealed this judgment.

### **Court of Appeal**

16. The Court of Appeal (Girvan LJ, Coghlin LJ and Higgins LJ) considered two issues, namely, the Commissioner's entitlement to:

- (i) make recommendations for consolatory payments
- (ii) to lay special reports before the Northern Ireland Assembly.

### **Consolatory payments**

17. The following points outline the relevant sections of the Commissioner for Complaints (NI) Order 1996 in relation to consolatory payments.

- The Commissioner for Complaints (NI) Order 1996
  - Article 7 refers to health and social care bodies as outlined in Schedule 2
  - Article 8 refers to general healthcare providers
  - Article 16 relates an application for compensation for the person aggrieved but only in relation to Article 7 –health and social care bodies, **not individuals**
- Under Article 16 (3) Damages awarded under this Article shall be such as the county court may think just in all the circumstances to compensate the person aggrieved for any loss or injury which he may have suffered on account of—
  - (a) expenses reasonably incurred by him in connection with the subject matter of the maladministration on which his complaint was founded;
  - and

- (b)his loss of opportunity of acquiring the benefit which he might reasonably be expected to have had but for such maladministration

### The Appeal Judgement

18. The judgment emphasised that the Commissioner for Complaints (Northern Ireland) Order 1996 ('the 1996 Order') specifically provides for a County Court procedure for monetary compensation under Article 16 (which relates to Article 7 Investigations, which covers Health & Social Care Trusts, **but excludes individual health care providers**). The courts view was that Article 16 allows persons who have sustained injustice as a result of maladministration to apply to the County Court **only for compensation for expenses and loss of opportunity**. They also noted that were 'damages' to be awarded outside of the court process under Article 16, normal procedural protections and safeguards would not apply.
19. Article 8 of the 1996 Order was originally introduced to confer a power upon the Commissioner to investigate not only public bodies, but independent health providers. **However, the judgement states that the legislature made a clear choice not to extend the statutory scheme for damages in Article 16 to Article 8 cases, and that this was intended to ensure that that in Article 8 cases "no question of monetary compensation should arise"**.
20. In essence, therefore, the judgement sets out that there is no statutory provision for imposing **compensatory** payments on individual health practitioners subject to investigation under Article 8. Furthermore, any statutory provision for compensatory payments against health service bodies under Article 7 is limited to compensation for expenses and loss of opportunity.



### Special reports to the Assembly

21. Article 19 of the 1996 Order gives the Commissioner the power to lay a general report before the Assembly annually and other such reports as he thinks fit. The judgement concluded that the Commissioner had **no power** to lay a special report before the Assembly in relation to the alleged maladministration of JR55. It was emphasised that due to the potential adverse consequences on JR55's professional reputation and status, Article 6: the right to a fair trial, and /or Article 8: the right to a private and family life, of the European Convention on Human Rights would be engaged by such a process, and that therefore, **even if such a power did exist, there would need to be proper safeguards to ensure procedural fairness.**

### **How JR55 impacts on the current draft Bill**

#### Investigations and sanctions

22. Section 21 of the draft Bill (like the 1996 Order) makes provision that the Ombudsperson must not investigate any action in respect of which the person aggrieved has a remedy of statutory provision or by way of proceedings in a court of law. This would seem to preclude the Ombudsperson with dealing with matters of potential clinical negligence. The draft Bill, however, also gives the Ombudsperson the discretion to proceed with investigations even if such a remedy exists, if he/she is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to have resort such a provision. The current Commissioner has exercised this discretion to proceed with investigations in the past and there is no reason to presume that it will not be widely utilised in the future. This has three potential impacts:

- (a) The Ombudsperson can deal with matters which ought properly be dealt with in the Courts, but without the benefits of the legal safeguards of the Court system; and/or
- (b) That patients will still be able to obtain financial compensation in circumstances where they would currently be unable to successfully bring a civil claim;
- (c) In addition patients can go to the civil court following a successful Ombudsman finding and get additional financial compensation.

23. Express provision will be made if a listed authority fails to comply with a recommendation made by the Ombudsperson, including a recommendation for a payment. The Ombudsperson may then be able to take one of the following steps:

1. Lay a Special Report before the Northern Ireland Assembly

This would allow a practitioner to be identified in a report to the Northern Ireland Assembly which could then be put before a Committee of the Assembly, including the Health Committee.

Girvan LJ emphasised in JR55 that, due to the potential adverse consequences on JR55's professional reputation and status, Article 6 and /or Article 8 ECHR would be engaged by such a process, and that therefore, **even if such a power did exist in the 1996 Order, there would need to be proper safeguards to ensure procedural fairness.**

2. Apply to the County Court for Damages

As above, there is a provision under Article 16 of the 1996 Order that a complainant who is found by the Commissioner to have suffered injustice as a result of maladministration can apply to the County Court for damages. This provision currently only applies to health service bodies (Article 7). Under the draft Bill this provision will be extended to all listed authorities, including general practitioners/individual healthcare providers.

It is clear from comments made by the Commissioner in connection with the current Bill, that in the event of non-compliance with his recommendations, (which would include recommendations for payments), his preferred option to encourage compliance will be to lay a Special Report before the Northern Assembly. Should this approach be adopted in practice, practitioners will be faced with the option of making a recommended payment, or being named in a report to the Northern Ireland Assembly.

This provision, gives rise to a potential new basis for patients seeking monetary recompense from practitioners.

Section 44(2) of the draft Bill states that:

*“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 might 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”.*

It is clear that 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.

3. Request that the Attorney General apply to the High Court for a mandatory or other injunction.

That is an order requiring a listed authority to take, or refrain from taking a specific step or steps.

The latter option would potentially give the Commissioner the power to seek to change the manner in which practitioners exercise their clinical judgement. Whilst it is anticipated that the Courts would require the Commissioner to justify the exercise of such power, it is questionable whether the Ombudsperson is the best placed and/or qualified to make recommendations on the systemic application of issues of clinical judgement.

24. The Commissioner has been granted leave to appeal the decision of the Court of Appeal to the Supreme Court. The hearing is likely to be February / March 2016. **Therefore this judgement has significant implications for the draft Bill as currently drafted. BMA Northern Ireland recommends that this legislation should not be progressed until the judgement has been made.**

25. This next section outlines our concerns over specific clauses in the draft Bill in relation to:

- legal privilege,
- legal representation
- consolatory payments

- listed authorities.

### **Northern Ireland Public Services Ombudsperson (NIPSO) Bill**

26. The Northern Ireland Public Services Ombudsman Bill ('the draft Bill') will amalgamate the existing offices and roles of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints to create a single office of Ombudsperson.
27. The draft Bill would replace the existing provisions of the Commissioner for Complaints (Northern Ireland) Order 1996 ('the 1996 Order') and the Ombudsman (Northern Ireland) Order 1996.
28. The draft Bill applies to listed bodies, which include family services practitioners, including general practitioners and public health and social care bodies.
29. The 1996 Order currently allows the Commissioner to consider issues of:
  - Alleged maladministration through action taken by a general health services providers; and/or
  - The merits of a decision to the extent that it was taken in exercise of clinical judgement in connection with general health services. It is proposed that these provisions will be retained under the draft Bill.

### **Legal Professional Privilege**

30. The draft Bill states at section 31(5) that:

*“Subject to section 32 (1) and (2), no person is compelled, for the purposes of an investigation, to give any evidence or procure any document which that person could not be compelled to give or to produce in civil proceedings in the High Court.”*

(This section mirrors the existing Article 13(2) of the 1996 Order)

31. The draft Bill, however, proposes two additional clauses:

*“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.”*

32. These provisions would introduce a new power for the Ombudsperson to override legal professional privilege. This would mean that a practitioner would be required to provide the Ombudsperson with a copy of any legal advice they had received, relevant to an issue raised in the complaint under investigation.

33. This constitutes a significant erosion of the safeguards currently available to practitioners, which allows them to obtain legal advice on a confidential basis. This may have particular significance for medical practitioners as the matters which give rise to an Ombudsperson’s investigation could potentially also ultimately be subject to criminal proceedings, an inquest, a civil claim for clinical negligence and/or regulatory proceedings. Anything which inhibits any

practitioner from being full and frank with their legal advisers, or vice versa could inhibit their ability to obtain legal advice.

34. The proposed changes in the draft Bill fail to take into account the significant public interest in legal professional privilege being upheld for all members of the public. The proposal to compel disclosure of information subject to legal professional privilege is an erosion of an important civil protection.
35. It may be argued that in some circumstances it would benefit a practitioner to disclose legal advice, for example, to explain why they took a particular course of action. There is, however, nothing to preclude a practitioner opting to disclose legal advice should they wish to do so.
36. The draft Bill does suggest some safeguards in this respect, namely, that the contents of any privileged documents must not be disclosed in the Commissioner's report, nor are such documents admissible in applications made to the County Court to the damages or the High Court for an injunction under the provisions of the draft Bill. Even with these safeguards medical practitioners may, however, feel inhibited in being frank and open with their legal advisers.
37. This provision of the draft Bill is also inconsistent with an individual right not to self-incriminate themselves.

### **Entitlement to legal representation**

38. Under the 1996 Order a practitioner has an automatic right to a hearing represented by Counsel and/or a solicitor (which includes a right to the examination and cross-examination of witnesses) where the Commissioner considers there are grounds for making a report or recommendation that may

adversely affect that practitioner. This automatic right will be removed under the following section of the draft Bill:

*30 (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, solicitors or otherwise.

39. If enacted in its current format, the draft Bill, which gives the Ombudsperson significantly enhanced powers, will also remove the protection of an individual's automatic right to representation by counsel and solicitors. The draft Bill would also give the Ombudsperson the discretion to exclude a practitioner from being represented by a BMA or medical defence organisation representative.
40. This is particularly concerning given that such investigations may set out the Ombudsperson's opinion on matters of clinical judgement, which could potentially have a significant impact on a practitioner's reputation and indeed could trigger other matters such as regulatory proceedings. Medical practitioners are in an unusual position in this respect as they are the only group in respect of whom the Ombudsperson can reach an adverse finding, without first having to reach a finding of maladministration. The Ombudsperson can reach an adverse decision if he considers there has been an inappropriate exercise of clinical judgement.
41. It is unclear why the automatic right to a hearing should be removed, particularly when it is only triggered in cases where an individual may be subject to adverse findings.
42. The Bill is silent as to how it is anticipated that the discretion will be exercised.



## Consolatory payments

43. As outlined earlier, the 1996 Order does not provide the Commissioner with the power to recommend the payment of monetary sums in cases involving general health care providers.

44. The draft Bill would, however, expressly give the Ombudsperson this power, in section 11 which states:

*“The purposes of an investigation are –*

*(a) to ascertain if -*

*(i) the matter properly warrants investigation, and*

*(ii) the allegations contained in a complaint are in substance true,*

*(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...**”*

45. There is no right of appeal in the draft Bill against recommendations of payment made by the Ombudsperson. **Any challenge to recommend payments would, therefore have to be made by way of judicial review, which can be costly.**

46. Furthermore, despite the judgement of the Court of Appeal in JR55, the draft Bill **does not** impose any express obligation on the Ombudsperson to explain the basis of any recommendations made, including financial payments. It may,

therefore, be difficult to assess whether the recommendation is reasonable and/or whether there may be grounds to challenge it in a judicial review setting.

47. This section is arguably wide enough to allow the Ombudsperson to make a recommendation for payments in circumstances which would normally be dealt with by way of a civil claim to the County or High Court. Under the draft Bill, such payments could be recommended by the Ombudsperson without any of the safeguards open to practitioners in a Court process such as:

- A right to full details of the case being made against the practitioner
- Disclosure of all relevant documentation held by a patient or a third party relevant to the matters in issue
- Provisions governing the exchange of expert evidence on which either party intends to rely
- A requirement for it to be demonstrated that:
  - There has been a breach of duty (namely that a practitioner's actions fell below that of a reasonable body of his/her peers); and
  - Evidence that a patient has sustained some loss of damage as a consequence of the breach of duty prior to any damages being awarded.
- A right to legal representation throughout the process
- An established set of guidelines by which any financial award will be assessed
- A right to appeal against the basis of judgement and/or the amount awarded.

48. None of the above safeguards are currently provided by the draft Bill.

**Listed authority – Schedule 3**

49. Schedule 3, Listed Authorities refers to, *‘a general health care provider and an independent provider of health and social care*. BMA Northern Ireland would like to point out that these categories of Listed Authorities in many instances refer to individuals, such as general practitioners, dentists, pharmacists and optometrists as opposed to statutory bodies.
50. Taken with clause 11 (b) (ii): payment and clause 34 (2) (d): laying special reports will adversely impact on individual health care practitioners. Under the 96’ Order, compensatory payments were limited to health care bodies and limited to compensation for out-of-pocket expenses. Sweeping up individual healthcare practitioners under Schedule 3 will have serious financial implications for these individuals.

**Conclusions**

51. BMA Northern Ireland believes that this Bill has the potential to significantly change the landscape for medical practitioners faced with an investigation by the office of the Ombudsperson. We consider that the negative implications, professionally and financially, for our members are unacceptable. Furthermore, the erosion of the fundamental principles of legal representation and privilege are outwith any modern society.

**Recommendations**

**BMA Northern Ireland recommends that this legislation should not be progressed until the judgement has been made.**

**BMA Northern Ireland recommends:**

- **The removal of the following sections from the draft Bill:**
  - i. **Payment: 11 (b) (ii)**
  - ii. **Legal Representation: 30 (7) (b)**
  - iii. **Legal Professional Privilege: 32 (1) (2)**
  
- **Exemptions for individual health care practitioners from 11 (b) (ii) and 34 (2) (d)**

**ENDS**

**9 September 2015**