MDU Briefing

Northern Ireland Public Services Ombudsperson Bill

1. The MDU is the UK's leading Medical Defence Organisation. It is a not-for-profit, mutual organisation providing a range of medico-legal services to its members who represent 50% of the UK's hospital doctors and general practitioners, and over 30% of the UK's dentists. As part of the benefits of membership we advise and assist our medical and dental members with clinical complaints procedures, including to the Ombudsmen in all UK jurisdictions, and it is in that context that the following comments are made.

2. The Public Services Ombudsperson's Bill ("the Bill") proposes to consolidate a number of ombudsman and commissioner offices, and relies to some extent on existing legislation such as the Commissioner for Complaints (Northern Ireland) Order 1996. It proposes significant expansion of some of the existing powers, and we are gravely concerned about the potential professional and financial impact of the proposed changes on individual doctors and we believe they would have a similar impact on the health service generally.

3. Our concerns broadly fall into two areas: potential lack of fairness and introduction of new costs sanctions that would have the potential to substantially increase the financial burden on NHS staff and institutions. Our concerns about lack of fairness are that the proposals do not appear to be consistent with the procedural fairness and with natural justice that are enshrined within the European Convention on Human Rights and the Human Rights Act 1998. Our concern about new costs sanctions relates to the potential consequence of creating a parallel jurisdiction that could 'award' redress payments, which would in effect be compensation awards, without the accepted legal safeguards of civil litigation rules and procedures.

<u>Potential lack of fairness</u>

4.1 When doctors or dentists face a complaint it is sometimes necessary for them to take professional advice, particularly if the allegations are serious. But the Bill treats complainants and those complained about in different ways and while this would allow the complainant to choose representation as he or she sees fit, the proposed restrictions in respect of respondents' choice of representatives have the potential to unreasonably and unfairly restrict the right of the respondent to provide a full defence.

Clause 7(3) of the Bill allows the complainant to be represented by any person whom the Ombudsperson considers appropriate. Consequently, the Ombudsperson could not refuse to hear from a representative unless they considered that person to be an inappropriate representative, and in such circumstances it is clear that the complainant could be represented by someone else. It follows that a solicitor could represent the complainant's views and account of events to the Ombudsperson.

4.2 However, the Bill's proposals are far more restrictive in determining who could represent the respondent. Under clause 30(7)(b) discretion is given by the Ombudsperson to "determine whether

any person may be represented in the investigation by counsel, solicitor or otherwise". Plainly, this could give the Ombudsperson discretion to deny representation to a doctor or dentist and refuse to hear from or to correspond with a respondent's medical defence organisation, solicitor or barrister. This raises an obvious risk of procedural unfairness.

4.3 Both complainant and respondent should have equal rights to representation and it should not be for the Ombudsperson to determine who can represent an individual or organisational respondent.

5. Clause 32(2) provides that, "a listed authority is not entitled in relation to any investigation to any such privilege in respect to the production of documents or the giving of evidence as is allowed by law in legal proceedings". The explanatory memorandum (paragraph 69) lists the various circumstances where the Ombudsperson could not use that information in a report or where it could not be used in county court proceedings.

5.1 It would be unfair and should not be possible legally for an Ombudsperson to be able to demand documentation that is covered by legal privilege. Even if it were possible for an Ombudsperson to override an essential legal right, to do so would inhibit the ability of doctors and dentists to seek legal or professional advice.

5.2 The memorandum comments at paragraph 201 that the Bill did not engage the provisions of the European Convention on Human Rights ("ECHR"). It is difficult to understand, given the comments made above about procedural fairness and, in particular, the ability to obtain privileged information, that ECHR Article 6 and Article 8 rights are not engaged.

5.3 The Ombudsperson's powers to compel disclosure cannot and should not be extended to include privileged documentation.

Additional financial burden on NHS staff and organisations

6. In similar language to the 1996 Order, the Bill provides, at clause 21, that the Ombudsperson ***must not*** [emphasis added] investigate any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law. The Ombudsperson is afforded some discretion to investigate where a complainant clearly does have the basis on which to litigate (e.g. a potential claim in negligence) where they are "satisfied in the particular circumstances it is not reasonable to expect the person aggrieved to resort to or have resorted to it".

6.1 The MDU's view is that it is not the role of the Ombudsman to recommend financial recompense as that is the role of the courts through a procedure that has proper legal safeguards. It is clear that the intention of the committee, as expressed in paragraph 60 of the memorandum, is that it was "content to retain the bar on investigation in [cases where the complainant has legal redress] ***on the basis that the mechanisms for redress provided by statute or by the courts should normally be used*** [emphasis added]". We would agree with this, however, the MDU's current experience of the Ombudsman's procedure is that recommendations of financial recompense are made in a manner that is arbitrary, not transparent and open to challenge. The Ombudsman does not currently employ any objective benchmark or standard when using the discretion described in paragraph 6, above.

6.2 We suggest therefore that the legislative intention, as expressed in paragraph 60 of the memorandum, should be to allow discretion to the Ombudsperson in alternative remedy cases only in exceptional circumstances and that clause 21(3)(a) should have the word "particular" replaced with "exceptional".

7. The structure of clause 11(b) of the Bill is quite different from the equivalent article in the 1996 Order. In essence the Order provides that where it appeared desirable, the Commissioner should effect a settlement of the matter and if that is not possible should provide his opinion as to what would effect a fair settlement of the matter. In Clause 11, however, the concept of the legislation moves away from effecting a settlement to allowing the Commissioner to "bring about a settlement, including by recommending that:-

(i) Action to be taken by the person aggrieved or listed authority; or

(ii) That the listed authority make a payment to the person aggrieved."

7.1 The proposed significant legislative change would be in effect to create a parallel jurisdiction to the civil courts' ability to award compensation, as it would provide complainants with financial redress if the Ombudsperson judges them to have suffered injustice at the hands of a doctor or dentist or organisation employing them. But the Ombudsperson's jurisdiction has none of the fundamental legal safeguards that exist in civil procedure litigation. For example, in civil litigation the standard against which the doctor's or dentist's treatment will be judged against will be that of *Bolam* – a practice that is capable of support by a responsible body of professional medical or dental opinion. There is no mention of any standard that the Ombudsperson would be obliged to adopt: the discretion afforded the office would be so wide that it could vary from case to case. We believe this contravenes the rights of the respondent to a fair procedure.

7.2 Furthermore, the Ombudsperson's investigation does not allow the complainant's evidence to be tested as it would in court, or to give equivalent weight to the expert evidence adduced by the doctor or dentist compared to that which is commissioned by the Ombudsperson.

7.3 There is also the question of how the Ombudsperson assesses and decides on the level of compensation to recommend. In the courts such decisions are ultimately for the court, but in which applies a transparent and consistent approach, which is known to all parties. The process to be adopted by the Ombudsperson is not set out in the Bill, and consequently it is reasonable to assume that it would be similar to the approach the Ombudsman currently applies, which is inconsistent, not subject to rigorous analysis of losses, not subject to considerations of proportionality and where the computations are neither transparent nor explained.

8. The comments in paragraphs 6 and 7, above, are not concerned solely with the procedural unfairness that is associated with them. The very real unintended consequence of the creation of a parallel jurisdiction for compensation awards is that very significant amounts of money could be required in 'compensation' from health service bodies and general medical and dental practitioners and paid to complainants. This money would have to be met from existing health budgets and inevitably it would impact on funds available to treat all patients.

8.1 It is important to address a misconception that surrounds the Ombudsperson's powers being limited to merely recommending financial compensation or redress, the point being that a

recommendation is not considered binding. It is clear that in drafting the Bill the committee has in mind the significant sanction of being able to "name and shame" those who have not complied with a recommendation (see clause 37 – the laying of a special report before the Assembly). That power is fundamentally coercive, and will, in all likelihood, create what is in effect a binding recommendation.

8.2 Where a question arises of compensation we suggest such complaints must not be dealt with by the Ombudsperson. The complainant should be informed that they have an alternative remedy which they can pursue, should they wish. It is not suggested that the Ombudsperson should never have discretion to effect a settlement where a modest financial payment is deemed necessary. For example, the Ombudsperson may determine, during the course of an investigation, that it would be reasonable for the complainant to be reimbursed by the health service body for modest out of pocket expenses (such as multiple taxi fares that would not have been necessary but for a service failing causing injustice).

8.3 We suggest that the Ombudsperson's jurisdiction to recommend financial compensation or redress must be strictly limited to actual losses incurred by the complainant that are directly attributable to the service failure complained about, which the Ombudsperson determined did happen and amounted to injustice. We suggest that it is made explicit that the Ombudsperson should not have any powers to determine general or special damages as it is self-evident that such matters are for the court. We further suggest that in any event there is a cap on such redress recommendations which is set at £1,000.

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