PUBLIC SERVICES OMBUDSMAN BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by the Committee for the Office of the First Minister and deputy First Minister ('the Committee'), in order to assist the reader of the Bill and to help inform the debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

2. The Memorandum should be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill, and where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. There are presently two statutory offices:

- the Assembly Ombudsman for Northern Ireland ('the Ombudsman') provided for in the Ombudsman (Northern Ireland) Order 1996 ('the Ombudsman Order'); and,

- the Northern Ireland Commissioner for Complaints ('the Commissioner') provided for in the Commissioner for Complaints (Northern Ireland) Order 1996 ('the Commissioner Order).

4. The Ombudsman Order and the Commissioner Order (collectively 'the 1996 Orders') replaced the Parliamentary Commissioner Act (Northern Ireland) Act 1969 and the Commissioner for Complaints Act (Northern Ireland) Act 1969 which first introduced the ombudsman function into law in Northern Ireland.

5. The Office of the First Minister and deputy First Minister ('OFMDFM') commissioned Deloitte to review the offices of the Ombudsman and Commissioner and Deloitte's Report was published in 2004.[1] The Ombudsman/Commissioner, Dr Tom

[1] http://www.ofmdfmni.gov.uk/index/making-government-work/legislation-and-the-assembly/assembly-ombudsman.htm

Frawley, approached the Committee in April 2010 and asked it to consider taking forward the Review's recommendations for updating the offices.

6. The Committee engaged in 2010 with OFMDFM which was undertaking a review of the Deloitte Report recommendations. OFMDFM indicated by letter of 28 June 2010 that due to other competing priorities and resource constraints it would not be bringing forward legislation in light of the Deloitte Report but welcomed the Committee doing so and confirmed the Department's willingness to cooperate.

CONSULTATION

7. The Committee carried out a public consultation on a range of recommendations coming out of the Deloitte Report and other matters between September and December 2010 and commissioned an analysis of the consultation responses from Assembly Research and Information Service (RaISe) published in March 2011.

8. Following the May 2011 Assembly Elections the reconstituted Committee was briefed in June 2011 by RaISe and by the Ombudsmen in the Republic of Ireland, Scotland and Wales. In June 2011 the Committee considered and reached a preliminary view on a range of issues emerging from the Deloitte Review and the consultation – it also took evidence from Dr Frawley and his deputy, Ms Marie Anderson.

9. The Committee considered and developed its policy proposals over the succeeding months and in July 2012 agreed a policy paper on which it sought the views of key stakeholders including OFMDFM, other Assembly Committees, the Assembly Commission, the Ombudsman and the Equality Commission for Northern Ireland ('Equality Commission'). The Committee also took legal advice on a range of emerging issues.

10. The Ombudsman/Commissioner provided the Committee with a very detailed response. OFMDFM sought the views of other Northern Ireland Departments and provided a comprehensive response to the Committee early in 2013. The Committee then re-visited its proposals in light of the consultation responses and advice received and was briefed again by the Ombudsman/Commissioner on a number of outstanding issues.

11. The Committee reached 'final' policy decisions at its meeting on 20 March 2013 when it also agreed that a written report should be prepared. The Committee agreed its Report "*Proposals for a Northern Ireland Public Services Ombudsman Bill*" which was published and debated by the Assembly on 16 September 2013 and approved.

12. The Committee agreed its drafting instructions and during 2014 has considered and settled draft provisions and formally agreed the Bill for introduction at its meeting on 10 December 2014

13. The Bill will combine the offices of Ombudsman and Commissioner ('the existing offices') into a single office to be known (see clause 1 of the Bill) as the Northern Ireland Public Services Ombudsman ('the NIPSO'), combining the powers and remit of the existing offices.

14. The Bill will also reform remit and powers and provide for appointment of the NIPSO on the nomination of the Assembly and for the NIPSO to report to the Assembly and Assembly Committees.

OPTIONS CONSIDERED

General Approach -

15. The Ombudsman and Commissioner are creatures of statute and bringing forward a bill is the only option open to the Committee to update and reform the existing offices. The Committee's public consultation 2010 sought views on whether the people of Northern Ireland would be more effectively served if a single Ombudsman's office were established and this was widely welcomed. Rather than update and amend the existing legislation, the Committee agreed that a bill to create a new single office, merging and reforming the existing offices, was the best way forward. Where differences in the 1996 Orders required a policy choice to be made the Committee's approach has been, where possible, to "level up" in terms of the powers and remit of the NIPSO and the remedies available to a complainant. In addition to combining the two offices, the main policy options considered by the Bill are outlined below.

Relationship with the Northern Ireland Assembly

16. The Committee regards the role of the Ombudsman/Commissioner in investigating complaints of maladministration in public services as closely aligned with the work of the Assembly and its committees in holding ministers, departments and ALBs to account. This position informed the Committee's thinking in developing its policy as did the relationship of the Comptroller and Auditor General (C&AG) with the Assembly.

Independence

17. The Committee considers that a number of its specific proposals tend to bolster the independence of the new office. In the development of the draft Bill the Committee noted that the Northern Ireland Act 1998 ('1998 Act') provides in relation to the C&AG:

> [Section 65]
>
> *(3)The Comptroller and Auditor General for Northern Ireland shall not, in the exercise of any of his functions, be subject to the direction or control of any Minister or Northern Ireland department or of the Assembly; but this subsection does not apply in relation to any function conferred on him of preparing accounts.*

The Committee considers that an express declaration on the face of the Bill will further emphasise the independence of the NIPSO and that it should also, as in the case of the C&AG, provide clarity about any limits on that freedom from direction and control.

Financial accountability

18. The Committee noted that the 1996 Orders provide OFMDFM with the power to approve the expenses of the existing offices and the number of staff.

19. The Committee considers that the relationship of the C&AG with the Audit Committee (established under section 66 of the 1998 Act) in terms of considering the C&AG's budget estimate provides a suitable model of financial accountability for the new office - one better aligned to the role of NIPSO in that it avoids any appearance of a conflict of interest which might arise where a body which the NIPSO can investigate has responsibility for approving the NIPSO's expenses. The Committee considered transferring a range of approval powers to the Assembly Commission but concluded that it should be left to the NIPSO to manage his or her own budget and then account, via the Audit Committee, for how it was spent.

20. Accordingly the Bill provides for the NIPSO to submit his or her budget estimate to the Audit Committee which would consider and lay it in the Assembly. The Committee noted the Memorandum of Understanding which the Audit Committee and the C&AG have agreed. The Committee considers that this not only provides a useful framework for settling the C&AG's estimate but also provides for the Audit Committee to be briefed on the C&AG's corporate plan. The Committee would welcome a similar approach in relation to the NIPSO. The Committee will explore with the Finance Committee and the Audit Committee the option of a memorandum of understanding with the Department of Finance and Personnel in relation to the budget estimates of the C&AG and the NIPSO.

Recruitment

21. Responsibility for identifying a candidate for nomination for appointment to the existing offices lies with OFMDFM. The Committee's 2010 consultation envisaged this taking place under the auspices of the Assembly Commission and a clear majority of those responding supported this approach. No issues were raised in relation to this approach in OFMDFM's response to the 2102 key stakeholder consultation.

22. The Committee considered a role for an Assembly committee in the recruitment/selection process but eventually decided against this approach as the final nomination decision lies with the Assembly as a whole.

23. The Committee considers that by providing for the Assembly Commission to identify the best candidate by fair and open competition the Bill reflects the alignment of the roles of the NIPSO with the Assembly and its committees in holding the Departments and other public bodies to account.

Formal Appointment

24. The 1996 Orders do not provide any role for the Assembly in appointments to the existing offices.

25. The Committee considered a number of different mechanisms for formal appointment to the office, including the current mechanism of appointment by Her Majesty, appointment by Her Majesty on the nomination of the Assembly, appointment by the Assembly on its own or appointment by the Assembly Commission. Responses to the public consultation reflected a range of views.

26. In reaching a decision the Committee noted that the Scottish and Welsh ombudsmen are appointed by Her Majesty on the nomination of the respective legislatures and that the Irish Ombudsman is appointed by the President on recommendation by resolution passed by Dáil Éireann and by Seanad Éireann. The Committee also noted that the 1998 Act provided for the C&AG to be appointed by Her Majesty on the nomination of the Assembly.

27. The Committee agreed by majority that the Bill should provide for appointment by Her Majesty on the recommendation of the Assembly.

Term of office

28. Appointments to the existing offices are permanent (subject to retirement) as opposed to for a fixed term. The Committee consulted on a seven year fixed term appointment in line with current practice for many public appointments. The majority of responses favoured this approach.

29. The Committee considers that a seven year term will ensure that the NIPSO outlives the Assembly that nominates him or her and will be long enough to enable the office holder to have a real impact. The Committee also considers that appointment for single term will bolster the NIPSO's independence as there will be no prospect of re-appointment for a second term.

30. The Committee noted the requirement in the 1998 Act that removal of the C&AG could only be recommended on foot of a resolution of the Assembly requiring the "*the support of a number of members of the Assembly which equals or exceeds two thirds of the total number of seats in the Assembly*." The Bill makes similar provision in relation to the removal of the NIPSO.

Salary

31. The Committee's consultation sought views on the linking of salary to judicial pay scales. While a majority of consultees responding were in favour of such a link the Committee noted the wide range of salaries paid to different ombudsmen in the UK and Ireland and is mindful that the level of salary needs to be such as to attract suitably qualified candidates of the right calibre while also representing value for money in light of comparable office holders discharging similar responsibilities. Accordingly, the Bill provides that the Assembly Commission should set the NIPSO's salary.

32. The Committee accepted OFMDFM's suggestion in the consolidated response to the 2012 key stakeholder consultation that the salary should be subject to an upper limit

of the maximum payable in the Northern Ireland Civil Service and the Bill provides accordingly.

33. The Bill provides that the NIPSO's salary be paid directly out of the Consolidated Fund and not be subject to the annual estimates process, as is the case with the existing offices.

34. The recommendation of the Minister of Finance and Personnel is required for charges on the Consolidated Fund and the Committee sought and obtained the Minister's recommendation.

Conflicts of interest

35. The Committee considered a range of measures to prevent conflicts of interest arising in terms of eligibility for appointment and restricting, for a period of time, the freedom of an ex-NIPSO to take up appointments with bodies within his or her remit. The Committee's key stakeholder consultation sought views on such restrictions and the Committee decided to adopt measures to provide flexibility where the Assembly Commission considered that restrictions could be waived.

36. The Committee was of the view that the Assembly Commission should be a body within the remit of the NIPSO but was mindful that the role of the Commission in identifying a candidate for nomination by the Assembly and deciding whether to vary the restrictions on an ex-NIPSO subsequently taking up appointments with listed authorities, could also create a potential conflict of interest.

37. The Committee considers that the Commission is well placed to manage any conflict of interest by virtue of its composition and through the engagement of independent expertise where appropriate and liaison with the Commissioner for Public Appointments.

38. The Committee is satisfied that the Commission can set the NIPSO's salary and other terms and conditions prior to appointment and that this will not create a conflict. Thereafter, the final decision to seek removal for ill health or misconduct will be a matter for the Assembly.

Name of the office

39. The Committee preferred that the new office should be known as the Northern Ireland Public Services Ombudsman (NIPSO) as opposed to Public Services Ombudsman for Northern Ireland (PSONI).

40. During the drafting of the Bill the Committee decided to replace Ombuds**man** with Ombuds**person**. However, in light of further research on the origins of the term "Ombudsman", the Committee agreed to support the Ad Hoc Committee's amendments to revert to "Ombudsman" at consideration stage and further consideration stage.

Bodies within the Remit of the NIPSO

41. In terms of the range of public bodies within remit the Committee did not propose removing bodies currently within the remit of the existing offices. The Committee considered whether bodies within remit should be listed in schedules as under the existing legislation or whether the principle of "following the public pound" should be used. The Committee considers that a schedule of bodies within remit provides certainty.

42. The Committee consulted on an extension of remit to include universities, institutions of further education and schools. The Minister for Employment and Learning was content for Further Education institutions to come within remit but wished to review the complaints mechanism of universities prior to their coming within the NIPSO's remit. However, the Committee, while welcoming the review, agreed that complaints of maladministration from students or former students should be made to the NIPSO and that university visitors would continue to deal with other categories of complaint. The Bill also makes explicit that the NIPSO has no jurisdiction to investigate a matter to the extent that it relates to a matter of academic judgement.

43. During the drafting of the Bill the Committee noted that students of the Open University in Northern Ireland already have access to the Office for the Independent Adjudicator for Higher Education. The Committee considered that different approaches to complaints handling for OU students in different jurisdictions was undesirable and therefore only Queen's University of Belfast and the University of Ulster will be brought within the NIPSO's remit. References to a university will included a constituent college, school or hall or other institution of a university but only students enrolled in courses provided or validated by the university will be able to complain to the NIPSO.

44. The Minister for Education raised concerns that the role of existing mechanisms (such as the Special Educational Needs and Disability Tribunal) to resolve complaints would be undermined by the role of the NIPSO. However, following engagement between departmental officials and the Ombudsman's office, the Minister was content that complainants would, as at present, normally be required to exercise any right of appeal to a tribunal, before the NIPSO would accept a complaint.

45. The Committee also considered the Minister's suggestion that privately funded schools also be brought within the remit of the NIPSO. However, the Committee was mindful that it was proposing a "Public Services" ombudsman bill and concluded that bringing privately paid for services within the remit of a public services ombudsman was beyond the scope of its policy proposals.

46. The Committee also agreed, following input from the Audit and Public Accounts committees, that the C&AG should come within the NIPSO's remit. The C&AG welcomed this proposal.

47. The Assembly Commission was content that it comes within the NIPSO's remit. The Committee also agreed to add the General Teaching Council for Northern Ireland and the Police Rehabilitation and Retraining Trust to Schedule 3 to the Bill (at the request

of the Council and Department of Justice respectively) and to remove the Rural Development Council, at the request of Department of Agriculture and Rural Development.

Matters which may be investigated

48. The Committee consulted on a number of changes to the matters which the existing offices are empowered to investigate.

49. **Public Procurement -** the Committee noted that the Commissioner is free to consider complaints about procurement carried out by public bodies other than government departments. On the other hand the power of the Ombudsman to investigate procurement by Northern Ireland departments is limited to the process leading up to the decision to award a contract - not the award decision itself. The Committee proposed that the NIPSO enjoy the same remit in such cases as the Commissioner.

50. The Committee noted the objections of the Minister of Finance and Personnel to any change in the position regarding procurement by Northern Ireland departments in his response to the Committee's July 2012 key stakeholder consultation but also noted that the response did not highlight any problems with the operation of the same provisions by the Commissioner. On the other hand the Committee's proposal was welcomed by the Committee for Finance and Personnel.

51. The Bill provides (by omission of the restriction in schedule 4, paragraph 5 to the Ombudsman Order) that the NIPSO may investigate procurement complaints in relation to all listed authorities on the same basis as currently provided for in the Commissioner Order.

52. **Public sector employment -** the Committee noted the account of this remit set out in the report of the Deloitte Review and the Ombudsman/Commissioner's evidence to the Committee that the remit was originally intended to provide a means of addressing complaints of discrimination in public sector employment. The Deloitte Review noted the range of anti-discrimination mechanisms which have developed since 1969 and recommended that public sector employment issues be removed from the NIPSO's remit.

53. The Committee consulted on this proposal and while responses were predominantly in favour of removal of the remit the Committee also considered the responses from organisations suggesting caution.

54. While the Committee is mindful of the original rationale for the remit it considers that there are now in place sufficient alternative mechanisms for redress of alleged discrimination available to public sector employees. The Committee considers that the core element of the role of a public services ombudsman is to provide redress to members of the public in their capacity as the recipients of public services.

55. **Professional judgement in social care** - The Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997 provides that complaints about a range of health care providers can encompass issues of clinical judgement without any need to

first establish that there has been maladministration - in all other areas the existing legislation prevents the questioning of the merits of a decision taken without maladministration.

56. Complaints about the exercise of professional judgement in the field of social care may not be considered by the Commissioner unless it is first established that there has been maladministration. The Committee also noted that health and social care in Northern Ireland are jointly delivered by Health and Social Care Trusts.

57. The Committee consulted on this issue and responses highlighted the different approach in relation to clinical judgement and risk of confusion/overlap with the role of other oversight bodies. The DHSSPS response to the Committee's key stakeholder consultation in July 2012 raised a concern that many staff providing social care did not hold professional qualifications.

58. The Committee considers that complaints about the exercise of professional judgement in relation to social care should be dealt with on the same basis as complaints about the exercise of clinical judgement.

59. In relation to staff engaged in social care who are not professionally qualified the Committee is content that framing the relevant provision by reference to "the exercise of professional judgement" (a similar approach has been taken in Wales) would be understood to apply to the exercise of professional judgement by staff required to hold a particular professional qualification as a condition of their particular post. The Committee also agreed to adopt the approach of simply referring to "professional judgement" in health and social care to include "clinical judgement".

Making a Complaint

60. **Rights of appeal or legal redress a bar to investigation - t**he Committee is content to retain the bar on investigation in such cases on the basis that the mechanisms for redress provided by statute or by the courts should normally be used. However, this is on the basis that the Bill provides the NIPSO with the same discretion the existing offices enjoy, namely to accept a complaint where the NIPSO is "*satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort to or have resorted to* [a tribunal or court]."

61. **Role of MLAs** - the Committee noted that while the Commissioner may receive complaints directly from the public, a complaint to the Ombudsman must be made via an MLA. The Committee consulted on allowing the person aggrieved to complain directly to the NIPSO in all cases. There was overwhelming support for this approach and the Bill provides accordingly while making specific provision for MLAs to represent persons aggrieved.

62. **Aggrieved person's representative** - the Committee's proposal to permit persons other than MLAs to represent complainants was broadly welcomed in consultation responses and is reflected in the Bill subject to a requirement, in certain cases, that the NIPSO be satisfied that the representative is an appropriate person.

63. **Residency requirement for complainants** - the Committee consulted on removal of the 'residency requirement' for complainants and agreed to remove the requirement. In terms of the connection of complaints and complainants to a particular jurisdiction the Scottish legislation retains a residency requirement but the more recent Welsh legislation does not. The Committee also considered retaining the requirement in the 1996 Orders that the complaint relate to action taken in relation to the person aggrieved while he was present in Northern Ireland or in relation to rights or obligations which accrued or arose in Northern Ireland. In light of advice the Committee is satisfied that sufficient connection between a complainant and rights or obligations arising in Northern Ireland is established by the Bill providing that complaints can only be made about action taken by listed authorities and that those authorities only have functions which relate to Northern Ireland[2].

64. **Time limits for making complaints and "signposting" the NIPSO** - the Committee considers that it desirable that complaints to the NIPSO should be made as soon as possible after the conclusion of the listed authority's own complaint's procedure - while the best evidence was available. The Bill reduces the current time limit within which complaints must be made to 6 months from the conclusion of the internal complaints process rather than the current 12 months.

65. To ensure that complainants are aware that they may be entitled to refer a complaint to the NIPSO the Bill requires listed authorities to give notice in writing to complainants that the internal process has concluded, inform them that they may refer the complaint to the NIPSO and how to do so. The Bill also retains the discretion for the NIPSO to accept complaints outside the 6 month time limit "*if there are special circumstances which make it proper to do so"*. The NIPSO has a similar discretion to accept referred complaints received outside the prescribed time limit and complaints received before the internal complaints procedure has been exhausted.

Investigation of complaints referred by listed authorities

66. The majority of responses to the Committee's consultation on this issue favoured allowing listed authorities to refer complaints to the NIPSO. The Ombudsman was content on the basis that NIPSO had discretion as to whether to accept referred complaints. The Committee also considered the approach in Scotland, which requires that there has been a public allegation of injustice. The Committee noted the existing provision for referral by health bodies and was informed by the Ombudsman's office this had not been used. The Committee considers that the option of referral could be of benefit where a listed authority has been unable to resolve a complaint and trust and confidence has broken down to such an extent that completion of the internal complaints procedure is unlikely to produce any resolution. The Committee is content that NIPSO discretion will avoid any abuse of the referral option and that the provision for referral should encompass all listed authorities.

[2] Other than North South Implementation Bodies - in relation to these the Bill provides that they are listed authorities only to the extent that they exercise functions in or as regards Northern Ireland.

Investigation on NIPSO's own initiative

67. The Committee's consultation noted that a power of own initiative investigation did not exist in any UK ombudsman legislation. The Committee is aware that such a power is available to the Irish Ombudsman. Responses on the merits of a proposal to provide such a power were divided. Concerns raised included the danger of overlap with the remit of other bodies and the diversion of resources from addressing citizen's complaints. The Committee concluded that this could be a useful additional power provided it was directed at suspected systemic maladministration across one or more organisations. The Bill provides for own initiative investigation but will require the NIPSO to publish, and have regard to, the criteria to be used in determining whether to launch an own initiative investigation. The Bill will also require the NISPSO to prepare an investigation proposal and share that with the authority or authorities it is proposed to investigate. The Committee considered provision to require the NIPSO to submit the proposal to the Audit Committee and respond to any issues it raised and sought the views of the Audit Committee. The Audit Committee highlighted the Memorandum of Understanding which it has entered into with the C&AG by which it considers not only the C&AG's budget estimate but also the business plan. The Committee is content that a similar role in relation to the NIPSO will provide sufficient oversight of the use of the power of own initiative investigation. The Bill also provides for consultation and co-operation to help ensure that the NIPSO can liaise effectively with other investigatory and regulatory bodies and avoid any duplication of investigation and waste of resources.

Consultation and cooperation

68. There was overwhelming support for cooperation and information sharing with other ombudsmen in the UK and Ireland in response to the Committee's consultation. The NIPSO Bill provides that if at any stage in the course of considering a complaint or conducting an investigation, the NIPSO forms the opinion that the matter could be the subject of an investigation by a UK or Irish Ombudsman (in relation to North/South implementation bodies) or another relevant body then the NIPSO must consult that body and may cooperate with it. The other relevant bodies are the Commissioner for Children and Young People for Northern Ireland, the Commissioner for Older People for Northern Ireland, the Equality Commission and the Northern Ireland Human Rights Commission ('Human Rights Commission'). During the passage of the Bill the Committee agreed to add the C&AG, the local government auditor and the Regulation and Quality Improvement Authority to the list of bodies.

Investigation of complaints

69. **Privileged information** - The Ombudsman Order provides that bodies within the Ombudsman's remit cannot rely on privilege which would be allowed by law in legal proceedings as grounds for the non-production of relevant documents. The Committee wished to make equivalent provision for the NIPSO in respect of documents held by any listed authority. It also wished to ensure that that the right of the listed authorities to assert privilege in legal proceedings was unaffected. Accordingly, the Bill provides that relevant privileged documents are to be disclosed by a listed authority to the NIPSO but

the contents of those documents are not be disclosed in the NIPSO's report, nor can such documents be relied on in county court proceedings against a listed authority.

70. **Obligations of confidentiality or secrecy** - the Ombudsman Order provides that any obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to persons in the service of the Crown shall not apply to the disclosure of information to the Ombudsman. The Committee considers that the NIPSO Bill should make the same provision in relation to disclosure of information held by the Crown to the NIPSO.

71. **Investigation procedure -** The Commissioner Order currently provides an automatic right to a hearing with counsel and solicitor, examination and cross-examination of witnesses, in certain circumstances; namely, where it appears to the Commissioner that there are grounds for making a report or recommendation that may adversely affect any body or person. The Committee does not consider that this right would be necessary in every NIPSO investigation. Accordingly, the Bill provides that the procedure for conducting an investigation should be such as the NIPSO considers appropriate and, in particular, that the NIPSO may "*determine whether any person may be represented in the investigation by counsel, solicitor or otherwise*".

72. **Evidence gathering powers and notices prohibiting disclosure of information** - The NIPSO, like the existing offices, will have powers analogous to the High Court in relation to the attendance of witnesses and the production of documents. The 1996 Orders provide a power for the Secretary of State and heads of departments to serve a notice on the existing offices effectively prohibiting them from disclosing information or documents which would in the opinion of the Secretary of State or heads of department be prejudicial to the safety of Northern Ireland or the United Kingdom or otherwise contrary to the public interest. In merging the offices the Committee considered it appropriate that the NIPSO Bill should refer to Northern Ireland Ministers rather than "head of department" to avoid confusion with the permanent secretary of a department. On the substantive point of whether or not to retain such a power the Committee agreed by a majority to retain it. Accordingly the Bill provides that the Secretary of State or Northern Ireland Ministers may issue such notices. The Committee considered a request from the Secretary of State for a mechanism in the Bill to help inform her decisions regarding exercise of this power. The Committee agreed by a majority that this mechanism would be a memorandum of understanding to be agreed between the Secretary of State and the NIPSO concerning the exercise of their functions in relation to clause 50 which would be laid before the Assembly.

73. **Requirement for public bodies to provide facilities to the NIPSO -** The Committee consulted on a provision in the Welsh legislation which requires bodies being investigated to provide any facility which the Ombudsman may reasonably require, such as access to a photocopier where the NIPSO is on the listed authority's premises. Responses to this were positive and the Bill makes this provision.

74. **Defamation -** the existing office holders enjoy protection from claims of defamation in respect of publication by them of matters required or authorised to be

published under the existing legislation. The Ombudsman Order extends this protection to MLAs in relation to communications with the Ombudsman. The Committee considers that the protection available to MLAs in communications with the Ombudsman should be available to the person aggrieved (or a person acting on his or her behalf) for publication, in the course of communication with the NIPSO, of any statement made by the person aggrieved in connection with the investigation and the Bill provides accordingly.

Securing redress for the person aggrieved

75. **Alternative resolution of complaints -** The 1996 Orders provide that the purpose of an investigation includes effecting a settlement of the matter where it appears to the Ombudsman or Commissioner to be desirable. The Committee noted that the Welsh Ombudsman legislation makes specific provision for action short of conducting an investigation to resolve a complaint. The Committee considered that such provision would enhance the NIPSO's ability to achieve an early, cost-effective resolution of complaints instead of or in addition to conducting a formal investigation. Accordingly, the Bill provides that the NIPSO may take any action which the NIPSO considers appropriate with a view to resolving a complaint.

76. **Purposes of an investigation - Resolution -** the NIPSO Bill will provide that the purposes of an investigation are as follows:

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 Ombudsman 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,

Where it appears to the NIPSO to be desirable to do so, he or she may seek to bring about a settlement in relation to the complaint. This may include making recommendations for action to be taken and/or a payment to be made to the person aggrieved. In the vast majority of cases under the 1996 Orders a settlement is achieved or the listed authority complies with the recommendation of the Ombudsman or the Commissioner and the Committee does not expect this to change. However, where a listed authority does not comply with the NIPSO's recommendation the Bill provides for a range of options set out below.

77. **Special Report to the Assembly** - the Ombudsman Order currently provides that the Ombudsman may lay a special report before the Assembly where injustice has been sustained by a person as a result of maladministration and that injustice has not been, or will not be, remedied. The Assembly's standing orders may provide for the handling of such special reports but it is envisaged that the report would be considered by an appropriate committee and the listed authority would be asked to account for its actions. The Committee considered that this option should be open to the NIPSO in relation to all listed authorities.

78. **County court mechanism** - In its 2010 public consultation the Committee sought views on the mechanism in the Commissioner Order which allows a complainant who has been found by the Commissioner to have suffered injustice as a result of maladministration to apply to the county court for damages. There is no such provision in the Ombudsman Order. A clear majority of responses favoured removal of the county court mechanism as did the Commissioner, who felt that generally where the moral suasion of an ombudsman's report was not sufficient to secure a remedy for the complainant the next step should be a report to the relevant legislature.

79. The Committee was aware that relatively little use has been made of the county court mechanism and that as a general rule the authorities within the remit of the Commissioner complied with the Commissioner's recommendations. The Committee was, however, reluctant to remove a mechanism for redress from complainants in circumstances where there had been a finding of injustice and was also mindful that the county court mechanism may have contributed to the high level of compliance with the Commissioner's recommendations.

80. The Committee took oral evidence on this specific issue from the Commissioner who acknowledged some ambivalence on removing or retaining the mechanism. The Committee noted that the mechanism had not created any particular difficulty for the Commissioner in terms of a more litigious approach by the parties generally or a significant number of applications to the county court. On balance the Committee considered it was better to retain the mechanism.

81. The Committee also noted that the option for complainants to apply to the county court on foot of a Commissioner's report only exists in relation to complaints about the bodies listed in Schedule 2 to the Commissioner Order. This includes health and social care bodies (Health and Social Care Trusts) but not general health care providers (such as GP and dental practices) and independent health care providers (such as residential care providers). The bill reflects the Committee's view that where the NIPSO finds a complainant has suffered injustice he or she should have the right to apply to the county court and this should apply to all bodies within the NIPSO's remit.

82. **High Court application by the Attorney General** - The Commissioner Order provides for the Commissioner to request the Attorney General for Northern Ireland ('the Attorney General') to make an application to the High Court in certain cases - specifically where the Commissioner believes a body has engaged in conduct amounting to maladministration and is likely to engage in such conduct again. The High Court may grant such mandatory or other injunction or such declaration or other relief as appears to the court to be proper in all the circumstances.

83. The NIPSO Bill provides that where, following an investigation, the NIPSO is of the opinion that there is systemic maladministration, or systemic injustice in professional judgement cases, and that it is likely to continue unless the High Court intervenes to prevent it, then the NIPSO may request the Attorney General to make an application to the High Court.

84. The NIPSO may come to the view that there is systemic maladministration or systemic injustice as a result of the investigation of an individual complaint or as the result of conducting an own initiative investigation.

85. **Investigation reports and publication in the public interest** - The Committee consulted on extending the duty to send investigation reports to the complainant, the body concerned and any person alleged to have taken or authorised the action complained of or is otherwise involved in the allegations. Responses indicated broad support for the approach taken in Wales which requires body to publicise reports by advertisement. However the Committee considered that the confidential nature of the investigation and distribution to those immediately involved in the complaint encouraged open and frank engagement and greater publicity may be a corresponding disincentive. In response to submissions from the Ombudsman the Committee agreed that the Bill should provide a power to publish a report in the public interest, having given notice to the parties. The need for redaction and protection of identity would be assessed on a case by case basis.

86. The various mechanisms described at paragraphs 75-85 above are not mutually exclusive but complementary; more than one mechanism can apply depending on the facts of each situation.

87. **Complaints standards authority role** – The Committee had consulted on a design authority role for the NIPSO but decided in 2011 not to pursue it further. The Public Services Reform (Scotland) Act 2010 introduced a complaints standards authority role for the Scottish Ombudsman and during the committee stage of the NIPSO Bill the Committee considered this issue again in light of submissions and evidence to the Ad Hoc Committee. The Scottish Ombudsman's submission to the Ad Hoc stated of his Complaints Standards Team which implemented the changes:

> **"***This small team, working collaboratively with many others across the public services in Scotland, have arguably had greater impact on the day to day relationship between the pubic and public services than any other initiative undertaken by this office***."**

88. The Ad Hoc Committee also sought the views of the Ombudsman on the proposal who advised that his office's research suggested the need for common complaints standards principles and procedures across the public sector in Northern Ireland. He believed that a complaints standards role for the NIPSO would not only facilitate the development of complaints handling in Northern Ireland but would allow the Assembly and the Executive to make meaningful comparisons of the performance of bodies in each sector**.**

89. In light of the broad support for the proposal the OFMDFM Committee agreed to bring amendments introducing clauses 34 to 42 making provision for the NIPSO to establish principles of complaints handling and issue model complaints handling procedures with which listed authorities' procedures must comply. While the cost of introducing these changes in Scotland was relatively modest the Committee agreed to leave commencement of these provisions to the Assembly Commission in light of current

and ongoing financial constraints – with the hope that they will be commenced as soon as the necessary resources can be found**.**

Northern Ireland Judicial Appointments Ombudsman (NIJAO)

90. In April 2013 the Department of Justice ('DoJ') wrote to the Committee following up on a previous response to the Committee's key stakeholder consultation:

> *'This is to advise that the Minister of Justice has now decided that he wishes to ask the Executive to agree that the NIJAO should remain as a separate statutory office but that the functions should be carried out by the proposed new Northern Ireland Public Services Ombudsman. He also wishes to retain specific disqualifications that currently apply to the NIJAO, but only in relation to investigations of judicial appointments complaints. This would be achieved by providing that, should the Public Services Ombudsman be so disqualified, he or she should delegate such investigations to an appropriate person (eg. the Deputy Ombudsman or another ombudsman from a different jurisdiction) who is not disqualified. As far as possible, we do not wish to disturb the NIJAO's existing powers, duties and responsibilities, which are provided for in the Justice (Northern Ireland) Act 2002.'*

91. DoJ requested that the Committee agree to carry the necessary provisions to introduce this change in the NIPSO Bill. The Committee for Justice wrote on 25 March 2013 to advise that it had been briefed on the Minister's proposals and was content.

92. The Committee was briefed at its meeting on 22 May 2013 by DoJ officials on the NIJAO functions and the disqualification of lawyers, persons who have held judicial office and persons who have been engaged in political activity as a member of a political party, from appointment as NIJAO. The Committee raised a number of issues with DoJ officials including the parameters of political activity. The Ombudsman's evidence to the Committee was broadly supportive of the DoJ proposals noting that the roles were analogous in terms of responsibility for investigating maladministration.

93. Further correspondence with DoJ confirmed that any restrictions applicable to the NIJAO would not prevent the holding of the office of NIJAO by, for example, a lawyer but would require delegation of investigation of complaints to a non-lawyer. DoJ's response also clarified its understanding of how 'political activity' would be interpreted and that it would require more than merely being a member of a political party. In terms of annual reporting/accountability the NIJAO currently provides an annual report to the DoJ and DoJ lays that report before the Assembly. DoJ proposed that the annual report would be provided directly to the Assembly.

94. On this basis the Committee is content with the policy. In light of agreement between the Ombudsman and DoJ regarding reallocation of budget to enable the NIPSO to discharge the NIJAO function the Committee agreed to amend the Bill to remove DoJ's responsibility for the expenses of the NIJAO. The Committee agreed that the NIJAO's annual report should be provided to the Assembly but that the current power to direct the NIJAO to deal with specified matters in the annual report should be removed.

95. The Department of Justice has provided the following paragraphs (96-105) in relation to the development of its policy regarding the NIJAO.

BACKGROUND AND POLICY OBJECTIVES

96. The *policy in relation to the Northern Ireland Judicial Appointments Ombudsman (NIJAO) arises from the Northern Ireland Executive's review of arm's-length bodies that was announced by the Minister of Finance and Personnel in 2010. As part of this review, the Department of Justice identified the NIJAO as an office that should be subject to review.*

97. *The NIJAO's role is to investigate complaints from applicants for judicial appointments in Northern Ireland, where maladministration is alleged. The NIJAO also has a power, having consulted the Lord Chief Justice, to convene a tribunal to remove a judicial office-holder (and must be consulted by the Lord Chief Justice, if the Lord Chief Justice wishes to convene such a tribunal) and is responsible for selecting a lay member of the Northern Ireland Judicial Appointments Commission to sit on such a tribunal.*

98. *Since the office of NIJAO was established in 2006, there have been six complaints of alleged maladministration (an average of fewer than one per year), and the powers in relation to the convening of a removal tribunal have been exercised only once. The low volume of complaints was the primary reason for including the NIJAO as part of the review of arm's-length bodies. The purpose of the review was not to change the functions of the NIJAO, but rather to examine how efficiency might be improved through alternative ways of delivery.*

99. *The Department completed its review in December 2012 and concluded that the office of the NIJAO should be held by the proposed NIPSO.*

100. *One issue – in relation to eligibility – arose from this policy decision. Some disqualifications that currently apply to the NIJAO were not proposed to apply to the NIPSO. These are the disqualification of lawyers, former judicial office-holders and persons who are engaged in political activity as a member of a political party. It was decided that, in the interests of maintaining confidence in the independence of the office of NIJAO, these disqualifications should be retained in relation to judicial-appointments complaints. The policy, therefore, is that, in the event that the person appointed as NIPSO is so disqualified in relation to judicial-appointments complaints, he or she should delegate such investigations to a person not so disqualified (e.g. the deputy NIPSO, a senior investigating officer or an ombudsman from another jurisdiction).*

101. *The policy in relation to the NIJAO was agreed by the Northern Ireland Executive on 7 November 2013.*

CONSULTATION

102. *The Department of Justice consulted the following about policy in relation to the NIJAO: the NIJAO, the Northern Ireland Ombudsman, the Lord Chief Justice of Northern Ireland, the Northern Ireland Judicial Appointments Commission, the Law*

Society and the Bar Council. The Northern Ireland Ombudsman, the Lord Chief Justice and the Northern Ireland Judicial Appointments Commission were all content with the proposal. The NIJAO accepted the need to look at rationalisation, but queried the fit with the NIPSO. The Law Society preferred the NIJAO to remain as a separate appointment and the Bar Council did not respond.

103. *The Department also consulted the Assembly Committees for Justice and for the Office of the First Minister and deputy First Minister. Both Committees were content with the policy proposals.*

OPTIONS CONSIDERED

104. *The review considered three options: (i) the status quo, (ii) combining with the NIPSO and (iii) combining with other justice ombudsmen.*

105. *Combining with the NIPSO was favoured because:*

- *the roles of both ombudsmen are complementary as they both relate to investigating complaints of maladministration;*
- *the proposed NIPSO will have a large resource of relevant investigative skills and expertise; and*
- *the NIJAO will remain statutorily distinct and thus counter any perception that the role is being* diminished**.**

COMMENTARY ON CLAUSES

Part 1: The Northern Ireland Public Services Ombudsman

106. Part 1 of the Bill establishes the office of the NIPSO and sets out how it is constituted.

Clause 1: The Northern Ireland Public Services Ombudsman

107. This clause provides that there is to be a Public Services Ombudsman. Schedule 1 sets out the administrative details about the NIPSO and provides that the NIPSO is to be a corporation sole. The main function of the NIPSO is to investigate alleged maladministration in government, public and quasi-public bodies (these are collectively referred to as listed authorities and the full list of them is contained in Schedule 3).

Clause 2: Independence

108. The NIPSO is independent of government. There are some exceptions to this, for example the Assembly Commission sets the NIPSO salary and other terms and conditions; the Assembly may request that the NIPSO be removed from office and the NIPSO is accountable for his or her budget.

Clause 3: Appointment

109. The Assembly and the Assembly Commission are responsible for determining who is nominated for appointment as the NIPSO. The formal appointment is by the Her Majesty. Appointment is for a single seven year term. Schedule 1 sets out how the NIPSO may leave office.

Clause 4: Abolition of existing offices

110. As a consequence of the establishment of the NIPSO, the existing offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints are abolished. Those offices were regulated by the Ombudsman (Northern Ireland) Order 1996 and the Commissioner for Complaints (Northern Ireland) Order 1996. Both these Orders are repealed by this Bill. Schedule 2 sets out how the staff, assets and liabilities of those existing offices are transferred to the office of the NIPSO.

Part 2: Investigations

111. The main power of the NIPSO is to investigate listed authorities. Part 2 sets out how this power is to be used. Part 2 is further sub-divided into several cross headings. The first cross heading deals with the power of the NIPSO to investigate. The second cross heading deals with the authorities who can be investigated. The third cross heading deals with the subject matter which can be investigated. The next three cross headings set out the different procedures involved for each different type of investigation. The final cross heading sets out the way in which investigations must be conducted.

Clause 5: Power to investigate complaints made by a person aggrieved

112. The key investigatory power is the power to investigate a complaint made by a member of the public. Clause 5 is a framework clause. It sets out the key criteria for the exercise of this power and points to the other clauses where the details on those criteria may be found. The key criteria are:

- The complaint is made by member of the public
- The complaint relates to a listed authority
- The complaint must be about maladministration or injustice consequent on the exercise of professional judgement in health and social care
- The correct procedure has been followed

The person making the complaint is referred to as the person aggrieved.

Clause 6: Power to investigate complaints referred by a listed authority

113. The NIPSO can also investigate a complaint referred by a listed authority. Clause 6 is also a framework clause, setting out the criteria and pointing to where the details on those criteria may be found. The key criteria are:

- The complaint made by the person aggrieved to a listed authority
- The listed authority is not able to resolve the complaint

- The complaint is about maladministration or injustice consequent on the exercise of professional judgement in health and social care
- The correct procedure has been followed

Clause 7: Acting on behalf of a person aggrieved

114. Other people can act on behalf of the person aggrieved (for example where the person aggrieved has authorised this, or the person aggrieved cannot act). There is a broad range of people who can act on behalf of a person aggrieved:

- MLAs
- Personal representatives
- Family members
- Others

In some cases, the NIPSO will need to first confirm that the person is suitable to act on behalf of the person aggrieved.

Clause 8: Power to investigate on own initiative

115. This is another key investigatory power – the power for the NIPSO to launch an investigation without waiting for a complaint from a person aggrieved. This is a new power which isn't possessed by the existing offices. The criteria are similar to the criteria for ordinary investigations. The key difference is that the NIPSO can only launch an own initiative investigation where there is a reasonable suspicion of systemic maladministration or systemic injustice (injustice consequent on the exercise of professional judgement in health and social care).

Clause 9: Criteria for own initiative investigations

116. The NIPSO must establish, and haver regard to, further criteria for when to launch an own initiative investigation and publish them.

Clause 10: Alternative resolution of complaints

117. The NIPSO has the flexibility to use alternative methods of resolving complaints made about listed authorities.

Clause 11: Purposes of investigation

118. This clause summarises some of the purposes of an investigation. These are to check if the complaint was justified and how it can be resolved.

Clause 12: Listed authorities

119. A body is a listed authority if it is listed in Schedule 3. This list can be updated by OFMDFM after consultation with the NIPSO and the body in question. A body can only be added to the list if it has some sort of public or governmental dimension.

Clause 13: Meaning of action taken by a listed authority

120. This clause provides that action is taken by a listed authority if it does the action itself, or it is done on its behalf. The NIPSO can also investigate a failure by a listed authority to act.

Clause 14: Matters which may be investigated: general

121. The standard jurisdiction of the NIPSO is to investigate alleged maladministration through action taken in the exercise of administrative functions by listed authorities. Subsequent clauses set out some specialised cases where the jurisdiction is slightly different.

Clauses 15, 16 and 17: Matters which may be investigated - professional judgement

122. Under these three clauses, the NIPSO can also investigate the merits of a decision of a body to the extent that it was taken in consequence of the exercise of professional judgement. This can only be done in the health and social care field, in relation to three specific types of bodies:

- health and social care bodies (see the definition in clause 59),
- general health care providers, and
- independent providers of health and social care.

Clause 18: Matters which may be investigated: universities

123. The NIPSO is given a new power to investigate complaints from students of alleged maladministration through action taken by universities in the exercise of administrative functions. This relates to students enrolled in courses provided or validated by the University of Ulster and Queen's University Belfast. This supersedes the existing power of the visitor of a university to investigate complaints by students. If the NIPSO doesn't have jurisdiction in a matter relating to universities, the jurisdiction of the visitor is unaffected. This clause also contains a transitional provision in subsection (6) to deal with complaints made to the visitor but unresolved before this Bill becomes law.

Clause 19: Administrative functions of staff of tribunals

124. Court proceedings are not subject to the jurisdiction of the NIPSO, see paragraph 4 of Schedule 5. However, clause 19 provides that the NIPSO may investigate some of the administrative work done by staff working in courts or tribunals. Schedule 4 lists these tribunals.

Clause 20: Exclusion: public sector employment

125. This clause and the following two clauses set out some areas where the NIPSO does not have jurisdiction to investigate. Under clause 20, the NIPSO cannot investigate a complaint relating to public sector employment.

Clause 21: Exclusion: other remedies available

126. The NIPSO cannot investigate a complaint if the person aggrieved has a right to take a case to court instead. However, this rule can be waived if the NIPSO thinks it is not reasonable to expect the person aggrieved to take a case to court.

Clause 22: Other excluded matters

127. This clause introduces Schedule 5. That Schedule sets out other instances where the NIPSO does not have jurisdiction.

Clause 23: Decisions taken without maladministration

128. This clause reiterates that the prime function of the NIPSO is to investigate maladministration, save in the cases where the investigation concerns r professional judgement. There is no definition of maladministration in the Bill. There was no definition in previous legislation in Northern Ireland, England, Scotland or Wales on the meaning of maladministration. When the Parliamentary Commissioner Act 1967 was being debated in Westminster Richard Crossman MP made this statement

> "A positive definition of maladministration is far more difficult to achieve. We might have made an attempt in this Clause to define, by catalogue, all of the qualities which make up maladministration, which might count for maladministration by a civil servant. _ It would be a wonderful exercise—bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on. It would be a long and interesting list." (HC Deb 18 October 1966 vol 734 cc42 – 172)

129. This has become known as the Crossman catalogue and is normally taken to be a fair summary of what comprises maladministration.

Clause 24: Complaint handling procedure to be invoked and exhausted

130. This clause and the following three clauses set out the procedure which must be followed for a complaint to be made to the NIPSO under clause 5. Under clause 24, the person aggrieved must first make the complaint to the listed authority and give the authority a chance to resolve the complaint. The NIPSO has discretion to waive this requirement.

Clause 25: Duty to inform person aggrieved about the Ombudsman

131. The listed authority must tell the person aggrieved when they have exhausted the complaints handling procedure, and must also tell the person aggrieved that it is possible to refer the complaint to the NIPSO.

Clause 26: Form and time limit for making complaint

132. It is for the NIPSO to determine the way in which complaints are to be submitted. For example, the NIPSO could allow complaints to be made in writing, by email or online. This could include a special procedure for allowing oral complaints in special circumstances as long as these are subsequently reduced to writing. The ordinary time limit for making a complaint to the NIPSO is 6 months from the day that the complaints

handling procedure has been exhausted. If the NIPSO has decided to accept a complaint which hasn't exhausted the internal complaints handling procedure, the time limit is 12 months from the day that the person aggrieved first became aware of the problem.

Clause 27: Meaning of exhausting the complaints handling procedure

133. Clause 24 states that the complaints handling procedure must be exhausted. Clause 27 sets out how that is done. Normally a complaints handling procedure is exhausted when the listed authority makes a final decision on a complaint.

Clause 28: Procedure for complaint referred to the Ombudsman

134. This clause sets out the time limit for complaints referred to the NIPSO by a listed authority. The NIPSO may waive these time limits if there are special circumstances which make it proper to do so.

Clause 29: Procedure for own initiative investigations

135. The procedure for own initiative investigations is quite different from that for other investigations. The NIPSO must send an investigation proposal to the listed authority. The proposal must state how the criteria for an own initiative investigation have been satisfied.

Clause 30: Investigation procedure

136. This clause sets out how the NIPSO must carry out investigations. It contains procedural rules to ensure that the investigation is fair to all parties. For example, if an allegation is made against a person, that person will have a right to hear that allegation and counter it. The NIPSO has a power to allow parties to an investigation to be legally represented in that investigation. There is also a power to pay expenses or allowances to witnesses.

Clause 31: Information, documents, evidence and facilities

137. The NIPSO is entitled to request documents and seek assistance from the persons being investigated. The NIPSO also has the power to compel people to give evidence or provide documents.

Clause 32: Privileged and confidential information

138. The normal rules on confidential information and legal privilege do not apply for the purposes of the NIPSO investigating a listed authority. Normally, a listed authority could refuse to disclose this sort of information. However, the NIPSO can insist on seeing it in the course of an investigation. There are safeguards for this later on in the Bill. Under clause 47, information subject to legal privilege cannot be included in a report. Under clause 56, this information cannot be used in court proceedings. Clauses 49 and 50 contain further provision on disclosure of information obtained by the NIPSO in the course of an investigation.

Clause 33: Obstruction and contempt

139. It is an offence to obstruct the NIPSO in course of his or her work. This is treated as the equivalent to contempt of court.

Part 3: Complaints Handling Procedure

140. Part 3 establishes the NIPSO as a complaints standards authority modelled on the provisions introduced for the Scottish Ombudsman in the Public Services Reform (Scotland) Act 2010. Clauses 34 to 42 introduce provision for the NIPSO to establish principles of complaints handling and issue model complaints handling procedures with which listed authorities' procedures must comply.

Clause 34: Meaning of complaints handling procedure

141. Clause 34 defines a "*complaints handling procedure"* for the purposes of the Bill as the procedure of a listed authority for examining complaints in respect of matters which the Ombudsman may investigate.

Clause 35: Statement of principles

142. The NIPSO must consult Ministers and others on a draft statement of principles concerning complaints handling procedures and have regard to any representations made. The NIPSO must then lay a draft statement of principles before the Assembly for approval and, subject to that approval, publish it. A similar process applies to any revision of the principles.

Clause 36: Obligation for listed authority to have complaints handling procedure

143. A listed authority must have a complaints handling procedure which complies with the statement of principles.

Clause 37: Model complaints handling procedures

144. The NIPSO may publish model complaints handling procedures (model CHPs) which comply with the statement of principles after consultation with such listed authorities and others as the NIPSO thinks fit. Any revisions must follow a similar process.

Clause 38: Obligation for listed authority to comply with model CHPs

145. Where the NIPSO specifies a listed authority to which a model CHP is relevant then the authority, when notified of this, must ensure that its procedure complies with the model CHP and send a description of its procedure to the NIPSO within 6 months.

Clause 39: Declaration of non-compliance of complaints handling procedure

146. The NIPSO may make a declaration that a procedure doesn't comply with a specified model CHP or with the statement of principles. The NIPSO must give reasons and specify required modifications. A listed authority must re-submit its procedure within 2 months, having taken account of the modifications.

Clause 40: Submission of description of complaints handling procedure; general

147. A listed authority must submit a copy of its complaints handling procedure to the NIPSO within three months of the NIPSO requesting it and such additional information as the NIPSO requests.

Clause 41: Application

148. This clause provides that the duties in in clauses 36 and 38 do not apply where this would be inconsistent with any other statutory provision or where the listed authority lacks the necessary powers to ensure compliance with the duties.

Clause 42: Promotion of best practice etc

149. The NIPSO must monitor the complaints handling practices of listed authorities and identify trends, promote best practice and encourage cooperation and sharing of best practice. Listed authorities must cooperate with NIPSO unless they lack the power to do or doing so would be inconsistent with any other statutory provision.

Part 4: Miscellaneous and General

150. Part 4 contains other miscellaneous provisions about the functions of the NIPSO. It obliges the NIPSO to make reports. It gives the NIPSO protection from defamation proceedings for statements made in exercising the functions of the office. It regulates the disclosure of information by the NIPSO. It obliges co-operation with other ombudsmen. It also sets out the power for the NIPSO or a person aggrieved to apply to a court, following an investigation, in order to remedy any maladministration discovered by that investigation.

Clause 43: Reports on investigations

151. The NIPSO must send a copy of a report on an investigation to the people concerned with that investigation.

Clause 44: Publication of reports on investigations in the public interest

152. The NIPSO may publish a report if it is thought in the public interest to do so. The NIPSO must first consult with any persons that the report is about.

Clause 45: Publication of reports on own initiative investigations

153. If the NIPSO has launched an own initiative investigation, a report on that investigation must be published.

Clause 46: Reports to the Assembly

154. The NIPSO has several reporting obligations to the Assembly. Firstly, the NIPSO must lay an annual report before the Assembly on what the NIPSO has done during the year. Secondly, in a particular case where an injustice has been uncovered by the NIPSO but not remedied, a report on that case can be laid before the Assembly. Thirdly, if an own initiative investigation has been launched, the NIPSO must report on this to the Assembly. Finally, the NIPSO has discretion to make any other reports to the Assembly thought suitable.

Clause 47: Reports and privileged information

155. A report must not disclose the content of information subject to legal privilege.

Clause 48: Privilege for certain publications

156. The NIPSO is protected from defamation proceedings for statements published in connection with the performance of functions under the Bill. A person aggrieved is protected for publication, in the course of communication with the NIPSO, in connection with an investigation.

Clause 49: Disclosure of information

157. Information obtained by the NIPSO is to be kept confidential, save for certain purposes. Those purposes include making decisions about investigations, publishing reports, giving assistance in the prosecution of certain criminal offences, protecting the health or safety of the public, etc.

Clause 50: Disclosure contrary to public interest

158. This clause gives a power to Ministers and the Secretary of State to prevent the NIPSO disclosing information which is not in the public interest. It also requires the Secretary of State and the NIPSO to agree a memorandum of understanding concerning the exercise of their functions in relation to this clause. This memorandum of understanding could make it easier for the NIPSO and Secretary of State to liaise in advance over material which it would not be in the public interest to disclose. The NIPSO must lay a copy of the agreed memorandum, and any revisions to it, in the Assembly.

Clause 51: Consultation and co-operation with other ombudsmen

159. If the NIPSO is investigating something that another ombudsman is investigating, the NIPSO must consult that other ombudsmen. Furthermore, the NIPSO may co-operate with that other ombudsman, for example by disclosing information, working together or jointly publishing a report. This consultation and co-operation only applies where the other ombudsman is one of those referred to in subsection (4). Subsection (4) lists ombudsmen and commissions from Northern Ireland, Scotland, Wales and England. The NIPSO can also work with the Ombudsman from the Republic of Ireland where the investigation concerns a North / South Implementation body.

Clauses 52 and 53: County court applications by a person aggrieved

160. These two clauses grant a person aggrieved the right to apply to the county court for compensation. There must first have been a finding by the NIPSO that the person has suffered an injustice. The action is against the listed authority which has caused the injustice. In addition to ordering compensation, the county court can make any other order it thinks appropriate (for example directing the listed authority to do something to right the wrong). The claim itself must be made by an individual.

Clauses 54 and 55: High Court applications by the Attorney General

161. These two clauses grant the right to the Attorney General to apply to the High Court in cases of systemic maladministration. There must first have been a finding by the

NIPSO of systemic maladministration and a request from the NIPSO to the Attorney General to make this application. Unlike applications to the county court, this type of application is not made by an individual complainant but by the Attorney General. The High Court has the power to order the listed authority involved to do, or not to do a particular thing. Where the matter being investigated relates to professional judgement (see clauses 15, 16 and 17) then rather than looking at systemic maladministration, the test is whether systemic injustice has been sustained as a result of this judgement.

Clause 56: Court proceedings and privileged information

162. Information which is subject to legal privilege (for example lawyer /client advice) cannot be used in any of these two types of court proceedings.

Clause 57: Supplementary provision in relation to court proceedings

163. The court may rely upon what the NIPSO states in any report as being correct, unless there is some evidence to the contrary.

Part 5: Northern Ireland Judicial Appointments Ombudsman

164. This Part only has one clause, **clause 58**. It provides that the office of the Northern Ireland Judicial Appointments Ombudsman is automatically to be occupied by the person who is currently the NIPSO. Schedule 6 sets out more detail on how this is to work in practice.

Part 6: Supplementary Provisions

Clause 59: Interpretation

165. This clause defines terms used elsewhere in the Bill.

Clause 60: Power to make further provision

166. This gives the Assembly Commission power to make further provision in order to give effect to this Bill. The Bill authorises the making of subordinate legislation in several instances.

Clause 61: Orders

167. This clause states what procedure is to be followed in making that subordinate legislation; in particular the degree of control the Assembly has over this process.

Clauses 62 and 63: Consequential amendments

168. As a consequence of the changes made by this Bill, there is a need for a large number of consequential changes to other pieces of legislation. Clauses 62 and 63 together with Schedules 7 and 8 make these changes. These amendments are contained in two separate schedules to make it easier to administer and see the nature of the changes made.

Clause 64: Commencement

169. This clause sets out when the various provisions of the Bill come into operation (i.e. the law comes into effect). The structural provisions of the Bill (things like the title of the Bill, the power to make Orders etc.) and the provisions allowing for the establishment and appointment of the NIPSO come into operation on the day after the Bill is made. The bulk of the Bill then comes into operation on 1 April 2016. At this point, the NIPSO can exercise the main functions of receiving complaints, commencing investigations etc. The NIPSO's remit over further and higher education bodies only comes into operation on 1 October 2016. Remit over grant-aided schools, only comes into operation on 1 April 2017. Part 3 dealing with complaints handling procedure, other than clause 34, will be commenced by order to be made by the Assembly Commission. Finally, the power to investigate on his or her own initiative comes into operation on 1 April 2018.

Clause 65: Repeals

170. As well as the consequential changes discussed above, there are repeals which are also consequent upon the making of this Bill. This clause and Schedule 9 set out those repeals. For example, the legislation regulating the existing offices of the Ombudsman and Commissioner is repealed.

Schedule 1: The Northern Ireland Public Services Ombudsman

171. This Schedule is introduced by clause 1. It sets out the administrative detail of the establishment of the NIPSO. The NIPSO is not an agent of the Crown. There are conditions of eligibility for appointment which prevent the NIPSO from having other jobs or appointments which may conflict with the independence of the office. The Assembly Commission is to determine the salary, with a safeguard that the salary must not exceed the maximum salary payable in the Northern Ireland Civil Service. The Assembly has the power to remove the NIPSO, but only on the grounds of ill-health or misconduct, and only with a two-thirds majority. The NIPSO is restricted for a period in terms of the jobs that can be done after ceasing to be NIPSO. If there is a vacancy, there can be the short term appointment of an Acting NIPSO. The NIPSO can appoint staff and advisers and may delegate functions to staff and, in special circumstances, to other suitably qualified persons. The expenses of the office are to be paid by Act of the Assembly, but the NIPSO must provide budget estimates and accounts each year.

Schedule 2: Transfer of assets, liabilities, staff and other transitional and savings arrangements

172. This Schedule is introduced by clause 4. The main function of this schedule is to transfer the property of the existing offices of the Ombudsman and the Commissioner to the NIPSO. There are also transitional arrangements to govern the handover from the existing offices to the new office. If a person made a complaint to the existing offices but that complaint was not resolved before the establishment of the new office, then the old rules continue to apply, but the NIPSO steps in as the investigator. Provision is also made to ensure a person aggrieved in not disadvantaged, for a transitional period, by the change in the time limit for making a complaint from 12 months to 6 months. Paragraph 12 ensures that the definition of "public appointment" in the Commissioner for Public

Appointments (NI) Order 1995 is not affected by the repeal of the Commissioner for Complaints (NI) Order 1996.

Schedule 3: Listed authorities

173. This Schedule is introduced by clause 12. It lists all the authorities within the NIPSO's remit.

Schedule 4: Tribunals referred to in section 19

174. This Schedule is introduced by clause 19. It lists the tribunals where the NIPSO has jurisdiction in respect of their administrative functions (not their judicial functions).

Schedule 5: Other excluded matters

175. This Schedule is introduced by clause 22. It sets out other areas where the NIPSO does not have jurisdiction. For example, the NIPSO cannot investigate a complaint about public inquiries or court proceedings.

Schedule 6: Amendments consequent upon the Ombudsman being the Northern Ireland Judicial Appointments Ombudsman

176. This Schedule is introduced by clause 58. The Northern Ireland Judicial Appointments Ombudsman (NIJAO) was established and is regulated by the Justice (Northern Ireland) Act 2002. Under clause 58, the NIPSO automatically becomes the NIJAO. This Schedule makes the necessary changes to the 2002 Act consequent upon this. Under the 2002 Act, if a person has ever practised law or held judicial office, the person is ineligible to be the NIJAO. If the NIPSO has this legal background, then he or she is ineligible to exercise certain NIJAO functions. In this case, the NIPSO must appoint another person to carry out those particular functions. This Schedule also amalgamates certain of the administrative functions of the two offices. DoJ commented:

> **"In** particular this Schedule amends Schedule 3A to that Act. Paragraph 4 of this Schedule substitutes for paragraph 1 of Schedule 3A new paragraphs 1, 1A and 1B and 1C. New paragraph 1(1) and (2) specifies various conditions that will make the NIJAO ineligible to exercise specified functions. New paragraph 1(1), (3), (4) and (5) requires him or her to consider if certain past experience or service would make it inappropriate for him or her to exercise specified functions, and that he or she may consult the Department of Justice as part of such consideration. New paragraph 1A requires the NIJAO, where he or she is ineligible under paragraph 1, to direct an appropriate eligible person or persons to exercise these functions; and new paragraph 1B specifies the eligibility criteria for a person so directed. New paragraph 1C provides that specified functions are those relating to the investigation of judicial-appointments complaints and to the convening of a removal tribunal. Paragraphs 5-11 of this Schedule omit or amend various provisions of Schedule 3A to take account of the effect of clause 49**."**

Schedule 7: Amendments to Part 9 of the Local Government Act (Northern Ireland) 2014

177. This Schedule is introduced by clause 62. The Local Government Act (Northern Ireland) 2014 gave the Commissioner additional functions in respect of investigations

into local government. With the abolition of the office of the Commissioner, there is a need for consequential changes to the 2014 Act. This Schedule contains those consequential amendments. In broad terms, the consequential amendments fall into two categories. Firstly, in exercising functions under Part 9 of 2014 Act the NIPSO is to be known as the Northern Ireland Local Government Commission for Standards and references to the Commissioner are now to be read as references to the NIPSO. Secondly, in investigating local government matters, the NIPSO has powers contained in the 2014 Act along with other powers applying to those investigations contained in this Bill. Provision is also made in the 2014 Act for adjudication hearings and related powers, the publication of reports on the NIPSO's website and consultation and cooperation with the C&AG and the local government auditor.

Schedule 8: Other minor and consequential amendments

178. This Schedule is introduced by clause 63. It contains other changes to legislation consequent upon the making of this Bill.

Schedule 9: Repeals

179. This Schedule is introduced by clause 64. It contains all the repeals which are necessary in consequence of the making of this Bill.

FINANCIAL EFFECTS OF THE BILL

180. The Committee has always been mindful of the difficult public expenditure climate in which its legislative proposals are being considered. Reflecting this, the Committee agreed that the Public Finance Scrutiny Unit within RaISe would work in cooperation with the Ombudsman/Commissioner and prepare an assessment of the potential financial implications of the Committee's proposals, excluding NIJAO and Local Government Code of Conduct complaints. The following paragraphs draw on this work. It should be noted that throughout the figures are rounded to the nearest thousandth and are subject to fluctuation that has been explored using sensitivity analysis.[3]

181. Savings could result from the removal of the public sector employment remit which has been estimated at £131,000 per annum in recurrent savings, realised from 2016-17.

182. In addition, the power to take action to resolve a complaint prior to investigation has been estimated as cost neutral. This would be dependent on complaint numbers rising under this new power. Appropriate measures would be put in place to monitor this.

[3] See RaISe Research Papers NIAR 827-013 (22 November 2013) and NIAR 490-14 (1 October 2014) [Hyperlink] for more detailed information on potential costs and savings. These figures should not be taken as actual predictions. To do so would be to claim a spurious level of forecasting accuracy. Rather, they provide a robust indication of likely levels of costs and potential savings and are subject to the estimates and assumptions outlined in the Research Papers referenced above (see in particular section 2 of NIAR 490-14, pp5-7).

183. However, it is anticipated that additional resources would be required to implement: schools, further education and higher education coming within remit; the extension of public procurement remit; own initiative systemic investigations; professional judgement in social care – including professional advice to inform the NIPSO's decision; increased reporting and financial accountability to Assembly Committees as determined by Standing Orders; Northern Ireland Audit Office ('NIAO') and Assembly Commission coming within remit; and the costs of merging offices/rebranding. It has been estimated that this could amount to an additional one off cost of £4,000 in 2014-15; £47,000 in 2015-16 and £4,000 in 2016-17. There will also be £50,000, £53,000 and £477,000 recurring costs per annum in 2014-15, 2015-16 and 2016-17 respectively. Potential savings relating to own initiative investigations would need to be monitored and reported back to the Assembly Committee charged with oversight for this responsibility.

184. Overall, the total cost of the proposals for the 2014-15 to 2016-17 period is £504,000. This figure can be broken down over the three financial years as follows:

Breakdown of Expenditure by Financial Year	
2014-15	£54,000
2015-16	£100,000
2016-17	£350,000

185. The expected on-going annual cost from 2017-18 onwards is estimated to be £346,000.

186. In addition to the proposals above, and in response to requests from the Department of Justice and the Department of the Environment, the bill also provides for the NIPSO to assume the NIJAO remit and the Local Government Standards remit. Discussions are ongoing between NIPSO and DoJ about the amount and mechanism by which DoJ will fund the NIPSO to discharge the functions of the NIJAO, including investigation costs, and any savings will depend on the agreement reached. The Local Government Act provides a mechanism to fund NIPSO to deliver the Local Government Standards remit. The full resourcing associated with the above functions have not been included in the costs stated above.

187. Members were also aware of the potential for its proposals to generate some small additional administrative costs for those bodies coming within remit for the first time, for example arising from the requirement in the legislation to notify a complainant of their right to complain to the NIPSO. In order to manage the additional costs, both to bodies coming within remit and for the NIPSO, the Committee's bill provides for phased implementation of the additional powers and bringing bodies within remit.

188. In relation to the costs of the complaints standards authority role of the NIPSO, in Part 3 of the Bill, the Committee sought the views of the Ombudsman's office and

OFMDFM. The Ombudsman advised that the initial staffing level on introduction in Scotland had been 3 full-time staff, reducing to 1.5. The Ombudsman envisaged start-up in Northern Ireland requiring two full time staff. The Committee agreed that the Assembly Commission should have the power of commencement of the complaints standards authority provisions, to be exercised when resources permitted.

HUMAN RIGHTS ISSUES

189. The Committee is satisfied that the Bill is compatible with the provisions of the Human Rights Act 1998 ('HRA'). Further information on human rights issues in the Bill is provided in the section dealing with legislative competence below. DoJ has advised that it considers there are no human rights issues in relation to the provisions in respect of the NIJAO.

EQUALITY IMPACT

190. In reporting to the Assembly on its legislative proposals the Committee considered the equality impact of its proposals. The Bill provides for the removal of the public sector employment remit. In its responses to the Committee the Equality Commission expressed some caution about this particular proposal while recognising the rationale for it and that the tribunal system is designed to address employment matters.

191. The Committee noted the example cited by the Equality Commission of a non-employee whose application for a job was mislaid and who lost out on the opportunity. The Committee did not consider that such circumstances were likely to be so frequent as to have a significant equality impact and, should these or other circumstances give rise to a suspicion of unlawful discrimination, they would be capable of interrogation by serving a statutory questionnaire under the appropriate anti-discrimination legislation.

192. The Committee considers that extending the NIPSO's remit to include the exercise of professional judgement in the field of social care (in conjunction with the existing remit in relation to professional[4] judgement in respect of health care) is likely to have a positive equality impact for more vulnerable citizens (whether through age, disability or social deprivation) who are more likely to avail of social care services.

193. The Committee considers that the new power of own initiative investigation of suspected systemic maladministration or injustice could have a positive equality impact as it may well be used to investigate areas of public service where the recipients are less likely or less able to bring and sustain complaints in their own right.

194. The reduction in the time limit for bringing a complaint from 12 months to 6 months might be thought to disadvantage the more vulnerable in society who may be less able to bring a complaint. However, the Committee considers that the mandatory, written signposting requirements on public bodies will make it more likely that vulnerable members of society are made aware of their rights and informed about how to contact the NIPSO. The Committee also considers that the exercise of the NIPSO's discretion to

[4] Referred to as 'clinical' judgement in the Commissioner for Complaints (NI) Order 1996

accept complaints outside the 6 month period will offset any risk of the more vulnerable members of society being disadvantaged.

195. The Committee's Report to the Assembly proposed allowing oral complaints and the Committee considered that this would have a positive equality impact. However, during the preparation of the draft Bill the Committee concluded that such provision would be overly complicated. Therefore the Bill provides that the NIPSO may specify the form in which complaints must be made, and any particulars which complaints must contain. Where the form and content requirements are not met the Bill provides that the NIPSO may accept complaints if there are special circumstances which make it proper to do so.

196. The Committee considers that the sharing of information between the NIPSO and bodies such as the Equality Commission, the Human Rights Commission, Northern Ireland Commissioner for Children and Young People and the Commissioner for Older People, should have a positive equality impact by avoiding duplication of effort/resources and identifying issues affecting public service delivery to protected groups.

197. Taking the provisions in the Bill together, the Committee believes that it will have a positive equality impact.

198. DoJ has indicated**:**

> **"***The screening by the Department of Justice of the policy in relation to the NIJAO concluded that there was no impact on equality of opportunity and consequently that an equality impact assessment was not necessary. A regulatory impact assessment of the policy in relation to the NIJAO was not necessary because it does not impose any costs or savings on business, charities, social economy enterprises or the voluntary sector***."**

LEGISLATIVE COMPETENCE

199. The Chairperson of the Committee for the Office of the First Minister and deputy First Minister made the following statement:

> *"In my view the Public Services Ombudsperson[5] Bill would be within the legislative competence of the Northern Ireland Assembly"*

Background

200. The legislative competence of the Assembly is governed by section 6 of the 1998 Act. The Committee considered that this section should set out the matters which it considered when deciding that the Bill was within the legislative competence of the Assembly.

201. The Committee did not consider that the Bill would be incompatible with European Union law, or that it discriminated against any person or class of person on the

[5] The title of the Bill on introduction was the Public Services Ombudsperson Bill.

ground of religious belief or political opinion. The Committee was also satisfied that the Bill did not modify any enactment specified in section 7 of the 1998 Act. There were three matters detailed in section 6 of the 1998 Act which were in the view of the Committee engaged by provisions of the Bill - territorial extent, effect on excepted matters, and compatibility with rights guaranteed by the European Convention on Human Rights ('Convention rights').

Territorial Extent

202. The Committee considered whether the Bill contained any provision which would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland. In particular, it noted that (as with the 1996 Orders), the Bill created power for the NIPSO to investigate 'an implementation body to which the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999 applies'. The Committee was satisfied that because the investigative power was limited by Schedule 3 to the Bill the power was exercisable only in or as regards Northern Ireland.

Excepted Matters

203. The Committee considered that certain provisions of the Bill dealt with excepted matters. It was satisfied that these provisions were ancillary to other provisions (whether in the Bill or previously enacted) dealing with reserved or transferred matters. These provisions were brought to the attention of the Secretary of State, who must under section 8 of the 1998 Act consent to a Bill containing such provisions.

204. In clause 3, provision is made for the appointment of the NIPSO by Her Majesty. In Schedule 1, at paragraphs 9 and 10, provision is made for Her Majesty to remove the NIPSO from office. Provision is also made in Schedule 1 for Her Majesty to appoint an Acting NIPSO. These provisions are similar to provisions for the appointment and removal of the Ombudsman and Commissioner under the 1996 Orders. The provisions confer a function on the Crown, an excepted matter; and necessitate the amendment of the Northern Ireland Constitution Act 1973, also an excepted matter. The Committee considered that these provisions dealt with excepted matters ancillary to transferred matters, these being the creation and dissolution of offices in the transferred field.

205. Clause 20 removes public sector employment from the remit of the NIPSO. Under the 1996 Orders, it was possible for local or central government employees to complain to, respectively, the Commissioner or Ombudsman about maladministration in their employment. It was the view of the Committee that this provision provided public sector employees, somewhat anomalously, with a benefit not available to private sector employees. The Committee took the view that this anomaly should be removed. The possibility of recourse to the highly-developed system of industrial and fair employment tribunals was thought sufficient to protect the rights of public sector employees. The Equality Commission were advised of this proposed change and raised no substantive concerns.

206. The effect of clause 20 is that a person who could previously have complained about maladministration by way of discrimination or incitement to discrimination on grounds of religious belief or political opinion in his or her employment will no longer be able to do so. Clause 20 has an indirect effect on section 78 of the 1998 Act, which is an excepted matter. The Committee was satisfied that section 78 of the 1998 Act was intended to ensure that the Ombudsman or the Commissioner could investigate maladministration by way of discrimination or incitement to discriminate on grounds of religious belief or political opinion where the complainant had not exhausted remedies in a court, and not to prevent any change to the jurisdiction of the Commissioner or the Ombudsman under the 1996 Orders. The Committee concluded that clause 20 did not deal with something with which section 78 of the 1998 Act solely or mainly deals.

207. Schedule 1 paragraph 18 confers an additional function on the committee required to be established by section 66 of the 1998 Act. Section 66 is an excepted matter. The Committee took the view that section 66 of the 1998 Act deals 'solely or mainly' with the expenses of the NIAO and that the conferral of an additional function on the committee required to be established by section 66 did not deal with an excepted matter, since the functions of that committee as regards the NIAO were unchanged.

208. The Committee noted that a number of further amendments to the 1998 Act would arise as a consequence of the repeal of the 1996 Orders. The provisions in question are included at Schedules 8 paragraphs 5 to 8 and Schedule 9 to the Bill. In particular the Committee noted amendments to sections 75, 76, and 78 of the 1998 Act. Sections 76 and 78 are excepted matters and section 75 is a reserved matter (under paragraph 22(f) of Schedule 2 to the 1998 Act and paragraph 42(b) of Schedule 3 respectively). The Committee recognised the importance of the equality duties created by these provisions in the devolution settlement in Northern Ireland, and was anxious to ensure that the Bill would have no effect on the application or enforcement of these duties.

209. The Committee noted that section 75 was intended to create a statutory duty on specified public authorities to have due regard to the need to promote equality of opportunity among persons with various specified characteristics, and to have regard to the desirability of promoting good relations among persons with a subset of those characteristics. It defined a public authority by reference, inter alia, to the Schedules to the 1996 Orders, but did not otherwise deal with the 1996 Orders.

210. The Committee was satisfied that the amendments were ancillary to a reserved matter, since the purpose of the relevant provisions of the 1998 Act was to create equality duties for public authorities, not to fix the bodies subject to the jurisdiction of the Ombudsman and Commissioner. The Bill makes the necessary consequential amendments to section 75 to ensure congruity between the 1998 Act and the Bill and maintains the range of bodies subject to equality duties. For example, certain bodies currently enumerated in section 75(3) are to be included as 'listed authorities' in the Bill, and will as such no longer need separately to be identified in section 75 of the 1998 Act.

211. The Committee took the same view in respect of sections 76 and 78 of the 1998 Act, since the definition of public authority in section 76(7) is largely the same as that in section 75(3), and similar amendments are necessary. Section 76 is an excepted matter. The repeal of the 1996 Orders also requires amendment to those provisions of section 78 which refer to the 1996 Orders. Section 78 is an excepted matter. The Committee agreed that amendments to sections 76 and 78 of the 1998 Act were matters ancillary to the transferred matters of dissolution of the offices of Ombudsman and Commissioner and the creation of the NIPSO.

Incompatibility with the Convention Rights

212. The Committee considered that the Bill would be compatible with the Convention rights. It noted that the NIPSO would be a person certain of whose functions are of a public nature for the purposes of section 6 of the HRA and the corresponding obligation imposed on him or her to exercise powers in a way compatible with the Convention rights. The Committee did not consider that any provision of the Bill would be on its face incompatible with the Convention rights, and it considered that any powers conferred on the NIPSO by the Bill could be exercised in a manner compatible with the Convention rights.

213. The Committee considered that the Convention rights likely to be engaged by the Bill arose under Articles 6, 8 and 10 of the Convention, and did not consider that other Convention rights were engaged by the provisions of the Bill.

214. The Committee noted that Article 6 of the Convention governed fair procedures for the determination of civil rights and could be engaged by provisions of the Bill. Article 6 rights would be afforded to both listed authorities and complainants. The Committee did not consider that the work of the NIPSO itself engaged Article 6, since decisions of the NIPSO, including recommendations to listed authorities and complainants, did not create binding obligations, and were not as such dispositive of civil rights. It was noted that in circumstances where a determination by the NIPSO could be argued to be dispositive of the civil rights of a person – perhaps where the NIPSO intended to make adverse comment on a serious lapse of professional judgment - the NIPSO could under clause 30(7) permit representation by solicitor or counsel to safeguard the rights of that person.

215. The Committee considered at length the provisions of clause 52, by which a complainant may apply to the county court for compensation where 'the NIPSO reports that… the person aggrieved has sustained an injustice'. Under clause 57, the report of the NIPSO relating to an investigation (including a conclusion that injustice has been sustained by a person aggrieved) is to be accepted by the county court as 'evidence of the facts stated within it, unless the contrary is proven'.

216. Similar provision has existed in Northern Ireland since 1969. However, the Committee was anxious to ensure that, given the larger range of bodies subject to the jurisdiction of the NIPSO, and the wide powers of the NIPSO to require sight of papers held by listed authorities (including sight of papers which would attract a claim of

privilege in a civil court), the Bill contained safeguards to protect the Article 6 rights of complainants and listed authorities.

217. The Committee noted that it would be inconsistent with the principle of equality of arms, in particular the adversarial principle, if a person aggrieved could rely on an admission made to the NIPSO by the listed authority, or privileged documents obtained by the NIPSO using his particular powers under the Bill, in the course of proceedings in the county court. The Committee wished to ensure that material which would not be disclosable in court proceedings in the ordinary course could not be disclosed in court proceedings adjudicating on a claim for compensation by a person found in a NIPSO investigation to have suffered an injustice.

218. To regulate the use of material gathered in the course of a NIPSO investigation in court proceedings, the Bill provides at clause 47 that any report made by the NIPSO may not disclose the content of privileged documents or evidence. Privileged documents or evidence obtained by the NIPSO for the purposes of an investigation are not admissible in court proceedings under the Bill, nor, under clause 49, may the NIPSO be called to give evidence in county court proceedings. The Committee considered that these clauses preserved the wide range of powers commonly afforded to UK Ombudsman, while ensuring the listed authority was not disadvantaged in its ability to rebut any finding contained in a NIPSO report in adversarial proceedings determinative of civil rights.

219. Article 8 of the Convention provides for the right to respect for private and family life, home and correspondence. The Committee recognised that this right could extend to material concerning life and correspondence in the professional sphere. It noted that the NIPSO's use of powers, particularly use of coercive powers analogous to those of the High Court, to require the production of information, could constitute an interference with the Article 8 right. This would be so only in the case of onward transmission of that information, which would in most cases be precluded by clause 49 of the Bill.

220. The Committee noted, however, that the NIPSO had powers to publish reports in the public interest which could in some circumstances contain information relating to private matters. It noted that material complaints by persons aggrieved would in many cases relate to private matters. The Committee considered that in most cases the Bill expressly precluded the publication of such information, except to the person aggrieved and the listed authority by which it would already be held; and considered that in other cases the publication of such information, where the NIPSO considered it to be in the public interest, could be compatible with Article 8. It noted that the NIPSO would need to be satisfied that the publication of such material corresponded to a pressing social need and was reasonably proportionate to the fulfilment of that need, taking into account the NIPSO's particular role in protecting the public from injustice arising from maladministration and decisions taken in the exercise of professional judgement.

221. The Committee noted the NIPSO's power to make a special report to the Assembly where a person aggrieved has suffered injustice and the injustice has not been remedied. The Committee considered concerns raised that a special report could have a potentially coercive effect and in particular where a special report dealt with an

individual general health care provider. The Committee noted that the power to make a special report to the legislature is common to other UK ombudsmen and has been exercised by the Health Services Ombudsman for England in relation to general health care providers. The Committee considered that the power to make a special report was capable of being exercised by the NIPSO in a manner which was both procedurally fair and compatible with Article 8.

222. The Committee also noted that, in addition to being a public authority for the purposes of the HRA, the NIPSO was bound by the Data Protection Act 1998 ('DPA'). It concluded that the limitations on the powers of the NIPSO, under the Convention, the DPA, the HRA and common law, should ensure that any interference with Article 8 rights was proportionate and that the integrity of any information provided (whether by persons aggrieved or listed authorities) would be protected.

223. The Committee finally considered the extent to which Article 10 of the Convention was engaged. It noted that complainants and the NIPSO were by clause 48 of the Bill afforded absolute protection from the law of defamation, facilitating and encouraging the free exchange of views and opinions. It considered the power under clause 50 of Northern Ireland Ministers and the Secretary of State to issue notices preventing the disclosure of information supplied to the NIPSO (even in circumstances where in the view of the NIPSO the publication of that information is in the public interest). It noted that the basis on which such a notice could be issued was directed to two of the derogations provided under Article 10 (the safety of Northern Ireland or the United Kingdom, and the public interest). It further noted that the exercise of the power was subject to judicial review and that both the Secretary of State (under section 6 of the HRA) and Northern Ireland Ministers (under section 24 of the 1998 Act) must themselves act in a way compatible with the Convention. The Committee concluded that to the extent that clause 50 constituted an interference with the Article 10 right, it was of limited application and capable of being exercised in a way compatible with those rights.

SECRETARY OF STATE CONSENT

224. The Secretary of State has consented under section 8 of the 1998 Act to the Assembly considering the Bill.

RECOMMENDATION

225. The Minister of Finance and Personnel, Mr Simon Hamilton, had made the following recommendation as required under section 63 of the 1998 Act.

> *"As Minister of Finance and Personnel, I recommend the Ombudsperson[6] Bill to the Assembly as is required by section 63 of the Northern Ireland Act 1998."*

[6] The title of the Bill at this point was the Public Services Ombudsperson Bill.