



Northern Ireland
Assembly

**COMMITTEE
FOR THE OFFICE OF THE
FIRST MINISTER AND DEPUTY
FIRST MINISTER**

**OFFICIAL REPORT
(Hansard)**

Draft Commissioner for Older People Bill

12 May 2010

NORTHERN IRELAND ASSEMBLY

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DEPUTY FIRST MINISTER**

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Members present for all or part of the proceedings:

Mr Danny Kennedy (Chairperson)
Mrs Naomi Long (Deputy Chairperson)
Mr Alex Attwood
Mr Barry McElduff
Mr Francie Molloy
Mr Stephen Moutray
Mr Jimmy Spratt

Witnesses:

Ms Jane Corderoy)
Mr Chris McCafferty) Office of the First Minister and deputy First Minister
Dr Gerry Mulligan)
Mr Stephen Orr)

The Chairperson (Mr Kennedy):

Good afternoon; you are very welcome. You are here to brief us on the draft Commissioner for Older People Bill and the changes to it following consultation. Perhaps you will provide a brief overview and then answer questions. I should remind you that the session is being recorded by Hansard.

Dr Gerry Mulligan (Office of the First Minister and deputy First Minister):

Thank you. With your permission, I will take five minutes to give you a brief overview, as there

are some important points that we would like to have recorded. I would like to introduce my colleagues: Jane Corderoy is the head of the Bill team, and Stephen Orr and Chris McCafferty are members of it. They have been single-handedly driving the process and have got us to where we are today with the Bill. They will take any detailed questions on the Bill, the policy proposals and the consultation document.

The Department's response to the public consultation deals comprehensively with the many important and detailed issues that were raised; the draft Bill that accompanies that paper reflects those changes.

I want to leave as much time as possible for questions, but, if I may, I would like to provide a brief overview of Ministers' responses to the consultation and also to pick up on one or two points, particularly those that were raised by Committee members at previous meetings.

We were very pleased with the response to the public consultation: more than 400 people attended events at different locations, and we received 80 substantive written responses. In general, the consultation revealed strong support for the broad thrust of the powers and duties proposed and for anchoring them firmly within the United Nations principles for older people. The consultation also endorsed the suggested age range and provisions regarding how the legislation is to be kept under review as well as issues of accountability.

Not all proposed changes have been accepted; I will deal with those later. However, Ministers have accepted suggestions that, for example, the commissioner should have powers to commission mediation services, and the scope of the commissioner's formal investigatory powers should extend to certain private and voluntary organisations, such as nursing and residential care homes, that provide services to older people. I know that there were strong views expressed in the Committee about the need to extend the scope of the commissioner's powers in that way.

There were also proposals to amend the residual clauses to minimise overlap and duplication between the commissioner's office and other organisations. The Committee will have seen changes to the proposed list of relevant authorities. Ministers have now decided that the Northern Ireland Office (NIO) should be removed from the list as most of the relevant justice organisations now come within the scope of the legislation following the transfer of policing and justice powers.

Ministers have committed to considering a suggestion by the Older People's Advocate of enabling the commissioner to co-operate with the Human Rights Commission in taking relevant human rights cases on behalf of older people, consistent with the Human Rights Commission's victims' standing under the law.

There was also a wide range of suggestions to which we responded positively in the consultation report that may not need specific legislative provision. They are aimed at ensuring value for money, good working relations between the commissioner's office and other regulatory bodies, and good outreach services.

The consultation raised one or two points that were of particular interest to the Committee. There was broad agreement with the concept of establishing this office, although some organisations felt that such decisions should be set in a wider landscape review of regulatory bodies. Support for the establishment of the office of the commissioner was echoed recently by Dame Joan Bakewell, the outgoing English older people's champion, and in the 'Report of the United Nations Expert Group Meeting on "Rights of Older Persons"'.

There was support for the principal aim of the commissioner: to safeguard and promote the interests of older people; the consultation report clarifies that "interest" is a broader term that includes rights. The proposed duties and general powers of the commissioner received strong support from consultees and were retained in the Bill.

Ministers have also responded to a widely held view that the commissioner should have a role in mediation and arbitration, which can provide a much speedier and more cost-effective method of resolving disputes. A new clause is therefore inserted, empowering the commissioner to facilitate a conciliation service with a view to resolving disputes that might otherwise end up in court.

The adequacy of the enforcement powers proposed in the Bill received a mixed response from consultees. Some favoured the strengthening of the powers, including, for example, the power to fine; others said that, in their experience, formal enforcement powers are not necessary to achieve a satisfactory outcome to a complaint and that power to make recommendations may be sufficient to allow the body complained of to take responsibility for correcting failures. Ministers have

considered the mixed views of consultees in this matter and believe that the evidence of successful complaint resolution from comparable organisations, such as the Northern Ireland Commissioner for Children and Young People and the Northern Ireland Ombudsman, does not provide a convincing case for additional enforcement powers, and therefore the powers contained in the draft Bill are retained.

As I said, the Commissioner will have the same powers as the High Court to enter premises, carry out an inspection, call for documents and interview witnesses and to prevent obstruction in his or her work. He will have the power to make recommendations for change and to expose unreasonable non-compliance with his or her recommendations. Ministers believe that those powers, together with the authority of the commissioner's office, give the commissioner considerable power to effect change on behalf of older people.

If the experience of the commissioner were to deviate from that of comparable bodies that experience high levels of compliance with recommendations, there is provision in the Bill for triennial reviews of the legislation to enable the commissioner to highlight the issue and make recommendations for amendments to the legislation to strengthen the enforcement powers of the office if need be.

In previous evidence to the Committee, the issue was raised of the extent of the commissioner's powers in relation to private and voluntary sector nursing and residential homes. In the draft Bill, those organisations were included under the remit of the commissioner, but only in relation to the public functions of the organisations — in cases where a resident's care is wholly or part-funded by a trust. That limitation, and the scope of the commissioner's remit, was a cause of concern to some members of the Committee, and equally for many of the consultees who provided responses. Ministers have considered the various points at issue raised by consultees and the strength of feeling involved and have therefore decided to amend the Bill to bring all nursing and residential homes in the private and voluntary sector under the commissioner's remit as "relevant authorities". That means that the full range of the commissioner's powers can be applied to assist older people in such homes, regardless of how their care is funded. That is a significant step, and Ministers believe that that change to the Bill in particular highlights how they can respond to people's needs and provide them with the assistance and support that they need, now and in the future.

In conclusion, Chairman, you will see from the examples that I have chosen that the consultation shows the high level of public interest in this important Bill and in the office that it will establish. The many views expressed have informed the final shape of the Bill, which Ministers will submit to you as the most appropriate powers and duties for the holder of this important office.

I had hoped to present these proposals earlier, but, as that was not possible, I respectfully ask the Committee to provide its views in advance of tomorrow's meeting of the Executive, at which we hope to obtain endorsement to publish the consultation report and introduce the Bill to the Assembly before summer recess.

Subject to the Assembly's consideration, it is hoped that the Bill will be passed early in 2011 and that a commissioner can be appointed as soon as possible thereafter.

The Chairperson:

Thank you for that overview, Dr Mulligan. With the proposed changes and amendments, is there any cross-over or link to the role of the Northern Ireland Ombudsman? At his recent visit to the Committee he was a wee bit concerned that almost a new commissioners and ombudspeople industry is being created.

Dr Mulligan:

The ombudsman made that very point in his submission; he suggested that we take a broader view of the regulatory landscape. However, Ministers do not wish to wait for such a broader view, although that is not to say that it should not be considered at some point in future; they are anxious to establish a commissioner's office, given the support in the community for it. The ombudsman also expressed unease about his own office being a relevant authority. We took that point on board and removed the Northern Ireland Ombudsman's Office from the list of relevant authorities. We hope that that will allay any concerns.

Mr Stephen Orr (Office of the First Minister and deputy First Minister):

There is explicit provision in the Bill that if a complaint is made to the commissioner for older people, he or she may not investigate if the complaint falls within an existing statutory complaints system. The ombudsman's complaint system would be such a statutory complaints system, so it is protected by the Bill.

Mrs Long:

I have two very simple questions. You list in the report the bodies that withheld consent from being included in the Bill. Why did those bodies not wish to come under the remit of an older people's commissioner?

You said that there will be further exploration on whether the commissioner will be able to work through collaborative powers with the Human Rights Commission to deal with cases that might require victims' standing to be exercised. Was the possibility of giving victims' standing to the older people's commissioner explored? I know that the Northern Ireland Assembly could not do that; it would have to come from Westminster. However, was the option explored with the Government at Westminster? Did it meet resistance, or was it simply deemed a diversion to getting the Bill through and therefore co-operation with the Human Rights Commission was regarded as the quickest route?

Ms Jane Corderoy (Office of the First Minister and deputy First Minister):

Victims' standing cannot be put in primary legislation here. We did not pursue that option with Westminster, for the reasons that you mentioned. Ministers were also swayed by the argument not to create duplication or to establish bodies that had the same powers; there is already a body in Northern Ireland with the power of victims' standing.

Mrs Long:

The Children's Commissioner raised that point on a number of occasions. In some ways, it is more acute for the commissioner for older people, because someone could start a case with them but pass away before the case has gone through the courts with the support of the commissioner. Therefore, it is important for somebody to have victims' standing to take on the case on a point of principle.

The Children's Commissioner raised that issue, and I would have thought that the same rules of collaboration would exist between the Children's Commissioner and the Human Rights Commission, but it does not seem to have resolved that conflict. I am slightly concerned. Could it be explored as part of the suggested discussions, or has it been completely ruled out as an option?

Dr Mulligan:

At this stage, it would not be a realistic option if we were to get the legislation through the Assembly. The alternative suggestion, which Dame Joan Harbison made, is something that Ministers are looking at with interest as a way of at least allowing human rights cases to be pursued in collaboration between the office and the Human Rights Commission.

The legislation in respect of the Commissioner for Children and Young People is a subject of review. Ministers will look at that proposal in the light of the proposal from the Commissioner for Children and Young People that she should also have victims' standing. Therefore, there may be scope in that proposal to accommodate both aspects. The Children's Commissioner's proposal is actively being considered.

Ms Corderoy:

If an older person who had taken a complaint had passed on, the commissioner could still take forward that case with their current powers.

Mrs Long:

Even when they are acting on their behalf? There was an issue about this in specific cases where it is human rights-related.

Ms Corderoy:

It is not in the human rights aspect, but it will be in all other aspects.

Mrs Long:

Why were certain bodies excluded?

Ms Corderoy:

The Parliamentary Commissioner for Administration and the Northern Ireland Ombudsman both felt that there was a hierarchical argument why they should not be included.

Mr Orr:

"A body of last resort" was the phrase that the ombudsman used in giving evidence to the Committee on 21 April. They said that they see themselves as the organisation of last resort; therefore, they should not be investigated.

Ms Corderoy:

The Information Commissioner has concerns about the confidentiality of the information that they hold specifically in respect of the High Court powers that our commissioner is proposed to have. We tried to explore ways round that, but we could not deal with it in the legislation. The Information Commissioner will still be subject to the investigatory powers of the commissioner, although not the formal investigatory powers of the commissioner. We have included an amendment to clause 7 to enable our commissioner to assist an older person, including providing financial assistance in relation to complaints about other bodies.

The Chairperson:

The ombudsman mentioned the possibility of duplication. Do you discount that?

Dr Mulligan:

In general, the residual clauses are very strong in ensuring that the commissioner would not take cases that fall within the jurisdiction of another organisation. Stephen may want to elaborate on that.

Mr Orr:

There were two methods of dealing with that problem. First, as Gerry said, there are clauses that limit the commissioner from acting when another organisation already has responsibility for a matter. I refer to the clause that specifically deals with the ombudsman's complaints system: if a complaint is made to the commissioner that falls within the ombudsman's statutory complaints system, the commissioner may not investigate it. Residual clauses limit the commissioner from acting where another organisation has responsibility.

The other non-statutory mechanism is memorandums of understanding. The Department's management statement will agree with the commissioner that they should arrange to have memorandums of understanding with organisations with whose work there may be overlap, such as the Regulation and Quality Improvement Authority in the health field, for example, although there will be others.

Dr Mulligan:

It would also be worth giving an example of the influence of a residual clause that prevents the

commissioner for older people being lobbied as a way of appealing a decision of another regulatory body. That would mean that the office could not be used as a form of appeal.

Mr Attwood:

I welcome the fact that the nursing home category has been broadened. That was a glaring omission; it would have been almost bizarre to have homes taking care of older people not being subject to legislation on older people.

I will not detain the Committee on some of the more substantive points of the Bill, as the Committee will deal with them by tabling amendments.

Is the Public Prosecution Service (PPS) subject to the legislation?

Mr Orr:

Not as a relevant authority. My understanding is that the PPS has not transferred to the Department of Justice and is, therefore, not within the remit of the Bill as a relevant authority.

Dr Mulligan:

I suspect that the PPS is not within the scope of the legislation, but the Department will confirm that.

Mr Attwood:

The PPS has transferred many of its functions to DFP, as public prosecution funding falls to DFP rather than to the Department of Justice; where the responsibility may lie has not yet been worked out. However, apart from that technicality, a body such as the PPS, which is a very substantial body in the North, and around which there are all sorts of concerns, may not be subject to the Bill. I understand the reason for that and the PPS will argue that much of its work has not been devolved from London. However, there is a potentially odd situation of a body of weight and authority in the North with many staff that deal with the public not being subject to the authority of the commissioner.

Dr Mulligan:

Given the recency of the transfer of policing and justice and its ramifications, the Department will have to clarify that at a later stage.

Mr Attwood:

What will happen if the Bill does not get past the Executive in this session? It would not be tabled in the Assembly until the middle of September at the very earliest. We have only approximately 28 weeks' sitting time between now and the Assembly election — even less if the Bill is not passed by the Executive before the summer.

Dr Mulligan:

That is why the Department is anxious to ensure that the Bill is introduced to the Assembly before the summer recess. It has calculated the time necessary for the Bill to make its passage through the House with very little headroom, and, given that other important Bills are going through the House, we want to make sure that the Bill is introduced as quickly as possible. It will be tight, but the Department is anxious to ensure that it gets through.

The Chairperson:

It would be useful if the Department could clarify the point on the PPS before the Committee's submission to the Executive tomorrow.

Dr Mulligan:

If possible, we will get back to the Committee this afternoon.

The Chairperson:

I suppose that the Committee could table an amendment to the Bill if that was considered helpful. However, will you please confirm that fairly quickly?

Dr Mulligan:

It will be treated as a matter of urgency.

Mr McElduff:

In what circumstances might the commissioner commission mediation services for an older person as an alternative to legal proceedings? I refer to the introduction of the new conciliation of disputes power.

Mr Orr:

The intention behind the new power is that mediation services will provide an alternative to legal proceedings. Although legal proceedings are a possibility, the Bill allows that rather than the older person concerned taking a legal case or the commissioner taking a legal case on their behalf — which is inevitably costly, time-consuming and adversarial — the commissioner could commission mediation or conciliation services to resolve a dispute in a quicker and less stressful way.

The Chairperson:

It would be useful to have clarity about the PPS as soon as possible.

Dr Mulligan:

We will do that, Chairperson.

The Chairperson:

Might we have that this afternoon?

Dr Mulligan:

Yes. We will follow up on that right away.

The Chairperson:

I understand that Dr Mulligan is to be our man in Brussels. We congratulate you on that and wish you well.

Dr Mulligan:

Thank you.

The Chairperson:

Thank you for your contribution. You have had the honour of appearing before the Committee a great many times, and your attendance record has been on a par with most of us here.

Dr Mulligan:

Thank you for your good wishes. I look forward to being before the Committee again on Europe and its institutions; I also look forward to hosting the Committee in our new offices in June. I

hope that I can facilitate the Committee in its work with the institutions.

The Chairperson:

Thank you very much.