



Northern Ireland
Assembly

Research and Library Service Bill Paper

16 June 2010

Jane Campbell

The Commissioner for Older People Bill

NIAR 303-10

The Commissioner for Older People Bill comes at a time of growing public and political awareness of the needs and interests of older people. Research by the OFMDFM and the Age Sector confirmed that there is significant need and a strong case for establishing an independent Commissioner for Older People in Northern Ireland. This paper explains what the Commissioner for Older People Bill will achieve and summarises some of the key issues that emerged from the public consultation.

Key Points

- The purpose of the Bill is to create a Commissioner for Older People for Northern Ireland.
- The Commissioner will have a wide range of functions and powers. These include promotional, advisory, educational, legal and investigatory functions and powers. The Commissioner may act in the interests of older people both generally and individually.
- The principal aim of the Older People's Commissioner, in exercising his or her functions or powers generally, will be to safeguard and promote the interests of older people.
- The Commissioner will refer to the United Nations Principles for Older Persons (UNPOP) when determining what the interests of older people are and when deciding if and how to exercise his or her functions or powers in relation to older people. The Principles are Independence, Participation, Care, Self-fulfilment and Dignity.
- The Commissioner will be appointed by the First Minister and deputy First Minister acting jointly and will serve a term of four years, renewable once.
- Older people will be involved in the process to appoint an Older People's Commissioner.
- It is estimated that it will cost £500,000 to establish the office and £1.5million annually thereafter
- The Commissioner for Older People Bill was introduced on 25 May 2010. The Assembly agreed the 2nd Stage on 7 June 2010. The Assembly Committee for the Office of the First Minister and deputy First Minister will begin 2nd stage examination of the Bill on 16 June 2010.

Executive Summary

In 2006 a proposal in the Transitional Assembly for the creation of a Commissioner for Older People received wide support from all the parties. A further debate on the matter by the restored Assembly in 2007 also received wide support. In 2008 the OFMDFM took the first steps in preparing policy proposals and draft legislation by engaging independent consultants to examine the possible role and remit for an Older People's Commissioner. Following a 14 week public consultation process in the autumn of 2009 the Commissioner for Older People Bill was introduced on 25 May 2010. The Assembly agreed the 2nd Stage on 7 June 2010.

The legislation is based fairly closely on the legislation for the Commissioner for Children and Young People in Northern Ireland (NICCY) and gives the Commissioner a wide range of functions and duties. The principal aim of the Commissioner is to safeguard and promote the interests of older people. The Bill requires the Commissioner to take account of the United Nations Principles for Older People (UNPOP)¹ in considering what the interests of older people are. These are Independence, Participation, Care, Self-fulfilment and Dignity.

The Commissioner will assist people age 60 and over however the Bill makes provision for assisting those aged 50 and over in exceptional circumstances or where an issue raises a question of principle.

The Bill requires the Commissioner to promote the provision of opportunities for and the elimination of discrimination against older people. The Commissioner must also promote positive attitudes towards older people and encourage their participation in public life.

The Commissioner will have powers of review, complaint and formal investigation in relation to a large array of organisations and individuals (known as 'relevant authorities' in the Bill). These will include government departments, district councils and other commonly known public bodies. In line with strong public opinion expressed in the consultation the Bill was amended to enable all nursing and residential care homes to be brought within the Commissioner's remit as relevant authorities.

Where 'relevant authorities' are concerned the Commissioner can review how the interests of older people are represented in an organisation, how complaints made by older people are treated, how the organisation is inspected to see how it is managed and older people are treated and how an organisation responds when it is informed about something that could be affecting the interests of older people.

Following the consultation the Bill was amended to allow the Commissioner to commission conciliation services in relation to disputes which may lead to proceedings involving the law or practice concerning the interests of older people.

¹ The Principles are Independence, Participation, Care, Self-fulfilment and Dignity.

The Bill empowers the Commissioner to conduct a formal investigation into a wide range of bodies (relevant authorities) and for this purpose the Commission is given the same powers as a High Court judge. This will mean he/she can call for documents and witnesses and enter premises, take copies of documents, interview in private any older person present who consents to be interviewed and any person employed on the premises. Obstruction of the Commissioner in any of these things could equate to contempt of court.

The Commissioner will have wide powers which extend into non-devolved areas – except in some circumstances where the Commissioner will be able to make representations to the Secretary of State and/or the Assembly.

The appointment of the Commissioner will be made by the First Minister and deputy First Minister acting jointly. The appointment will be for four years, renewable once. The OFMDFM will provide funding for the Commissioner.

Contents

Key Points page 3

Executive summary page 4

Introduction page 9

Background to the Bill page 9

Content of the Bill page10

1 Introduction

The Commissioner for Older People Bill comes at a time of growing public and political awareness of the needs and interests of older people with many countries starting to confront the difficulties of an ageing population. The Northern Ireland Executive has committed itself in its Programme for Government (PfG) to providing a 'strong independent voice' for older people. The Northern Ireland government, like the Welsh Assembly government in recent years, has called for the establishment of an independent champion for older people. It is anticipated that Northern Ireland's Commissioner for Older People will be appointed within the lifetime of the current Assembly.

2 Background to the Bill

The proposal can be traced back to December 2006 when a debate in the Transitional Assembly called for the creation of a Commissioner for Older People in Northern Ireland. The motion was supported by all the parties. The restored Assembly debated the issue again in June 2007 and as before, the motion received cross-party support. Subsequently the OFMDFM engaged independent consultants Deloitte to examine the case for a Commissioner for Older People, resulting in a report in May 2008 *Examining the Case for a Commissioner for Older People*² which concluded that there is significant need and a strong case for establishing an independent Commissioner for Older People.

Meanwhile age sector organisations were sponsoring independent research and publishing their own recommendations. In December 2007 Help the Aged and Age Concern NI published *Key Messages: Independent Commissioner for Older People*³ setting out five key criteria for achieving a suitable independent Commissioner. A second report *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland*⁴ was published in March 2008.

The Government appointed Dame Joan Harbison as Interim Older People's Advocate on 1 December 2008. The part-time appointment was expected to last for 18-24 months and cease on the appointment of a Commissioner for Older People. The role of the Advocate was to identify and address the problems faced by older people and provide advice to Ministers on what needs to be done to address those problems.

² http://www.ofmdfmi.gov.uk/opc_report_may_pdf463kb_pdf

³ *Key Messages: Independent Commissioner for Older People* Help the Aged NI / Age Concern December 2007

⁴ *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland*. Help the Aged NI/ Age Concern March 2008

The public consultation process on draft policy proposals and a draft Bill began on 1 October 2009 and ran for 14 weeks concluding on 7 January 2010. Announcing the consultation junior Minister Newton stated:

The Executives Programme for Government includes a commitment to deliver a strong independent voice for older people. Today's consultation announcement is an important step towards delivering on this commitment.

Minister Kelly added:

The launch of the consultation today is very appropriate as it is Older People's Day and this is Age Awareness Week with the theme this year being Representation. The Executive recognises the importance of ensuring that the views of our older people are represented.

The Older People's Commissioner will have a role in promoting and safeguarding interests, advancing equality, challenging discrimination and empowering and enabling the voice of older people.

We want the views of older people heard through this consultation so we can ensure the Commissioner, once in place, meets the needs of the people that he or she will represent and champion⁵.

Over 80 written responses were received. The OFMDFM also organised nine public consultation events in November 2009 and these were attended by over 400 individuals and organisations. As a result of the consultation the department has made some amendments to the Bill. The OFMDFMs report on the Consultation Analysis (May 2010)⁶ stated that in general, responses to the consultation reflected broad support for the proposed legislation. Only a very small number of respondents were opposed to the establishment of the Office⁷.

3 Content of the Bill

The Bill has 29 clauses and 3 Schedules.

Clause 1 and 2 establishes the Commissioner for Older People for Northern Ireland and specifies the principle aim of the Commissioner

Clauses 3 -20 specifies the functions (duties and powers) of the Commissioner

Clause 21 provides for reviews of the legislation

⁵ <http://www.northernireland.gov.uk/news/news-ofmdfm/news-ofmdfm-october-2010/news-ofmdfm-011009-junior-ministers-launch.htm>

⁶ http://www.ofmdfmi.gov.uk/version_-_final_-_for_web_-_con_report_and_analysis_25_may_2010.pdf

⁷ For example, the Irish National Teachers Organisation (INTO) felt that the role would be better performed by the Equality Commission.

Clauses 22 – 29 cover interpretation, commencement and short title of the Bill.

Schedule 1 relates to staffing, funding and other procedural arrangements.

Schedule 2 sets out the procedures in relation to investigation under clause 3(2) or (3)

Schedule provides a list of relevant authorities which is additional to those defined in clause 26.

The Bill is based fairly closely on the legislation for the Commissioner for Children and Young People in Northern Ireland. Some key additions inspired by the Welsh model have been added: these include duties to promote positive attitudes towards older people, to encourage participation in public life and to promote the provision of opportunities for older people and the elimination of discrimination against older people. Further revisions to the legislation were made following the public consultation.

It has been acknowledged that the NICCY model provides the Commissioner with extensive powers, the most wide-ranging of all the Children's Commissioners throughout the UK. The age sector accept that the NICCY Order was "the obvious starting point" for consideration of policy options for a Commissioner for Older People due to the fact that there are similarities between the 'rights' and 'interests' of those at the opposite ends of the age spectrum and also because NICCY is operating successfully in Northern Ireland.⁸

Prior to the Department's first draft of the Bill the age sector carried out research which examined and compared 4 possible models for the Commissioner for Older People. These were the "NICCY" model⁹, an Enhanced Commissioner model (which was a development of the NICCY model), an Ombudsman model and an Advocacy model. This research critically analysed limitations and restrictions on the powers and remit of each model and concluded that an Enhanced Commissioner model was preferred. The reasons for this were:

...The Enhanced Commissioner model is based both on international standards but also the need for a body which can take a holistic, strategic approach towards the protection of the rights and interests of older people¹⁰.

The Age sector research weighed up the implications of replicating the NICCY legislation for the Commissioner for Older People and concluded that a number of limitations and restrictions which existed in the NICCY Order would prevent the Older Peoples Commissioner taking the 'holistic strategic approach' to the protection of the rights and interests of older people that they maintained was paramount.

⁸ *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland.* Help the Aged NI/ Age Concern March 2008 Page 8

⁹ *The Commissioner for Children & Young People (Northern Ireland) Order 2003* (the "NICCY Order").

¹⁰ *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland.* Help the Aged NI/ Age Concern March 2008 page 25

Clause 1 The Commissioner for Older People For Northern Ireland

This clause creates a Commissioner for Older People for Northern Ireland who will be appointed by the First Minister and deputy First Minister jointly. Some groups proposed that the Assembly should have a role in the appointment of the Commissioner as is the case for the Scottish Human Rights Commissioner as regards the Scottish Parliament.¹¹ Clause 1 also directs that the Ministers will take into account the views of older people before making the appointment. Respondents to the consultation were strongly in support of this.

The clause also makes provision for Schedule 1 of the Bill which relates to the establishment and operation of the Commissioner and his or her office. There was strong support for the post being a full time one, and for the Commissioner having the power to appoint staff as he or she may determine - the same arrangements as for the Northern Ireland Commissioner for Children and Older People (NICCY). Schedule 1 also allows the Commissioner to cooperate with other bodies, either in the UK or elsewhere, which exercise functions in relation to older persons or their interests.

The OFMDFM will have funding and accounting oversight of the Commissioner, again, these arrangements follow the NICCY model. The department is content as to the independence of the body under these arrangements and satisfied that accountability of the Commissioner to the Assembly will be achieved through appearing before and reporting to the OFMDFM Committee (and any other Assembly Committee on any matter related to the issues of older people). Some respondents preferred the Commissioner to be totally independent of any government department, answerable to the Assembly - as in the case of the Scottish Children's Commissioner.¹²

Clause 2 Principal aim of the Commissioner

The principal aim of the Commissioner is stated in this clause – this is to safeguard and promote the interests of older people. The Bill requires the Commissioner to take account of the United Nations Principles for Older People (UNPOP)¹³ in considering what the interests of older people are and the consultation respondents were strongly in favour of this being made explicit in the legislation. There were proposals that the legislation go further than this. Pointing out that the UNPOP is a weaker human rights instrument than the UNCRC and other UN and European instruments, one respondent nonetheless wanted the legislation to include an explicit statement that the court will take into account the Commissioner's duty in relation to the UNPOP in any judicial proceedings in which it is involved¹⁴. Another respondent, (the Northern Ireland Human

¹¹ For example, the Northern Ireland Council for Ethnic Minorities (NICEM), Age Concern/Help the Aged, the Age Sector Platform, NICVA

¹² NICEM

¹³ The Principles are Independence, Participation, Care, Self-fulfilment and Dignity.

¹⁴ NICEM, the Northern Ireland Human Rights Commission (NIHRC)

Rights Commission (NIHRC)), felt the legislation would be significantly improved if other human rights standards applicable to older people were also referred to in the Bill. Disability Action was also disappointed with the limited reference to UN principles and instruments, for example, the UN Convention on the Rights of Persons with Disability. In the report of the consultation exercise the department states:

Although the Commissioner will have a duty to have regard to the UN Principles for Older Persons, OFMDFM will draw the Commissioner attention, upon appointment, to other international agreements and relevant legislation.

The interests of the older person are to be the Commissioner's main consideration in deciding whether or how to act. The term "interests" is not defined in the Bill, an issue which was commented on a number of times in the consultation. Several groups, including the NIHRC wished the principle aim to be extended to include, *rights*, as well as interests of older people. The Explanatory and Financial Memorandum (EFM) which accompanies the Bill explains however:

In each case that arises the term should be interpreted in the way that is most appropriate to the relevant person and the particular situation. [Interests is a broader term covering the wider picture. Interests includes but is broader than rights]¹⁵

Although the department is content that this approach is in line with other UK legislation which does not define the term, concern may remain that the term is not explicitly defined in the legislation.

Clause 3 Duties of the Commissioner

The duties of the Commissioner are set out in this clause. These include duties to:

- (i) Promote an awareness of matters relating to the interests of older people and of the need to safeguard those interests;
- (ii) Keep under review the adequacy and effectiveness of the law and practice relating to the interests of older people;
- (iii) Keep under review the adequacy and effectiveness of the services provided to older people by relevant authorities;
- (iv) Promote the provision of opportunities for, and the elimination of discrimination against, older people;
- (v) Encourage best practice in the treatment of older people;
- (vi) Promote positive attitudes towards older people and encourage participation by older people in public life;

¹⁵ Older People Commissioner Bill Explanatory and Financial Memorandum

- (vii) Advise the Assembly, the Secretary of State or a relevant authority on matters concerning the interests of older people;
- (viii) Take reasonable steps to encourage older people to communicate with the Commissioner and his or her staff and to seek the views of older people; and make themselves or their staff available, as far as is practicable, at a place convenient for older people.

The clause bestows the same duties upon the Commissioner as NICCY with some additional duties added based on the Welsh Commissioner for Older People. These include duties to promote positive attitudes towards older people, to encourage participation in public life and to promote the provision of opportunities for older people and the elimination of discrimination against older people.

Some respondents proposed additional duties, for example a statutory duty to liaise regularly with the age sector. Others proposed there should be a statutory duty to cooperate with other Commissions through Memoranda of Understanding. In the Consultation report the department states its position on the matter of working with other bodies:

...the Commissioner for Older People will not work in isolation from other regulatory, scrutiny and oversight bodies which are already undertaking duties in relation to older people. We do not think that the Commissioner should replace or duplicate the duties of existing statutory or voluntary organisations. Indeed in some cases this could cause confusion or it could even be unhelpful for the Commissioner to intervene in or investigate a case which another body might be better equipped to deal with.

Consultation respondents strongly supported cooperation with other bodies; NICEM added however, that the Older Peoples Commissioner should have the same full breadth of powers enjoyed by these bodies. Likewise, Age Concern NI/Help the Aged supported cooperation but added:

Setting the criterion that the last body into the field should be the one with the least power just to avoid handling complexity, even though in time that body will become the leading expert in its field, is not a tenable position

The draft Bill does not made explicit reference to the establishment of Memoranda of Understanding, the department explains why:

Ministers are not persuaded however that it would be beneficial to make it a statutory requirement for the Commissioner to establish memoranda of understanding with bodies providing services to older people. This is because a memorandum of understanding is a voluntary agreement between participating organisations. It is dependent upon the agreement of both organisations involved to identify their roles and responsibilities and agree a document specifying which organisation has lead responsibility in which areas. It is based on mutual good will

and a shared commitment from both organisations to make it work. That being the case, placing a legal obligation on the Commissioner to agree such documents with other organisations would be placing a legal burden on the Commissioner that he or she, despite his or her best efforts, may not be able to meet.

It also states:

As part of its sponsorship role, OFMDFM will highlight to the Commissioner the value of agreeing memoranda of understanding with appropriate organisations to clarify roles and responsibilities and increase co-operation with other bodies.

In relation to Clause 3 duty (iv) *Promote the provision of opportunities for, and the elimination of discrimination against, older people*, Disability Action was concerned about overlap with the Equality Commission's role in this respect. The Equality Commission commented that it is important that its own continuing role in this regard is reinforced. It stated that effective measures must put in place to avoid any unnecessary or confusing duplication.

In relation to (v) *Promote positive attitudes towards older people and encourage participation by older people in public life* Disability Action questioned whether this, "though laudable", conflicts with the duties contained in the Disability Discrimination Order.

In relation to duty (vi) *Advise the Assembly, the Secretary of State or a relevant authority on matters concerning the interests of older people*, the question of "interests" and "rights" arose again. NIHRC reiterated that because "interests" is not explicitly defined or set out in the legislation "*it may prove difficult to demonstrate why the Secretary of State or any other body should accept this advice*". In its view the Commissioner's advice is likely to be more authoritative if the Commissioner's duties are linked to the rights of older persons and not restricted to "interests".

Clause 4 General powers of the Commissioner

This clause empowers the Commissioner in a number of ways. These general powers include:

- Undertaking, commissioning or providing assistance for research or educational activities concerning the interests of older people;
- Issuing guidance on best practice in relation to any matter concerning the interests of older people;
- Conducting investigations in relation to any matter;

- Compiling, providing and publishing information on matters concerning the interests of older people, and
- Making representations or recommendations to any body or person about any matter concerning the interests of older people.

For duties listed in Clause 3(2) and 3 (3) of the Bill the Commissioner is given the power to carry out a formal investigation.

There was broad approval in the consultation responses about the general powers of the Commissioner. The NIHRC however, raised a concern again that no explicit reference to rights weakens the powers of the Commissioner.

Age sector research from 2008 which looked at the implications of replicating the NICCY model¹⁶ for the Commissioner for Older People Bill identified some confusion in relation to the Commissioner's powers to conduct investigations. For example, the formal investigation powers set out later in the Bill in clauses 13- 20 (which include the powers of a High Court Judge) are not available for investigations launched under Clause 4. There is a need for clarification about the differing 'levels' of investigation contained in the Bill, a point made several times in the consultation. The approach to investigative powers used in the NICCY Order is regarded as a complicated one and the research from 2008 questioned why the investigatory powers and the duties and powers of clause [13] should not apply to the other types of investigations provided for elsewhere.

Cause 5 General review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities

This clause provides for the general review of advocacy, complaint, inspection and whistle-blowing arrangement of relevant authorities. The Commissioner is empowered to examine whether the procedures in such organisations are effective at promoting and protecting the interests of older people.

Clause 5(4) was revised following the consultation. There were concerns amongst many respondents that the legislation allowed the Commissioner to act only where no other body or organisation has powers. Respondents maintained that whilst the Commissioner's focus is on older people, the strategic decisions of other bodies may be informed by other priorities with the result that no action is taken in some cases. After consideration of this the department changed to wording from:

..unless the Commissioner is satisfied that no other body or person has power under any statutory provision to review those arrangements.

¹⁶ *The Commissioner for Children and Young Person (Northern Ireland) Order 2003*, known here as the "NICCY legislation".

to: *...unless it appears to the Commissioner that there is no other body or person likely to review those arrangements.*

Clause 6 Review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in individual cases

This clause is similar to the previous one but allows for a review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in *individual cases* – i.e. on a particular person or at a particular location.

Referring to subsection (3) (but which also applies to clause 5(4)) the NIHRC again questioned the ‘filling the gaps’ approach to the Commissioner’s powers – maintaining that the Commissioner’s role must be more than a “matter of last resort.” Even though the phrase has been “softened” in both clauses 5 and 6 it is likely the NIHRC and others will continue to view this as an unnecessary restriction on the Commissioner’s powers and a lessening of the role. This view concurs with research from 2008 which examined the implications of ‘copying’ the NICCY model for the Commissioner for Older People Bill and concluded:

It can be seen that the NICCY model is more of a patchwork of powers than might immediately be apparent. Its powers of advice and promotion are wide but its powers of investigation and representation are curtailed. The model gives primacy to existing agencies, in some cases, an absolute primacy and in others, a qualified primacy. In formal terms, the NICCY is seen to be ‘filling the gaps’ in existing provision for inspection, investigation and representation¹⁷.

Clause 7 Assistance with complaints to relevant authorities

The Commissioner is empowered to provide assistance with complaints to relevant authorities by providing whatever help an individual older person needs, including financial help, to enable the older person to bring a complaint to the organisation involved. The Commissioner may act on behalf of an older person in making the complaint and in any investigation or other proceedings conducted by the organisation following the complaint. The Commissioner must first of all take account of whether there is another organisation or person *likely* to support the older person in making the complaint.

Part of the clause was reworded following the consultation, 7(1) “*subject to subsection 3*” was removed following an amendment to the wording of subsection 3 and there was a revision to 7 (3) to now read:

¹⁷ Page 25 *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland*. Age Concern NI / Help the Aged March 2008

In deciding whether to provide assistance to an older person under subsection (1), The Commissioner may take account of the financial or other assistance available to the older person in relation to the complaint.

The restriction on the Commissioner to act only when no other body is likely to act in clause 7(4) (and elsewhere in the Bill) was commented on by a number of respondents and groups who preferred to have this restriction lifted. Other respondents however, were in favour of this constraint on the Commissioner and were concerned about duplication with existing statutory bodies. The department's position is made clear:

We recognise the need to avoid duplication with existing statutory bodies and there are specific clauses in the Bill to help to prevent this.

The department does however, acknowledge the concerns expressed about the effect of clauses such as 7(4). Its response was to review some of the restrictions and in some instances 'soften' clauses so that:

..the Commissioner is not prevented from certain actions but will be able to use his/her discretion and judgement including determining when it is appropriate to provide assistance¹⁸.

Clause 7(6) is a new subsection in the Bill and brings the NI Commissioner for Complaints, Assembly Ombudsman for NI, the Information Commissioner and the Pensions Ombudsman into the list of Relevant Authorities.

Clause 8 Investigation of complaints against relevant authorities

This clause gives the Commissioner the power to investigate the handling of a complaint made by an older person against a relevant authority. The Commissioner must first of all be satisfied that the case raises a question of principle. The Explanatory and Financial Memorandum that accompanies the Bill explains that this is to make sure that only the most serious cases come to the Commissioner.

In its consultation response, the NIHRC wanted greater clarity here - for while 8(1) provides a power to investigate a complaint by an older person, it does not refer to complaints made by others on the older person's behalf. NIHRC recommended that the Bill is amended to ensure that the Commissioner can investigate complaints made by an individual on behalf of an older person.

Clause 9 Actions which may be investigated: restrictions and exclusions

¹⁸ Para 11.46 Consultation analysis and report OFMDFM May 2010

This clause covers restrictions and exclusions to actions which may be investigated. The Commissioner is not permitted to investigate where an older person has a right of appeal, complaint or review to a tribunal set up by law or to a court. The Commissioner can act if he/she believes that it is not reasonable to expect the older person to have used the right to appeal or to take the case to court.

The clause also states that Commissioner is prevented from carrying out an investigation in cases involving criminal proceedings or civil proceedings by anyone other than a relevant authority. These cases would be dealt with by the court.

In the Assembly 2nd Stage Debate on the Bill on 7 June 2010 Mark Durkan commented on the clarity of the language of clause 9. Taking the example of the Presbyterian Mutual Society's situation the Member questioned whether the Society would be excluded from the Commissioner's assistance under this clause¹⁹.

Clause 10 Power to bring, intervene or assist in legal proceedings

The Commissioner is empowered to bring, intervene or assist in legal proceedings by this clause. He/she must decide if the case involves a question of principle and if there are special circumstances involved. If so, the Commissioner may take the case to court. The Commissioner may act as *amicus curiae* or friend of the court by giving information to the court on matters affecting older people. The powers covered in this clause received strong support in the consultation.

Victim standing²⁰ was an issue that was raised repeatedly throughout the consultation. The department has stated its position on the issue and said that that is not a matter that can be included in the Bill. In the consultation analysis report the department stresses that victim standing pertains only to human rights cases and that in all other areas, the Commissioner will have what is known as "standing" – that is the ability to bring forward a case on behalf of older people or an individual older person without any older person being directly involved in the legal proceedings.

The department is giving further consideration to a suggestion made by the Advocate that the Commissioner for Older People through his/her collaborative powers could work in co-operation with the NI Human Rights Commissioner (NIHRC) on this issue.

Clause 11 Assistance in relation to legal proceedings

¹⁹ Junior Minister Kelly stated in response that he will reply in writing to the Member on this matter.

²⁰ The Northern Ireland Human Rights Commission (NIHRC) was given "victim standing" in relation to human rights cases by Westminster legislation, the Justice & Security (NI) Act 2007. This means that the NIHRC can initiate a legal case in its own right based on the European Human Rights Convention without involving a specific person.

The clause relates to the Commissioner's powers of assistance in relation to legal proceedings. It applies where an older person (not the Commissioner) has brought a case to court involving the interests of older people but the older person would like the help of the Commissioner with their case.

Again, some respondents to the consultation saw a 'secondary role' being given to the Commissioner by clause 11 subsection (3) - the restriction to act when it appears that no other body is likely to act. Age sector research from 2008 which looked at the implications of using the NICCY model for the Bill commented on this and the previous clause saying:

... an extensive power to assist individuals in legal proceedings, which is otherwise modelled on the legal assistance powers of the NIHRC and the ECNI, is subject, once again, to a residual clause which significantly limits the ICOP's [Independent Commissioner for Older People] power of legal assistance... Once again the ICOP is given a secondary role, only able to act where bodies such as the NIHRC or the ECNI are unlikely to do so.²¹

Clause 12 Conciliation of disputes

This clause provides the Commissioner with powers to commission conciliation services in relation to disputes that may lead to court action. This is a new clause inserted into the Bill following the consultation exercise. Many respondents to the consultation felt this would provide a cost effective alternative to lengthy legal proceedings and bring about quicker resolution to problems for older people for whom time is often a critical factor. The Department agreed and made the adjustments to the Bill.

Clause 13 Formal investigations

The Commissioner is empowered to conduct formal investigations of the actions of relevant authorities by this clause.

In the Assembly 2nd Stage Debate on 7 June 2010 Mark Durkan queried the clarity of the language of clauses 13-17 (and clause 9) asking the Minister to clarify what is meant by formal and informal investigations in the draft Bill²². This concurs with the consultation response from Help the Aged/Age Concern which also reported confusion in relation to the Commissioner's powers of formal and informal investigation as specified in the Bill noting that there are "*distinctions between different investigation*

²¹ Page 53 *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland*. Age Concern NI / Help the Aged March 2008

²² Junior Minister Kelly stated in response that he will reply in writing to the Member on this matter.

*powers and limitations to many of the Commissioner's powers (in the areas of reviews, complaints, casework)*²³.

The Explanatory and Financial Memorandum (EFM) which accompanies the draft Bill goes some way towards clarification of the Commissioner's investigatory powers within the Bill. Some groups however, may still question the *need* for differing levels and types of investigation in the legislation wishing to see the Commissioner able to avail of the same powers across all of his or her duties and functions.

An important issue to a number of respondents in the consultation was older people's access to financial services. An Equality Commission report of 2008 *Older Peoples Access to Financial Services*²⁴ recommended that a future Older People's Commissioner has powers of review and investigation that apply to the private sector as well as the public sector. In the context of widespread evidence of the financial abuse of older people the authors warned against the legislation for the Older People's Commissioner being based on the present NICCY Order. Otherwise, the authors said, the Commissioner could not become involved in the issue of older people's access to financial services. Their report recommended the Enhanced Commissioner model be adopted.

Within the discussion on collaborative working in the consultation analysis report the department commented that there is scope for the Commissioner to cooperate with bodies such as the Consumer Council on issues such as such as access to services, transport, energy and water, consumer education, financial inclusion and capability.

Clause 14 Formal investigations: exclusions

This covers exclusions in formal investigations. In cases where the Commissioner has previously brought, or intervened in, or provided assistance with legal proceedings he/she is prevented from carrying out a formal investigation. The Explanatory and Financial Memorandum explains that this is to ensure that no conflict arises between the Commissioner's advocate and ombudsman roles.

Clause 15 Report on formal investigation

There are procedures to be followed by the Commissioner when he/she carries out a formal investigation of a relevant authority. A report of the investigation must be prepared and persons and organisations who must receive a copy are specified. A confidentiality requirement prevents the Commissioner to name, in the report, individual

²³ Page 7 Consultation response from Help the Aged NI /Age Concern.

²⁴ *Older Peoples Access to Financial Services*. Equality Commission for Northern Ireland 2008

[http://www.equalityni.org/archive/pdf/OLDERPEOPLEFinancialservices\(F\).pdf](http://www.equalityni.org/archive/pdf/OLDERPEOPLEFinancialservices(F).pdf)

Referred to in this paper as the "ECNI report"

people or contain any details that might help identify that person unless the Commissioner believes that it is necessary to do so.

Clause 16 Further action following report on formal investigation

Following on from Clause 15 this relates to further action which the Commissioner can take after publishing a report of a formal investigation.

Clause 17 Evidence in formal investigations

This relates to the type of evidence or information which the Commissioner may have access to in order to conduct a formal investigation.

The clause gives the Commissioner in a formal investigation all the powers of the High Court in respect of the attendance and examination of witnesses and the production of documents. Anyone who obstructs the Commissioner from doing these things could be guilty of contempt of court.

Clause 18 Powers of entry and inspection for purposes of formal investigation

The Commissioner is empowered to enter a building in which an older person lives or is being held or is receiving care or education. It applies when the Commissioner is carrying out a formal investigation into premises managed by a relevant authority.

Clause 19 Obstruction and contempt in relation to formal investigation

A sanction is provided against obstruction of the Commissioner as he or she conducts a formal investigation.

Clause 20 Disclosure of information by Commissioner

The Commissioner may only disclose information during a formal investigation for

- The purposes of the investigation and the report of an investigation
- Any court proceedings involving a criminal offence
- Any enquiry with a view to the taking of proceedings for a criminal offence
- Any proceedings related to obstruction of the Commissioner; or for
- Health and safety reasons of a person at risk.

Clause 21 Review of this Act

Every three years after the passing of the Act the Commissioner must review the workings of the legislation and send a report to the First Minister and deputy First Minister.

A three year period was agreed by the majority of respondents in the consultation with only slight variations. Some wanted the Commissioner to be free to recommend changes to the legislation whenever he/she feels this is required.

Clause 22 Privilege for certain publications

This clause allows that any report that the Commissioner is required or permitted to publish is exempt from challenge under the law of defamation.

Clause 23 Application of this Act: relevant authorities with mixed functions

This clause provides that for a general health care provider, the relevant authority provisions of the Bill apply only to the general health care by the provider. The Explanatory Memorandum explains that in relation to an independent provider, the relevant authority provisions of the Bill apply only to the service the independent provider was providing (or which it is its function to provide) under arrangements with a health and social care body or a general health care provider. In relation to any other relevant authority (except a nursing or residential care home) the relevant authority provisions of the Bill apply only to the public functions exercised by the relevant authority.

Subsection (3) of the clause was reworded from:

In relation to any other relevant authority, the relevant authority provisions of this Act apply only in relation to matters arising in connection with the exercise by the authority of its public functions.

to read:

In relation to any other relevant authority (except a person carrying on or managing a residential care home or nursing home), the relevant authority provisions of this Act apply only in relation to matters arising in connection with the exercise by the authority of its public functions.

This revision brings nursing and residential care homes in the private and voluntary sector within the remit of the Bill as relevant authorities. The issue of the inclusion of private and voluntary organisations was widely discussed in the consultation. Help the Aged NI/Age Concern's position was:

The legislation should also cover all public, private and voluntary organisations responsible in any way for the health and social care of older people. We do not think the proposals go far enough in extending the legislation to independent bodies if the Commissioner's powers will cover only older people whose care costs are being met out of the public purse. All bodies providing residential care for older people on a public, private or voluntary basis should fall under the same obligations and these obligations should be available to all residents.

NICEM supported the expansion of the Commissioner's remit beyond relevant authorities to include community and faith-based organisations and major private sector employers and service providers.

Clause 24 Application of the Act: matters arising before commencement

This clause provides for the retrospectivity of the Bill, i.e. that the Commissioner would be able to look at issues which happened before the Bill passed into law.

Clause 25 Interpretation: "older person"

The words "older person" means a person aged 60 or over but the Commissioner could deal with a matter raised by someone aged 50 or over if it was an issue that raised a question of principle affecting people age 50 or over generally or there were exceptional circumstances.

The clause also proposes that where an older person has died or is for some reason incapable of representing himself/herself, a representative acting on their behalf should also be able to do anything under this Bill that can be done by an older person.

There is no legal or generally accepted definition of an older person and it is not covered in the UNPOP. Respondents to the consultation were generally in agreement with the definition of an older person expressed in the draft Bill. Age 60 and over is also used in the Older People's Commissioner for Wales legislation. There was agreement amongst respondents that there are situations in which a matter of principle is at stake in relation to younger persons – i.e. those 50+ and the provision to have discretion in certain circumstances was welcomed. It was pointed out that life expectancy is lower than average for certain groups, for example people with a learning disability.

Clause 26 Interpretation : "relevant authority"

This clause defines the term "relevant authority". It includes any authority which falls within the scope of the Assembly Ombudsman or the Commissioner for Complaints. It

also includes other organisations which carry out work directly relevant to the lives of older people and which are specifically listed in Schedule 3. This list includes a number of bodies in the area of health. This clause also allows the Office of the First Minister and deputy First Minister to add, modify or remove a body from the list.

The list was changed by the department following the public consultation. The Financial Ombudsman was added. Due to the devolution of policing and justice a number of bodies previously included are no longer specifically named as the Bill as they are now listed in the Commissioner for Complaints (NI) Order 1996 or the Ombudsman (NI) Order 1996.

Replies to the consultation from a number of groups on the matter of relevant authorities stated again that the legislation should cover all public, private and voluntary bodies responsible in any way for the health and social care of older people. It was also proposed that the NIO and other Westminster departments should be included in the list. This has been achieved with respect to the NIO with consent given by the Secretary of State. The department has stated that Westminster Departments will not be included in the list of relevant authorities as their work is outside the remit of the assembly.

Clause 27 Interpretation: general

This clause defines a number of terms used throughout the Bill.

Clause 28 – Commencement

This clause provides for a number of the provisions of the Bill to come into operation 2 weeks after Royal Assent and provides for the other provisions to come into operation by subordinate legislation.

Clause 29 – Short title

This clause provides for the short title of the Bill.