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Summary

The Northern Ireland Human Rights Commission:

(para 9) advises that the legislation should include a clause that specifically states that the role of the NIPSO is to consider the extent to which the listed authority has acted with regard for the human rights of others, as an aspect of investigating maladministration... further advises therefore that specific reference to human rights in the Bill would offer clarity to listed authorities in terms of the NIPSO's duty to use human rights a benchmark in its assessment of them.

(para 12) advises that allowing complaints to be made in forms other than writing will help ensure equality of access to the services of the NIPSO as the previous requirement may have deterred complaints from people with limited literacy, learning or physical disabilities and people not proficient in English.

(para 13) advises that the time limit for making complaints to the NIPSO should remain as 12 months as the proposed reduction is most likely to disadvantage the more vulnerable and marginalised in society.

(para 18) advises that clause 35 (4) be amended to include a duty on the NIPSO to take into account the human rights of any person aggrieved and any other person considered appropriate before publishing any investigation report in the public interest and that the NIPSO's communicate his considerations and their outcome to the person aggrieved and other persons considered appropriate

(para 19) further recommends therefore that the NIPSO should be bound to communicate to persons aggrieved and any other person considered appropriate that he/she has considered the human rights of all concerned.

(para 21) advises that clause 41 be amended so that scope for a NI Minister or the Secretary of State to prevent information being disclosed by the NIPSO is narrowed.

(para 22) is concerned that a fee may deter people from seeking a copy of the report and advises that if a report is being published on public interest grounds it should be available to the public free of charge.

(para 23) advises that the NIPSO should be required to assess the reasonableness of charging of a fee for the provision of reports, taking into account the importance of accessibility and not disadvantaging vulnerable and marginalised groups

(para 24) welcomes the clauses 37 (2), 45 and 46 in the Bill which provide the NIPSO with measures to assist in ensuring compliance and securing redress for individuals

(para 27) advises that the Bill should ensure that the NIPSO itself is exemplary in ensuring procedural fairness in its handling and investigation of complaints.

(para 28) therefore advises that clause 30 be amended to include a specific requirement on the NIPSO to ensure that the rights of all are respected and promoted in his/her conduct of investigations



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The Public Services Ombudsperson Bill [NIA 47/11-16]

1. The Northern Ireland Human Rights Commission (the NIHRC), pursuant to Section 69(4) of the Northern Ireland Act 1998 is obliged to advise the Assembly whether a Bill is compatible with human rights. In accordance with this function the following statutory advice is submitted to the ad hoc Committee on the Northern Ireland Public Services Ombudsperson Bill.
2. The Commission bases this advice on the full range of internationally accepted human rights standards. The Northern Ireland Executive is subject to the obligations contained within the international human rights treaties that have been ratified by the United Kingdom. In the context of legislation creating and empowering the office of an Ombudsperson, the relevant treaties include the:
 - the CoE European Convention on Human Rights (ECHR)¹;
 - the International Covenant on Civil and Political Rights (ICCPR)²;
 - the International Covenant on Economic, Social and Cultural Rights (ICESCR);³
 - the UN Convention on the Rights of Persons with Disabilities (UNCPRD);⁴
 - The International Convention on the Elimination of All Forms of Racial Discrimination;⁵
 - the UN Convention on the Rights of the Child and⁶
 - the Charter of Fundamental Rights of the EU⁷
3. In addition to these treaty standards there exists a body of 'soft law' developed by various human rights bodies. These declarations and principles are non-binding but provide further guidance in respect of specific topic areas. The relevant standards in this context include;

¹ Ratified by the UK in 1951.

² Ratified by the UK in 1976.

³ Ratified by the UK in 1976

⁴ Ratified by the UK in 2009

⁵ Ratified by the UK in 1969

⁶ Ratified by the UK in 1991

⁷ Ratified by the UK in 2000

- Council of Europe Recommendation No. 757
 - Council of Europe Recommendation No. R (85) 13
 - UN Resolution 2000/64
4. In November 2012, the NIHRC entered into a 20 month Service Level Agreement with the Assembly Ombudsman / Commissioner for Complaints (AOCC). During this time the NIHRC provided advice to the AOCC on how to embed a human rights-based approach to its work. This evidence is therefore based on a record of direct engagement with the work of the AOCC, its complaint handling and investigation procedures and the tangible positive outcomes of those investigations.
 5. Overall, the NIHRC welcomes the Bill in its attempt to further strengthen this important institution. The granting of the power to conduct own-initiative investigations, whereby systemic maladministration can be investigated and uncovered is particularly welcome and pioneering for the UK. The NIPSO has significant implications for Northern Ireland in terms of potentially protecting and promoting human rights. The NIHRC advises that the NIPSO itself must comply with human rights law and also follow the principles of a human rights-based approach which requires upholding and embodying certain values and principles.

Ombudsperson as protector of Human Rights

6. A number of instruments at the Council of Europe have affirmed the important role of the Ombudsperson as an alternative to the Courts, in protecting human rights. The Council of Europe Committee of Ministers has called on states to empower Ombudsman, "to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved"⁸ The terms of reference of the Council of Europe's Commissioner for Human Rights includes facilitating "the activities of national ombudsmen or similar institutions in the field of human rights".
7. Clause 1 (3) states that the "principal purpose of the Ombudsperson is to investigate maladministration in listed authorities".⁹ The NIHRC notes that there is no statutory definition of 'maladministration' anywhere in the UK. What is known as the 'Crossman' definition includes, "bias, neglect, inattention, delay, incompetence, inaptitude, perversity,

⁸ Recommendation No. R(85)13 of the Committee of Ministers adopted on 23 September 1985.

⁹ The NIHRC notes that under clause 17 which relates to health and social care complaints the NIPSO may go straight to investigating the merits of a decision taken in the exercise of clinical or professional judgement. However, the central argument remains the same

turpitude, arbitrariness and so on".¹⁰ This guidance, dating back to 1967, has been used with responsibility and effectiveness to date by Ombudspersons in the UK. In addition, the AOCC along with other Ombudspersons in the UK, has been using the Principles of Good Administration to make a determination of whether maladministration has occurred. These Principles have served as a constructive benchmark to public authorities who are themselves duty bearers under human rights law. One of the Principles requires public authorities to "act in accordance with the law and with regard for the rights of those concerned".¹¹ The AOCC through the 20 month Service Level Agreement with the NIHRC has issued a position statement that refers to the full range of human rights treaties ratified by UK.

8. The NIHRC accepts that a statutory definition of maladministration is not necessary and indeed may serve as an unhelpful constraint on the Ombudsperson. However, the NIHRC advises that the term 'maladministration' and the Crossman definition predates the Human Rights Act 1998 and indeed the UK's ratification of a number of human rights treaties. As evidenced above, the CoE has placed significant importance on the creation and resourcing of Ombudspersons to promote and protect human rights and the NIPSO will have clear duties under the Human Rights Act 1998 regarding the ECHR rights.
9. Given the clear duty on the NIPSO by virtue of the Human Rights Act and the standards of the CoE stressing the important role of Ombudspersons in promoting and protecting human rights, **the NIHRC advises that the legislation should include a clause that specifically states that the role of the NIPSO is to consider the extent to which the listed authority has acted with regard for the human rights of others, as an aspect of investigating maladministration. The NIHRC further advises therefore that specific reference to human rights in the Bill would offer clarity to listed authorities in terms of the NIPSO's duty to use human rights a benchmark in its assessment of them.**

Ensuring equality of access to the NIPSO

10. The NIPSO offers an important accountability mechanism in Northern Ireland generally and specifically in promoting and protecting the right to good administration under the EU Charter for Fundamental Rights. As already stated it also offers an important opportunity to strengthen human rights protection in Northern Ireland. As required by Article 14 ECHR/ Article 2 ICCPR (the non-discrimination clauses) the Bill therefore must ensure that the NIPSO is accessible to all and in particular to the

¹⁰ Richard Crossman, Leader of the House of Commons, defined this term at the time of the Parliamentary Commissioner Act 1967. *The Ombudsman - the developing role in the UK*, Standard Note SN/PC/04832, House of Commons Library, November 2012

¹¹ http://www.ni-ombudsman.org.uk/Publications.aspx#Ombudsman_Principles

most vulnerable and marginalised in Northern Ireland who may have the worst experiences when using public services. Clauses 25 and 26 of the Bill therefore have important implications for how the NIPSO can ensure equality of access.

11. The NIHRC welcomes the introduction, in clause 25, of the statutory duty to listed authorities to inform aggrieved persons about the NIPSO once its own complaints procedure has been exhausted. This provision will ensure that all complainants are aware of the NIPSO and in particular aid more vulnerable and marginalised people, who may not know of the existence of the NIPSO to take their complaint further.
12. The NIHRC welcomes the removal of the requirement that complaints to the NIPSO be made in writing. **The NIHRC advises that allowing complaints to be made in forms other than writing will help ensure equality of access to the services of the NIPSO as the previous requirement may have deterred complaints from people with limited literacy, learning or physical disabilities and people not proficient in English.**
13. Clause 26 also makes provision for reducing the time limit for making a complaint to the NIPSO from 12 months from the internal complaints system being exhausted to six months. The NIHRC is concerned that the reduction in time limit may deter complaints from persons who have felt particularly distressed by their experience of the complaints procedure and indeed the actions that led to the complaint in the first place. The NIHRC is particularly concerned that vulnerable groups such as younger people, older people, people with learning disabilities and people from minority ethnic backgrounds may need a longer period of time to consider whether to pursue a complaint further and endure the process of articulating it again to another body. Clause 26 (4) allows the Ombudsperson to investigate a complaint falling outside of this time limit if he/she believes there are "special circumstances which make it proper to do so". However, personal distress suffered by the complainant may not fall with what are considered "special circumstances". The NIHRC advises that the Bill should enhance protections for rights holders. It does not therefore accept the position in the Explanatory Notes as satisfactory i.e. that the statutory obligation on listed authorities to notify complainants of the NIPSO's role counters any adverse impact of the reduction in the time limit. **The NIHRC advises that the Bill should enhance protections overall and that therefore in order to ensure the NIPSO process is accessible to all, the time limit should remain as 12 months.**
14. The NIHRC welcomes the removal of the residency requirement for complainants. The removal of the requirement that the person aggrieved be resident in Northern Ireland assists in strengthening access of non-UK nationals and, in particular immigrants, to the NIPSO.

Migrants to Northern Ireland may access or attempt to access, a range of public services during their time living here, also have human rights to access those services and therefore should have access to an independent complaints process should those rights not be protected and respected.

15. However, the NIHRC notes that while there is a duty under clause 37 (1) on the NIPSO to lay an annual report before the Assembly there is no further clarity on what that annual report should contain. For example, there is no duty on the NIPSO to analyse and publish information on trends and patterns in complaints overall. The NIPSO will not be a designated authority for the purposes of equality monitoring and the NIHRC accepts that given the Equality Commission is a listed authority such designation would not be appropriate. However, this leaves the NIPSO in a unique position where it is not subject to equality monitoring. The NIHRC notes that public services Ombudspersons in England, Wales and Scotland publish information on complainants according to protected equality grounds, such as, gender, age and ethnicity. Such information assists Ombudspersons in questioning why certain groups do not seem to be using their services and finding ways to make their services more accessible to such groups. The AOCC has not published or indeed collated such information on complainants to date. The NIHRC advises that the NIPSO should be expected to collate and publish such information.
16. The NIHRC welcomes the inclusion of social care, schools and further education institutions within the remit of the NIPSO. The inclusion of social care is potentially positive for the rights of older people and people with disabilities who are more likely to be in need of or in receipt of social care services. The inclusion of schools and further education institutions offers an important avenue for children and young people to bring complaints.

Publishing findings – the public interest and balancing rights

17. Clause 35 allows the NIPSO to publish an investigation report if he/she believes this is in the public interest. The NIHRC views as positive that the NIPSO must give notice of this proposal to the person aggrieved, the listed authority and any other person alleged to have taken the action to which the complaint relates (clause 34 (2)). This notice is important because the publication of a report in this manner is a departure from how the current offices of the NI Ombudsman and Commissioner for Complaints have operated. Currently all complaints are investigated in private and there is no provision to publish reports in the public interest. Therefore complainants and bodies or individuals that are the subject of a complaint hitherto had an expectation of privacy. The NIHRC refers the ad hoc Committee to the Donaldson Report in which it was welcomed that changes in legislation would allow the Ombudsman to

make his reports public as a means of strengthening the patient voice in health care complaints.¹²

18. The NIHRC notes the provision under clause 35 (4) under which the NIPSO will have a duty to consider the “interests” of the person aggrieved and any “other person considered appropriate” before deciding whether to publish the report. The publication of reports and/or related information has the potential to impact on the human rights of the person aggrieved and other persons named in any report. In particular the disclosure of such information may lead to interference with the right to respect for private and family life (Article 8 ECHR/ Article 17 ICCPR). **The NIHRC therefore recommends that clause 35 (4) be amended to include a duty on the NIPSO to take into account the human rights of any person aggrieved and any other person considered appropriate before publishing any investigation report in the public interest.**
19. Article 8 ECHR is a qualified right and therefore may be interfered with provided any such interference is in accordance with the law, in pursuance of a legitimate aim, necessary in a democratic society and proportionate. The legitimate aim in the circumstances may legitimately be public interest reasons. **The NIHRC further recommends therefore that the NIPSO should be bound to communicate to persons aggrieved and any other person considered appropriate that he/she has considered the human rights of all concerned.**
20. The NIHRC notes with concern, however, the possible obstacles under clause 41 to the NIPSO exercising his/her powers. Under clause 41 the First Minister and deputy First Minister (acting jointly) a NI Minister or the Secretary of State may prevent information being disclosed by the NIPSO on the basis that it would be “prejudicial to the safety of NI or the UK or otherwise contrary to the public interest” (clause 41). The NIHRC notes these are wide exemptions and may lead to unnecessary interference with the NIPSO’s ability to publish reports in the public interest or even investigate complaints or carry out own-initiative investigations.
21. **The NIHRC advises that clause 41 be amended so that scope for a NI Minister or the Secretary of State to prevent information being disclosed by the NIPSO is narrowed.**
22. Under Article 10 ECHR/ Article 19 (2) ICCPR everyone has the right to receive information as an aspect of the right to freedom of expression. Under Article 21 UNCPRD disabled people have the right to receive and impart information on an equal basis with others. Under Article 13 of the UNCRC the right to receive and impart information is guaranteed to

¹² The Donaldson Report, page 28, published January 2015 (available at www.dhssps.gov.uk)

children also. The NIHRC notes clause 35 (5) allows for the NIPSO to charge a “reasonable fee” for supplying a copy of the report that he/she has decided to publish on public interest grounds. The Bill also allows for the NIPSO to charge a “reasonable fee” for supplying a copy of a report following an own-initiative investigation. **The NIHRC is concerned that a fee may deter people from seeking a copy of the report and advises that if a report is being published on public interest grounds it should be available to the public free of charge.**

23. Similarly the NIHRC does not agree that the NIPSO should, without exemption, be permitted to charge a fee to supply a copy of report following an own-initiative investigation. Own initiative investigations are to be conducted where the NIPSO believes there are systemic problems with a listed authority and following the publishing of criteria as to how the subject of own-initiative investigations are to be decided. It is therefore not appropriate that all members of the public whatever their circumstances might be expected to pay a fee to have sight of reports that reveal systemic problems or failures in listed authorities. The NIHRC is concerned that this potentially compromises the right to good administration and the right to receive information as an aspect of the right to freedom of expression under Article 10 ECHR/ Article 19 (2) ICCPR. The requirement of a fee is more likely to prevent people from more vulnerable and marginalised groups and in particular disabled people and young people from accessing reports who are more likely to be on lower incomes or have no independent income. **The NIHRC advises that the NIPSO should be required to assess the reasonableness of charging of a fee for the provision of reports, taking into account the importance of accessibility and not disadvantaging vulnerable and marginalised groups.**

Ensuring compliance

24. Ombudspersons only have the power to make recommendations to listed authorities which are not legally binding. While the current offices of the Assembly Ombudsman and Commissioner for Complaints have enjoyed a high rate of compliance with recommendations that cannot always be guaranteed. **The NIHRC welcomes the clauses 37 (2), 45 and 46 in the Bill which provide the NIPSO with measures to assist in ensuring compliance and securing redress for individuals, as highlighted below:**
25. Clause 37 (2) states that the NIPSO will have the power to lay a special report before the Assembly “where an injustice has been sustained by a person aggrieved” and the NIPSO believes that this “has not been, or will not be remedied or adequately remedied”. Clause 37 is particularly welcome given that the power of the NI Commissioner for Complaints to lay a special report before the Assembly under such circumstances has

been questioned in legal proceedings. ¹³The leverage that clause 37 (2) provides to the NIPSO is therefore welcomed.

26. Clauses 45 and 46 retain existing provision regarding the Attorney General. Under clause 45 where the NIPSO is of the opinion that there is systemic maladministration in a listed authority which is likely to continue he/ she may request that the Attorney General applies to the High Court for relief.

Independence and Procedural Fairness

27. As the Explanatory Notes make clear, the NIPSO will not be a court or tribunal for the purposes of human rights law. The European Court of Human Rights case of *Bentham v Netherlands*¹⁴ established that a body that has the power to make recommendations only does not meet the requirements of a court or tribunal. The NIPSO therefore is not legally bound by the requirements of Article 6 ECHR/ Article 14 ICCPR. However, as an institution responsible for holding listed authorities to account where they fail to uphold basic principles such as fairness and equality **the NIHRC advises that the Bill should ensure that the NIPSO itself is exemplary in ensuring procedural fairness in its handling and investigation of complaints.**
28. Furthermore the NIPSO will itself have evidence gathering powers analogous to the High Court and it is therefore vital that the Bill ensures insofar as possible that the NIPSO will exercise these powers in a manner that respects the human rights of all and guarantees procedural fairness and impartiality. **The NIHRC therefore advises that clause 30 be amended to include a specific requirement on the NIPSO to ensure that the rights of all are respected and promoted in his/her conduct of investigations.**
29. The NIHRC notes the wide discretion given to the NIPSO under clause 30 to conduct investigations as he/she “considers appropriate in the circumstances of the case.” The NIHRC agrees with the requirement that the listed authority or any person against whom allegations have been made be given the opportunity to comment on the allegations. The discretion subject to such requirements regarding procedural fairness is appropriate given the importance of protecting the independence of the NIPSO in conducting investigations.
30. The NIHRC agrees with the position in the Explanatory Notes that the statutory bar on the NIPSO disclosing privileged information in court proceedings including the County Court mechanism under clause 43 protects the principle of equality of arms as an aspect of Article 6 ECHR/ Article 14 ICCPR.

¹³ JR55 v NI Commissioner for Complaints 2014 NICA 11

¹⁴ *Bentham v the Netherlands* 1985 (Application No: 8848/80)

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May 2015**