



# RESPONSE TO THE CALL FOR EVIDENCE ON THE PUBLIC SERVICES OMBUDSPERSON BILL

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## **Introduction**

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (NI) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,600 solicitors working in some 520 firms, based in over 70 geographical locations throughout Northern Ireland as well as practitioners working in the public sector and in business. Members of the Society thus represent private clients in legal matters, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, this role is as important as ever.

The solicitor's profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and is appropriately qualified to assess the practical out workings of policy proposals.

**May 2015**

## **Overall Policy of the Bill**

### *Purpose of the NIPSO*

1. The Society responded to the initial public consultation by OFMDFM on the issue of updating and reforming the office of the NI Ombudsman through the creation a unified office known as the Northern Ireland Public Services Ombudsperson (NIPSO). In that response, the Society noted that whilst combining the roles of the Commissioner of Complaints and the Assembly Ombudsman has merit, care should be taken to ensure that the NIPSO had a clear and focused remit and that the ultimate organs of accountability remained the Northern Ireland Assembly and the courts where appropriate.
2. In particular, we see the NIPSO as having an important role in terms of informing the debate around public administration in addition to the handling of individual complaints. It is pleasing to see that the Department has chosen to list the bodies within the Ombudsman's jurisdiction in Schedule 3 of the legislation. This creates the space for a reasoned debate about the appropriate reach of the NIPSO and the potential to address any issues in terms of overlap and duplication of oversight.
3. We preface our remarks by stating that the office of the NIPSO should have a distinct role and purpose, to remedy maladministration at one step removed from the courts and to report directly to the Northern Ireland Assembly where appropriate. Accordingly, the Society will direct our response towards considering whether the draft Bill delivers a balanced regulatory framework for the new office and structures their interaction with other key institutions in the public sphere proportionately.

## **Power to Apply to the County Court**

4. The Society welcomes the continuance of the power for complainants to apply to the County Court for redress under Clause 43 of the draft Bill. Although this is rarely invoked, this is principally due to a high degree of compliance with the Ombudsman's recommendations. It is reasonable to assume that this compliance is in some measure encouraged by this power and the presence of other referral mechanisms. Delivering effective mechanisms of redress for citizens is characterised by distinct levels of accountability stretching from administrative level through to the courts, and this is reflected by the retention of this provision.

## **The Structures Proposed by the Bill**

### *Access to Representation and the Disclosure of Legal Advice*

5. The draft Bill gives rise to serious concerns in relation to the removal of legal privilege for listed Authorities and the decision to invest the Ombudsman with the power to determine whether or not such listed Authorities are entitled to legal representation. It is our view that these proposals infringe important fundamental rights enshrined in the ECHR and incorporated in the Human Rights Act 1998.
6. In the case of the former, the fundamental right of the client to a private and family life under Article 8 ECHR is engaged, which extends to correspondence with legal representatives. The Society would also alert the Committee in the case of the latter to the importance of Article 6 ECHR and allowing respondents an effective opportunity to challenge investigations which may result in an adverse outcome for the organisation and individuals concerned.
7. The Committee noted in their Report on the proposals in 2013 that compliance with Article 6 ECHR would depend upon the procedure as a whole and the Society will comment directly on these points. It is our view that the Bill as currently drafted does not deliver a balanced and proportionate set of powers for the Ombudsman in relation to the office's primary functions.

### *Legal Privilege*

8. Clause 31 (5) of the draft Bill replicates Article 13 (3) of the Commissioner for Complaints (Northern Ireland) Order 1996 stating that no evidence or documents can be compelled, other than those which could be compelled in High Court proceedings. Crucially, however the draft Bill also extends the provisions of Article 14 (3) of the Ombudsman (Northern Ireland) Order 1996 to the new combined office at Clauses 32 (1) and (2). This provision explicitly overrides legal privilege in the context of an investigation by the new Ombudsman. The clause moves beyond government departments and includes general health care bodies and other public bodies currently under the remit of the Commissioner for Complaints Order.
9. The client has a fundamental human right to be entirely candid with his/her legal adviser and this right is not overridden by other public policy considerations. This principle was established to encourage access to the justice system and to serve the rule of law by encouraging complete disclosure to legal advisers. Although privilege may be overridden by statute, the Society does not consider that a compelling policy rationale for doing so has been put forward. The Society regards this provision in the Bill as an unwarranted interference with the rights of clients to an expectation of privacy in relation to their communications with their legal advisers.

10. When considered alongside the proposals discussed below to both expand the investigatory powers of the office and to invest the Ombudsman with the discretion to determine entitlement to legal representation, the proposed model is fundamentally imbalanced. This blanket provision disregards the importance of privilege as one of the cornerstones of our civil liberties. On that basis, the Society would urge the removal of these clauses from the draft Bill.

### *Power to Regulate Representation*

11. The provision in Clause 30 (7) (b) of the draft Bill, which provides a power for the Ombudsman to “determine whether any person may be represented in the investigation by Counsel, Solicitor or otherwise”, is deeply troubling. Taken in conjunction with the proposed provisions on privilege, this would establish a position whereby the Ombudsman would both control the terms on which legal representation was accessed and be able to obtain any legal advice received. The Society considers that this raises serious issues of proportionality and the right to a fair hearing under Article 6 ECHR.
12. The breadth of the Ombudsman’s discretion can be appreciated with reference to the general power invested in the office holder to determine the procedures governing investigations under Clause 30 (6). Procedural fairness would balance the rights of the respondent with an appropriate set of the powers for the investigatory body. The Society consider that taken together, these clauses create a fundamental imbalance in the legislation in favour of the Ombudsman. They do so by concentrating power over process directly in the investigating body and by infringing the general checks and balances which are integral to the respondent’s right to a fair hearing under Article 6 ECHR.
13. The Society would caution that the Ombudsman is a hybrid office, combining both investigatory and adjudicatory functions, in contrast to the separation of these functions in the court process. This fusion is directly linked to the position of the office as a means of dealing with complaints where the facts are not in dispute and where the redress required is below that which would be required by a formal court process. By expanding the powers of the office both in terms of determining the procedural rights of respondents and its investigatory remit, some aspects of the proposed Bill have the potential to seriously undermine confidence in the NISPO if enacted.
14. Although it may be said that unlike a court, the Ombudsman cannot strictly enforce their recommendations, in practice the Ombudsman exercises highly persuasive power. The capacity to refer to the County Court and to petition the Attorney General to apply to the High Court apply for injunctive relief in serious systemic cases strengthens the Ombudsman’s position. This is in addition to the decision to extend to the new office the current Assembly Ombudsman’s powers to issue special reports to the Assembly, under Clause 37 (2). Accordingly, any assessment of the powers provided to the NIPSO must be seen in the wider political context and the evidence of the high degree of compliance with his recommendations.

## *Reputational Damage*

15. In addition, it is important to note the negative impact a finding of maladministration for those employed by a public authority in reputational and career terms. This reputational risk for professionals in the public service places a high premium on the importance of procedural fairness as a means of securing confidence in regulatory mechanisms. The Society does not believe that the current structures as set out in the Bill are appropriate and that more proportionate provisions could be put in place to achieve the policy goals of the NIPSO.
16. The provision within the current Article 12 (7) of the Commissioner for Complaints (Northern Ireland) Order 1996, which provides an automatic right to a hearing in circumstances where a report or adverse finding may be forthcoming, is the correct approach. The substitution of this provision for the current Clause 30 (7) (b) would go some way to redressing this mischief by striking a more proportionate balance between robust investigatory powers and the right to a fair hearing.

### **'Own Initiative' Investigations**

## *Partnership and Avoidance of Duplication*

17. The Society urged caution in our earlier representations on the proposal to establish a power for the Ombudsman to initiate investigations in the absence of receiving complaints. This was due to the potential resource implications, the risk of undue duplication of work and the uncertainty which may be created by the inclusion of such a wide ranging power. Our view was premised on the principle that the Ombudsman's office should seek to work in partnership with Assembly Committees tasked with oversight of the bodies under its jurisdiction. As a result, this delicate balance should be reflected in the statute. These Committees often provide reports dealing with systemic problems in the governance of particular organisations and it is important that the Ombudsman complements, rather than usurps this role.

## *Certainty and Procedural Fairness*

18. The decision to incorporate this power in the draft Bill in Clauses 8 and 9 gives rise to the need to establish greater certainty around the principles to be applied when initiating investigations. In particular, it will be important to guard against any accusations of arbitrariness in the initiation of investigations, which should be based on credible and verifiable grounds for suspicion. It is this combination of a greater breadth of investigatory powers and unfettered discretion to control the procedural aspects of investigations which gives rise to the Society's overarching concerns about the draft Bill in its current guise.

19. It is an overarching principle of the rule of law that citizens and public bodies should understand clearly the extent of the duties that are placed upon them. In particular, the definition of “systematic maladministration” in Clause 8 (4) (a) of the Bill requires to be unpacked, with criteria to identify the circumstances which must be present to trigger investigations. Defining this remit in a transparent and proportionate manner would serve the public interest by increasing confidence in the office and the fairness of the overall process.

#### *Payment of Compensation by Listed Authorities*

20. The Society notes that the draft Bill provides the new office with the power to recommend a compensatory payment is made to an individual by general health care providers, including GPs, Dentists, Pharmacists and Optometrists. The provision of this power could have financial implications for such providers, both in terms of liability for payments and the burden of professional indemnity insurance. Accordingly, when set against the background of enhanced discretionary powers and a broader investigatory remit, the decision to incorporate compensatory powers, their level and operation needs to be considered carefully.
21. Currently, the test for civil liability in terms of clinical judgment involves the need for the claimant to establish a duty of care and that a breach of that duty of care has caused damage/loss. These thresholds do not apply to investigations of the Ombudsman and it is submitted that focus should be directed to the suite of powers available, the limits to compensation awarded and the appropriate distinction between formal court processes and the procedure of the NIPSO.
22. Specifically, the role of the Ombudsman, as stated above is as a separate resolution process from the courts, extending to cases which relate to facts which are non-contentious and where the aggrieved party is seeking relatively modest compensation. The Society would therefore stress to the Committee that any powers incorporated should be proportionate to the procedures to be put in place.

#### *Form of Complaints, Time Limits and Aggrieved Persons*

23. In relation to the receipt of complaints, the Society notes this is placed at the discretion of the Ombudsman in Clause 26 of the draft Bill. As a general principle, it is important that the Ombudsman’s service is both accessible and visible to the community as a whole in order to increase its effectiveness. However, the admission of oral complaints could have resource implications in terms of bureaucracy and the Society would re-state our view that whilst complaints should be in written form, mechanisms to assist vulnerable complainants should be put in place. This would combine the advantages of prescribing written complaints as a more focused method of establishing the issues, whilst ensuring access to the Ombudsman is practical and effective. This matter is likely to be resolved in the form of guidelines adopted by the NIPSO following passage of the legislation but is a point which the Committee may wish to consider within the context of the draft Bill.

## **Conclusion**

24. The Society welcomes the invitation to submit comments in respect of your Committee's deliberations on the Public Service Ombudsperson Bill and should you require any further information, please do not hesitate to contact the Society.