

## MPS Evidence Submission

### **Northern Ireland Assembly Ad-Hoc Committee: Northern Ireland Public Services Ombudsperson (NIPSO) Bill**

May 2015

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#### **About MPS**

1. MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind.
2. MPS is not an insurance company, but a mutual (not-for-profit) organisation which exists to serve and protect its members and to safeguard their professional reputation, interests and integrity.
3. Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This includes clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.
4. Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

#### **Legal Advice & Healthcare Practitioners**

##### **Summary**

5. It is common for healthcare practitioners, particularly doctors and dentists, to seek independent advice upon receipt of a patient complaint.
6. In our 2013 Annual Report, we explain that MPS opened 3,989 new files relating to complaints.<sup>1</sup> This accounted for 24% of the total medical files opened that year and was the largest category by case type.
7. Independent professional advice is tailored to the particular needs of the individual healthcare practitioner and is funded at the personal expense of the practitioner involved, either through

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<sup>1</sup> Medical Protection Society "Supporting members through difficult times" Strategic Report 2013  
<http://www.medicalprotection.org/uk/about-mps/organisation-and-finance>

## MPS Evidence Submission

### Northern Ireland Assembly Ad-Hoc Committee: Northern Ireland Public Services Ombudsperson (NIPSO) Bill

May 2015

---

his/her privately instructed solicitor or, more commonly, through an annual subscription to a medical or dental defence organisation such as MPS.

#### Our Concerns

##### Legal Professional Privilege

8. Section 32(2) of NIPSO Bill seeks to remove from listed authorities, such as general health care providers, the privilege allowed by law in legal proceedings. We submit that doctors, dentists and other healthcare professionals must be entitled to access legal advice, in the knowledge that this information will not be used to their detriment at a later stage.
9. The rationale for legal professional privilege has been described at length in a number of UK court judgments, which we do not intend to rehearse in the present submission. In summary, legal advice privilege exists solely for the benefit of the client and in order to ensure that there is full, and frank, communication between lawyers and their clients.
10. The Committee is referred to the House of Lords judgment in *Three Rivers (no 6)*, [2004] UKHL 48, wherein Lord Scott sets out his position as follows:

*“...communications between clients and lawyers...should be secure against the possibility of **any scrutiny** from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else...It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material”*

(emphasis added)

11. The safeguards in the Bill, prohibiting the publication of the privileged information in the NIPSO's report and restricting the admissibility of privileged documents in certain court proceedings, do not protect the fundamental rights of individual healthcare professionals.

## MPS Evidence Submission

### Northern Ireland Assembly Ad-Hoc Committee: Northern Ireland Public Services Ombudsperson (NIPSO) Bill

May 2015

---

#### Legal Representation

12. The Commissioner for Complaints (Northern Ireland) Order 1996 provides an automatic right for legal representation, including testing of evidence by cross-examination, if it appears to the Commissioner that there may be grounds for making any report or recommendation that may adversely affect any body or person.
13. The NIPSO Bill does not contain an equivalent provision and Section 30 provides the Ombudsperson with *the discretion* to determine whether any person can be represented in the investigation by a solicitor or barrister. Thus, it would appear that the draft Bill is incompatible with the basic right to legal representation.

#### **MPS Proposals**

14. *If the Committee is minded to retain the provision on privileged information, we submit that there should be an amendment to Section 32, with the aim of protecting the privilege relating to private legal advice i.e. advice which has not been financed out of public funds.*
15. *Section 30 of the draft Bill should be amended to reflect the current position in relation to legal representation (as provided by Article 12(7) of the Commissioner for Complaints (Northern Ireland) Order 1996).*

#### **Payment of Compensation**

#### **Summary**

16. The Commissioner for Complaints does not, at present, have the power to recommend the payment of a monetary sum in cases involving individual health care providers, such as medical and dental general practitioners.

## MPS Evidence Submission

### Northern Ireland Assembly Ad-Hoc Committee: Northern Ireland Public Services Ombudsperson (NIPSO) Bill

May 2015

---

#### Our Concerns

17. The proposal at Section 11 (b) (ii), to allow the Ombudsperson to make a recommendation in relation to financial settlements may have serious implications for the financial standing of individual healthcare practitioner such as GPs and GDPs. The Bill creates, in effect, a parallel jurisdiction to award compensation without the necessary safeguards that have evolved in civil court proceedings and which ensure fairness. A GP, for example, could be asked to pay a significant sum of money for alleged failures that may not give rise to civil liability.
18. We are also concerned that the legislation does not emphasise the conciliatory role of the Ombudsperson. Article 11(b)(i) of the Commissioner for Complaints (Northern Ireland) order 1996 requires the Commissioner to seek to effect a settlement, before proceeding to Section (b)(ii) i.e. the stage of recommending what action should be taken to effect a fair settlement or remove the cause for complaint. The proposals outlined in Sections 10 & 11 of the draft Bill, do not require the Ombudsperson to seek to bring about a settlement, before proceeding to recommend what action should be taken.

#### MPS Proposals

19. Financial compensation in relation to the exercise of clinical judgement should be the sole domain of the civil courts (as provided for by Sections 43 and 44 of the draft Bill). Section 11 (b) should be amended to prohibit the recommendation of payments in matters relating to clinical judgment.
20. We believe that Section 11(b) should also be amended to reflect the two stage approach as envisaged by the Commissioner for Complaints legislation. This could easily be achieved by replacing the word “including”, with the term “or, if that is not possible”.

#### Own Initiative Investigations

#### Summary

## MPS Evidence Submission

### Northern Ireland Assembly Ad-Hoc Committee: Northern Ireland Public Services Ombudsperson (NIPSO) Bill

May 2015

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21. Healthcare professionals are facing an unprecedented level of regulation. By way of example, a single adverse incident may lead to investigations by a practitioner's employer or contracting body; the coroner; the medical regulator; and by a public inquiry. It may also be subject to a clinical negligence claim by the patient or their relatives.
22. We refer the Committee to the comments of Sir Liam Donaldson and colleagues at page nine of their report *'The Right Time, the Right Place: An expert examination of the application of health and social care governance arrangements for ensuring the quality of care provision in Northern Ireland'* (December 2014):

*'Whether establishing formal, often lengthy, and costly inquiries is the right way to drive improvement is very debatable. Certainly doing so as the normative response to failure has important disadvantages. In particular, it often paralyses the organisation under scrutiny as its staff become pre-occupied with preparing evidence and supplying information. The learning is often put on hold – sometimes never to be returned to – until the inquiry is over. The burden of recommendations to be implemented and progress-checked can be overwhelming, so that the implementation becomes a bureaucratic exercise rather than a watershed moment for leadership, culture and the content of practice.'*

#### Our Concerns

23. Section 8 of the draft Bill significantly widens the scope of investigations open to the current office of Commissioner for Complaints. It permits the Ombudsperson to investigate any matter on their own initiative, provided that they have a 'reasonable suspicion' of 'systemic maladministration'. Furthermore, Section 9 gives the Ombudsperson the power to establish their own criteria for determining whether to commence an investigation under section 8.
24. Increasing regulation is not always the best way of improving patient care and safety, and can add to the culture of fear amongst staff working in the health service. Creating a culture of openness and learning should be the focus, rather than relying on blunt legislative tools to govern the behaviours of healthcare professionals.

## MPS Evidence Submission

### Northern Ireland Assembly Ad-Hoc Committee: Northern Ireland Public Services Ombudsperson (NIPSO) Bill

May 2015

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#### MPS Proposals

25. In view of the existing regulatory arrangements with respect to health care, we propose that Health and Social Care Trusts; general health care providers; and independent providers of health and social care should be subject to an exemption clause in Section 8 of the Bill, removing these bodies from the provisions relating to own initiative investigations.

#### Special Reports

##### Summary

26. A recent MPS member survey of more than 500 doctors revealed that 68% of respondents either agreed or strongly agreed that the current culture in healthcare is one of blame and shame, and that it will be difficult to overcome this.<sup>2</sup>
27. MPS believes that the Northern Ireland Executive needs to empower and support healthcare professionals to do what they entered healthcare to do – care for patients. Removing a culture of fear, and in its place creating one of openness and learning, should be a focus for the Northern Ireland Executive.

#### Our Concerns

28. The current legislation does not permit the Commissioner for Complaints to lay reports before the Assembly in individual cases. The proposals outlined at Section 37(2) of the Bill, which may allow the Ombudsperson to use a Special Report to 'name and shame' individual health care practitioners, are inappropriate.
29. This is because publication of such reports may have significant consequences for the reputation of a healthcare professional and his/ her relationships with other patients, as identified by the Northern Ireland Court of Appeal in *JR55-v-Northern Ireland Commissioner for Complaints* [2014] NICA 11. Special Reports are not an appropriate mechanism to resolve disputes about

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<sup>2</sup> MPS Press Release, 27 April 2015 [link](#)

## MPS Evidence Submission

### Northern Ireland Assembly Ad-Hoc Committee: Northern Ireland Public Services Ombudsperson (NIPSO) Bill

May 2015

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complex clinical issues and therefore do not benefit either the practitioner or the patient. Instead of encouraging the creation a reflective and learning culture, these reports serve to make a culture of name, shame and blame worse.

30. We hold similar reservations in relation to the publication of reports on investigations in the public interest, when issues of clinical judgment are involved.

#### MPS Proposals

31. We submit that Sections 35 and 37 should be amended to prohibit the publication of reports in the public interest and reports to the Assembly, where the matter under investigation relates to the exercise of clinical judgment (as set out in Sections 15(2)(b); 15(2)(c); 16(2)(b); 17(2)(b); 17(2)(c)).

#### Concluding remarks

32. In this submission we have outlined areas within the NIPSO Bill where we have concerns. These range from its implications on the ability of doctors, dentists and other healthcare professionals to access legal advice knowing that this information will not be used to their detriment at a later stage, to the move towards a 'name and shame' culture.

33. Our concerns, as outlined in this submission, are shared by the Medical and Dental Defence Union of Scotland (MDDUS), who support the amendments as outlined in Appendix 1.

34. We are keen to play a constructive role in the Assembly's scrutiny of this Bill.

*Attachments:*

*Appendix 1 –*

*MPS proposed amendments to the Northern Ireland Public Service Ombudsperson Bill (NIPSO) Bill*

*[MAY 26, 2015].*

# **Appendix 1**

## **MPS proposed amendments to the Northern Ireland Public Services Ombudsperson (NIPSO) Bill [MAY 26, 2015]**

### **Power to investigate on own initiative**

#### **Amendment 1**

Part 2

At page 3, line 37, Insert at start;

*Save for section 8(7) below,*

#### **Amendment 2**

Part 2

At page 4, end of line 13, insert new section 8(7);

*This section does not apply to investigations under sections 15(2)(b) or (c), 16 (2)(b) or (c), or 17(2)(b) or (c).*

### **Purposes of investigation**

#### **Amendment 3**

Part 2

At page 4, line 32, remove ‘including’, and insert;

*or, if that is not possible*

#### **Amendment 4**

Part 2

At page 4, end of line 32, insert new section,

*Section 11(b)(ii) does not apply to investigations under section 15(2)(b) or (c), 16(2)(b) or (c), or 17(2)(b) or (c).*



## **Investigation procedure**

### **Amendment 5**

Part 2

At page 11, at line remove

*In particular*

And from ‘the Ombudsperson may’, insert

*make such inquiries as appropriate.*

After ‘appropriate’ insert new section 30(8), which should read as the wording of;

*Article 12(7) of the Commissioner for Complaints (Northern Ireland) Order 1996.*

At line 32, remove all up to and including line 34.

## **Privileged and confidential information**

### **Amendment 6**

Part 2

At page 12, line 35:

*remove section 32(2)*

At page 13, line 3, insert new section 32(5);

*This section does not apply to investigations under sections 15,16 and 17.*

## **Publication of reports on investigations in the public interest**

### **Amendment 7**

Part 3

At page 14, line 5, insert at start;

*Subject to section 35(6) below,*

At page 14, line 15, insert at end new section 35(6);

*This section does not apply to investigations under sections 15(2)(b) or (c), 16 (2)(b) or (c), or 17(2)(b) or (c).*

## **Publication of reports on own initiative investigations**

### **Amendment 8**

Part 3

At page 14, line 17, insert at start;

*Subject to section 36(3) below,*

At page 14, line 21, insert at end new section 36(3)

*This section does not apply to investigations under sections 15(2)(b) or (c), 16 (2)(b) or (c), or 17(2)(b) or (c).*

## **Reports to the Assembly**

### **Amendment 9**

Part 3

At page 14, line 22, insert at start;

*Subject to section 37(5) below,*

At page 14, insert at end new section 37(5)

*This section does not apply to investigations under sections 15(2)(b) or (c), 16 (2)(b) or (c), or 17(2)(b) or (c).*

## **Application to county court by person aggrieved**

### **Amendment 10**

Part 3

At page 17, line 41, insert at start;

*Subject to section 43(4) below,*

At page 18, line 7, insert at end new section 43(4)

*This section does not apply to investigations under sections 15(2)(b) or (c), 16 (2)(b) or (c), or 17(2)(b) or (c).*

**ENDS**