

SUBMISSION ON THE NORTHERN IRELAND PUBLIC SERVICES OMBUDSPERSON BILL

1. Introduction

This is a submission by the Regional Health and Social Care Board in respect of the Northern Ireland Public Services Ombudsperson Bill (NIPSO).

The Board is the commissioner of services from the Health and Social Care Trusts in Northern Ireland. The Trusts have agreed that the Board should make this submission on their behalf, given the potential impact of the proposed Bill on their business.

The Trusts are:

- Belfast Health and Social Care Trust
- Northern Health and Social Care Trust
- South Eastern Health and Social Care Trust
- Western Health and Social Care Trust
- Southern Health and Social Care Trust
- Northern Ireland Ambulance Service Trust.

The Board and the Trusts are included in the “*Listed Authorities*” set out in the Bill.

2. Legal Professional Privilege

The Board and the Trusts have concerns in relation to the proposal contained in Section 32 of the Bill to deny a public authority the right to rely on legal professional privilege.

“32 (1) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or supplied to persons in the service of the Crown, whether imposed by any statutory provision or any rule of law, applies to the disclosure of information for the purposes of an investigation.

(2) A listed authority is not entitled in relation to any investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings”.

Legal professional privilege has been described as a cornerstone of our justice system. This proposal, if introduced, would effectively introduce a two tier system, whereby public

authorities, including the Board and the Trusts are denied the right to legal professional privilege, whereas other organisations and individuals would continue to retain that right.

The purpose of legal professional privilege is to allow a client to communicate candidly and openly with its legal advisor in the secure knowledge that confidentiality will be maintained; and, further, that any legal advice given will be full and frank to enable the client to make a proper decision. The client is also reassured by the fact that no other party may access the contents or nature of that advice, unless the client is willing to waive the said privilege.

This is a fundamental protection which encourages complete candour with the legal advisor and therefore allows the client to obtain legal advice on a fully informed basis.

To remove legal professional privilege will undoubtedly have a negative effect on the ability of the Board and the Trusts (as well as the other listed authorities) to obtain robust legal advice in what are frequently very difficult and complex situations. The Board understands the current Ombudsman does obtain legal advice frequently from public authorities on a voluntary basis. There is no reason why this practice could not continue, as it is clearly a decision of the public authority whether or not to provide the legal advice obtained in any circumstance.

Removal of legal professional privilege also breaches fundamental rights set out in the European Convention on Human Rights, enshrined in the Human Rights Act 1998, in particular Article 8, the right to respect for private and family life. Specifically, this may impact on individuals, such as doctors, nurses, social workers or managers who are the subject of a complaint and whose professional reputation or career may be adversely affected. Removal of legal professional privilege will inhibit their ability to discuss candidly and openly their actions with their employer's legal advisers: and consequently compromise the ability to obtain robust and frank legal advice.

The Board also understands that the Ombudsman has indicated that confidentiality would be maintained, even if the legal advice was disclosed to the Ombudsperson under the new arrangements; however disclosure of the legal advice to the Ombudsperson is in itself a breach of the confidence between client and lawyer. Almost certainly legal advice will have influenced a public authority in making decisions in relation to its actions and the Ombudsperson would presumably refer to such legal advice in any report on specific complaints and in reaching a decision in respect of the complaint. If the Ombudsman is currently receiving that legal advice on a voluntary basis, there appears to be no justification for introducing compulsion, particularly as it will have a negative effect on the ability of listed authorities to obtain candid, robust and frank legal advice.

Finally, the Ombudsperson has a role as adjudicator. The Board understands that no other adjudicator in our legal system can compel any individual or any organisation (public or

private) to disclose legal advice protected by legal professional privilege. It is submitted that to create an exception for the Ombudsperson is neither logical nor justifiable.

3. Sharing of reports on investigations

The Board notes the provision at Section 34 (2) (d), namely that a report of an investigation, the reasons for discontinuing an investigation and reasons for not investigating a complaint must be sent to “any other person that the Ombudsperson considers appropriate”.

The Board, as Commissioner of Services, welcomes the proposal that reports of an investigation are shared with other relevant bodies. As Commissioner, the Board would submit that it should be deemed an “appropriate” person, for this provision in the legislation, in respect of reports of investigations regarding Health and Social Care Trusts.

The Board also notes the provisions at Section 35, which gives the Ombudsperson authority to publish an investigation report where it is in the “public interest”.

As presently set out, the provisions do not give any party the opportunity to make submissions to the Ombudsperson in relation to whether or not the report should be so published. It is the Board’s view that parties, in particular the aggrieved person and the listed authority, ought to be given that opportunity.

The Board would also urge the Ombudsperson to exercise care before deciding to publish a report, and should have due regard to the potential to undermine public confidence in services provided by listed authorities.

4. Making payments to the person aggrieved

The Board notes the proposed provision at Section 11 (b) (ii) which gives the Ombudsperson the power to recommend to a listed authority that it make a payment to the person aggrieved. The Board would have a number of concerns in respect of this proposal:

- (i) There is no suggested limit to the amount of payment envisaged.
- (ii) There is no legal test suggested: this would appear to give the Ombudsperson greater authority than the High Court, where a legal test must be satisfied before any payment of compensation can be ordered.

- (iii) As there are no legal safeguards proposed, in particular a test to be satisfied before making such a recommendation, and no provision for the listed authority to make submissions, the proposal to recommend a payment is fundamentally flawed, as it compromises fairness and prejudices a listed authority.

Given these concerns, the Board submits that payments to aggrieved persons should be a matter for the sole jurisdiction of the Courts.

5. Summary

In summary the Board makes this submission on its own behalf, and on behalf of the Trusts. The Board has serious concerns in relation to the proposals to remove legal professional privilege, publish reports without considering submissions from interested parties, and in making (unlimited) payments to aggrieved persons. It is hoped these submissions assist the Assembly in its deliberations. The Board would be happy to clarify or elaborate on this submission if required.

Dated 8th June 2015

10mm