



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Submission of Evidence to the Committee of the Office of the First Minister and deputy First Minister on the Commissioner for Older People Bill**

### **Introduction**

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission welcomes this opportunity to provide evidence to the Committee of the Office of the First Minister and deputy First Minister (the OFMdFM Committee) for the Committee Stage of the Commissioner for Older People Bill. The Commission welcomes in principle the creation of a Commissioner for Older People and recognises that older people are a potentially vulnerable group with rights that

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid.*, s.69(3).

<sup>3</sup> *Ibid.*, s.69(4).

<sup>4</sup> *Ibid.*, s.69(6).

require particular attention. The Commission will address a number of clauses within the Bill as well as the issue of 'victim standing'. The Commission understands that victim standing is not included within the draft Bill for the Older People's Commissioner. However, victim standing has been discussed before the OFMdfM Committee in the context of the Commission's own powers and it is important that the Commission is permitted an opportunity to raise its concerns on this point.

## **Clause 2: Principal aim**

3. Overall, it is disappointing that the principal aim and hence the remainder of the Bill are focused on the concept of 'interests'. This is a vague term that is difficult to define. While the Bill contains quite extensive powers for the Commissioner, it is the Commission's view that these are undermined somewhat due to the focus on 'interests'. For instance, when the Commissioner conducts a formal investigation, which permits her or him to call for documents and witnesses, enter premises, take copies of documents, etc (Clause 18), against what standards is she or he assessing the information? Where the powers of an investigatory body are as extensive as those proposed in the Bill, those against whom they are exercised should know what standards are being applied. The Commission is also concerned that with such a vague concept it will be difficult to manage public expectations of what the Commissioner can and cannot do. The term 'interests' is either so broad that it is rendered meaningless or it is setting a dangerous precedent whereby extensive investigation powers can be used without legal certainty as to their remit. It is the Commission's view that the principal aim should be explicit in its focus on rights. Rights are clearly codified in national, regional and international legal instruments while 'interests' are not.
4. The Commission notes that clause 2(3) requires the Commissioner to have regard to the UN Principles for Older Persons when determining what 'interests' means. As in its original response to the consultation, the Commission notes that the UN Principles are soft law. The UN Principles do need to be considered, but the primary focus should be on the human rights which older people have, as set out in legally binding international treaties to which the UK is a party.

## **Clauses 3 & 4: Duties and general powers of the Commissioner**

5. Clause 3 sets out the 'duties' of the Commissioner, that is, those duties that the Commissioner 'must' execute. Clause 3(8) then refers to the Commissioner's functions. A 'function' suggests something that an individual or body can do but is not necessarily obliged to do. The interchange between the two terms in the draft Bill is at times confusing. It seems that the term 'function' is intended to refer to the Commissioner's duties as set out in Clause 3 *and* her or his 'general powers' as in Clause 4 and, if this is the case, it would be helpful if an explanation to this effect could be included within the section on interpretation (clause 27).
6. The duties of the Commissioner require her or him to perform various tasks that are related to older person's interests. Again, 'interests' is not defined, yet there is a statutory duty on the Commissioner to work within this concept. There is a lack of clarity and therefore potential for the Commissioner to breach her or his own legislation because there is no agreement on what the term 'interests' means. This risks the Commissioner's office being the subject of endless litigation and/or complaints as relevant authorities and interested stakeholders question and attempt to define the concept of 'interests', whether for the purposes of warding off an investigation or attempting to initiate one.
7. Clause 3(4) requires the Commissioner to promote the provision of opportunities for, and the elimination of, discrimination against older persons. This is a direct duplication of the functions of the Equality Commission for Northern Ireland and the Commission would question why it is has been included. In addition, it would be preferable if the Commissioner's duty could be to advise "*on measures which ought to be taken*" to protect the rights and interests of older people" rather than the present wording, which is "*matters concerning*" their interests (Clause 3(7)).

## **Clause 8: Complaints**

8. There are circumstances when the Commissioner is prevented from investigating a complaint against a relevant authority, in particular, if the complaint falls within an existing statutory complaints system (clause 8(2)(b)). The Commission asks

what types of complaints are envisaged that would not fall within an existing statutory complaints system. The Commission suspects that most matters will fall within the remit of the Northern Ireland Ombudsman. If that is the case, the Commission would question the usefulness of this power if this exclusion is to remain.

9. As in our original submission, the Commission again asks for clarity on the meaning of clause 8(3)(b). It appears to exclude the Commissioner from pursuing a complaint even if it is excluded from other statutory complaints systems.

## **Clause 12: Conciliation**

10. New clause 12 permits the Commissioner to make arrangements for the provision of conciliation services. Clause 12(2) prevents the Commissioner and any officer of the Commissioner from participating in the provision of such services. Clause 12(3) states that the Commissioner must ensure appropriate safeguards to prevent disclosure to the Commissioner of information obtained by a person via such services. It is reasonable to question why this new clause is necessary given that a body with a case work function will ordinarily seek a resolution to a case outside of an official process. The Commission therefore asks why it is proposed to involve the services of a third party. The Commission does not believe it would compromise the office's role if it were itself to attempt to reach a resolution to the satisfaction of the complainant through informal means.

## **Clause 13: Formal investigations**

11. The Commissioner's powers of formal investigation are akin to those of the High Court and are therefore extensive. These powers would place the Commissioner's office in a position far exceeding those of other oversight bodies. This is even more so when such extensive powers are set out against such an elusive concept as 'interests'. The Commission also questions the validity of giving an organisation such extensive powers while at the same time requiring the investigation to be conducted in private and leaving publication of the investigations findings to the discretion of the Commissioner (clause 13 (5) and clause 15). That is certainly not the case with High Court proceedings, where it is the exception rather than the norm for its business to be held in private. High

Court judgments are also available for public view and scrutiny with certain details redacted if deemed appropriate. Published investigation reports have great merit in terms of demanding a rigorous process from the oversight body, offering learning to other public authorities that are not the subject of the investigation and therefore bringing value much wider than the particular investigation, which for practical reasons often has to be narrow and disciplined in focus.

## Victim standing

12. As in its original submission, the Commission's view is that if the Commissioner's role is to protect the rights of older people, OFMdFM should pursue the option of giving the Commissioner 'victim standing' for the purposes of the Human Rights Act 1998.<sup>5</sup> The Commission does not see the merit in any other approach; a body either has victim standing or it does not. The Commission is currently the only body with victim standing in Northern Ireland. As part of its work the Commission engages widely and routinely with other individuals and organisations to encourage referrals where there is potential for victim standing to be considered. However, the Commission cannot contemplate an approach, as has been suggested, whereby there is an agreement that by its nature places a duty on the Commission to collaborate with another named body on this matter. For various reasons, the Commission must reject this approach:

- The Commission is a 'Paris Principles'<sup>6</sup> National Human Rights Institution recognised by the United Nations and accredited with 'A' status by the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights. Central to the Paris Principles and the Commission's 'A' status is its independence. Once the Commission receives a referral, it is for the Commission alone to assess whether or not to pursue and fund a case. The Paris Principles provide that a National Institution shall *freely* consider questions falling within its competence (emphasis added). Although it shall also maintain consultation with other bodies (which the Commission currently does and values) this is not the same as the

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<sup>5</sup> This would permit the Commissioner to take a case in her or his own name.

<sup>6</sup> Principles relating to the Status of National Institutions (the Paris Principles). Adopted by UN General Assembly resolution 48/134 of 20 December 1993

type of collaboration that has been suggested in relation to standing.

- Fettering of discretion: the Commission's discretion to decide which cases to pursue (as set out in the Northern Ireland Act 1998 as amended) must not be fettered. Collaboration with another body on victim standing risks fettering the Commission's discretion on this matter.
  - Funding: there is a conflict of interest if funding for a case comes from another body as opposed to the Commission's sponsor department (i.e. the NIO). In addition, as a publicly funded body, there is a risk that, in accepting external funding for a core function, the Commission's overall funding could be reduced. Pursuing a case as a victim under the Human Rights Act 1998 is a core statutory function of the Commission.
  - The Commission also questions whether the Northern Ireland Assembly has the power to impose, by statute or policy, any duty on this Commission which was created by primary Westminster legislation.
13. The Commission maintains that a joined up approach to promoting the rights of older people will ultimately better protect the rights of everyone in Northern Ireland and ensure efficient use of scarce resources. This is a matter that the relevant organisations can assess and agree on an operational basis. For example, Memoranda of Understanding can be developed if appropriate among relevant statutory bodies and voluntary organisations. However, this cannot impact the discretion and independence of this Commission in relation to any of its powers including the issue of victim standing.

## **Application of the Bill**

14. The Commission welcomes the inclusion of individuals who are private fee-paying residents in a residential or nursing home within the terms of the Bill.<sup>7</sup>

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<sup>7</sup> See Hansard 12 May 2010, Committee for the Office of the First Minister and deputy First Minister: Draft Commissioner for Older People Bill.

## **Conclusion**

15. Given the concerns raised above, the Commission suggests that should the Executive still be minded to maintain the focus on interests, the role of the Commissioner should more appropriately be concentrated on a general review of advocacy, complaint, inspection and whistle-blowing arrangements, assistance with complaints and promotional or education activities.

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