

## **Summary of issues that the Commissioner could address and potentially investigate?**

(Further detail on each of these examples is included in the body of this paper)

**The Commissioner could address and potentially investigate the following:**

- 1. Financial abuse of older people** – the example used is financial abuse by lawful doorstep lenders offering loans to older vulnerable people
- 2. Isolation – this is identifying those vulnerable older people who service providers are not reaching or addressing their needs.** The people who have ‘fallen through the gaps’. The Commissioner will be the only body with a legal duty to have outreach programmes to older people.
- 3. End of life care (provision of palliative care for older people- where they are enabled to die in their own home if they wish).** The instances that we have discussed in this paper in the Health field are where the issue could not be dealt with by either the RQIA or the ECNI.
- 4. Inconsistent Provision of Rural/Community Transport** –issues raised to us in the consultation of a free bus pass but no buses (postcode lottery and patchy provision)
- 5. Transport provision for older women** [smart passes for women over 60]
- 6. Benefit uptake:** figures indicate that 40% of older people do not apply for the benefits to top-up their pensions.
- 7. Health services arranged under the Direct Payments scheme are not covered by the remit of existing oversight bodies**
- 8. Top-up Fees – families asked to ‘top-up’ fees for an older relative in nursing and residential care –** the Commissioner could investigate the evidence of inconsistent application of this money and make recommendations
- 9. Presbyterian Mutual Society – Commissioner could have intervened in this case this on behalf of older people**
- 10. Employment and Learning- the withdrawal of age based concessionary fees.** This is currently being taken forward by the

Advocate but if the Commissioner was in place they could bring their powers of investigation to this which the Advocate does not have.

- 11. Holiday insurance premiums, online hotel bookings, car hire**
- 12. The absence of anti-discrimination legislation in Northern Ireland in respect of age** in provision of goods, facilities and services
- 13. Issues of Pensions** - there is a significant risk that older people reliant in the future on private sector pensions will face higher levels of poverty.
- 14. No nutritional standards** for Meals-on-Wheels services with variations in the quality of provision.
- 15. Under funding of dementia research**
- 16. Long term Planning of Housing** – the planning of accessible housing provision for Older People so that they can stay in their homes for longer
- 17. Availability of Legal Guidelines for Older People to reduce fear or concern in respect of legal issues**
- 18. Differentials between home care fees charged and the rate Trusts are willing to pay for care**
- 19. Sign posting the landscape – including statutory/ Voluntary/Advice/Public bodies to stream line and simplify matters for older people**
- 20. Concern about the disadvantage faced by older people in gaining access to training, development and apprenticeship opportunities with an ageing work force**
- 21. Care in the Community (Advice NI)** -access to care assessments and access to the care services highlighted within these care packages
- 22. The malnutrition of older people in hospital – this example provided to the Committee on 8 September.** We have been advised that in this case no other statutory body (with investigative powers) has advised that they could take this on or are taking any action on this.
- 23. Disadvantages and difficulties facing older people when trying to access counseling and psychological services** that they might need for a range of reasons, including:

- risk of suicide
- depression and stress
- feeling isolated
- having no family/ carers to act as advocates
- not being aware of services
- not fully understanding their psychological symptoms and the treatments available to them
- being house bound
- emotional and psychological support for older people with dementia and their carers (who are often older carers)

**24. Whether a person is receiving the right care/treatment they need or not due to their age** Examples include:

- Arbitrary age based barriers in provision and equal access to health care and operations,
- having to wait too long for treatment,
- remaining too long in hospital, inappropriate care packages on discharge.

**25. The issue of whether there may be a problem of over-medication in nursing homes**

**26. The dignity that is the 'interests' of older people in receipt of residential/nursing/hospital care (hygiene /instances of bullying/ systemic neglect).**

**27. Housing-** Uptake of Housing Executive schemes to replace unfit housing. Accessing disability grant schemes and issues arising from repairs not carried out by NIHE / private landlords; older people unable to stay warm in their homes.

**28. Information Barriers within the Trusts – accessibility of information to older people**

**29. Access to Care in the Community:** discrimination where services deemed necessary are not provided to older people in their own homes

**30. Commissioner for Older People in Wales**

(1). We can confirm that the Commissioner in Wales in response to an individual complaint where an older person's interests had been affected looked at the policy of care home closures and the range of approaches and their impact on individual older people. These issues would not have fallen under either maladministration or discrimination.

(2). The Older People's Commissioner for Wales has also instigated an investigation on whether older people are treated with dignity and respect whilst in hospital. This will look generally into the policy of decisions of closures of Nursing/Care homes provision of health care by Trusts for Older People

**OFMDFM COMMITTEE:** *'Request for further information in relation to Gaps in investigative Powers Identified by the Department and what the Commissioner for Older People could investigate'*.

## **COMMISSIONER FOR OLDER PEOPLE BILL: EVIDENCE OF GAPS**

### **SECTION 1: Background information re: where the Gaps are in relation to older people?**

**1.1** The gaps between existing public bodies and the proposed Older People's Commissioner fall into two main areas:

- (i) Where no other public body has the power to act including investigate, and**
- (ii) Where a public body has the power to act but exercising its discretion it does not act.**

The second gap is just as important as the first. It is about an agency's willingness to prioritise older people or its capacity (which may be restricted by resource or strategic focus) to deploy its power. Through the research undertaken during the policy development process, both types of gap have been identified as evident in the work of existing public bodies.

**1.2** It is important to focus on the gaps that will be experienced by older people in the operation of the legislation.

Simply because other bodies have investigatory powers does not mean there is a need to prevent the Commissioner for Older People from having powers of investigation. It is also not a matter of saying that particular bodies have certain powers – these powers must relate to areas concerning older people's rights and interests. For example, some bodies have formal investigation powers but these are limited to specific areas of operation e.g. the Information Commissioner and the Police Ombudsman.

**1.3** Another area, more central to older people's lives, may be covered by a complaints body but the organisations may not have the power to proactively investigate the issue and how it affects older people generally (as opposed to investigating individual complaints). That is, the organisation may have to wait until an older person who has been affected by an issue makes a complaint before they can react. The Commissioner for Older People can be proactive and will be empowered to assess, identify and act to resolve a problem before it continues to have an adverse impact on the older person or older people.

## **Formal Investigatory Powers**

- 1.4** The fundamental reason why a Commissioner is needed is to concentrate in an holistic and strategic manner on the rights and interests of older people. The proposed Commissioner for Older People is unique in that no existing organisation has the remit to address the wider impact of issues on older people to inform systemic improvements and influence the wider social policy agenda.

It is important to reiterate that the Formal Investigation powers of the Commissioner for Older People are reserve powers to be deployed in **exceptional circumstances**. The Commissioner will have a wide range of powers to be deployed in the interests of older people including advisory, advocacy, research, educational, communication and outreach as well as the investigatory powers.

Formal investigatory powers come quite late in the Bill (Clause 13) after the Commissioner's core functions have been granted and it necessarily requires several clauses to specify the procedures and formal powers associated with them.

However by the very nature of their formality and the potential use of High Court powers these are reserve powers to be used exceptionally for critical strategic matters affecting the lives of older people.

We need to plan on the basis that when a dedicated Commissioner becomes active and they identify issues of strategic importance to older people that they have the powers and authority to challenge, investigate and make changes to improve the quality of life for older people.

### **Prevention of duplication**

- 1.5** Regarding the assertion that the powers of the Commissioner will lead to duplication of oversight we can confirm that the Older People's Commissioner will not replace or duplicate the duties of existing public bodies. The creation of a Commissioner will also simplify matters for older people seeking help and feedback from the public consultation supports this view.
- 1.6** Any concern about duplication is fully addressed both legislatively in the Bill (through 'Residual' clauses and collaborative provisions) and also by non-statutory policy decisions (memorandum of understanding, working protocols and pre-consultation between relevant agencies). The Commissioner will provide a focal point and will complement existing avenues of redress available to older people.
- The 'residual clauses' in the Bill; these place limits on the powers of the Commissioner and will ensure that where an existing body already has responsibility for a statutory complaints process the Commissioner cannot investigate or can do so only in limited circumstances. This

avoids the situation in which two publicly funded organisations are both involved in the same case. These Clauses include Clauses 5(3) and (4), 6(2) and (3), 7(3,4 and 5), Clause 8(2 and3), Clause 9 in its entirety; parts of Clause 10, Clause 11(3) and Clause 14.

- The Department has also made a public commitment, as part of its sponsorship role, to highlight to the Commissioner the value and importance of agreeing memoranda of understanding with appropriate organisations to clarify roles and responsibilities and increase co-operation with relevant bodies. OFMDFM in its sponsorship role of the Commissions will ensure the management of an MOU with the Commissioner to prevent duplication and waste of effort. The memoranda of understanding with other regulatory bodies will ensure that there is a “joined-up” approach to the interests of older people.
- In addition the Commissioner has a General Power [Schedule 1: Paragraph 2] to co-operate and collaborate with other bodies.

### **Evidence of the proposed model working well in practice**

**1.7** The Welsh Commissioner for Older People works well with the Public Services Ombudsman and alongside the work of the Equality and Human Rights Commission and the Children’s Commissioner in Wales.

Likewise the NI Commissioner for Children and Young People (with similar powers to those proposed for the Commissioner for Older People) works well alongside the Equality Commission, the NI Human Rights Commission and the NI Ombudsman.

### **Examples of collaborative working where gaps exist**

**1.8** An example of this working in practice would be where the RQIA has the power to co-operate with other public authorities in the United Kingdom enshrined in legislation.

The Commissioner will also consult with relevant bodies as a means of managing any risk of overlap or duplication. This is a similar arrangement to that proposed by the NI Ombudsman in his evidence to the OFMDFM Committee on 27 July 2010 in respect of his role and that of the Comptroller and Auditor General. The Northern Ireland Ombudsman made a bid for increased powers, potentially duplicating those of the Comptroller and Auditor General on systemic review. He proposed pre-consultation between the two bodies as a means of managing the overlap and duplication.

## **SECTION 2: Where are the Gaps for older people in the oversight roles of existing bodies?**

### **Existing oversight bodies**

- 2.1** Various papers have been presented to the Committee listing oversight bodies and powers without distinguishing between different types of bodies and their powers, and there are significant differences.
- 2.2** Evidence given to the Committee has suggested the Commissioner's proposed powers would lead to duplication and overlap with examples of the work of other investigatory and regulatory bodies. In many of these cases those bodies listed as potentially duplicating with the Commissioner's work, we believe, are not directly relevant to the proposed work of the Older People's Commissioner, and distract from the core purpose of the legislation. However some of these bodies do provide recourse to some older people (among their provision of service to all other age groups) but there still remains a gap in provision and specific areas that the Commissioner for Older People would be able to and empowered to investigate, some of which are covered below.

Moreover, this issue needs to be placed in the context of the propensity and frequency of existing statutory bodies to take up issues on behalf of older people given either their wide-ranging or generalist remit.

Given that a number of bodies which have been listed in evidence to the Committee are not materially relevant to this legislation, and some do not possess the powers proposed in the Commissioner for Older People legislation, these lists risk confusing the issue.

### **Clarification of facts**

- 2.3** We note also that at various times it has been suggested to the Committee that the Welsh Commissioner does not have investigation powers. This is not the case, the Welsh legislation has parallel powers of Formal Investigation and the 2007 Regulations provided the Welsh Older Peoples' Commissioner with similar High Court powers to call for evidence as proposed for the Commissioner here.
- 2.4** The Committee has also been informed that Deloitte did not recommend legal and investigation powers. This is not the case. The Deloitte Report was clear in recommending that the Commissioner should have investigatory and complaint handling powers, like those of the NI Commissioner for Children and Young People. These were therefore included in the Draft Bill and received strong support during both the pre-consultation and public consultation on the proposals.

## Complexity of complaints

2.5 In their response to the OFMDFM public consultation the Information Commissioner stated:

*'Regulatory bodies by virtue of their statutory remit may look at very specific aspects of a complaint which may not address those issues relevant to an older person and their treatment by that public authority.'*

2.6 The issues that older people face are multi-dimensional covering discrimination, breaches of rights, poor practice, lack of attention – in other words, the rights and interests of older people in the widest sense. This is what the Older People's Commissioner uniquely brings to the table and, from this position, adds value to existing bodies and arrangements.

## 2.7 Existing oversight bodies

(A). The first category of relevant bodies is that covering equality and rights with reasonably extensive powers in areas where their remit extends. These bodies do have investigation and enforcement powers but only in certain areas.

- (i) **Equality Commission for Northern Ireland (ECNI):** The Equality Commission has a wide-ranging remit that covers a range of equality areas including age in some respects (the legislation widely covers 'age' not just older people). The ECNI remit for age discrimination extends to issues in respect of employment and higher/further education and training only.

OFMDFM are currently actively considering the advancing of anti-discrimination legislation here including the extension of age discrimination to non-employment areas. However legislating as a result of any decision taken for further anti-discrimination legislation that affects older people outside of employment-related areas – such as goods, facilities, and services, will take time.

In any event, the rights and interests of older people is a much broader concept than discrimination rights and, while it is important to recognise when there is discrimination, it would be artificial to reconstruct controversies into discrimination disputes when wider issues are involved.

The ECNI is duty bound to prioritise those areas of equality and anti-discrimination for which it holds the primary responsibility for the legislation. The Equality Commission has wide discretion on whether to give legal assistance to a case and deploys this assistance power in pursuit of its view of strategic cases. For example the Age Sector has advised the Department that the

Commission exercised its discretion (possibly on grounds of resource capacity/limited fit with strategic priorities) not to take a case on behalf of women pensioners. It also has responsibility for the section 75 duty to promote, 'the provision of equality of opportunity for all age groups'.

The ECNI do not have a specific duty as the Commissioner for Older People will have as detailed below;

- 3 (4) The Commissioner must promote the provision of opportunities for, and the elimination of discrimination against, older persons, and
- 3 (6) The Commissioner must promote positive attitudes towards older persons and encourage participation by older persons in public life.

In their submission to the Committee the ECNI have reiterated the following:

*'The Commission notes the difference between 'promoting the provision of opportunities for older people' envisaged for the Commissioner for Older People and promoting equality of opportunity which is one of the Commission's duties under the Age Regulations and other legislation. We recognise that this difference indicates the absence of potential conflict. We welcome the obligation on the Commissioner to promote the elimination of discrimination, which mirrors that of the Commission, believing that the broader the range of action against discrimination, the better the outcomes will be.'*

The Equality Commission does not have jurisdiction to act in relation to goods, facilities and services – including public services, such as the failure to provide nutritionally for older people in hospital. With Assembly agreement the Older People's Commissioner will be in place and operational in early 2011 and able to act on this very issue. The intention would be for the Commissioner to work closely with the ECNI on these issues.

- (ii) **The Northern Ireland Human Rights Commission (NIHRC):** To come under the auspices of the NIHRC one has to make a human rights case. Human rights articles<sup>1</sup> of most relevance to older people are likely to be Article 3 on torture and inhuman and degrading treatment (abuse) and Article 8 on family and private life. While it is useful to appreciate the human rights dimension of any controversy it is not helpful to reconstruct all issues into human rights issues. There are a vast range of issues affecting the rights and interests of older people which are not human rights issues

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<sup>1</sup> The European Convention on Human Rights and UK Human Rights Act 1998 Schedule 1

within the meaning of the Human Rights Act – the concept of the rights and interests of older people is wider than this and it would be artificial to reconstruct controversies into human rights disputes when wider issues are involved. Moreover, the NIHRC has a considerable agenda across the entire field of national, European and international human rights instruments.

Unlike women, children and young people, minority ethnic groups and people with disabilities, there are no specific enforceable European or international instruments for older people. Therefore to consider that a Human Rights Commission can give priority to older people in the way that a Commissioner for Older People would is unrealistic.

The NIHRC does not have an advocacy role. If a breach of human rights is found by the Commissioner for Older People they will be able to agree a combined approach with the NIHRC.

The RQIA in their response to the Department's consultation indicated that, 'nine out of ten care homes are within the private or charitable sectors but, as the law stands, the scope of the Human Rights Act does not directly extend to these residents'. The Department now understands that through Article 15 and 36 of Section 145 of the Health and Social Care Act this loophole has in part been closed by the coverage of publicly funded clients. However there is still a gap in respect of self and privately funded clients in care homes. This means that the self funded residents of independently run care homes who experience Human Rights abuses cannot use the Human Rights Act to challenge the care provider. Following the Department's consultation the amendment to the draft Bill to ensure that all nursing and residential care homes are brought within the Commissioner's remit as relevant authorities means that the Commissioner for Older People could address this loophole and investigate these bodies.

- (B).** The second category is a standards body which is responsible for minimum care standards and quality in health and personal social care.
- (i) Regulation and Quality Improvement Authority:** The RQIA has no specific remit on the rights and interests of recipients of health and social care services. Its focus is on ensuring that providers meet minimum standards and work towards improvement. Classified as an executive NDPB, the RQIA works to a wider agenda and the the Department of Health, Social Services and Public Safety (DHSSPS) may give it directions with respect to the exercise of its functions with which it must comply. Its aims are to keep the DHSSPS informed, encourage improvement of services by conducting reviews against quality standards and thematic and service reviews and investigations as directed by the Department

and regulation of independent establishments and agencies. Since 2009, the responsibility for complaint investigation and resolution now rests with the service provider and with the HSC Trust and not with the RQIA. The service provider is expected to agree strategic partnerships with other regulators, public representatives and service users to ensure sensitive, service-user focus but the RQIA work is primarily initiated through inspection and reviews against a minimum standard and continuous improvement against that standard. The RQIA covers health and personal social services but within that field it has an extensive range from children's homes and fostering agencies to independent clinics and residential care homes.

From the public consultation on the Commissioner Bill and proposals it is evident that the RQIA is supportive of an Older People's Commissioner with investigatory powers, most likely understanding how the Commissioner can complement and add value to its own work. As a body focused on implementation of standards and with a legal power to cooperate, the RQIA will be able to work with the Older People's Commissioner; for example, it could undertake joint reviews with or use evidence gathered through the Commissioner's special expertise on older people to inform its own recommendations on standards. In fact only by taking the RQIA and the Older People's Commissioner together can the possibility of closing the gap in health and personal social services be realised – the RQIA works from the top-down perspective (via its agency focus) while the Commissioner works from the bottom-up (via his or her focus on older people's rights and interests).

**(C).** The third category comprises complaints handling bodies. The Ombudsman bodies below are limited to acting on individual complaints, usually after the complainant has exhausted all other forms of redress.

They generally cover maladministration i.e. issues of process or whether a decision was reasonable or not. These bodies do not seek to apply the realisation of a right nor do they undertake wider systemic reviews and investigations.

The focus of the Commissioner for Older People's investigations is on the 'interests' of older people and is driven by the UN Principles for Older Persons so it has a wider breadth and would be able to focus on the 'merit' of the decision and the 'quality' of provision. The specific focus of an investigation that is based on *'injustice resulting from maladministration'* will likely focus on procedural aspects of a decision and process rather than the merits and how an older person is treated.

- (i) NI Ombudsman (NI Commissioner for Complaints and Assembly Ombudsman):** The office of the Assembly Ombudsman

brings together the Assembly Ombudsman for NI and the NI Commissioner for Complaints. The NI Ombudsman has wide discretion to investigate individual complaints of 'injustice as a result of maladministration'. Maladministration is process driven and although it is not defined in legislation it is described on the NI Ombudsman website as including; *'Avoidable delay; Faulty procedures or failing to follow correct procedures; Not telling you about any rights of appeal you have; Unfairness, bias or prejudice; Giving advice which is misleading or inadequate; Refusing to answer reasonable questions; Discourtesy and failure to apologise properly for errors and Mistakes in handling your claims'*.

The NI Commissioner for Complaints receives complaints directly from individuals about local councils, education and library boards, health and social services boards and trusts.

Individuals do not have a right of access to the Assembly Ombudsman; a complaint against government organisations (government departments, agencies and other public bodies) must be referred by an MLA. The NI Ombudsman himself does not have power of enforcement, an individual must look to the courts for enforcement where his recommendation is not implemented.

The NI Ombudsman's investigations focus on the manner in which decisions and actions have been taken. Only if maladministration has been found may the actual substance of a decision be questioned by the Ombudsman.

The content of policy or the merits of a decision taken without 'maladministration' is not within the jurisdiction of the NI Ombudsman. These would be within the remit of the Commissioner for Older People.

The NI Ombudsman investigation must be on *'injustice resulting from maladministration'* and the complainant is expected to pursue their complaint with the body that has caused the problem, and secondly with any other alternative avenue of redress that may be available, before approaching the NI Ombudsman as the body of last resort.

Although the concept of maladministration may be wide, investigations by the NI Ombudsman are more likely to focus on the procedural aspects of decisions rather than the merits. Article 7(9) of the Commissioner for Complaints (Northern Ireland) Order 1996 states:

*Nothing in this Order authorises or requires the Commissioner to question the merits of a decision taken without maladministration by a body to which this Order applies in the exercise of a discretion vested in that body.*

This does not mean that the Ombudsman cannot consider all the merits of the case but there must be maladministration.

The NI Ombudsman cannot instigate an investigation.

There are gaps for older people in the services provided by the Ombudsman. For example, the Ombudsman has no powers of strategic investigation or legal casework, nor does the office cover aspects such as promotion, advice, outreach and advocacy. The sole area of potential overlap is extremely narrow as the Ombudsman's role is confined to the grounds of 'injustice as a result of maladministration' that is poor administration or the wrong application of rules. On cases of 'maladministration' the NI Ombudsman would have precedence in investigations.

Any potential for overlap is fully addressed by the legislative provisions in the Commissioner for Older People Bill including that at Clause 8(2) of the Bill which sets out a clear statutory restriction on the Commissioner's powers that will protect both the remit of investigatory powers of the NI Ombudsman and of the Commissioner for Older People. Clause 8(2)(b): -

*"the Commissioner may not exercise the Commissioner's powers under subsection (1) in relation to a complaint unless the Commissioner is satisfied that – (b) the complaint does not fall within an existing statutory complaints system".*

- (ii) **The Parliamentary and Health Service Ombudsman:** Information provided to the Committee by the Research and Library Services is incorrect. The Health Service Ombudsman receives individual complaints directly about the NHS in England (not via an MP). However, individuals do not have a right of direct access to the Parliamentary Ombudsman; a complaint against government organisations (government Departments, agencies and other public bodies) must be referred by an MP.
- (iii) **The Financial Ombudsman Service:** The Ombudsman operates on an individual basis in a specialised area. It is highly unlikely that there would be any duplication or overlap with the Older People's Commissioner. If and when age discrimination legislation on goods, facilities and services is introduced, the Commissioner may prove to be a uniquely valuable resource to the Financial Services Ombudsman. The Financial Services Ombudsman co-operates with the range of official bodies and ombudsmen in the financial field through Memoranda of Understanding e.g. with the Financial Services Authority, Office of Fair Trading and the Pensions Ombudsman.
- (iv) **The Pensions Ombudsman:** The Ombudsman investigates and decides upon pension complaints, usually after they have been

through the complaints process of the pension scheme. Again this is a fairly specialised area where duplication or overlap is highly unlikely. Its determinations are enforceable.

**(D)** Other bodies with powers will be less central to the main thrust of the work of the Older People's Commissioner. It would be incorrect to suggest that these bodies duplicate or overlap significantly with the Commissioner:

**(i) The Information Commissioner**

The Information Commissioner is the UK's Independent Regulator with a statutory remit under the Freedom of Information Act (2000) which includes promoting public access to official information. Under the Data Protection Act 1998, the Commissioner is responsible for promoting the protection of personal information.

In their response to the OFMDFM public consultation the Information Commissioner stated: *'The [Information] Commissioner for example, can look at the aspects of information handling by a public authority or data controller but this may be only one aspect of what the individual wishes or needs investigated. The issue of what truly concerns the individual may be in relation to particular treatment or access to a service which the [Information] Commissioner would not have the statutory remit to look at. It should be realised that a complaint that an individual may have with a relevant authority may be multifaceted and one regulator or complaints body may not have the statutory powers to deal with the entirety of the complaint.'*

**(ii) The Police Ombudsman**

Examples of what the Police Ombudsman has investigated include: firearms reports, the use of CS spray, the use of baton guns and tasers, deaths in custody/following police contact and fatal traffic collisions involving police vehicles.

It is more likely that the Older People's Commissioner's relationship will be with the PSNI and the NI Policing Board; for example, raising policy matters with both and immediately turning an investigation over to the police where it becomes apparent that a crime has been committed.

**(E)** Several bodies listed in evidence to the Committee are not materially relevant to the Commissioner for Older People legislation as they do not have the range and level of powers envisaged for the Older People's Commissioner.

**(i) NI Consumer Council**

The Consumer Council's role is to give all consumers a voice and make it count. In their response to the public consultation on the proposed Commissioner they indicated support for the establishment of a

Commissioner and that they would work collaboratively with the Commissioner to raise levels of consumer proficiency among older people and also to address financial capability and financial inclusion issues for older people.

**(ii) NI Patient and Client Council**

The Patient and Client Council provides an independent, confidential and free complaints support service. The Council does not investigate complaints.

**(iii) Local Government Staff Commission**

In general, the terms of reference for the Commission are to exercise: “general oversight of matters connected with the recruitment, training and terms and conditions of employment of officers of councils and the Northern Ireland Housing Executive and of making recommendations to councils and the Northern Ireland Housing Executive on such matters.” The Local Government Staff Commission has no powers of investigation.

### SECTION 3: Examples of Gaps / What the Commissioner for Older People could investigate?

**3.1** In addition to the examples from our own policy development we are grateful to the following organisations who supplied examples of cases that the Commissioner for Older People might wish to investigate. These include: Age NI, the Age Sector Platform, the Advocate for Older People, Centre for Ageing, Research and Development in Ireland (CARDI), Citizens Advice Bureau, Advice NI, the Consumer Council, Changing Ageing Partnership (CAP), Good Morning Belfast, the British Association for Counselling and Psychotherapy and the Law Centre.

**3.2** These examples below illustrate the type of gaps between agencies that the Older People's Commissioner will identify and act on as someone focused specifically on identifying problems that are likely to affect older people.

#### (i) **Malnutrition of older people in hospital<sup>2</sup>**

As the **RQIA** regulates the independent health and personal social services sector it has focused on food and nutrition standards in nursing homes, not hospitals for which it does not hold or collect any information – HSS Boards and Trusts (which cover hospitals) come under an RQIA-monitored duty of quality. The RQIA is driven by standards inspection and review and likely to get involved in a complaint only where it is notified of a breach of regulation or associated standards. The RQIA does not investigate or deal with individual complaints. Individual complaints are

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<sup>2</sup> The **RQIA advised** Age NI that it deals only with second stage complaints from the regulated sector (e.g. nursing homes) and would signpost this type of complaint to the Ombudsman's Office. The RQIA has only inspected nursing homes on food and nutrition standards not hospitals and does not hold or collect any such information but is beginning a review.

**Ombudsman's Office:** Responded to Age NI: 'The Commissioner [of Complaints] can consider complaints relating to such matters where they have in the first instance been put to the Trust concerned and considered under the HSC complaints procedure. Complaints cannot be considered on a collective or systemic basis – rather each individual complaint has to be considered on its own merits. This requires the aggrieved person or a suitable alternative to put the complaint in writing to the Commissioner. The Commissioner then determines whether or not to investigate.'

**Equality Commission:** Responded to Age NI: 'In relation to your issues regarding the Commission's role and its powers relating to complaints in regards to older people's nutrition, and feeding in hospitals in Northern Ireland, unfortunately this is not an issue which the Commission can deal with as it falls outside of our remit. The age discrimination legislation in Northern Ireland applies to Employment and Further and Higher Education issues, the age regulations do not prohibit discrimination by those who provide goods, facilities and services to the public.'

**NI Human Rights Commission:** as of 15 September 2010, Age NI received an acknowledgement only from the NIHRC.

**Patient Client Council:** Not a body with statutory complaints and investigatory powers on this matter.

referred to the NI Ombudsman who can only respond to and deal with maladministration and who cannot proactively carry out an investigation into issues affecting older people generally.

The real life case of the recent nutrition controversy is a good example of where collaboration between the Older People's Commissioner and the RQIA could have identified a problem at an earlier stage and worked together with complementary powers – one top-down (agency improvement body) and the other bottom-up (older people's rights and interests) underpinned by compliance mechanisms.

The **NI Ombudsman** deals only with complaints of maladministration that have already completed an internal complaints process. Complaints cannot be considered on a collective or systemic basis – each individual complaint has to be considered on its own merits if the Commissioner for Complaints determines to investigate and his decision is unenforceable. The **Equality Commission** has no remit to deal with older people's nutrition and feeding in hospitals as current age regulations do not prohibit discrimination by those who provide goods, facilities and services to the public. As of 15 September, the **NI Human Rights Commission** has not yet responded fully to the request from the age sector on how it could/would act. The **Patient and Client Council** does not have any statutory complaints and investigation powers.

In this 'gap' the Commissioner for Older People could have intervened and acted. The Commissioner for Older People could have addressed this issue including through the use of their formal Investigatory powers.

## (ii) Transport and older women

In 2001 senior citizens in North Belfast had several meetings with the Equality Commission to pursue the case for free transport for women at age 60. At that time women retired and got their pension at age 60 but were not entitled to the Smart Pass until 65; while men got their pension and Smart Pass on retirement at age 65. The Age Sector advised us that the ECNI believed there were solid strong legal grounds for the case but we understand did not take this case forward due to either resource or strategic plan restrictions. While this is a sex discrimination case, it indicates how, in this case, older women did not fit within the strategic priorities of the Commission. Had this inequality been addressed free travel for the over 60s may have been introduced earlier than 2008.

An Older People's Commissioner is more likely to have seen this as a priority given the number of people impacted and to have backed the case. A quicker win would have been of benefit to many people who might not have been able to avail of it by the time it eventually came in seven years later. No other body would have had the power to act on this.

### **(iii) Isolation**

On 7 April 2009 at the first official event of the newly formed charity, Age Concern Help the Aged NI, 200 older people took the opportunity to tell the organisation that rural isolation is their biggest concern.

Delegates were clear that rural isolation is the biggest issue facing our ageing population. Particular anxiety was expressed for those who are housebound and unable to participate socially within their local communities.

No public body exists to address the issue of pro-actively identifying the issues affecting isolated members of our older population in both rural and urban areas and feeding this information and findings into helping to shape government policy and the provision of services. This has resulted in the growth of befriending organisations such as Good Morning Belfast – a voluntary group who phone isolated older people on a daily basis to check on their well being. Their anecdotal evidence indicates that there are many vulnerable older people living in isolation who live outside the influence of our public bodies. This can happen for example as a result of bereavement, growing fragmentation of families or a decline in support services. Isolation can frequently result in depression and malnutrition.

Whilst many public organisations do good work when they encounter vulnerable older people in their daily work such as Social Services teams, there is no public organisation, other than the Commissioner for Older People, tasked with the duty that they must seek the views of older people and be accessible to and accountable to older people including especially isolated vulnerable older people (Clause 3 (8) of the Bill specifically places this obligation on the Commissioner).

Through the Commissioner's outreach and community networks the Commissioner for Older People would be well placed to measure the extent of the problem and take this issue to the heart of government helping both to hold Government to account and to better shape policy and services for older people.

### **(iv) Arbitrary age based barriers**

Around 18 months ago a 69-year old man was allegedly refused treatment in Musgrave Hospital's brain injury unit due to the hospital's policy not to treat anyone over the age of 60 years. None of the existing bodies intervened. While it looks like age discrimination, the Equality Commission's remit does not extend to services. The Older People's Commissioner could have stepped in to protect this older man's rights and interests. In the end it was the public airing in the media that unlocked the situation, but not before a delay in treatment and considerable distress to the family acting on behalf of the injured man. The Older People's Commissioner has a duty to review the adequacy and effectiveness of

services provided to older people [Clause 3(3) of the Bill] and would certainly have been able to speak out about this, draw attention to it, advocate on behalf of the older man and would, if they wished, have been able to undertake a systemic review around arbitrary age-based barriers which no other body can currently do in this instance.

**(v) End of life care**

Studies show that the majority of older people prefer to die at home, but in 2008 over 50% of all deaths occurred in hospital. While the DHSSPS has developed a strategy, this period in life can oscillate between private and public care with the patient not being the primary determiner of where s/he will be placed.

The Older People's Commissioner whose legislation and investigatory powers are grounded in the United Nation's Principles for older Persons [that include independence, participation, care self-fulfilment and importantly dignity] is able to take up issues concerned with older people's dignity and respect in relation to palliative care at the end of life and could have undertaken an investigation across the different types of providing bodies where others bodies do not have powers to act.

Alternatively, a combination of the Older People's Commissioner working from the standpoint of older people's rights and interests alongside the RQIA from the standpoint of standards in the health and personal social services could have jointly looked at this leading to a better result for the individual older person and for health and social care provision in Northern Ireland.

**(vi) Medication in nursing homes**

An example given to the Committee on 20<sup>th</sup> January 2010 by Dr Mulligan of OFMDFM was some recently published research 'that suggested that there were instances of overmedication of older people in residential care. That is potentially an area that the commissioner for older people might wish to investigate. It is not necessarily the case that human rights issues are at stake, or that degrading or inhuman treatment is involved but it certainly falls within the 'interests and rights' of older people. These sorts of issues might well prompt the Commissioner to hold an investigation. However, if there were some suggestion of illegality, the Commissioner would refer the matter to the PSNI, as the appropriate body to follow up on a criminal investigation.' The RQIA has a role in addressing this issue and the Commissioner would be able to add weight to this and to work with the findings from their inspections to help to identify if there is a systemic issue and to bring greater focus and publicity to it.

**(vii) Dignity of older people in residential/nursing/hospital care**

Similarly to the example detailed above, if there was emerging evidence to suggest that there was a systemic problem in respect of care provision by

a hospital or a domiciliary care agency of a deliberate unofficial policy of neglect, (for instance with regards older people's hygiene or evening hydration) in relation to their treatment e.g. anecdotal evidence from the public consultation suggested there may be several instances to suggest endemic bullying in such circumstances. These would fall within the issues of the 'dignity' and the 'interests and rights' of older people and could be investigated by the Commissioner for Older people. This is something the Commissioner would likely want to work closely with the RQIA inspection staff on.

**(viii) Direct Payments for privately organised care**

There is a gap in the protection of older people who have private social care paid for by publicly-funded Direct Payments. The RQIA's remit covers breach of standards or regulations. Complaints about processing Direct Payments fall within the Health and Social Care Complaints Procedure, and then onto the NI Ombudsman for maladministration issues. However, delivery of social care services by independent providers, including people directly employed who may in any event not fall under the regulated establishment as defined in the RQIA legislation, is not covered. The Commissioner for Older People could examine this issue and take forward a case for an older person or older people.

**(ix) Financial activity/abuse**

Recently the Citizens Advice Bureau advised that there has been a 108% increase in the number of legal Doorstep Lender loans. These products are typically targeted at vulnerable older people who will be at home during the day. 'Doorstep lenders' offer small value, short-term unsecured loans e.g. £300. APR would normally be 400%, without any consideration of ability to repay debts. These are generally repaid on a weekly basis from a customer's home to a representative or agent of the company. The agent's weekly home visit is central to the process as are frequent top-up loans. These are significant features of Doorstep loans and help manage the lender's risk. Many vulnerable older people are on small incomes and manage very tight margins. The attraction of these immediate cash loans can result in long term debt.

The Financial Services Authority has a role in this however there is no statutory public body actively addressing this type of legal financial activity on behalf of the interests of older people. The Commissioner for Older People could examine the work of these financial institutions to determine if the interests of older people are a consideration in their business with a view to changing their practices. The Commissioner might also use the results of a general investigation to expose the damaging effects on the interests of older people of this type of financial abuse.

**(x) Presbyterian Mutual Society**

As we confirmed to the Committee at its 8 September meeting, the Commissioner could have intervened on behalf of older people in the Presbyterian Mutual Society case to ensure that the interests of older people affected were fully represented and protected as far as possible in the resolution of the case.

#### **(xi) Employment and Learning**

The Employment Equality (Age) Regulations (Northern Ireland) 2006 led to unintended consequences for older people; the impact has been fewer older people registering for Further and Higher education courses – a 37% decrease. Although the ECNI enforces the age regulations, the Older People's Advocate was asked by the Junior Ministers in the last year to examine the impact that the withdrawal of age based concessionary fees had had on older people's participation in education. The Older People's Advocate examination was supported by the Minister with responsibility for Employment and Learning. The process of this examination uncovered the fact that the situation was not uni-dimensional but rather a complex interaction between policies and practices at many different levels. The ECNI have not pursued this to date. Whilst the Older People's Advocate examined this issue, she does not have statutory powers to investigate. This could well have been the subject of an investigation by a Commissioner for Older People working singly or jointly with the ECNI.

#### **(xii) Housing**

Several older people have experienced considerable difficulty in accessing the Housing Executive's disability grant scheme as the process can be complicated and difficult. Several older people have given up despite needing adjustments to their home e.g. downstairs toilet etc. When the matter was raised with him, Nigel Dodds MP MLA stated that he felt an Older People's Commissioner could tackle a lot of the problems in the system by investigating how current processes are not user-friendly for older people.

The Welsh Commissioner has also identified this as an area of activity. Issues that arise include adaptations that allow people to remain in their homes and in practice these are taking a very long time to install. Another housing issue is the cost of maintaining properties. The Commissioner for Older People could undertake research into this, use his/her powers of review, investigate to gather further information and if he or she thought it necessary, undertake a Formal Investigation. The Commissioner could work with the NI Ombudsman on this.

#### **(xiii) Housing, Planning and Older People**

Below are issues raised with the Older People's Advocate by a number of older people living in a proposed regeneration area and who had been

lobbying and raising concerns over a period of time with regards to their housing needs.

- Lack of communication with regards future plans and development for older people
- Undervalue of properties due to extensions and improvement
- Unwilling to move as home fits the purpose for older residents
- Didn't want to move from family and friends
- Afraid they couldn't afford to move back once the regeneration was completed
- Older people were concerned the regeneration was creating housing specifically for young families and no provision for accommodation for older people such as bungalows.

Powers of Investigation would assist the Commissioner to:

- monitor and negotiate to ensure a balance between younger people and older people's needs,
- prepare information in a complicated system for older people.
- The Commissioner could use his/her investigative powers to examine the policies and identify if these have considered the interests and rights of older people.

#### **(xiv) Health and Social Care Complaint Handling Procedures**

The experience of the Older People's Advocate also called into question the effectiveness of arrangements in the area of health and social care to resolve disputes through mediation. The Advocate considered that the Commissioner might have an important role in ensuring they operate effectively for older people. Her experience has raised her awareness of the difficulties older people face when things go wrong within health and social care provision and the length of time it takes to have issues addressed. Time is something which many older people may not have.

Some of these issues may well be able to be addressed informally through taking a pragmatic and common sense approach but it would be necessary for an Older People's Commissioner to have the powers to formally investigate the effectiveness of such procedures if they are consistently found wanting in respect of older people.

#### **(xv) Provision of Rural Transport**

The Commissioner could research, advise, advocate and if needed investigate issues around provision of transport in rural areas including examining community transport systems that generally assist people to travel to local towns but not local hospitals or clinics (an issue raised by the Centre for Ageing Research and Development in Ireland).

**(xvi) Holiday insurance, travel insurance, online hotel bookings, car hire**

The Age Sector have advised that holiday insurance, travel insurance, online hotel bookings, car hire are all consumer services on which older people are unable to get satisfaction. The purpose of powers of investigation is to explore issues which may often be quite hidden. It is also impossible to anticipate issues that may come to light in the future that will require investigation and recommended actions to resolve in a manner that prevents them occurring again and again for one older person after another.

The Commissioner for Older People could work with the Consumer Council on this issue, advise the Financial Ombudsman and independently produce research, undertake an information gathering investigation and ultimately bring the report to the attention of the Secretary of State.

**(xvii) The absence of anti-discrimination legislation in Northern Ireland in respect of age**

With the sole exception of employment, older people need more protection in monitoring and raising awareness of issues arising from the provision of goods, facilities and services. A Commissioner could be an important watchdog in this regard and raise the profile of issues in respect of discrimination in such provision and promote the importance of further legislation here to fully protect older people from discrimination in the delivery of goods, facilities and services. The Commissioner has a duty to review the adequacy and effectiveness of law relating to the interests of older people [Clause 3(2)] and could work with ECNI and OFMDFM towards legislative change.

**(xviii) Examples of issues facing older people supplied by Centre for Ageing Research and Development in Ireland**

Older workers: as people are going to be working for longer and longer and in an ever-changing workplace, a key issue for older people is obtaining **equal access to training, development and apprenticeship opportunities** to ensure that they are able to keep their skills up to date and remain in work whilst they are ineligible for their pension. There are significant concerns that, for example, apprenticeship schemes, are aimed mainly at younger people.

Poverty: there is a significant risk that older people reliant in the future on **private sector pensions will face higher levels of poverty.**

Malnutrition: a real issue for older people. However in comparison to the issue of obesity, it receives limited public attention. For example there are **no nutritional standards for Meals-on-Wheels services with variations in the quality of provision.**

**Dementia:** one of the most significant issues in terms of the cost of long-term care for older people yet it receives **relatively small amounts of research funding**.

Benefit uptake: figures indicate that **only 60% of older people apply for the benefits to top-up their pensions**. This issue applies to Housing Executive schemes to replace unfit housing. It has proven **very difficult to enable older people to access these schemes**.

A key issue is ensuring that those organisations responsible fulfil their duties to older people by making sure that older people **actually get the services to which they are entitled**.

#### **(xix) Available Legal Guidelines for Older People**

Guidelines for older people in relation to legal problems are available through voluntary organisations such as Age Concern (although these relate specifically to England and Wales law). A recent report for the Changing Ageing Partnership (CAP) by the Institute of Governance at Queen's University of Belfast has shown that in Northern Ireland one solicitors' firm, has produced advice that is available both in paper form (on request) and online that explains in plain language various aspects of law relevant to older people. It should be noted that this information is intended for use prior to attending a face to face appointment with a solicitor. However, there is no publication through the government or indeed the legal profession that is widely available or has been drafted with the specific purpose of reducing fear or concern among older people in respect of legal issues.

#### **(xx) Mental Health And Wellbeing Of Older People – Information Supplied By The British Association for Counselling and Psychotherapy (BACP)**

The Commissioner, with its focus on older people's 'rights and interests', would be the only body that would have a strong strategic focus on the mental health and wellbeing of older people. This is significant given concerns about discrimination faced by older people in accessing psychological therapy services. The British Association for Counselling and Psychotherapy has identified the following issues that the Commissioner would be able to act on:

- **Discrimination** – older people face subtle discrimination when trying to access the appropriate health services. Health Professionals may assume that older people's symptoms are due to the ageing process, and therefore are seen as inevitable. The Commissioner could examine to what extent health and social care professionals are aware of the covert discrimination that exists and could investigate the

discrimination older people face when accessing psychological therapy services.

- **Access to services** – older people find it more difficult to access appropriate services that they might need for a range of reasons, including:
  1. risk of suicide
  2. depression and stress
  3. feeling isolated
  4. having no family/carers to act as their advocates
  5. not being aware of services
  6. not fully understanding their psychological symptoms and the treatments available to them
  7. being house bound
  8. emotional and psychological support for older people with dementia and their carers (who are often older carers).

It is important that outreach services are available for older people, and that health professionals pro-actively identify and assess patients. Once an assessment has been made, interventions, such as telephone counseling, can be effective for the house-bound older person.

Telephone counselling and psychotherapy can offer many benefits to older people who live in rural areas. Specifically, telephone counselling can improve people's quality of life and help to manage the psychological effects of their condition. Enabling the provision of telephone counselling in rural areas could allow people with dementia to maintain their independence in their own home for as long as it is possible. BACP has published guidelines on both on-line and telephone counselling and would be pleased to share these with the Commissioner. It is also important to note that it's not just in their own homes that older people face problems; there is evidence of high levels of depression in residential care homes.

The Commissioner could investigate the difficulties in access to services and identify appropriate outreach services to put in place for older people.

- **Suicide** – In the western world rates of suicide is high in the over 60's. It is important that suicide awareness and prevention is not overlooked in older people. The Commissioner could consider this issue and investigate whether the appropriate support is available to identify and support older people who are suicidal. The DHSSPS has responsibility for service provision but there is no oversight body with a strategic focus on this area.
- **Dementia** - the increase of dementia has an enormous emotional impact on carers and family members of people with dementia and has also placed a strain on health and social care services. Medical treatments are advancing and psychological support has been found to be effective. It is essential for the Commissioner to examine whether older people with

dementia and their carers receive the emotional/psychological support they need to reduce stress and enhance quality of their life. Again this is an issue that the Commissioner could investigate.

- **Life threatening and chronic diseases** - such as stroke, heart attack, lung disease have a large psychological impact on older people. Counsellors and psychotherapists can offer support for people suffering from life threatening and/or long term conditions. The Commissioner review policy in this area and the provision of these services and whether the appropriate support services are available for older people to help them to manage long term or life threatening conditions.
- **Poly-pharmacy and treatment preferences** - studies indicate a preference for psychological treatments over medication in older people. Also taking medication for psychological problems on top of medication for the sort of physical ailments that many older people suffer from can have unpredictable and undesirable results. Many medications have not been tested in combination with others. The BACP in their evidence to the Bill team has suggested that the Commissioner could investigate older people's preferences for either psychological or medical interventions and whether these are fully considered.
- BACP has previously commissioned an external review of counselling older people, which concluded that counselling is effective with older people, particularly in the treatment of depression, with outcomes consistent with those found in younger populations, suggesting that old age is not and should not be a barrier to being able to benefit from counselling (Hill, 2004):
- Further information supplied by the BACP is included at **Annex 1**.

Some though not all of the examples provided above could be considered as cases of discrimination but many could only be taken forward by a body with the specific and unique focus on the 'interests and rights' of older people.

**(xxi) Differentials between home care fees charged and the rate Trusts are willing to pay for care (Law Centre)**

Law Centre case studies indicate that older people are being left to handle the consequences of an ongoing difficulty between the public/independent sectors regarding appropriate funding for long term care. When Trusts require an older person to move from their current care home, Trusts have asked the families of older relatives to pay a "top up" fee to ensure a replacement care home place even though the Trust had initially placed the client in a home which met all their needs. In the case studies concerned, no other home was identified by the Trust prior to placement. The Law Centre believe that this is a breach of departmental guidance in relation to third party top up charges for nursing home fees and is a matter that the Commissioner could investigate on behalf of vulnerable older people.

The Age sector have also brought this example to our attention as a matter that falls outside both the RQIA's particular responsibilities in public sector health and personal social services around quality and standards and the NI Ombudsman's investigation of complaints of maladministration. They believe that not only is this a breach of guidance in relation to third-party contributions to residential and nursing care but that there is evidence of inconsistent application of existing legislation and guidance. This is likely to be a matter of interest to the Older People's Commissioner that he/she could, if they felt it was appropriate, conduct an Investigation into.

#### **(xxii) Information Barriers within the Trusts**

The Law Centre has advised the Department that older people and their families face barriers when seeking to voice their concerns about possible abuse, neglect or discrimination in healthcare. Despite the considerable work of the NIHRC and the Equality Commission on Section 75, there remains a lack of public information regarding human rights and their application to healthcare in Northern Ireland. This lack of information is a considerable barrier both to the realisation of human rights for older people in healthcare and to the ability of older people to voice concerns about possible breaches of human rights.

The Law Centre advise that the NIHRC has found that there appears to be a lack of consistency in the recording of unmet needs in the provision of healthcare services to older people and therefore a lack of knowledge on the part of the Government as to the real level of need. They consider that this issue needs to be addressed by Trusts.

The Commissioner for Older People could conduct a formal investigation into the lack of provision of information across the Trusts and seek compliance that barriers about possible abuse, neglect or discrimination in healthcare are tackled.

#### **(xxiii) Health Trust Issues (Law Centre)**

Law Centre case studies also demonstrate that older people who raise complaints against the Trusts and feel they have not had a satisfactory outcome have no recourse to any other public body to seek resolution of their problems. They can of course approach the NI Ombudsman but only if there has been evidence of maladministration - but for everything else there is a clear gap in provision. The Commissioner for Older People would be able to carry out investigations on behalf of older people into;

- Top Up fees
- Inappropriate accommodation
- Recognition of older carer's needs (this is becoming more a more prevalent issue).

**(xxiv) Sign-posting the landscape – Voluntary Sector/Charities/Advice/Public bodies**

The Consumer Council has advised that there is considerable confusion among older people as to which advice/public/voluntary body they should approach for assistance. The Commissioner for Older People will not only be able to act on behalf of older people but would actually streamline and simplify the process for older people bringing clarity to where they can access help and redress. The evidence of the experience of the Advocate would support this; the public can easily identify with the remit of the Older People's Advocate.

**(xxv) Health Trust Issues (Advice NI)**

Advice NI advised that the Commissioner might investigate:

- discrimination against older people in availability/access to services
- Malnutrition of older people in hospitals
- improper arrangements for older people either in terms of having to wait too long for treatment, remaining too long in hospital and the delivery of inappropriate care packages on discharge.

Further information supplied by Advice NI is included at **Annex 1**.

**(xxvi) Care in the Community (Advice NI)**

Advice NI advised that the Commissioner should investigate those occasions where older people are being discriminated against

- where services deemed necessary are not provided to older people in their own homes
- access to care assessments and access to the care services highlighted within these care packages.

The Commissioner would likely seek advice from and work with the Equality Commission on this.

**(xxvii) Older People and Housing (Advice NI)**

Advice NI advised that the Commissioner should consider getting involved as an advocate acting for older people on occasions where repairs are not carried out by NIHE / private landlords.

**(xxviii) Commissioner for Older People in Wales**

**(1).** The Older People's Commissioner for Wales has undertaken two Investigations resulting from individual complaints where an older person's interests have been affected. The Commissioner examined the policy supporting decisions of care home closures and the range of approaches and their impact on individual older people. This issue would not have fallen under either maladministration or discrimination.

(2). The Older People's Commissioner for Wales has also instigated a Review into the question of whether older people are treated with dignity and respect whilst in hospital. This will look into the provision of health care by Trusts for Older People

The aims of the Review are:

- to consider older people's experiences, both good and bad, when they are hospital in-patients
- to make practical recommendations where people are not treated with dignity and respect and to spread good practice where they are.

This report will include information on the following issues:

- Personal privacy, including issues with mixed sex wards and facilities
- Communications, including how people are informed about, and involved in decisions about their care, the type of language used and terms of address
- Food and nutrition including offering and respecting choice, identifying and providing appropriate assistance
- Personal hygiene such as condition of hospital bathrooms, assistance with washing if appropriate, and the use of incontinence pads
- Managing end of life care
- Recognising older people in all their diversity
- Planning for discharge including when to plan and how this is communicated
- Autonomy and identity including access to personal items such as glasses and false teeth and personal possessions
- Awareness of individual rights and understanding of how to complain
- Any other examples of good or bad practice related to maintaining dignity and respect.

### **(xxix) Benefit Uptake**

This issue must be placed in the context of levels of poverty amongst pensioners – 2008/09 figures indicate that 31% of pensioners are living in poverty. This figure is steadily increasing in NI; in the UK as a whole it is decreasing.

The Centre for Ageing Research and Development in Ireland advised us that they would estimate that 40% of pensioners do not apply for benefit top-ups to their pensions such as pension credit.

The Social Security Agency has commissioned the Citizens Advice Bureau to improve levels of benefit uptake but we understand that this is a limited time-bound project.

No body other than the Commissioner for Older People would have the authority and the legal powers – the Commissioner has a legal duty in the Bill to have outreach activities/programmes in place for older people – to investigate this issue, to bring together other organisations to develop

action plans to ensure that this vulnerable group of people are identified and offered the information and financial help they are entitled to.

### **Concluding remarks to Section 3:**

**3.3.** This Section demonstrates that there are several gaps in current provision and protection where a Commissioner for Older People would be uniquely placed to address.

In many of the cases outlined above the Commissioner for older People could act in conjunction with another existing body including the RQIA or the ECNI if their remit allowed.

However in many of the 'worked cases' above the Commissioner for Older People would be the only body which could and would act including using (if appropriate) its powers of investigation. Many of these cases would not come under "maladministration" and they may not raise issues of discrimination or breaches of Human Rights.

When issues such as the real life example of the malnutrition issue come to light, it is important that there is someone who is able to act, if appropriate to investigate, and above all to resolve the problem quickly.

**3.4** An Older People's Commissioner is uniquely placed as a body with a range and breadth of powers available; with a specific focus on the needs of older people and strongly motivated and able to act for older people. The Commissioner for Older People will be able to:

- Prioritise older people's issues.... no other body currently does this.
- Be sensitive to older people's needs and conscious of the need to act with urgency
- Provide a focal point offering specialised support, tailored to meet the needs of older people (older people face difficulties in navigating the existing bodies and much time is lost in their doing so)
- Build expertise to help inform decision making as our older population grows, contributing to improved practice and helping ensure the best possible use of available resources

The Older People's Commissioner Duties that the Bill specifies that they must undertake include:-

- Promoting an awareness of matters relating to the interests of older people and of the need to safeguard those interests ;
- Keeping under review the adequacy and effectiveness of the law and practice relating to the interests of older people;

- Keeping under review the adequacy and effectiveness of the services provided to older people by relevant authorities;
- Promoting the provision of opportunities for, and the elimination of discrimination against, older people;
- Encouraging best practice in the treatment of older people;
- Promoting positive attitudes towards older people and encourage participation by older people in public life;
- Advising the Assembly, the Secretary of State or a relevant authority on matters concerning the interests of older people (this could cover any issue);
- Taking reasonable steps to make older people aware of the existence and functions of his/her office and its location;
- Taking reasonable steps to encourage older people to communicate with the Commissioner and his or her staff and to seek the views of older people; and
- Making themselves or their staff available, as far as is practicable, at a place convenient for older people.

## SECTION 4: Rationale for a Commissioner for Older People

- 4.1** Wales is a comparable jurisdiction and in the rationale for establishing a Commissioner for Older People in Wales similar issues pertinent to and affecting older people here were identified including: poor housing, poverty, poor nutrition, lack of opportunity for employment and inadequate transport services.
- 4.2** The evidence also suggested that there was a wider perception of an imbalance of power and influence, and a lack of respect for older people. Age is seen as stigmatising and it is felt that older people are discriminated against. The need was identified to confront ageism and other discrimination against older people, to tackle stereotypes of old age and improve the engagement with, and participation of, older people in our communities.
- 4.3** The highest proportions of older people in Wales live in rural local authorities and this raises particular difficulties for significant numbers of older people living in physical isolation – with less access to transport, for instance, than the majority of the population, despite their greater need to be able to access services or simply to be able to live a socially healthy life. In addition there are issues of substantial financial hardship, the challenge of living on a fixed income, and many older people are faced with a choice between eating and heating their homes as well as having real concerns about the basic pension and benefit entitlement.
- 4.4** In Wales the Equality and Human Rights Commissioner, the Public Services Ombudsman<sup>3</sup> (PSO), the Children’s Commissioner and the Commissioner for Older People work well together.
- 4.5** The Advisory Group establishing the Welsh Commissioner concluded that there was a need for an Older People’s Commissioner for Wales – *in addition* to the Equality and Human Rights Commission [EHRC, formerly CEHR]. The main reasons were:
- To ensure that there is a powerful, high level focus on older people in Wales. The Advisory Group anticipated that the Commissioner would be able to tackle issues from a broader perspective than that of the Commission for Equality and Human Rights (CEHR), with the benefit of a wider remit; and increasingly develop Wales-specific case knowledge and an in-depth understanding of the Welsh policy context.
  - The Advisory Group anticipated that the CEHR would be limited, certainly initially to considering issues of “age” as they affect employment. The Group stressed that unless further legislation is brought in to address this, goods and services and other areas would

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<sup>3</sup> The Public Services Ombudsman in Wales has many of the powers/legislative amendments proposed for the NI Ombudsman as per the Deloitte ‘Review of the Offices of the Assembly Ombudsman for NI and the NI Commissioner for Complaints’, 2004

not be covered by the CEHR. The Group was concerned that it would therefore remain lawful to discriminate against older people on the grounds of age in many areas of their daily lives except employment.

- Also, it believed that there are important human rights breaches which cannot be pursued under the Human Rights Act (HRA) and which would not, therefore, fall within the scope of the CEHR's work. For example, only public functions are covered but many of the residential and care services for older people are provided by the private sector. This point was also raised by the RQIA in their response to the OFMDFM public consultation on the Commissioner for Older People Bill here.
- The Group also believed that there could be many cases of unfair treatment and poor services which do not constitute unlawful discrimination because they fall 'out of scope' of discrimination legislation. These cases may involve particularly marginalised and vulnerable older people.
- The Advisory Group anticipated that the CEHR's very broad remit covering all of Britain and all six equality "strands" would mean that the Commission was unlikely to be in a position to conduct Formal Investigations into each and every area of discrimination
- The Advisory Group also stressed that the Commissioner's overarching scrutiny role would allow for the overseeing of standards in the provision of services to older people, liaising with different organisations, and in being able to make recommendations as part of his/her consultative role.
- In addition, the Commissioner would add value to existing agencies in Wales, for example, to the role of bodies such as the Care Standards Inspectorate for Wales in relation to human rights.

A similarly strong case can be made in Northern Ireland and has been evidenced in this paper.

### **International context**

**4.6** The UN Expert Group Report on the "Rights of Older Persons", was presented to the UN General Assembly at its 64<sup>th</sup> Session (September 2009), and addresses the issue of the protection of human rights as they relate to older persons.

The report made a number of recommendations. Included amongst them were:

- The establishment of a national "ombudsman" [or Commissioner] to protect the rights of older persons; and
- The possible establishment of an International Convention on the Rights of Older Persons.

In terms of the Legislation on the establishment of a Commissioner for Older People here, the UN Report is to be welcomed and shows that we are leading the way internationally when it comes to addressing the rights of older people.

## **SECTION 5: The evidence from the Commissioner for Older People in Wales**

**5.1** The Welsh Older People's Commissioner was invited to represent Wales on the UK Government's Single Equality Bill stakeholder group and liaised closely with the Equality and Human Rights Commission in Wales.

**5.2** The Welsh Commissioner refers to the fairly tight-knit public sector community there where people tend to know (at least, those who wish to) which body fulfils which role. Where there has been any confusion over the Commissioner's role, the Welsh Commissioner explains that she is like the Welsh Children's Commissioner and people can then identify that role. She explains that the Commission's role is unique and different to that of other bodies, such as the Public Services Ombudsman for Wales, because older people are the focus of what they do.

In August 2010 a Memorandum of Understanding was signed by the Older People's Commissioner, the Children's Commissioner and the Public Services Ombudsman to demonstrate commitment to joint working and avoidance of duplication of roles. The bodies already refer cases to one another where appropriate.

Officials from the Office of the Welsh Commissioner for Older People have assured OFMDFM that they have an excellent working relationship with the Welsh Public Service Ombudsman (whose legislation has influenced the development of proposals for amendment of the NI Ombudsman legislation). The Welsh Commissioner for Older People has come across cases that have involved a mixture of both 'maladministration' and 'policy concerns affecting the interests of older people' and is exploring the possibility of joint working on these with the Public Services Ombudsman.

**5.3** In considering the question of overlap of powers the Northern Ireland Older People's Advocate suggested that:

"Another safeguard against potential duplication or replication is the provision in the Bill [powers of co-operation with other bodies] for Memoranda of Understanding between the bodies with which this might be most likely. It is also cautionary to consider if some overlap may ensure greater vigilance in decision making affecting older people and provide more accessible pathways into the relevant systems if problems occur."

**5.4** It is well recognised that some issues may be addressed informally through taking a pragmatic and common sense approach but the Older People's Advocate is strongly of the view that it would be necessary for an Older People's Commissioner to have the powers to investigate the effectiveness of such procedures if they are consistently found wanting in respect of older

people. The Advocate believes, “The powers that are given to the Commissioner in the Bill are not just ‘wants’ but rather are ‘needs’ to ensure the protection of the interests of older people and to ensure any issues or difficulties which arise are dealt with in a timely and open manner.”

**5.5** The Welsh Commissioner has a unique role to look at the direct lived experiences of older people and has a focus on the following:

- Older people and the home
- Older people and the broader community
- Older people and Health and Social care
- Older people and managing money
- Older people and the Law

## **SECTION 6: In conclusion**

- 6.1** The Welsh experience demonstrates the importance of synergy between promotion and investigation. On the one hand, scrutiny through investigation can feed into advocacy. On the other, investigation powers will encourage action without constant recourse to their use – their mere existence is enough to ensure cooperation by public bodies with the work of the Commissioner and the Commissioner can, on an exceptional basis, call upon his/her Formal Investigatory powers when a strategic issue affecting an older persons rights and interests is so serious as to warrant them. Evidence from the experience of the Children’s Commissioner here supports this.
- 6.2** The overwhelming case for the Older People’s Commissioner is this fact along with demonstrable need for a strategic holistic role securing, promoting and safeguarding the rights and interests of all older people.
- 6.3** This paper clarifies both that while there are several oversight and investigatory organisations in existence there are still gaps in the existing provision for redress for older people and in many cases only the Commissioner for Older People with the focus on the ‘interests’ and the ‘rights’ of older people could act.
- 6.4** By the very nature of their formality and the potential use of High Court powers the Formal Investigatory powers are reserve powers to be used exceptionally for critical strategic matters affecting the lives of older people. However we need to plan on the basis that when a dedicated Commissioner becomes active and they identify issues of strategic importance to older people that they have the powers and authority to challenge and investigate issues leading to change in policy and improvement in services.
- 6.5** The holistic view of the rights and interests of older people underpinned by effective powers enables the Older People’s Commissioner to pursue a range of issues on behalf of older people which may include breaches of rights and interests of older people, breaches of regulatory standards and also work with other bodies on discrimination and human rights issues as well as ensuring ‘good practice’ in terms of the ‘interests’ of older people.

**Commissioner for Older People Bill Team**

**OFMDFM**

**14 September 2010**

**Evidence from public consultation**

1. The British Association for Counselling and Psychotherapy indicated that;

- Counselling is efficacious with older people, particularly in the treatment of anxiety, depression and in improving subjective wellbeing.
- Outcomes are consistent with those found in younger populations suggesting that old age is not a barrier to being able to benefit from counselling.
- Of the various counselling approaches Cognitive Behavioural Therapy has the strongest evidence base and is efficacious with older people in the treatment of anxiety and depression.
- There is a lack of research into a number of counselling approaches which are commonly used in routine practice, particularly interpersonal, psychodynamic, client-centred, validation, goal-focused and gestalt therapies.
- When different therapeutic approaches are tested against each other with this population, outcomes are not significantly different, indicating an absence of superiority of any one particular type of counselling.
- Evidence as to the efficacy of reminiscence therapy and life review in the treatment of dementia and cognitive decline is weak, but consideration should be given to the chronic and debilitating nature of these conditions as compared with more treatable disorders such as anxiety and depression.
- Evidence indicates that individual, as opposed to group counselling, is the psychological treatment of choice among the community-dwelling older population and that this may be the more effective modality with this population.
- Although not necessarily reflecting older people's preferences, group counselling for nursing home residents and home-based individual counselling for community-dwelling older people are both feasible modes of service delivery.
- A proactive approach to the identification of psychological problems among residential and community-dwelling older people is necessary to ensure problems are not left untreated.
- Training counsellors to treat older people is feasible and some studies report that good outcomes are associated with highly-qualified therapists who have undergone specialised training in working with older people.
- There is an urgent need for counsellors to research UK older populations, UK health and social care settings and the routine counselling approaches used in the UK.
- Future research should generate practice-based evidence that assesses the effects

**2. Advice NI examples**

Advice NI believe that areas where the Commissioner might usefully exercise powers include:

1. Older People and Health:  
Commissioner to consider getting involved on occasions where older people being discriminated against in the health service. For example malnutrition of older people in hospitals; improper arrangements for older people either in terms of having to wait too long for treatment, remain too long in hospital, inappropriate care packages on discharge;
2. Older People and Care in the Community:  
Commissioner to consider getting involved on occasions where older people being discriminated against where services deemed necessary not provided to older people in their own homes; access to care assessments and access to the care services highlighted within these care packages
3. Older People and access to Advice / Information  
Commissioner to consider offering a generic Freephone information / advice service for older people
4. Older People and Housing  
Commissioner to consider getting involved on occasions for example where repairs not carried out by NIHE / private landlords; older people unable to stay warm in their homes;

Other areas for consideration include:

- Basic human rights and welfare issues / income adequacy – potential European legislative dimension and involvement
- Positive Ageing: involvement in cases that show older people want to remain active members of society (right to work, education, right to safe environment etc)
- Employment rights and discrimination is going to be a significant issue over the next few years due to the retirement age debate: older people may need represented properly at fair employment tribunals or even company disciplinary/progress meetings.
- Advocacy and information provision – how to reach those who are so marginalised/isolated that they can also access this info
- The Commissioner also needs to have in place procedures to measure, review and monitor advice, complaints, outcomes, advocacy to see how successful it (the Commissioner's Office) has been and how it can do better (with greater efficiency)
- Ethnic/racial issues need highlighted too as the community becomes more multi-cultural – these older people may be more marginalised than so-called indigenous older people and therefore need greater protection

**Collaborative Working:**

- The NIHRC in their evidence to the OFMDFM Committee on 30 June indicated *“Our Commission is focussed on ensuring that no overlap or duplication takes place in our current functions. That is part of our work everyday. The Prisoner Ombudsman, Criminal Justice Inspectorate and our organisation have separate powers, and, recently all three of us had to come together in light of an emergency and a crisis in NI’s prisons to work out who should do what and whose responsibility it was to act on the issue. That is how we work. We do not suggest for one minute that, as a consequence, any of those other bodies are not needed. Duplication is not always a bad thing...”*
- The Welsh Commissioner for Older People works well with the Public Services Ombudsman and alongside the work of the Equality and Human Rights Commission and the Children’s Commissioner in Wales.
- Likewise the NI Commissioner for Children and Young People (with similar powers to those proposed for the Commissioner for Older People) works well alongside the Equality Commission, the NI Human Rights Commission and the NI Ombudsman.

The Commissioner for Older People will also consult with relevant bodies as a means of managing any risk of overlap or duplication:

- As an example of this working in practice would be where the RQIA has the power to co-operate with other public authorities in the United Kingdom enshrined in legislation.
- This is a similar arrangement to that proposed by the NI Ombudsman in his evidence to the OFMDFM Committee on 27 July 2010 in respect of his role and that of the Comptroller and Auditor General. The Northern Ireland Ombudsman made a bid for increased powers, potentially duplicating those of the Comptroller and Auditor General on systemic review. He proposed pre-consultation between the two bodies as a means of managing the overlap and duplication. The NI Ombudsman and the Commissioner for Older People could also work in this way together (just as is the case in practice in Wales).