

[REDACTED]

From: [REDACTED]
Sent: 07 January 2010 17:12
To: Older Peoples Legislation Team
Cc: [REDACTED]
Subject: Immediate response of the Information Commissioner's Office to consultation on Commissioner for Older People Bill.

Dear Sir,

Re: Consultation Response to 'A Commissioner for Older People in Northern Ireland' – Consultation Document and Draft Bill.

The Information Commissioner's Office has only by chance been informed of the ongoing consultation referenced above. We had not been in receipt of a mailing of the consultation papers. Since being informed of this today I have given a cursory review of the consultation as well as telephoning the Equality Unit of OFMDFM to inform them that we will have our substantive response to this consultation by next Wednesday.

As per my discussion today I had identified on initial review the Information Commissioner's Office anomalous inclusion as a 'relevant authority' (Schedule 3 of the draft bill) . The Information Commissioner's Office is a reserved body in terms of Northern Ireland's public authorities. Our office does not report to or come under the remit of the devolved legislature in Northern Ireland but is directly accountable to Westminster and is an NDPB of the Ministry of Justice. There would therefore be obvious administrative law difficulties with its inclusion along with statutory NI specific public authorities or bodies with functions wholly pertaining to transferred matters for Northern Ireland. We will however address these points in our substantive response of next week.

Thank you for your attention to this immediate response.

[REDACTED]
ICO NI.

[REDACTED]

08/01/2010

Consultation in relation to the Commissioner for Older People in Northern Ireland

Introduction

The Information Commissioner ('the Commissioner') welcomes the opportunity to input to the above consultation process and accompanying legislation ('the draft bill') by the Office of the First Minister and Deputy First Minister ('OFMDFM'). Whilst the Commissioner recognises the wider questions raised by the consultation, this response will focus on areas relating to his own remit and the concerns and comments that the consultation and draft bill raises and specifically his inclusion as a 'relevant authority' under the proposed draft bill.

Background

The Commissioner is the UK's independent regulator with a statutory remit under the Freedom of Information Act 2000 (FOIA) which includes promoting public access to official information. Under the Data Protection Act 1998 (DPA), the Commissioner is responsible for promoting the protection of personal information. The Commissioner does this by providing guidance to individuals and organisations and taking appropriate action where the law is broken. The Commissioner has functions relating to Northern Ireland which are also covered by Section 75 of the Northern Ireland Act 1998.

The Commissioner is aware that in December 2007, the then First Minister and Deputy First Minister announced their commitment to work towards the establishment of a Commissioner for Older People in Northern Ireland ('the COPNI'). In taking this forward, Deloitte Consulting were commissioned to prepare a feasibility study and as part of this work other Commissioner models were looked at including the Children's Commissioner and the Older People's Commissioner in Wales. The Commissioner is also aware that much work has been done in terms of research and consultation into the promotion of the social inclusion of older people. Such work has also arisen from other areas of government policy, including the Government's overall anti-poverty strategy to develop an integrated approach for tackling financial economic and social inclusion in Northern Ireland as a whole¹.

In relation to this consultation document, the Commissioner welcomes the proposed establishment of a COPNI. It follows a successful appointment of an Older People's Commissioner in Wales with whom the Commissioner has had the opportunity to engage. Experience with the Older People's Commissioner in Wales has proved there is a sufficient collective will to ensure issues affecting older people are considered and mainstreamed into our service provision.

¹ OFMDFM Consultation 'Ageing in an Inclusive Society. Promoting the social inclusion of Older People. June 2004

The inclusion of the Information Commissioner's Office as a 'relevant authority'

The Commissioner has noted that his office is included as a 'relevant authority' for the purposes of the draft bill (s.25 (1) (c) and Schedule 3). Section 8 of the draft bill allows the COPNI to investigate complaints made against 'relevant' public authorities. The Commissioner seeks further urgent clarification regarding its inclusion in this list of relevant public authorities. The Commissioner does not report to or come under the remit of the devolved legislature in Northern Ireland. He is directly accountable to Westminster and his office is an independent NDPB sponsored by the Ministry of Justice. The Information Commissioner is appointed by Her Majesty by Letters patent (s.6 (2) DPA).

Schedule 3 of the Northern Ireland Act 1998 lists the subject matter of the Data Protection Act 1984 and 1998 as being a reserved matter for the Northern Ireland Assembly. Reserved matters include those areas which may be transferred to the competence of the Northern Ireland Assembly at a future date. Section 6 (1) of the DPA as amended by section 18 (1) of the FOIA establishes the post known today as the Information Commissioner. The Commissioner has responsibility for regulating the FOIA, DPA, Environmental Information Regulations 2004 and the Privacy and Electronic Communications Regulations 2004, all of which contain further functions, duties and powers for the Commissioner. It is the Commissioner's understanding that reserved matters (and this would include the existence and functions of the Commissioner) can only be legislated by the NI Assembly with the consent of the Secretary of State (s. 8 (b) NI Act 1998). The Commissioner has noted that it is not included as a body covered under the Commissioner for Older People (Wales) Act 2006. It is the Commissioner's understanding that the NI Assembly cannot therefore legislate in relation to his office or his core functions as enacted in the DPA. The Commissioner understands that the NI Assembly cannot legislate or make provisions or enact legislation which would affect laws in other countries or territories other than Northern Ireland². The Commissioner seeks urgent clarification as to why it is included as a relevant authority in this draft bill. The Commissioner further considers that there is the potential for administrative law and jurisdictional difficulties with its inclusion in this draft bill with NI public authorities or bodies with functions wholly pertaining to transferred matters for Northern Ireland.

The Commissioner has only made general comments in relation to the remainder of the consultation document and the draft bill in relation to his experiences and suggestions for those proposals, but primarily awaits clarification from OFMDFM in relation to its inclusion as a relevant authority in this draft bill.

² Section 6 (1) of the NI Act 1998 states " A provision of an Act is not law if it is outside the legislative competence of the Assembly."

(2) A provision is outside that competence of any of the following paragraphs apply --

(a) it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland."

Complaints made to the COPNI

The Commissioner has noted that section 8 (1) of the draft bill has proposed that the COPNI can investigate complaints made by an older person where the interests of the older person have been adversely affected by any action of the relevant authority. Under section 42 of the DPA, the Commissioner has the power to accept complaints made to him by individuals or *on behalf of any person* who believes him to be directly affected by the processing of personal data.³ The Commissioner has noted that the draft bill does not allow complaints to be made by others on the older person's behalf. From the Commissioner's experience of complaints handling he would suggest that OFMDFM may wish to consider amending the draft bill to include a provision for actions to be taken on behalf of individuals. This would therefore not leave individuals at a disadvantage, which for incapacity or other reasons would be prevented from making a complaint to the COPNI.

Section 8 (2) of the draft bill states that the COPNI cannot exercise the power to investigate a complaint under subsection (1) unless he is satisfied that the complaint firstly raised a question of principle; and the complaint does not fall within an existing statutory complaints scheme. The Commissioner would seek further clarification in relation to this section and specifically to have defined what is meant by the complaint raising a 'question of principle'. It appears to the Commissioner that, without the development of a complaints criteria or statutory code of practice in relation to complaints handling, there could be the potential for the duplication of work between regulatory bodies which could lead to confusion or conflicting outcomes.

Where other statutory complaints systems exist, the COPNI under the draft bill, cannot investigate a complaint (section 8 (2) (3)). The Commissioner is also concerned that 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 the older person and their treatment by that public authority. Such a restriction on the COPNI being able to accept a complaint because another public authority is looking at an aspect of it could place an individual at a disadvantage. The 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 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 multi-faceted and one regulator or complaints body may not have the statutory power to deal with the entirety of the complaint. The Commissioner would welcome the development of guidelines which would allow the COPNI to develop its own criteria and exercise his own discretion when it is appropriate to act in a

³ Section 42 states " A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of the Act"

complaint. Such criteria could take into account other avenues or complaints bodies which individuals may have recourse to or have had a ruling from. The Commissioner is mindful of his powers to share information under section 76⁴, and schedule 7 of the FOIA⁵, in which he can share and receive information with other named Ombudsmen and authorities where it appears to him that the information relates to matters where he or the other Ombudsmen have jurisdiction to enforce. These provisions list authorities including the Northern Ireland Commissioner for Complaints and Assembly Ombudsman which the Commissioner can share information. The Commissioner would recommend OFMDFM might want to liaise with his sponsoring department, the Ministry of Justice to learn about their experience of drafting such clauses as section 76 above. The Commissioner would recommend that OFMDFM consider such experience if they intend to draft similar provisions in the draft bill to allow COPNI and other regulatory bodies in Northern Ireland to share information. The Commissioner's considers that his experience as enshrined in statute supports mutual co-operation between complaint handling bodies whilst the clarity afforded by the wording in the statute respects the unique responsibilities and position of the other bodies listed.

Assistance in relation to legal proceedings.

Allike those powers conferred on the Commissioner under section 53 of the DPA, it is proposed in the draft bill that the Commissioner can offer assistance in relation to legal proceedings. The Commissioner has noted that the COPNI at section 11 (2) of the draft bill can offer legal assistance but only where he is satisfied that the case raised a '*question of principle*'; it would be unreasonable to expect the older person to deal with the case without assistance because of its complexity or there are other special circumstances which make it appropriate for the COPNI to provide assistance. The Commissioner has also noted at section 11 (3) of the draft bill provide that the COPNI may not grant an application for assistance in relation to legal proceedings unless it appears that no other body or person is likely to provide assistance. The Commissioner would welcome further clarification and the development of criteria on the assistance in legal proceedings. The Commissioner would again specifically ask what is meant by a case which raises a 'question of principle' (draft bill, s.11 (2) (a)), and would welcome the

⁴ Section 76 (1) states "the Commissioner may disclose to a person specified in the first column of the Table below any information obtained by, or furnished to the Commissioner under of for the purposes of this Act of the Data Protection Act 1998 if it appears to the Commissioner that the information related to a matter which could be the subject of an investigation by that person under the enactment specified in relation to the enactment specified in relation to that person in the second column of that Table

⁵ Section 76 of the FOIA allows the Commissioner to disclose to one of a range of named Ombudsmen any information which appears to him to relate to a matter which could be the subject of an investigation by that Ombudsman. Schedule 7 of the FOIA provides for the Parliamentary Commissioner and other Ombudsmen to disclose to the Commissioner any information which appears to the Parliamentary Commissioner to relate to matters in respect of which the Commissioner might exercise his enforcement powers of which relates to the commissioning of an offence under the FOIA or DPA.

development of a set of criteria in relation to assistance with legal proceedings. This he considers would not fetter the discretion of the COPNI in achieving redress for an older person simply because no other body or person is likely to provide assistance. Such criteria may take into account what other avenues an individual has attempted or other regulators the individual has approached and whether that organisation had assisted the elderly person or not.

Formal investigations carried out by the COPNI

The Commissioner is cognisant of the powers being proposed in the draft bill which would allow the COPNI to conduct investigations, compel evidence and allow for the production of information and documents (s.16 (1) of the draft bill). The Commissioner has noted that the interpretation section of the draft bill defines 'information' as information recorded in any form. As discussed above, section 76 of FOIA allows the Commissioner to disclose information in very limited circumstances; however, in relation to the majority of information furnished to the Commissioner, it is protected from disclosure by a statutory bar. Apart from those specific and limited powers set out under section 76, the Commissioner is bound by virtue of section 59 of the DPA to keep all material and documents furnished to him for the purposes of his investigations confidential. Indeed it remains a criminal offence for ex-employees of the Commissioner to reveal the detail in information furnished to him confidentially (s.59 (3) DPA).

The Commissioner has specific concerns that information (and especially information that may be furnished to him which has a security asset classification of confidential, secret or top-secret) could be compelled as part of the COPNI's investigative remit, especially if it was intertwined with those functions and duties which the COPNI is tasked to promote and investigate. The Commissioner would seek clarification about those powers being proposed to compel evidence and especially in relation to the work of his office. The Commissioner envisages that security of information furnished to/by other regulators will also be of paramount concern to them especially those who handle more sensitive material. The Commissioner would welcome such clarification and/or the development of a set of guidelines in relation to the proposed evidence gathering powers of the COPNI. The Commissioner would also recommend that in relation to the information held by it specifically and especially to sensitive case-work information (including sensitive material held for the purposes of its investigations) that OFMDFM seek further advice and provide urgent clarification specifically to the Commissioner in relation to these proposed powers. The Commissioner would also recommend that OFMDFM seek further advice from the Commissioner on the development of criteria for good information handling in relation to the security of the information being gathered and stored by the new COPNI which he is happy to provide following this consultation.

