



Law Centre (NI)

**OFMDFM: A Commissioner for Older People
in Northern Ireland**

**Law Centre (NI) response
January 2010**

Law Centre®

Introduction: About Law Centre (NI)

Law Centre (NI) is a public interest law non-governmental organisation. We work to promote social justice and provide specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services from our two regional offices in Northern Ireland. We provide a specialist legal service (advice, representation, training, information and policy comment) in five areas of law: community care, immigration, social security, mental health and employment to almost 450 member agencies. Members include local Citizen Advice Bureaux, independent advice agencies, local solicitors, trade unions, social services, probation offices, constituency associations of local political parties, libraries and other civic organisations. Our community care unit deals with care and other issues affecting older people.

We restrict our comments to our areas of expertise and experience and therefore address only some of the questions which were posed for consultation.

Specific Questions

1. Do you agree with the need for a Commissioner for Older People?

We support the need for a Commissioner for Older People. The Deloitte report in May 2008¹ concluded that there was a significant need and a strong case for establishing a Commissioner for Older People in NI. This conclusion was based upon a number of factors including the ageing population in NI, the lack of a body which has the concerns of older people as its primary focus; the identification of challenges facing older people; the increased recognition of the rights of older people in Government strategy and policy and a review of arrangements in other jurisdictions. We agree that a Commissioner for Older People is a positive step to address these identified factors.

2. The United Nations Principles for Older Persons are set out in full at Annex 1 of this document. They are: Independence, Participation, Care, Self-fulfilment, and Dignity. Do you think the Commissioner should take account of the UN Principles for Older Persons whenever he or she is deciding:

a. How to act? And

b. What constitutes the interests of older people?

The UN Principles serve as a vital framework for the work of the Commissioner. Consideration also needs to be given to the wider range of national and

¹ Deloitte MCS Ltd, OFMDFM 'Examining the Case for a Commissioner for Older People' Report May 2008

international human rights instruments and legislation that impacts upon older people including but not limited to the UN Principles for Older People, the UN Paris Principles, the EU Employment Framework Directive, Article 25 of the European Charter of Fundamental Rights; and national and regional requirements such as the Human Rights Act 1998, Section 75 of the Northern Ireland Act 1998 and the Employment Equality (Age) Regulations (Northern Ireland) 2006.

3. What age range do you think the Commissioner should mainly cover?

4. Do you think that the Commissioner should be able to provide his or her services to people aged 50 years and over in certain circumstances?

We support the recommendation that 60 years and over is the appropriate age range for the Commissioner to mainly cover and agree that the Commissioner should be able to provide services to people aged 50 years and over in certain circumstances which should be set at the discretion of the Commissioner.

6. Do you think that the Commissioner should have a Principal Aim to safeguard and promote the interests of older people?

We would recommend that the Commissioner's Principal Aim should be to '*safeguard and promote the rights and interests of older people.*' We believe it is important that the term '*rights*' is included within the Commissioners Principal Aim and reflected in the body of the legislation.

7. When dealing with the case of a particular older person, do you think that the Commissioner should have as a paramount consideration the interests of that older person?

We would welcome further information regarding the potential differentiation between the Principal Aim of the Commissioner and what the Commissioner should have as a 'paramount consideration'. As these are so similar it is confusing to have both on the face of the legislation. The Commissioner should give paramount consideration to his/her Principal Aim which we would define as a duty to '*safeguard and promote the rights and interests of older people.*'

8. Do you have any other suggestions about what the Principal Aim and Paramount Consideration should be?

See answer to questions 6 and 7.

9. Do you think the Commissioner's role and functions should be based on the interests of older people?

The Commissioner's role and functions should be based on the interests *and rights* of older people.

10. Do you agree that the duties proposed are suitable for a Commissioner for Older People?

We agree that the duties proposed are suitable for the Commissioner. We support the breadth of the duties proposed and the opportunity for Northern Ireland to lead the way in the UK with a strong set of duties for its Commissioner.

11. Are there any other duties not included that you believe it would be essential for the Commissioner to carry out?

The duty to keep law and practice under review could usefully be broadened to include a duty to keep the law, *policy* and practice under review. This would include, for example, the Older People's Strategy '*Ageing in an Inclusive Society*'. OFMDFM are currently revising this Strategy and it will be an integral framework for promoting the social inclusion of older people.

We also support the recommendation made by Age Concern Help the Aged NI that the Commissioner should have a duty to liaise regularly with the age sector.

12. Do you think the Commissioner should have memoranda of understanding or working protocols with other organisations?

We believe it is very important that the Commissioner establishes Memoranda of Understanding with the other Commissions to ensure positive collaborative working. We note the fact that consideration is being given to whether or not the Bill should include a statutory requirement for collaborative working. We support the recommendation of Age Concern Help the Aged NI that the Commissioner must have the power to cooperate with other bodies and that there should be a statutory requirement on bodies with common interests to collaborate. This should be outlined in Memoranda of Understanding between agencies to strengthen strategic collaboration.

13. Do you agree with the general powers proposed for the Commissioner? If not, please explain.

Yes, we agree with the general powers proposed for the Commissioner. In reference to question 12 it is of note that the Commissioner has a proposed power to co-operate with other bodies. This power will add the development of collaborative working by the Commissioner with other relevant bodies/organisations.

We welcome the inclusion of the general power to bring legal proceedings or to assist an older person with a court case. We are concerned by the proposal not

to grant the Commissioner 'victim status' and will comment more on this in answer to question 27.

14. Are there any other general powers that you think the Commissioner would need? That is, do you think that there is anything else the Commissioner would need to be able to do?

See our answer to question 27

15. Due to the potential for a conflict of interest we are not currently proposing that the Commissioner should have powers of mediation or arbitration, however we are interested in your views on the following potential options:

A. If it is possible, should the Commissioner be able to provide financial assistance towards the cost of mediation in a dispute involving an older person?

B. Should the Commissioner hold a register of mediation/arbitration services and be able to direct older people to these services?

C. Do you think the Commissioner should have the power to "make arrangements" with any other person to provide mediation/arbitration services in relation to disputes involving older people?

Finally, in what circumstances do you think that mediation or arbitration would be appropriate?

We support the option for the Commission to hold a register of mediation/arbitration services to be able to direct older people to these services. We also believe it is appropriate for the Commission to have the power to make arrangements with any other person to provide mediation/arbitration services in relation to disputes involving older people, provided that all communication between the Commission and any external person is transparent and the independence of the external person is assured.

The Commissioner should be given the discretion to decide whether it is appropriate to provide financial assistance towards the cost of mediation. It will then be at the Commissioner's discretion to decide whether to provide financial assistance based on the available budget and in accordance with its strategic casework selection policy.

16. Do you agree that the Commissioner should have the specific powers to review in general and individual cases, the advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities?

17. Do you agree that the Commissioner should be able to provide assistance (e.g. offer support, guidance and/or funds) to an older person with their complaint against a relevant authority?

We support the proposals to give the Commissioner specific powers to review in general and individual cases, the advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities. We also agree that the Commissioner should be able to provide assistance to an older person with his/her complaint against a relevant authority.

We do not agree, however, with the proposal that the Commissioner may not review these unless there is no other body or person that has the legal power to review those arrangements. The Commissioner's priority is to advance the interests and rights of older people and his/her powers should not be limited in this way. While another body or person may have the legal power to review arrangements there is no guarantee that they will use that power if the interests of older people are not seen to be a priority. As already discussed there is no need for a conflict in the duplication of powers if there are effective memoranda of understanding between bodies.

18. In relation to relevant authorities, do you think there are any other formal or specific powers that the Commissioner would need?

As previously stated we believe the Commissioner should be granted full powers rather than the residual powers proposed in the draft legislation. We are particular concerned by the range of limitations imposed on the Commissioner's powers. Paris Principle A.2 provides that a National Human Rights Institute (such as the Commissioner) 'should be given as broad a mandate as possible.'² Yet the draft legislation proposes to only allow for the Commissioner to exercise residual powers and the draft legislation imposes numerous limits to the Commissioner's powers in the areas of reviews, complaints, investigation and casework. We agree with the submission made by Age Concern Help the Aged NI that the Bill as currently drafted does not meet the standard of the Paris Principles and we support the request that these constraints on the Commissioner's powers be lifted.

19. What do you think the Commissioner should be able to do if a relevant authority does not follow the Commissioner's recommendations?

We welcome the powers outlined within the proposals however; we do not believe that they go far enough. While we agree that the power to 'name and shame' can be substantial especially if fully publicised, the Commissioner cannot

² Available at <http://www2.ohchr.org/english/law/parisprinciples.htm> Correct as of 07/01/10

take the matter any further if the relevant authority chooses not to comply with the Commissioner's recommendations. In contrast the Equality Commission has a wider scope within which to exercise its powers of formal investigation and has enforcement powers, including the power to issue a non-discrimination notice and seek an injunction against non compliance.³

20. In Chapter 11, Paragraph 11.23 we set out the reasons why the Commissioner should not act in any case where an existing organisation already has the power to act. What do you think about this?

We are opposed to the proposals to restrict the Commissioner's powers in this way. See our response to questions 16, 17 and 18. As stated while the legal power may exist for other bodies to act this does not mean that those bodies will prioritise the interests of older people and use their powers to intervene. By ensuring that the Commissioner has full powers this will ensure that the interests of older people are not lost to the strategic priorities of other bodies.

21. Do you think that the list of organisations at Annex 6 should be included as relevant authorities?

22. Are there any other organisations that you believe should be included in Annex 6 as relevant authorities?

23. If you answer yes to question 22, can you explain why they should be included?

We agree with the list of organizations at Annex 6 however note some other organisations/bodies that should be included. We would welcome the inclusion of all private/independent residential care homes as relevant authorities regardless of whether or not care costs are being publicly funded. All bodies providing residential care for older people on a public, private or voluntary basis should fall under the same obligations and these obligations should be applicable to all residents. These bodies have been determined to be public bodies within the Health and Social Care Act 2008 therefore should be included as relevant organisations. Residential care in Northern Ireland is a major issue which the Commissioner will be involved in and therefore he/she needs to have full powers to intervene on behalf of those older people in residential care. The mandate of the Commissioner should be extended to include community, voluntary and commercial organizations that are involved in the health, social care or support of older people.

We note the limitations on the Commissioner's powers in respect of reserved matters and those bodies that are responsible for issues such as pensions, tax

³ Under Article 67 of the Sex Discrimination (NI) Order 1976

and benefits all which have a significant impact on older people in NI are not listed as relevant authorities. It is concerning that the Commissioner's powers in relation to these matters will be limited. We comment further on this point in answer to question 28.

24. Of the three potential options, outlined in Chapter 11, Paragraph 11.39, regarding the extent of the Commissioner's powers in relation to relevant authorities, which do you consider to be the most appropriate and why?

Option 3 is the best option as it provides for the highest degree of protection for older people.

26. Do you agree that the Commissioner should be able to take or support legal cases? (support includes providing financial support)

We believe it is vital that the Commissioner is given the power to be able to take or support legal cases. Once again we would urge OFMDFM to revisit these proposals to ensure that the Commissioner is given full rather than residual powers to ensure that the Commissioner's right to grant assistance is not limited if another body also has a remit. While we appreciate the concern about overlapping powers such issues can be dealt with effectively through the development of clear Memoranda of Understanding. The proposals to limit the Commissioner's powers will have a substantial impact on the Commissioners' ability to protect and further the interests and rights of older people.

27. As explained in Chapter 12, Paragraph 12.4, it is very unlikely that the Assembly will be able to give the Commissioner "victim standing" for Human Rights cases. What is your view of the Commissioner having "victim standing", that is being able to take Human Rights cases in his or her own name?

We are strongly in support of the Commissioner being granted 'victim standing'. This is important to ensure that the Commissioner can fully act in the best interests of older people. Consideration needs to be given to the specific situation of older people who may be more vulnerable to the stress of legal action and to the unfortunate fact that an older person may die before a lengthy legal issue is resolved. Restricting the Commissioner's powers by not granting him/her victim standing may potentially limit many older people's ability to access justice.

28. Regarding Chapter 13, what are the main issues that you think the Commissioner should be able to speak out about?

It is important that the Commissioner is given access to report and influence Westminster in a number of non-devolved areas, most importantly in relation to

pension matters and benefits. These two issues in particular have a significant impact upon older people in Northern Ireland and it is important that the Commissioner has the standing to be able to present the impact of policies in these areas on older people in Northern Ireland.

29. Do you agree that the Commissioner should be a full-time paid post?

The Commissioner should be a full-time paid post.

30. Who should be responsible for appointing a Commissioner for Older People? (See Chapter 14, Paragraph 14.6)

The Commissioner should be appointed jointly by the First Minister and deputy First Minister and approved by the Assembly, as is the case for the Scottish Human Rights Commissioner as regards the Scottish Parliament.

38. The Age Sector Report recommended that the, “Commissioner should have an active relationship with, but be demonstrably independent from, stakeholder organisations.” Do you agree with this statement?

39. If you answered yes to question 38, how do you think this should be achieved?

40. The Age Sector Report ³⁴ recommended that there should be “an infrastructure of champions in government and across the public sector, with visible leadership demonstrated at Ministerial level, to work with” the Commissioner “in promoting and protecting older people”. Do you agree with this recommendation?

41. If you answered yes to question 40 – how do you think they will improve the lives of older people?

Law Centre NI was involved with the consultation process in the development of the Age Sector Report and agree with its recommendations and reasoning.

42. It is good practice for every organisation providing services to the public to have a complaints procedure. Do you think the Commissioner should have one?

We agree that the Commissioner should have a complaints procedure and the Commissioner should be subject to the same scrutiny as other bodies by the Assembly Ombudsman.

44. If you answered yes to Question 43 how often do you think the Commissioner should be required to examine the legislation? (See Chapter 14, Paragraph 14.28)

- A. Every 3 years
- B. Every 4 years

C. Every 5 years

The Commissioner should be required to review the legislation for the first time within the first two years on implementation. This will ensure that any issues or obvious gaps within the legislation are quickly identified and can be rectified or amended as soon as possible. Thereafter, the legislation should be reviewed every 3-5 years.

Conclusion

Law Centre (NI) welcomes the opportunity to respond to the consultation. We trust you will find our comments helpful. If there is any further way in which we could contribute to this process we would welcome the opportunity to do so.

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