



A Commissioner for Older People in Northern Ireland

A Report and Recommendations from the Age Sector

February 2009

Contents

1. Background to the commitment for a Commissioner	Page 1
1.1 Commitment by Assembly and Ministers	
1.2 Appointment of interim Advocate	
1.3 Age Sector deliberations	
2. The need for a Commissioner for Older People	Page 3
2.1 The position of older people in Northern Ireland today	
2.2 The strategy for older people and the proposal for a Commissioner	
2.3 The rights of older people: United Nations Principles on Older People	
2.4 The rights of older people: age discrimination	
2.5 Role of the Commissioner for older people	
3. Extent of role and remit of the Commissioner	Page 11
3.1 How the Commissioner will add value	
3.2 Definition of target age group	
3.3 Relevant authorities and jurisdiction	
3.4 Fit with other commissions	
3.5 Fit with other organisations	
4. The Commissioner's Duties and Powers	Page 17
4.1 Range of duties and powers	
4.2 Communication, participation and engagement	
4.3 Research, education and advocacy	
4.4 Review and investigation	
4.5 Information, advice and casework	
4.6 Legal intervention	
4.7 Mediation and arbitration	
4.8 Enforcement and sanctions	
5. Appointment and Accountability	Page 26
5.1 Principles	
5.2 Status	
5.3 Appointment and term of office	
5.4 Reporting arrangements	
5.5 Financial arrangements	
Annex A: Summary of Recommendations	Page 31
Annex B: United Nations Principles for Older Persons	Page 34
Annex C: List of those involved in discussions	Page 36
Annex D: The necessary powers and functions of the Older People's Commissioner	Page 37

1. Background to the commitment for a Commissioner

1.1 Commitment by Assembly and Ministers

On the 5 June 2007 the Northern Ireland Assembly called upon the Office of the First and deputy First Minister to prioritise the appointment of a Commissioner for Older People. The proposal had the longstanding support of Assembly members who had discussed it in the Transitional Assembly and was unanimously accepted.

Later that year, on the 18 December 2007, the First Minister and deputy First Minister announced that a Commissioner for Older people would be appointed. Deputy First Minister Martin McGuinness said: *“The issue of establishing an Older People’s Commissioner to champion the rights of older people has the support of the Assembly, the Executive and the Committee of the Office of the First Minister and Deputy First Minister”*.

First Minister Ian Paisley said: *“Our hope is that a Commissioner will provide older people with a strong and confident voice.”* He declared that the next stage in the process would be to agree on the role, remit and powers of a Commissioner and this would be carried out with wide consultation. *“Once the roles and responsibilities of the Commissioner have been decided we will move swiftly to putting in place the necessary statutory powers,”* he said.

The Office of the First and deputy First Minister commissioned Deloitte MCS Limited to assist them with the review. Of the case for ‘*an independent Northern Ireland Commissioner for Older People*’ and to advise on the potential roles and responsibilities of such a commissioner. The Deloitte report in May 2008 examined existing provisions, identified gaps, took the views of stakeholders and assessed costs and benefits.

1.2 Appointment of interim Advocate

The Northern Ireland Executive moved quickly to provide tangible evidence of its commitment. They proceeded to conduct a review and on the 4 April 2008 Junior Ministers Jeffrey Donaldson and Gerry Kelly announced that an advocate for older people would be appointed in the interim period while legislation was being put in place for a commissioner. *“The new advocate will act as a conduit between the sector and ministers. Among a wide ranging remit they will have a significant role to play in advising on the role of the new commissioner. In addition they will co-chair, with a senior departmental official, the Advisory Panel which will report back to Ministers about issues relevant to the sector.”* The Ministers indicated their active engagement in ensuring the Programme for Government delivered a strong independent voice for older people.

The appointment process began in May with the expectation that the Advocate would promote the rights of older people, ensure their voices are heard and provide the Ministers with information and analysis on older people’s priorities. *‘Among a wide ranging remit he or she will have a significant role to play in providing ministers with the views of the voluntary and community sector on the impact and practical out workings of policies and strategies aimed at older people. In addition they will co-*

chair, with a senior departmental official, the Advisory Panel which will report back to Ministers about issues relevant to the sector.'

In November the Junior Ministers announced the appointment of Dame Joan Harbison as the Older People's Advocate from 1 December 2008. Junior Minister Jeffrey Donaldson drew attention to the current economic downturn and the problems faced by older people in dealing with rising costs and said: "*Dame Joan will help us to not only identify and address the current problems faced by all older people but she will also provide us with independent advice on what needs to be done.*"

1.3 Age Sector deliberations

The Age Sector welcomed developments and took an active part in discussions throughout. In 2008 Help the Aged and Age Concern produced a paper identifying, among other things, criteria it viewed as necessary for a successful commissioner. These were:

- The Older People's Commissioner should have a strategic and holistic role in securing, promoting and safeguarding the rights and interests of older people.
- The Older People's Commissioner should be a body which is independent.
- The Older People's Commissioner should be complementary to existing bodies such as the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland.
- The Older People's Commissioner should offer value for money.
- The Older People's Commissioner must engage older people appropriately in all aspects of its work.

The two organisations commissioned research into the remit and powers of an Older People's Commissioner which was published in March 2008. Barry Fitzpatrick, having examined a range of models for a commissioner,¹ concluded that the Enhanced Commissioner model was preferable. He concluded: '*The Older People's Commissioner therefore ought to enjoy a full range of advisory, promotional, investigative and representational powers, creating a synergy between advice and promotion on the one hand and investigation and representation on the other but on a basis of equality of status with other bodies working in the field.*'²

This document identifies the reasons why an Older People's Commissioner (OPC) is needed, considers the role and remit such a Commissioner might fulfil and examines the powers necessary to support the responsibilities and duties. The paper is a result of deliberations in two policy roundtables and further discussion in the Age Sector. The roundtables benefited from the participation of equality and human bodies, the Older People's Advocate and specialist groups (see Annex C).

¹ The NICCY model; the Ombudsman/Inspectorate model; the Advocate model; the Enhanced Commissioner model.

² B Fitzpatrick, *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland*, March 2008, p6

2. The need for a Commissioner for Older People

2.1 The position of older people in Northern Ireland today

The appointment of an Older People's Commissioner with effective powers will be an important step towards realising the aspirations of older people in Northern Ireland. The future should be one in which older people are acknowledged in the diversity of their experience, knowledge and skills and are afforded the opportunity to participate fully in society. Older people deserve to have to barriers of isolation, poverty and neglect dismantled to enable them to exercise their full potential as citizens. The Older People's Commissioner has a role to play in celebrating older age as an achievement and ensuring that older people's rights are respected and fulfilled.

About a third of Northern Ireland's population is aged over 50 years. There are:

- 334,000 people aged over 60 years³
- 239,347 people aged 65 and over⁴
- 109,775 people aged 75 and over
- 53,000 people over 80 years of age
- 26,3000 people aged 85 and over

In the view of 84% of older people, the Northern Ireland Assembly and Executive need to do more to ensure that the rights of older people are protected and promoted.⁵ Northern Ireland MLAs from all political parties are aware of the difficulties many older people face as they indicated during the Assembly debate in June 2007:⁶

“Of the homes that suffer from fuel poverty, 44% are occupied by those of retirement age and above. In 2004-05, 1,280 deaths were cold-related, with the vast majority being older people.”

Mary Bradley MLA, SDLP

“One in every five of older people in Northern Ireland lives in poverty, and half of fuel-poor householders here are aged over 60. Nearly one in three people of pensionable age lives alone, and half of all people of pensionable age identify loneliness as a major problem”

Robert Coulter MLA, UUP

“About half of Northern Ireland's elderly live on less than £10,000 per year. ... many do not take up the benefits to which they are entitled.”

George Robinson MLA, DUP

“It is estimated that 11% of people aged over 65 will have dementia by 2015.”

Alastair Ross MLA, DUP

³ Government Actuary Department 2008 projections

⁴ NISRA, Resident Population Estimates 2006

⁵ Millward Brown Ulster, Omnibus Survey, August 2008

⁶ Northern Ireland Assembly, 5 June 2007

“Some 41% of older people here feel that they are treated differently from people in the general population because of their age. Of those people, 76% feel that they are treated worse than the general population because of their age.”

Mickey Brady MLA, Sinn Fein

“... senior citizens being denied millions of pounds in benefits, to which they are entitled, through no fault of their own. They go without just because the system is cumbersome, and they are put off by having to fill in forms.”

Kieran McCarthy MLA, Alliance

In the Age Challenge Survey 73% of people surveyed believe that age discrimination is an everyday fact of life for older people.⁷ While the numbers of older people accessing pension credit is going up, the percentage of people entitled to but not accessing the benefits to which they are entitled has also increased from 49% to 51%.⁸ The percentage of older people living below the poverty line remains the same at 28% while the percentage of those living in severe poverty has increased from 14% to 18% over a two year period.⁹

Housing unfitness has fallen, but the ‘lone elderly’ continue to be found in disproportionately high numbers in unfit dwellings.¹⁰ Rates of housing unfitness are higher in rural areas and those aged 40-59 and 60-74 were more likely than other age groups to live in rural areas.¹¹ The number of households headed by persons aged 60 and over that are fuel poor increased from 49% in 2001 to 51% in 2006.¹²

NISRA estimates that by 2011 there will be around 361,000 people aged over 60 increasing to 399,000 by 2016.¹³ Help the Aged suggests that the number of people 65 and over is expected to increase by 85% over the next twenty five years, with those 75 and over accounting for 12% of the population in 2036.¹⁴

The deputy First Minister of Northern Ireland suggests that with the number of people in Northern Ireland anticipated to increase from 1.689 million to 1.723 million between 2001 and 2041, the number of those of pensionable age will rise from around 259,000 to 495,000. Over the forty year period the number of older people will have almost doubled, following world trends when, by 2030, one quarter of the population of the developed world is expected to be over 65 years of age and almost one half of western Europe over 50 years of age.¹⁵

Northern Ireland, as with the rest of the world, will witness radical demographic change over the next twenty years – the projection of 1,000 people aged 100 and over

⁷ Age Challenge Survey 2008, ICM Research for Help the Aged

⁸ Income Related Benefits, Estimates of Take-Up 2004/2006 Northern Ireland

⁹ Data extracted from the Households Below Average Income report (FRSA) for 2005/06 and 2007/08

¹⁰ NIHE 2008

¹¹ Rural Homes and People, NIHE 2006 quoted in Public policy for Older People: the Age Agenda for Northern Ireland 2008, Age Concern NI

¹² Northern Ireland 2006 House Condition Survey, NIHE 2008 www.nihe.gov.uk

¹³ NISRA 2006

¹⁴ Spotlight Report 2008, Spotlight on older people in Northern Ireland, Help the Aged, p7

¹⁵ Deputy First Minister Martin McGuinness MLA, Northern Ireland Assembly Debate on an Older People's Commissioner, 5 June 2007

in 2030, when people in this age range are rare today, is one signifier of this.¹⁶ As the preparatory work for the Welsh Commissioner indicated, the UK will have the highest percentage of those over 60 in the European Union and changes in population percentages are partly due to increased numbers of older people and partly due to decreased numbers of younger people.¹⁷ Northern Ireland is projected to have the largest proportion of 60+ year olds in 2041.¹⁸

The magnitude of change compels urgent attention to addressing the implications for older people and society as a whole across the range of spheres: employment, volunteering, education, training, health and social care, transport, culture, arts and leisure and more. It demands attitudinal change and cultural shift of such depth that it must be driven by a champion with effective powers to assist and require change.

The Deloitte Report for OFMdFM lists a number of challenges: poverty, isolation and loneliness, fear of crime and personal and community safety, elder abuse, mobility and access to transport, availability of affordable and adaptable housing and insurance. Greater opportunities will need to be opened up to older people with better health and longer life expectancy.

2.2 The strategy for older people and the proposal for a Commissioner

As part of the Promoting Social Inclusion initiative of New Targeting Social Need (TSN), a commitment was given in the Programme for Government that the Office of the First Minister and deputy First Minister (OFMdFM) would establish a Working Group to consider the factors that cause older people to be at risk of exclusion. The PSI Working Group was established in 2002 comprising representatives from Northern Ireland departments, the wider public sector, the voluntary sector and organisations representing older people.

The Deloitte report listed a number of policy and strategic documents that have reflected and developed the context for an older people's strategy as well as a Commissioner for Older People. An older people's strategy document *Ageing in an Inclusive Society* was launched in March 2005 with a report for 2005/06 published in January 2007. The advisory panel has not met since February 2007, a second annual report has not been issued and the Executive has only recently adopted the strategy. The view of the sector is that little engagement has occurred in the development of Departmental Action Plans to implement the strategy.

On the other hand the First Minister of Northern Ireland noted, in January 2009, the free transport available now to those over 60 years, the rates discount for older people over 70 years who live on their own, consideration of ways to increase benefit take-up and a range of actions to increase the ability of older people to benefit from available government funds and to be better able to liaise with others in the community.¹⁹ In

¹⁶ Government Actuary Department, population projections (2006 base) quoted in Spotlight Report 2008, p26

¹⁷ A Commissioner for Older People in Wales: The Report and Recommendations of the Welsh Assembly Government's Advisory Group, March 2004, p4

¹⁸ Office of the First and Deputy First Minister, Examining the Case for a Commissioner for Older People Report, Deloitte MCS Limited, May 2008

¹⁹ First Minister Peter Robinson, Northern Ireland Assembly 12 January 2009

February 2009 Health Minister Michael McGimpsey launched a new single assessment tool, the first of its kind in the UK, for assessing the health and social care needs of older people, suggesting that it will bring consistency to assessment of older people in rural and urban areas from west to east.

The First Minister of Northern Ireland drew attention to the Office of the First and deputy First Minister's public service agreement target enshrined in the Programme for Government to create a strong, independent voice for older people. To ensure that the Commissioner has "*a sufficiently strong power-base in line with the expressed wishes of the sector*" the office will be underpinned by primary legislation for which a timetable has been prepared; the time estimated for legislation is one to two years.

A number of actions have evidently been undertaken which may be difficult to appreciate fully in the absence of a coherent strategy progress on which is monitored across the range of domains. In addition, no analysis is readily available of how much the Executive spends on older people. For comparison it was estimated in 2004, even before an Older People's Commissioner for Wales was established, that 60% of NHS spending in Wales was on older people, while funding of £10 million was made available to take forward the Strategy for Older People in Wales.

2.3 The rights of older people: United Nations Principles on Older People

The United Nation's Madrid International Plan of Action on Ageing 2002 outlined a number of central themes including: the full realisation of all human rights and fundamental freedoms of older people; the achievement of secure ageing; empowerment of older people to fully and effectively participate; provision of opportunities for personal development; commitment to gender equality; intergenerational independence and solidarity; health care and social protection.

The International Action Plan prioritised recommendations for action according to three foci: older persons and development; advancing health and well-being into old age; and ensuring enabling and supportive environments. The intention is '*to guide policy formulation and implementation towards the specific goal of successful adjustment to an ageing world, in which success is measured in terms of social development, the improvement for older persons in quality of life and in the sustainability of the various systems, formal and informal, that underpin the quality of well-being throughout the life course*'.

The Northern Ireland Executive is encouraged to consider the International Plan of Action on Ageing and incorporate the UN Principles for Older Persons²⁰ into its strategy and programme for older people in line with what Governments have been asked to do. The UN Principles cover independence, participation, care, self-fulfilment and dignity (see Annex C). They should inform the remit and work of the Older People's Commissioner in Northern Ireland.

In common with the sentiments expressed in Wales, it is suggested here that particular aspects of the UN Principles support the case for an Older People's Commissioner:

²⁰ Resolution 46/91 adopted by the UN General Assembly in December 1991

- Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
- Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.
- Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.
- Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.

Article 25 of the European Union Charter of Fundamental Rights states: *‘The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life’*.

2.4 The rights of older people: age discrimination

Following the EU Employment Directive on Equal Treatment requiring Member States to introduce legislation prohibiting direct and indirect discrimination on the grounds of age (and other grounds) the Employment Equality (Age) Regulations (Northern Ireland) 2006 came into effect on 1 October 2006. The Regulations made it unlawful for employers and others to discriminate on the grounds of age in the areas of employment, vocational training and further and higher education. In January 2008 the first age discrimination case was adjudicated in favour of the plaintiff who was not appointed to a post on the basis of age. It is likely that the legislation will take some time to make an impact and the limits of the protection are still being tested. A European Court of Justice decision is awaited on the Advocate-General’s opinion in the Heyday case which is supported by Age Concern England. The Advocate-General’s opinion is that while retirement provisions fall under the Equal Treatment Framework, the European Directive does not mean that a mandatory retirement age cannot be retained.

Age is the only equality ground that is not afforded legal protection from discrimination in the provision of goods, facilities and services, making it difficult for older people to access car and travel insurance, financial and other services. This limits their participation in society and could have a seriously detrimental impact on quality of life. A new Equality Bill in Britain will address age discrimination in the provision of goods, facilities and services while work on the single equality legislation originally promised in the first Northern Ireland Assembly appears to have ground to a halt.

The UK Joint Committee on Human Rights found many breaches of older people’s rights including in relation to neglect, abuse, malnutrition, inappropriate use of medication, lack of dignity and privacy and confidentiality issues. The Committee noted a significant distinction between a ‘duty to provide’ under care standards

legislation and a 'right to receive' under human rights legislation.²¹ The implication of human rights legislation means a shift in mindsets is required. Recent legislation on health and social care in Westminster was amended to apply human rights to private as well as public care providers (see below).

The Age Sector looks forward to a strong and inclusive Bill of Rights for Northern Ireland but is realistic about the challenges in achieving this. The Northern Ireland Human Rights Commission's remit extends to older people and it has investigated a number of cases involving older people.²² It undertook research in 2001 and 2004 on older people. Its 2001 report *Enhancing the Rights of Older People in Northern Ireland* covers a range of policy areas: social care, health, transport, income levels, housing, education and employment. The report found that laws, policies and practices still discriminate against older people in many areas and the extent of the discrimination tends to be hidden due to lack of research. It questioned performance on the statutory equality duty in relation to older people. The report's list of recommendations on legislation and policy action could usefully be revisited by the Commissioner for Older People to identify areas for attention, possibly in collaboration with the NIHRC and others.

The Equality Commission for Northern Ireland has generic equality responsibilities and specific responsibilities for a range of equality strands. Age is one of the strands in the Section 75 statutory equality duty under which public authorities must have due regard to the need to promote equality of opportunity under the oversight of the Equality Commission. The ECNI offers free confidential advice and assistance and may be able to help with legal assistance in cases of alleged discrimination, including where the Employment Equality (Age) Regulations (Northern Ireland) 2006 are concerned. It undertakes research and has published the results of a survey on awareness of age regulations and attitudes to age-related issues. The Commission also produces guidance and codes of practice as aids to implementation and enforcement. According to Deloitte the Commission has dealt with 365 legal enquiries on potential age discrimination, considered 42 applications for legal assistance and is supporting 9 cases on age discrimination in employment currently²³ (not all may be age cases involving older people).

Deloitte also notes that the Office of the Northern Ireland Ombudsman considers that it handles a considerable proportion of complaints each year, particularly in the health and social care sector although it does not keep age-related statistics. The Regional Quality and Improvement Authority monitors and inspects the quality of health and social care services to ensure the comfort and dignity of older people and others using the services. The Northern Ireland Social Care Council has a general remit to protect those using care services and their carers. The Mental Health Commission for Northern Ireland has a general remit.²⁴

²¹ Human Rights of Older People in Healthcare, Joint Committee on Human Rights, UK Parliament, August 2007

²² Deloitte May 2008, p25

²³ Deloitte, p24

²⁴ Deloitte, pp25-26 Deloitte lists these and other bodies with general remits that cover older people: Victims' Commissioners, Police Ombudsman for Northern Ireland, Prisoner Ombudsman for Northern Ireland, Criminal Justice Inspection Northern Ireland, Northern Ireland Commissioner for Children and Young People.

2.5 Role of the Commissioner for older people

An Older People's Advocate took up post on 1 December 2008 as an interim measure until the primary legislation can be drafted, debated and agreed and an appointment process held for an Older People's Commissioner. The role of the Advocate is to:

- provide a focus for individual older people and representative groups from the voluntary and community sector to highlight issues that are of concern for older people;
- bring these issues and concerns to the attention of the Junior Ministers in the Office of the First Minister and deputy First Minister;
- provide Junior Ministers with an analysis based on the views of the voluntary and community sector on the impact and practical out workings of policies and strategies aimed at older people;
- facilitate public consultation events on the proposed role, remit and powers of an Older People's Commissioner;
- where appropriate, co-chair with OFMdFM officials such meeting that are considered necessary with representative from the older peoples sector (the advocate may chair other meetings as he/she deems necessary with the sector).

An Advocate established in advance of primary legislation is necessarily constrained. As is evident in the role's description many of the Advocate's functions are focused on Ministers in its founding department, the Office of the First and deputy First Minister. The nature of the role as advocacy also limits its scope to champion and channel as described. While a valuable interim role, it is important that the future Older People's Commissioner has a wide canvas and fuller powers at her/his disposal. The recommended model is an Enhanced Commissioner model.²⁵ The OPC must be permitted to operate on an independent basis, undertake formal reviews and take on individual cases.

The Older People's Commissioner will have an important part to play in ensuring that older people's rights and interests are taken into account. S/he will be able to take a well-rounded and independent view of how public policy impacts the lives of older people; and to consider and comment on new initiatives and developments so they can impact with most benefit for older people. Through monitoring and representation the Commissioner will seek to influence improvement and tailoring of services so that older people suffer no disadvantage in terms of access, delivery or outcomes compared to others. S/he should take on an 'umpire' role leading on finding a solution to a problem where necessary.

In short, the Older People's Commissioner should be an independent champion for older people whose role should include both greater empowerment of older people and enforcement of their legal rights with clear aims and responsibilities. The Commissioner's aims and functions should be:

²⁵ As described in B Fitzpatrick, *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland*, March 2008

Overall aim: To promote and safeguard the rights and dignity of older people; to advance equality for and challenge discrimination against older people and to empower and enable the voice of older people in Northern Ireland.

Duties:

- Influencing policy and service delivery
- Championing and empowerment
- Information, advocacy and support
- Safeguarding, enforcing, enhancing and promoting rights
- Investigating complaints and matters of concern to older people

Recommendations

Recommendation 1: The mandate for the Older People’s Commissioner should be drawn from the UN Principles on Older People, the United Nations Plan of Action on Ageing, the European Union’s and UK government’s plans to improve equality and anti-discrimination laws and support the human rights of older people as well as the aims of any Northern Ireland Strategy for older people and views of older people themselves.

Recommendation 2: The overall aim for the Older People’s Commissioner should be: To promote and safeguard the rights and dignity of older people; to advance equality for and challenge discrimination against older people and to empower and enable the voice of older people in Northern Ireland.

3. Extent of role and remit of the Commissioner

3.1 How the Commissioner will add value

Together an Older People's Commissioner and the Northern Ireland Commissioner for Children and Young People (NICCY) provide a welcome and necessary focus to get vulnerable groups onto a level playing field.

Experience in the Age Sector and of the Older People's Advocate, even after a few months, point to the unique space in which the Older People's Commissioner will be situated. Perhaps the most unique aspect of that space is 'time'. Simply, things need to move quickly for older people as they have less time than others. This raises the imperative of having an OPC who can act quickly and has the power to ensure speedy responses, immediate compliance and rapid improvement. Added to that, as Northern Ireland society ages it becomes a more pressing priority to get things right as soon as possible.

Older people have less time to be bogged down in long legal battles lasting years, although strategic casework will be important. Other effective routes to challenge and improvement must be available and an OPC will need to be solution focused. This suggests a possible mediation role, proactively managing consultation towards bringing about greater understanding and finding common ground. With time a significant factor for older people the OPC will need to be invested with the power to move things forward in a timely fashion towards a solution; this suggests an arbitration role, with decisions that can be enforced.

Older people have wisdom and experience, yet their voices are not heard loudly or frequently enough. Participation and engagement of older people will be critical and a relatively unique element. While the Equality and Human Rights Commissions do not have this function NICCY led the way with its responsibility to develop and engage young people and promote their participation across society. The Older People's Commissioner will have the benefit of working with an age-group of people whose knowledge and skill has been developed and applied over a lifetime.

There are special circumstances pertaining to older people that merit special consideration. For example, many older people live on their own (nearly one in three) and identify loneliness as a major problem (fifty percent of older people). An Older People's Commissioner can gather the richness of the experience of the stakeholder group. S/he can provide a focus around which they can articulate ideas to meet not just their own needs and aspirations but also arguably Northern Ireland's major challenge: how to shape the future for a society that is inexorably ageing as population experts predict. An OPC can harness the best experts to help find answers, namely people with exactly the right knowledge and experience who have something to say – older people themselves.

Even with best intentions, older people cannot be a priority for the Human Rights or Equality Commissions with their wide-ranging remits. While it will be important for the Commissioner to work in harmony with other commissions an OPC will be able to form an overview of all aspects of older people's lives. It will be able to maintain an overarching scrutiny role for older people, overseeing standards of provision of

services, liaising and making recommendations. It will be able to add value to the work of a range of agencies from the major commissions to the Northern Ireland Social Care Council and the Regional Quality and Improvement Authority.

An OPC will be able to focus its work on older people while other commissions and agencies have broader remits. Of course there are generic equality issues which other commissions will take action on to the benefit of all or many equality strands, including on the ageing front. On the other hand an Older People's Commissioner, if given the appropriate duty and power, will be able to home in on investigations and cases with special reference to older people and beyond strict anti-discrimination legislation. With broad remits and many competing strands the Equality and Human Rights Commissions are unlikely to be able to prioritise investigations for one group or on issues outside the boundaries of anti-discrimination legislation.

The Older People's Commissioner is likely to be a focal point for older people. It will be an easily identifiable single-entry point of contact. It can play a valuable role in signposting to other organisations where it is not the right source of help.

3.2 Definition of target age group

The legislation establishing the Older People's Commissioner will need to make clear on whose behalf the functions are to be exercised, namely at what age to draw the line. There is no generally accepted definition, with different institutions and agencies adopting different ages. Some take age 50 as a starting point as some people take early retirement in their 50s while others take age 60; and suggestions have been made elsewhere for age 65 or 70. The majority of people that Deloitte consulted favoured 60+.

Age Sector organisations in Northern Ireland currently use 50+ which is also the EU definition. The Welsh Commissioner and the World Health Organisation (WHO) focus on 60+. While it is believed that 50+ provides the optimum age range to prepare people for the future challenges of ageing, 60+ might be appropriate given the anticipated increase in numbers coupled with health advances. However, discretion to act at 50+ in cases of exceptional need or circumstance should be provided for. This would allow particularly vulnerable people or groups to be included or specific issues with a potential significant impact for older people.²⁶ It is noted that in NICCY 18 is the normal cut-off point, but in some cases of vulnerable groups 21 applies. It is recommended that the lower age limit norm of 60 years be reviewed after three years.

If 60 years is agreed as the lower limit it will be necessary to flag up any implications arising from the variation with the EU definition which is 50+.

3.3 Relevant authorities and jurisdiction

There has been a tendency to designate only public bodies for a Commission's attention such as in Section 75, although the Equality Commission, for example, has powers over private as well as public employers in matters of fair employment. It also appears that the definition of bodies subject to human rights provisions is changing

²⁶ Older people with disabilities and Travellers are examples

with amendments to health and social care legislation in Britain. Section 145 of the Health and Social Care Act 2008 ensures that, contrary to an earlier decision by the House of Lords, the provision of certain social care can be taken to be a public function, albeit delivered in some cases by a private body, for the purposes of the Human Rights Act 1998.

It is difficult to decide upon a strict delineation between public and private in the delivery of services to older people. It is also questionable whether it is sensible to do so as the range of matters requiring oversight – residential homes, insurance, access to services and opportunities – are provided by public, private/commercial and voluntary/charitable organisations. As public, private and voluntary organisations are all relevant authorities as far as older people are concerned, it is recommended that the Older People’s Commissioner’s powers and duties should not be restricted to public authorities but should apply to public, private and voluntary sectors.

While the Older People’s Commissioner will be established to act on behalf of older people in Northern Ireland and should be able to operate across the full range of transferred matters and bodies charged with delivering, there are reserved or excepted matters which are also of great import for older people. Some of these were listed by Deloitte: pensions and criminal justice; others are tax and benefits. The Equality Commission has some influence over UK bodies if they have been designated under Section 75 as far as their functions relate to Northern Ireland. The Human Rights and Equality Commissions participate in meetings at Westminster on occasion in relation to legislation that is relevant to Northern Ireland. The OPC will need similar access.

Deloitte raised as an option the possibility of the OPC making representation on an excepted or reserved matter to the Assembly, leaving it to the Assembly to subsequently make representations to Westminster.²⁷ This is one channel, but it is insufficient. While the Deloitte suggestion of routing concerns to Westminster or Whitehall departments through an English Commissioner might be temporarily pragmatic it is not appropriate. It does not accord the Commissioner for Older People in Northern Ireland the required status alongside Commissioners in England, Scotland and Wales nor any recognition at the UK level.

This is a structural matter that affects many bodies in Northern Ireland and may not be easy to resolve. It is also an issue that exercised the minds of the committee advising on the Commissioner for Older People in Wales. That committee’s view believed that *‘it would greatly enhance the profile, status and independence of the Commissioner if he or she could be empowered to make representations to the UK Government direct, rather than through the National Assembly’*²⁸ and so recommended. The capacity of the OPC to make representations on non-devolved matters is a subject that the First Minister and deputy First Minister at UK level should raise with the UK Government place on an agenda for discussion between colleagues in Scotland, Wales and Northern Ireland with the UK government, perhaps around a meeting of the British Irish Council.

²⁷ Deloitte, p44

²⁸ A Commissioner for Older People in Wales: The Report and Recommendations of the Welsh Assembly Government’s Advisory Group, March 2004, p31

The Equality Commission and Human Rights Commission, albeit established under different legislation, brief Members of Parliament not just from Northern Ireland but others at Westminster and engage with Westminster committees. Should powers of representation at UK level not be forthcoming quickly, or at all, this should not prevent the Older People's Commissioner from raising these matters with colleague commissioners in other UK nations, advocating at Westminster or informally making representations to UK departments and seeking to influence where appropriate or necessary.

3.4 Fit with other commissions

An Older People's Commissioner should not just fill the gaps in existing provision or rely on other bodies to act. Rather it should take a strategic view across the full range of issues and have all necessary powers to act strategically. Indeed it would be undesirable and confusing to older people for an OPC to be precluded from becoming involved in areas of strategic importance for the rights and interests of older people. There is an expectation that the OPC will be involved, and have teeth, in all the 'big' areas in older people's lives including employment and goods, facilities and services where these affect older people, even where the Equality Commission has a role.

Older people are the OPC's priority and there is no guarantee that particular cases would fit strategically with other commissions' priorities or budget given their broader remit – and there is some evidence that this has been the case.²⁹ Thus the Older People's Commissioner should have equal status and a constructive relationship with other bodies, consulting with them on strategic priorities. The OPC should be given full powers to take cases and undertake investigations. Two bodies with similar powers should not create a problem provided there is a clear and applied Memorandum of Understanding (MoU). In addition, internal scrutiny committees in each organisation can play an important role in ensuring there is no practice of duplication.

The performance and impact of Memorandums of Understanding between the OPC and other commissions might be strengthened if behind them there was a specific legal duty to consult and power to cooperate. Elements of these could be detailed in legislation – e.g. requirements to inform, consult, avoid duplication, cooperate in separate investigations, act jointly, prepare and publish joint reports – or the duty might simply be stated, leaving its outworking to be arranged more flexibly in Memorandums of Understanding between commissions. Of course, the Memorandums of Understanding should be comprehensive and robust and address boundary overlaps, and enable the sharing of activity and resources. The legislation could place these requirements on the OPC solely but it would be more symmetric and effective if extended, within the same legislation, to other commissions. The basis of this approach is already in operation in Wales, in the Public Services Ombudsman (Wales) Act 2005.

Memorandums of Understanding were developed to allow commissions to work closely together on areas of overlap, avoiding duplication and filling gaps, but they must be living documents creating a driver to inform engagement. Existing practice

²⁹ The Age Sector and NICCY cited examples at the roundtable in January 2008

within commissions suggests the importance of: strong relationship building; direct communication with other agencies; discussing emerging trends; cross referencing plans and outlining and mapping priorities; and summit meetings of agency chief executives and chief commissioners.

It makes sense for commissions to have to co-operate on matters which fall within the remit of more than one of them. Otherwise there is a chance of ‘maladministration’, which could be picked up by the Assembly Ombudsman, the Commissioner for Complaints, or the Assembly’s Public Accounts Committee. [There are](#) good examples of effective MoU design and application. One element involved ironing out problems over people dropping through the legal assistance net due to identical limitations on funding cases under statute across a number of bodies where the bodies have similar criteria for funding/refusing cases.

On the other hand the Older People’s Commissioner may be given residual investigative and assistance powers conditional on no other agency having already investigated or acted in the matter in question. In this case there needs to be some assurance given that when another agency is carrying out an investigation it will take human rights and equality requirements for older people fully into account and seek to engage the office of the OPC appropriately.

Limitations can be ‘hard’ limitations or ‘soft’ limitations. An example of a ‘hard’ limitation is one where the body is not permitted to act unless a point or principle is involved or if no other body has the power to act. An example of a ‘soft’ limitation is where the power is phrased in more permissive language, couched in terms like ‘satisfied that it is not reasonable to expect the complainant ...’ or the body is permitted to consider additional factors such as ‘other special circumstances’. If powers are to be limited then the Commissioner should, as far as possible, have discretion to act.

The Older People’s Commissioner should be expected to engage with colleague commissioners for older people across the UK and Ireland, collaborating where appropriate.

3.5 Fit with other organisations

There should be an infrastructure of support comprising a network of leaders with strategic responsibility for the Older People’s Commissioner to interface with. The Welsh model proposed a significant level of support at Ministerial level, a theme that was picked up in the Deloitte report. Ministerial-level responsibility and a network of champions of senior civil servants in government departments and extending through local government and the public sector is the recommended infrastructure. Champions among political representatives should also be encouraged and developed. This would help to establish the necessary supportive climate within which the OCP will operate. S/he can helpfully comment and advise on the effectiveness of the champion structure, strategies and action plans.

The Older People’s Commissioner has to have a role that is distinct and separate from others in the field. A good proportion of its credibility, and its authority, will depend upon its independence, including appropriately from the Age Sector. Besides, many

voluntary organisations deliver public service for older people and should fall within the oversight responsibilities of an OPC. While close links with stakeholder organisations are desirable, these cannot be such as to undermine the independence of the Older People's Commissioner.

Recommendations

Recommendation 3: The lower age limit for the legal definition of older people on whose behalf the Commissioner would act should normally be 60 years. Provision should be made for the Commissioner to have discretion to act in cases of exceptional need or circumstances for people of 50 years and up. The 60 age limit should be reviewed after three years.

Recommendation 4: The Older People's Commissioner's powers and duties should not be restricted to public authorities but should apply to public, private and voluntary sectors.

Recommendation 5: The Older People's Commissioner should seek to influence matters affecting older people which are decided at UK-level. Additionally, steps should be taken by the Executive to formalise this arrangement with the UK Government.

Recommendation 6: The Older People's Commissioner should be given full investigation and assistance powers.

Recommendation 7: There should be a duty to consult and power to cooperate between commissions to strengthen the effect of Memorandums of Understanding and the ability to partner and collaborate.

Recommendation 8: 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 OPC in promoting and protecting older people.

Recommendation 9: The Older People's Commissioner should have an active relationship with, but be demonstrably independent from, stakeholder organisations.

4. The Commissioner's Duties and Powers

4.1 Range of duties and powers

The Older People's Commissioner should have a wide range of duties and powers to cover: communication, participation and engagement; research, education/awareness-raising and advocacy; review and investigation including complaints; information, advice and casework; legal intervention; mediation and arbitration; enforcement and sanctions; and review of the effectiveness of its own powers and duties.

The following paragraphs elaborate on these further, with the exception of the obvious and important function of keeping under review the effectiveness of the Commissioner's own powers and duties.

4.2 Communication, participation and engagement

Following the example of the Northern Ireland Commissioner for Children and Young People, high importance must be placed on fostering participation by older people within the OPC's work and in public processes and society generally. Securing older people's engagement will depend upon a strong communication duty with the Commissioner ensuring communication, promotion and visibility of staff and resources across Northern Ireland. NICCY's dedicated unit of staff who travel across Northern Ireland promoting participation is a model of good practice. The implementation of the duty to communicate with and engage older people should pay particular attention to hard-to-reach vulnerable groups.

Participation must be meaningful. Promoting a better flow of information from agencies to older people and between older people will assist. The opinion of older people should be actively sought by the Commissioner who will be duty-bound to make sure their views are heard and understood by her/himself and by others. There must be real listening, hearing, acting and monitoring feedback and involvement. Older people must no longer feel that things are 'done to' not with them. In return, effective participation will provide the OPC with evidence of interests, aspirations and concerns to be tackled in public policy and provision. NICCY recommends a formalized and visible role for stakeholders. In this regard the older people's advisory group suggested in the Deloitte report³⁰ might be regarded as the equivalent of NICCY's 25-person youth panel which has an active role and is often represented at NICCY's meetings with the Minister.

Securing effective engagement not only requires planning, but also attention to building capacity and securing confidence so that older people's valuable expertise can be effectively harnessed and goals achieved. Particular attention must be paid to vulnerable and marginalised older people. Implementing 'soft' functions in the OPC's remit is likely to comprise 80% of the OCP's work and so relationship building to understand need and aspiration and gather evidence for influencing policy will play a large part. It is anticipated that the Commissioner will consult with Age Sector organisations and consider whether a route such as the Age Sector Platform might be a useful vehicle through which to engage older people directly, as well as reaching out

³⁰ Deloitte, Option 4, p53

to older people not yet in touch with voluntary organisations and activist groups. As suggested in the Deloitte report, a publicly available communication and outreach strategy, to include those who are hard to reach, would be useful.³¹

4.3 Research, education and advocacy

It is anticipated that the Older People's Commissioner will commission and publish research on older people's rights and needs to provide evidence and stimulate and illuminate debate on issues and models of good practice. The OPC will be expected to draw upon information coming from older people, as well as raising awareness of their rights – and the role of the OPC in asserting and protecting those rights – among wider society and older people themselves.

The OPC's functions should include influencing policy and service delivery. The Commissioner will be the lead champion challenging ageism, discrimination and inequality on behalf of older people and campaigning to strengthen law and policy so that their lives are improved. S/he should make every effort to ensure that the UN Principles for Older People are taken into account by public and other bodies in their work. S/he should not just review the impact of policies but identify areas for development and change and comment on priorities for investment. Advocacy complements and builds upon the other roles of the Commissioner, through promoting the findings of reviews and investigations, research and casework.

The Commissioner should offer advice to the Assembly, the Executive and individual Ministers as appropriate. S/he should use other opportunities and networks to disseminate information and raise awareness including through the media and local government and civil society networks. The OPC should seek to influence UK legislation and policy that impacts on older people by making representation directly to those at Westminster and in Whitehall departments, and through collaboration with colleagues in Wales, Scotland and England.

Local government is set to become more important in 2011 following reform. It will have a clearer, refreshed civic leadership role. It will lead local public organisations in community planning. It will be at the head of local social partnership arrangements. Taking best practice from elsewhere, local political representatives should hold public agencies to account in a transparent manner on behalf of people.³² The OPC should advocate for local attention to older people and their concerns and aspirations.

As well as educating and advocating her/himself, the Commissioner's role is to promote the participation of older people directly in the business of designing and governing the services directed towards them. S/he should be a ceaseless advocate to public and other bodies of older people's voices in policy development, planning and service delivery and the need to sustain this engagement consistently. S/he could advance this goal through monitoring or randomly sampling agencies' performance on engagement with older people.

³¹ Deloitte, p42

³² This is a capacity that local government in Britain has currently; it is usually exercised through a council's overview and scrutiny committee. See also later in relation to citizen petitions

4.4 Review and investigation

Powers of review and investigation are among the most important for an Older People's Commissioner. The Commissioner needs to keep legislation, policy and practice under review and make recommendations for improvement and change to improve the welfare and life circumstance of older people and advance their rights. The Commissioner should be in the position to make proposals to the Assembly, the Executive, public agencies and, where appropriate, other bodies; and her/his opinion should be sought on relevant matters initiated by others. S/he will want to cooperate with other commissions who have responsibilities in this field, though they should expect the OPC to take the lead in advising on matters concerning older people specifically.

Investigations can get to the heart of persistent discrimination and affect fundamental change in a reasonably expeditious manner. They have the capacity to affect change across a sector or industry more immediately than waiting for the impact of successful legal cases to trickle down; and can bring about more radical, structural change depending upon the terms of reference. Even when not used, the very threat of investigation can be a powerful tool.

The OPC should have wide powers of investigation to review public authorities and private and voluntary providers on their compliance with legislation and service standards; the powers should not be restricted to public bodies. They should include powers to obtain information, make recommendations, publish reports and issue notices of performance required and other directions. S/he should be able to enter premises, require disclosure of documents and require individuals to give oral evidence. Robust investigations need to be followed up by enforcement of compliance, particularly in situations of serious dereliction or recurring failure.

Investigations should be able to be triggered by complaints from individuals, by emerging casework or issues that a legal case throws up and by the Commissioner deciding that an issue or a service or business sector requires attention. Indeed, areas for investigation might be signposted by other commissions. The Commissioner may want to prioritise more immediate and pressing investigations on matters that directly affect the quality of life of older people both collectively and individually. Moreover, in avoiding duplication between agencies it should be recognized that the OPC will be likely to acquire significant expertise in investigations concerning older people and may need to be the body that determines the most strategic areas of review and investigation on which to concentrate public monies in this area. This is a good example of a function that could be framed by a duty to consult and a power to collaborate and further guided by a Memorandum of Understanding.

The Commissioner must ensure that accessible processes are in place whereby older people can complain effectively about services provided by public bodies, and others where appropriate. Encouraging whistle-blowing on matters of serious concern among those working with older people and ensuring that whistle-blowing and complaints procedures in institutions and services are robust and can be used are particularly critical where vulnerable groups are concerned; so the OPC should have powers to audit these.

Following on from this, the OPC should have the capacity to review complaints which have not been resolved to the satisfaction of an older person, particularly where wider matters of principle are involved. The Commissioner must have the power to call for disclosure of papers and for persons to give evidence should an investigation be required.

4.5 Information, advice and casework

The Commissioner for Older People should be able to offer information and advice, and assist people, including financially, to undertake legal proceedings over alleged breaches of rights in strategic or other appropriate cases.

One of the challenges in creating an Older People's Commissioner is establishing a body that does not duplicate the work of other agencies while ensuring there are no gaps through which older people could fall. An understanding of duplication and gaps must be informed as much by accessibility of support channels to an affected group as by different agencies' duties and powers. The Equality Commission and the Human Rights Commission, with broad remits to eradicate discrimination and protect the rights of all, are focused on embedding a culture of rights and equality in society.

The Equality Commission's functions cover age discrimination in all its forms, while the Older People's Commissioner focuses on protecting and championing older people. There is an expectation that an OCP will be involved, and have teeth, in all the 'big' areas, including employment and good, facilities and services (GFS), where these affect older people's lives. Older people will naturally identify with and gravitate towards the Older People's Commissioner for information and advice and are the least likely of any group to want, or be able, to go from pillar to post for support.

The Equality and Human Rights Commissions cannot be expected to necessarily prioritise older people over other groups for legal assistance or investigation. It is also the case that older people experience some situations very differently from others and may continue to be treated differently; for example, they use care homes more extensively and more exemptions are expected in GFS than for other groups. Further, it is expected that the OPC's remit would extend into areas beyond simply anti-discrimination. There are areas that other commissions may not be able to take on but on which the Older People's Commissioner may be expected to act in some manner.

As with NICCY, the Older People's Commissioner should have the power to pursue legal proceedings and undertake casework for older people many of whom will be among the most vulnerable in society. Express powers are also needed to take group actions which can offer greater value for money and be an effective means of bringing about change. Other commissions have such powers; for example, NICCY's powers led to action in response to 128 complaints on one issue.³³ Sound counsel advises that it is better to have all necessary powers but not need to use them than not to have the requisite power at all.

³³ Information given at roundtable

Part of the OPC's profile and attraction to older people will be gained through responsiveness to individuals' complaints and taking strategic legal cases that make a wider impact or test new points of law. Such cases have proved effective elsewhere with those won or settled used to make an example, contribute towards prevention of future discrimination, raise awareness and inform work with employers and service providers to improve practice. As noted in the Deloitte report, casework will 'uncover learning and evidence which could feed into more strategic debates concerning policy, legislation and good practice.'³⁴

The number of cases that can be undertaken in any year will be limited by budget considerations. Expectations around access to legal assistance as well as budget pressures must be handled well to ensure other areas of the Commissioner's work such as research, education and awareness-raising are protected. Managing the casework relationship between commissions will be essential, but the practice is already well-established underpinned by agencies' Memorandums of Understanding.

Casework may not always, or often, be the route of first choice to resolve issues. Cases taken are likely to be a small number and very specific. Mediation (see below) and working with other bodies will weed out the majority while others may be arbitrated (see below) or point the way to an investigation where strong investigative powers, combined with effective sanctions, may well be the most effective response.

4.6 Legal intervention

The Commissioner must have the power to bring legal proceedings in her/his own right, relating to the protection of older people's rights generally or where s/he believes that an older person's rights have been denied. The OPC must be fully empowered to make applications to the court and third-party interventions in cases. Moreover, it might be equally effective and less costly if the practice was established for the Commissioner to be recognised and called upon by the court in appropriate cases to give expert oral or written testimony on matters affecting older people.

The Northern Ireland Commissioner for Children and Young People has spoken of the constrictions on the legal challenges she can take as NICCY does not have 'victim status'. When challenging legislation on the grounds that it violates articles of the Human Rights Act NICCY must find a specific child who has had that right violated and take legal action in their name. The lack of 'victim status', at the forefront of a court ruling in February 2009, must not be a mistake that is repeated for the Older People's Commissioner. If the OPC were to have 'victim status' it could issue challenges on the grounds that a matter may possibly contravene the rights of older people. Any steps that can remedy this gap through legislation for the Commissioner should be taken.

4.7 Mediation and arbitration

The OPC could have a useful mediation role geared towards bringing about greater understanding and finding middle ground on issues of contention and between those in dispute. This is a function that is recommended by other commissions. It would

³⁴ Deloitte, p40

involve the Commissioner in facilitating dialogue and dispute resolution and might entail, say, developing a set of principles e.g. around Trust closures of homes. The purpose would be more than advocacy – it would be about managing a process intended to reach a solution.

As ‘time’ is a critical factor for older people then the OPC should have an arbitration function in addition to mediation. To operationalise this, the Commissioner might have a register of arbitrators who can be called upon. Less costly and quicker than court or tribunal proceedings but nevertheless a process that is designed to reach a decision, arbitration meets the requirement of moving forward in a timely fashion. Further attention will be needed to how to enforce arbitration decisions in a speedy manner.

4.8 Enforcement and sanctions

Forewarning: It is remarked by other commissions that the very existence of a particular duty or power often functions in a preventative manner; for example, the threat of investigation has prompted action without the investigation itself having to go ahead. Recourse to formal investigations, as a stronger statutory investigation procedure, along with powers of reviews, supplemented by naming and shaming through publication of reports, are means of enforcement that should be available to an Older People’s Commissioner.

Pathway to swifter recommendations: Laws and regulation are generally effective because people want to avoid the penalties that are the consequences of non-compliance. Trevor Phillips, Chair of the Equality and Human Rights Commission in Britain commented that: “There is a major gap in what we as a Commission can do. Our powers mostly leap straight from guidance and monitoring to substantial and intrusive inquiries and investigations.”³⁵

The EHRC has asked government for a simpler and more proportionate tool to promote equality and transparency alongside existing inquiry and investigative powers. It is seeking powers to issue a formal notice requiring specific data within a timeframe of 28 days which it could publish either on its own or collate with that from other organisations, or use it to make evidence-based recommendations for improvement to a specific organisation. The EHRC believes that this new power would enable the Commission to take a more focused and proportionate approach to enforcement. A similar power given to the Older People’s Commissioner’s would increase the actions that could be taken in the timely manner that older people need.

Commissioner’s Guidance: Codes of practice and guidance can be influential in altering practice and securing change, particularly if the law under which they are issued makes clear that failure to abide by the code will raise a presumption that the actor has behaved unlawfully; the burden of proving the contrary then shifts to the actor. The Commissioner could be given power to issue codes of practice and guidance; for example, on engagement and treatment of older people in care services or for agreeing and reviewing compacts between care homes and their residents. This

³⁵ Trevor Phillips, Introduction to Fairness: a new contract with the public, Equality and Human Rights Commission, July 2008

power might extend to issuing notices of compliance requesting action within a specified time and undertaking audits of compliance. Alternatively, the Commissioner's powers might simply extend to issuing codes and guidance that do not make any person liable to proceedings but simply inform the way their business should be conducted.

In the latter case the codes and guidance could be used by regulatory bodies as an aid to assess performance or for the award of contracts (see below). In the legislation establishing the OPC, bodies such as the Regional Quality and Improvement Authority and the Northern Ireland Social Care Council that regulate and inspect health and social care could be required to take account of the OPC's guidance and recommendations. The Commissioner might also monitor and sample organisations or review a sector to determine whether a code or guide is being effectively applied and publish the results. Given the role of other bodies in the issuing of codes and guidance collaboration will be necessary. Again this is a matter that can be resolved with Memorandums of Understanding, especially if underpinned by a duty to consult and collaborate with other agencies

Citizen's petitions: Citizen's Petitions open up organisations to more public scrutiny. The Scottish Parliament allows individuals, community groups and organisations to have petitions considered by a standing committee which can decide whether the issue raised should be debated in the Parliament. The House of Commons Procedure Committee has proposed a system on e-petitioning which could result in a parliamentary debate or Select Committee inquiry. The Equality and Human Rights Commission envisages a mechanism to 'trigger' action by individuals, thus bypassing some of the more cumbersome elements of current enforcement regimes.

Government is introducing a new duty on local councils to respond to petitions relating to local authority functions or other public service where the council shares responsibility. It proposes to consult on a new right to petition to hold public body officers to account in public. It intends to work with key inspectorates to encourage them to consider petitions as important pieces of evidence to determine when inspections must take place; for example if an old people's care home is not up to acceptable standard.³⁶ There is no reason why a petitioning mechanism cannot be introduced for older people in Northern Ireland. This could also act as a pilot for more widespread use of petitioning to advance transparency and accountability in line with elsewhere.

In the words of Trevor Phillips: "we propose that we should embrace the most innovative developments in regulation, which do not leave the process of scrutiny, challenge and sanction solely in the hands of remote bureaucrats but use the tools of citizen power to enforce action ... and through their actions exert continuous pressure towards greater fairness and equality. ... We have to look at how social norms – not only the law – can change people's behaviour, persuading them to do things which are good for them and society."³⁷

³⁶ Communities in control: Real people, real power, Department of Communities and Local Government, 9 July 2008

³⁷ EHRC

Procurement: There is increasing interest and clarification in using procurement as a tool to ensure that organisations that receive public funds comply with equality standards. The EU Procurement Directives and Northern Ireland Procurement Policy permit social issues to be taken into account in public procurement. The Directives also confirm that breaching equalities legislation is sufficient reason to disqualify a contractor for selection.

The Equality Commission and the Central Procurement Directorate of the Department of Finance and Personnel issued guidance in 2008 to assist policy makers and procurement practitioners to integrate social, economic and environmental objectives appropriately within the procurement process. For the moment it is only guidance, not legally binding, but many would like to see its legal status enhanced so as to bring it into line with the ‘contract compliance’ provisions in Northern Ireland’s fair employment legislation, which deals with discrimination on the grounds of religious belief and political opinion.

The Confederation of British Industry (CBI) said in its evidence to the Equalities Review in Britain in 2005: ‘public procurement is a highly effective lever for increasing diversity and [employers] share the position of the National Employment Panel that there must be more systematic use of public purchasing power. The lever should be used more effectively by the public sector to further spread good practice in the private sector.’³⁸ It seems logical to apply this reasoning to matters concerning older people; in the funding of care homes, for example. The Older People’s Commissioner might work with the Equality Commission to clarify with agencies how they can best promote equality for older people through the procurement process.

Redress: The Department of Communities and Local Government in Britain is examining schemes of financial redress which even in token form are a reminder that it is the citizen who matters most in the transaction of business. The review, which is looking at current arrangements across the public services, in the private sector, and arrangements in other countries, is due to be submitted to the Secretary of State in early 2009. The review is likely to have models of redress that can be applied in Northern Ireland to improve performance for older people. It ought to be taken into account in drafting legislation for the Older People’s Commissioner and the Executive’s strategy for older people.

Recommendations

Recommendation 10: The Older People’s Commissioner should have a wide range of duties and powers to cover: communication, participation and engagement; research, education/awareness-raising and advocacy; review and investigation including complaints; information, advice and casework; legal intervention; mediation and arbitration; enforcement and sanctions; and review of the effectiveness of its own powers and duties.

Recommendation 11: The older people’s advisory group suggested in the Deloitte report should be considered as an important provision for the Older People’s Commissioner.

³⁸ EHRC

Recommendation 12: The Commissioner should offer advice to the Assembly, the Executive and individual Ministers as appropriate. S/he should be able to make representation directly to those at Westminster and in Whitehall departments, and through collaboration with colleagues in Wales, Scotland and England.

Recommendation 13: The Older People's Commissioner should have wide powers of investigation which would include powers to enter premises, require disclosure of documents and require people to give evidence. S/he should also have powers in relation to whistle-blowing and complaints. Powers of investigation should not be restricted to public bodies but should also apply to appropriate bodies in the private and voluntary sectors as well.

Recommendation 14: The OPC should have the power to assist people, including financially, to undertake legal proceedings over alleged breaches of rights in strategic or other appropriate cases. The power should extend to being able to advance group cases.

Recommendation 15: The Commissioner should have the power to bring legal proceedings in her/his own right, at the request of the court, through third-party interventions and in the capacity of 'victim' representing older people. The practice should be established for the Commissioner to be recognised and called upon by the court in appropriate cases to give expert oral or written testimony on matters affecting older people.

Recommendation 16: Consideration should be given to furnishing the Older People's Commissioner with powers of mediation and arbitration.

Recommendation 17: Consideration should be given to the range of enforcement and sanction powers to be made available to progress matters given that time is a factor for older people. Mechanisms could include pathways to swifter recommendations; codes of practice and Commissioner's guidance; citizen petitioning for older people; and the use of procurement. Account should be taken of the imminent report on schemes of financial redress in Britain.

Recommendation 18: In the legislation establishing the Older People's Commissioner, bodies such as the Regional Quality and Improvement Authority and the Northern Ireland Social Care Council that regulate and inspect health and social care should be required to take account of the Commissioner's guidance and recommendations.

Recommendation 19: The critique of duties and powers in the March 2008 paper *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland* should be taken forward in the discussion and drafting of legislation for the Older People's Commissioner. They appear in Annex D.³⁹

³⁹ B Fitzpatrick, *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland*, Age Concern Northern Ireland & Help the Aged, March 2008

5. Appointment and Accountability

5.1 Principles

The practical arrangements for establishing the office of the Commissioner for Older People and appointing a Commissioner are important as they need to get the balance right between independence and accountability. The arrangements and appointment process should guarantee an appropriate degree of independence so that the OPC can operate without interference from government or public authorities. On the one hand the Commissioner must be able to demonstrate clearly that s/he discharges the responsibilities and makes use of tax payer's money appropriately and with due propriety. At the same time the Commissioner must be, and be evidently seen to be, independently speaking up for older people.

An effective OPC must have the necessary trust to advocate for older people and exercise power of oversight across society and this demands independence and autonomy. While independence of commissions is an important principle in its own right it is arguably even more important for the Older People's Commissioner given the reliance of older people on public services as they age and, indeed, their increasing reliance on others generally. Therefore, the optimum arrangement is for the Commissioner to be independent from any department or body that it might have to challenge as not adhering to appropriate standards for older people.

5.2 Status

The establishment of the Older People's Commissioner as an NDPB with accountability to OFMdfM is not necessarily the most appropriate arrangement given that the Commissioner needs to be free to critique the department. Being directly accountable to the Assembly also raises issues as s/he should have the power to review the actions of the Assembly.

Autonomy is critical the Older People's Commissioner. It is notable that the Advisory Group in Wales advised that the Welsh Commissioner's post should be established as a 'Corporation Sole' with all rights, duties and property vested in the post-holder in her/his official capacity (as opposed to her/his personal capacity) and passed to each successor. Whatever form of legal structure is chosen the independence of the office must be assured.

The Older People's Commissioner should have parity of status with other commissions in Northern Ireland. The post should be established on a statutory basis, with appointment for a fixed term and be supported by an office. It should be a full-time paid post. Independence also requires sufficient financial and staffing resources to fulfil the remit and freedom to set its own agenda and determine priorities.

Legislation should also include a duty to establish a procedure for complaining against the Commissioner as a matter of good public administration.

The name of the post should be the Older People's Commissioner.

5.3 Appointment and term of office

The appointment should be made by the First Minister and deputy First Minister. Only the First and deputy First Ministers jointly should have the power to remove the Commissioner and only if s/he requests it her/himself or is considered physically or mentally incapable of undertaking the role or because of misbehaviour.⁴⁰

The term of office should be for a sufficient length to build up expertise but not so long as for the skills and expertise to become out of kilter with the priorities for the job. It can be argued that a renewable appointment might make it harder for the Commissioner to operate with complete independence. The norm for many appointments in Northern Ireland is 3/4 years with possible renewal, but it is possible to adopt a model from elsewhere where terms extend to six or seven years renewable or non-renewable. The appointment should be for a period of four years renewable once.

Candidates for the post should be able to demonstrate that they have a real understanding of what life is like for older people in Northern Ireland and that they can empathise with them. This should form part of the person specification in the job description for the post. Older people should be involved in the selection process. Time should be taken to impart the requisite knowledge and skills so they can play a full part and make their role in the appointment in a meaningful one. This would give a clear signal from the outset that the participation and engagement functions of the Commissioner are important and follow the good practice already established in Wales and in Northern Ireland with the Children's Commissioner. It would instil confidence not only that the process is transparent and independent, but demonstrably so.

5.4 Reporting arrangements

The Older People's Commissioner will need to demonstrate clearly that s/he is carrying out her/his role, using the financial and other resources at her/his disposal appropriately; and that s/he is able to maintain the confidence of older people and public confidence generally. The Commissioner should be able to show publicly that s/he is operating in accordance with the best interests and priorities of older people.

One method of doing this is regular consultation with and feedback to older people and this should be a duty placed on the Commissioner. However, formal accountability mechanisms are necessary. The OPC should prepare an Annual Report to be publicly available in accessible formats. The Annual report should summarise the action taken over the past year; summarise any reports which have been published (such as on investigations carried out or research undertaken); describe representations made by the Commissioner to the Assembly, public bodies and others as appropriate; review key issues for older people during the year and provide a summary of expenditure. The report might also provide an outline of the Commissioners priorities and financial plan for the year ahead.

⁴⁰ Recommendations made by the Welsh Advisory Group to protect the Commissioner's independence

The Annual Report should be submitted to both the First and deputy First Ministers and it should be laid in front of the Assembly to be discussed in plenary session. The Commissioner could be invited to appear from time to time before the Committee of the Office of the First and deputy First Minister, and other Assembly committees as they deal with issues of particular relevance to older people. Furthermore, the report could be made available to Parliament in light of the fact that the Commissioner might be commenting on non-devolved matters that have a bearing on older people in Northern Ireland. An appropriate route for this should be found.

It appears that there is general consensus among commissions that this type of accountability is more appropriate for independent public bodies which have a particular duty to scrutinise public bodies and their policies and services. Reporting in public to Northern Ireland's pre-eminent political forum differs from other types of control and provides a route for public accountability. Accountability is an important facet and the transparency that this level of reporting through the Assembly provides would ensure greater attention among the general public of older people.

5.5 Financial arrangements

It is anticipated that the Office of the First and deputy First Minister will provide the budget for the Older People's Commissioner in line with the department's PSA target. OFMdfM is a policy driven department responsible for equality matters with reach across all departments and thus is a natural place for the OPC to be linked with. However, it is not primarily a resource department. It is important for OFMdfM to be able to secure sufficient funds in the Executive's budget for the Older People's Commissioner.

The funding committed to equality and human rights bodies varies in Northern Ireland.⁴¹ The greatest sum of money goes to the Equality Commission for Northern Ireland with a current budget of £7 million to support 18-20 Commissioners including a full-time chief commissioner and approximately 150 staff. The Northern Ireland Human Rights Commission currently receives £1.63 million for 10 Commissioners including a full-time chief executive and around 26 full-time equivalent staff. The Northern Ireland Commissioner for Children and Young People has a budget of £1.84 million with one Commissioner and 28 staff. The Office of the Northern Ireland Assembly Ombudsman and Commissioner for Complaints has an annual budget of £1.5 million with an Ombudsman and 21 other staff.⁴²

The budget of the Welsh Older People's Commissioner is around £1.5 million annually with start-up cost of £500,000 for a Commissioner, and a Deputy Commissioner included in a staff of around 30.⁴³ Deloitte suggested in its Option 4, which most closely resembles the proposed Enhanced Commissioner model proposed here, that an annual figure for a Northern Ireland OPC might be £1.5 million plus an estimated £150,000 per year to support a regional advisory network.

⁴¹ Detail supplied by the commissions at the roundtable

⁴² Deloitte, p50

⁴³ Deloitte, p50

For the Older People's Commissioner to be, and be seen to be, effective and independent it requires sufficient financial and staffing resources to fulfil its remit and an agenda and set of priorities that speak to older people and their needs. In particular, resources are needed for investigations which should be a significant part of the OPC's role, albeit it should also have powers to mediate and arbitrate. The Commissioner must also be able to undertake some strategic casework which can be expensive and unpredictable. It has been the experience of other commissions, notably the Equality Commission, that case requests increase year on year as people become aware of their rights. Necessarily, of course, this must be managed within a reasonable budget.

It might be the case that appropriate powers to consult and cooperate between agencies would lead to a more strategic deployment of resources overall, although the individual remits and responsibilities of agencies need to be taken into account also. What is clear is that the guiding factor for Older People's Commissioner in determining deployment of resources must be that a matter has implications for the lives of older people; and in the case of casework this might be extended to say that normally a case should have implications for a number of older people.

The Older People's Commissioner should have a budget of at least the magnitude of that held by the Children's Commissioner. Start-up costs of around £500,000 will be required based on the estimate from Wales. Setting aside an additional £150,000 for a regional advisory network would be a good use of resources as well as tangible evidence on inclusion of and engagement with older people. Resources may be used most efficiently if consideration is given to sharing back office arrangements with other commissions.

Clearly, given population projections which show an increasingly ageing society, and one with a larger number of much older residents, it is important that the Older People's Commissioner is not a casualty or down-graded in any way should the Executive's Programme for Government and Budget be re-cast in light of the economic downturn. Furthermore, given that older people are increasing while other age groups are decreasing it will be important to stay on top of budget issues; the OPC's budget should be reviewed on a regular basis to ensure it is adequate to the increasing task.

The Older People's Commissioner will be the financial accounting officer for the office. The principle of independence should flow through to financial matters. Control through undue financial oversight should be avoided. If more regular financial oversight is thought necessary this could be attained through departmental participation in an Audit and Risk Committee in the Commission. The OPC and her/his office would be subject to audit by the Department of Finance and Personnel. External auditing could be provided by the Northern Ireland Comptroller and Auditor General.

Recommendations

Recommendation 20: The arrangements for the office of the Older People's Commissioner and the appointment process should guarantee an appropriate degree of independence so that the OPC can operate without interference from government or public authorities.

Recommendation 21: The Older People's Commissioner should have parity of status with other commissions in Northern Ireland. The post should be established on a statutory basis as a full-time paid post with sufficient financial and staffing resources to fulfil the remit.

Recommendation 22: Legislation should also include a duty to establish a procedure for complaining against the Commissioner as a matter of good public administration.

Recommendation 23: The name of the post should be the Older People's Commissioner.

Recommendation 24: The appointment of the Older People's Commissioner should be made by the First Minister and deputy First Minister for a term of office of four years renewable once.

Recommendation 25: The Annual Report should be submitted to both the First and deputy First Ministers and laid in front of the Assembly to be discussed in plenary session. An appropriate route should be found for laying the report in front of Parliament.

Recommendation 26: It is important that OFMdFM secure sufficient funds in the Executive's budget for the Older People's Commissioner.

Recommendation 27: The Older People's Commissioner should have a budget of at least the magnitude of that of the Children's Commissioner. Additionally, start-up costs of £500,000 should be provided. A top-up for a regional advisory network should be added.

Recommendation 28: Consideration should be given to sharing back office arrangements with other commissions.

Recommendation 29: Given increasing numbers of older people, and decreasing numbers in other age groups, the Older People's Commissioner should not be a casualty or down-graded in any way if the Executive's Budget is re-cast in light of the economic downturn. The OPC's budget should be reviewed on a regular basis to ensure it is adequate to the challenge of working towards an increasingly ageing society.

Recommendation 30: The Older People's Commissioner and her/his office should be subject to audit by Department of Finance and Personnel with external auditing provided by the Northern Ireland Comptroller and Auditor General.

Annex A: Summary of Recommendations

Recommendation 1: The mandate for the Older People's Commissioner should be drawn from the UN Principles on Older People, the United Nations Plan of Action on Ageing, the European Union's and UK government's plans to improve equality and anti-discrimination laws and support the human rights of older people as well as the aims of any Northern Ireland Strategy for older people and views of older people themselves.

Recommendation 2: The overall aim for the Older People's Commissioner should be: To promote and safeguard the rights and dignity of older people; to advance equality for and challenge discrimination against older people and to empower and enable the voice of older people in Northern Ireland.

Recommendation 3: The age limit for the legal definition of older people on whose behalf the Commissioner would act should normally be 60 years. Provision should be made for the Commissioner to have discretion to act in cases of exceptional need or circumstances for people of 50 years and up. The 60+ age limit should be reviewed after three years.

Recommendation 4: The Older People's Commissioner's powers and duties should not be restricted to public authorities but should apply to public, private and voluntary sectors.

Recommendation 5: The Older People's Commissioner should seek to influence matters affecting older people which are decided at UK-level. Additionally, steps should be taken by the Executive to formalise this arrangement with the UK Government.

Recommendation 6: The Older People's Commissioner should be give full investigation and assistance powers.

Recommendation 7: There should be a duty to consult and power to cooperate between commissions to strengthen the effect of Memorandums of Understanding and the ability to partner and collaborate.

Recommendation 8: 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 OPC in promoting and protecting older people.

Recommendation 9: The Older People's Commissioner should have an active relationship with, but be demonstrably independent from, stakeholder organisations.

Recommendation 10: The Older People's Commissioner should have a wide range of duties and powers to cover: communication, participation and engagement; research, education/awareness-raising and advocacy; review and investigation including complaints; information, advice and casework; legal intervention; mediation and arbitration; enforcement and sanctions; and review of the effectiveness of its own powers and duties.

Recommendation 11: The older people’s advisory group suggested in the Deloitte report should be considered as an important provision for the Older People’s Commissioner.

Recommendation 12: The Commissioner should offer advice to the Assembly, the Executive and individual Ministers as appropriate. S/he should be able to make representation directly to those at Westminster and in Whitehall departments, and through collaboration with colleagues in Wales, Scotland and England.

Recommendation 13: The Older People’s Commissioner should have wide powers of investigation which would include powers to enter premises, require disclosure of documents and require people to give evidence. S/he should also have powers in relation to whistle-blowing and complaints. Powers of investigation should not be restricted to public bodies but should also apply to appropriate bodies in the private and voluntary sectors as well.

Recommendation 14: The OPC should have the power to assist people, including financially, to undertake legal proceedings over alleged breaches of rights in strategic or other appropriate cases. The power should extend to being able to advance group cases.

Recommendation 15: The Commissioner should have the power to bring legal proceedings in her/his own right, at the request of the court, through third-party interventions and in the capacity of ‘victim’ representing older people. The practice should be established for the Commissioner to be recognised and called upon by the court in appropriate cases to give expert oral or written testimony on matters affecting older people.

Recommendation 16: Consideration should be given to furnishing the Older People’s Commissioner with powers of mediation and arbitration.

Recommendation 17: Consideration should be given to the range of enforcement and sanction powers to be made available to progress matters given that time is a factor for older people. Mechanisms could include pathways to swifter recommendations; codes of practice and Commissioner’s guidance; citizen petitioning for older people; and the use of procurement. Account should be taken of the imminent report on schemes of financial redress in Britain.

Recommendation 18: In the legislation establishing the Older People’s Commissioner, bodies such as the Regional Quality and Improvement Authority and the Northern Ireland Social Care Council that regulate and inspect health and social care should be required to take account of the Commissioner’s guidance and recommendations.

Recommendation 19: The critique of duties and powers in the March 2008 paper *The Possible Remit and Powers of the Independent Commissioner for Older People in Northern Ireland* should be taken forward in the discussion and drafting of legislation for the Older People’s Commissioner. They appear in Annex D.

Recommendation 20: The arrangements for the office of the Older People's Commissioner and the appointment process should guarantee an appropriate degree of independence so that the OPC can operate without interference from government or public authorities.

Recommendation 21: The Older People's Commissioner should have parity of status with other commissions in Northern Ireland. The post should be established on a statutory basis as a full-time paid post with sufficient financial and staffing resources to fulfil the remit.

Recommendation 22: Legislation should also include a duty to establish a procedure for complaining against the Commissioner as a matter of good public administration.

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Recommendation 27: The Older People's Commissioner should have a budget of at least the magnitude of that of the Children's Commissioner. Additionally, start-up costs of £500,000 should be provided. A top-up for a regional advisory network should be added.

Recommendation 28: Consideration should be given to sharing back office arrangements with other commissions.

Recommendation 29: Given increasing numbers of older people, and decreasing numbers in other age groups, the Older People's Commissioner should not be a casualty or down-graded in any way if the Executive's Budget is re-cast in light of the economic downturn. The OPC's budget should be reviewed on a regular basis to ensure it is adequate to the challenge of working towards an increasingly ageing society.

Recommendation 30: The Older People's Commissioner and her/his office should be subject to audit by Department of Finance and Personnel with external auditing provided by the Northern Ireland Comptroller and Auditor General.

Annex B: United Nations Principles for Older Persons

Independence

1. Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.
2. Older persons should have the opportunity to work or to have access to other income-generating opportunities.
3. Older persons should be able to participate in determining when and at what pace withdrawal from the labour force takes place.
4. Older persons should have access to appropriate educational and training programmes.
5. Older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities.
6. Older persons should be able to reside at home for as long as possible.

Participation

7. Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.
8. Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities.
9. Older persons should be able to form movements or associations of older persons.

Care

10. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.
11. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.
12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.
13. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.

14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

Self-fulfilment

15. Older persons should be able to pursue opportunities for the full development of their potential.

16. Older persons should have access to the educational, cultural, spiritual and recreational resources of society.

Dignity

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

18. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

Annex C: List of those involved in discussions

Dame Joan Harbison, Older Person's Advocate

Equality Commission for Northern Ireland

Northern Ireland Human Rights Commission

NI Commissioner for children and Young People

Prof Brice Dickson Queen's University School of Law

Northern Ireland Law Centre

Access to Benefits

Stratagem

Volunteer Development Agency Age Project

Centre for Ageing Research and Development in Ireland

Changing Ageing Partnership

Age Sector Platform

Age Concern

Help the Aged.

Annex D: The necessary powers and functions of the Older People's Commissioner

For ease of reference, the index to Articles 7-23 of the NICCY Order are set out and annotated to suggest whether the duties and powers they contain are a satisfactory starting point from which to develop the duties and powers of the Older People's Commissioner

Functions of the Commissioner

7. Duties of the Commissioner

These duties include advisory, promotional and review functions. They are a satisfactory basis upon which the Older People's Commissioner can operate.

For example, Article 7(1) provides:-

"The Commissioner shall promote -

(a) an understanding of the rights of children and young persons;

(b) an awareness of the importance of those rights and a respect among children and young persons for the rights of others; and

(c) an awareness of matters relating to the best interests of children and young persons."

Article 7(4) provides:-

"The Commissioner shall advise the Secretary of State, the Executive Committee of the Assembly and a relevant authority on matters concerning the rights or best interests of children and young persons -

(a) as soon as reasonably practicable after receipt of a request for advice; and

(b) on such other occasions as the Commissioner thinks appropriate."

8. General powers of the Commissioner

So also, Article 8 is a solid basis for the general powers of the Older People's Commissioner.

For example, Article 8(1) provides:-

"The Commissioner may undertake, commission or provide financial or other assistance for research or educational activities concerning the rights or best interests of children and young persons or the exercise of his functions."

Article 8(3) provides:-

"The Commissioner may, for the purposes of any of his functions, conduct such investigations as he considers necessary or expedient."

Article 8(6) provides:-

"The Commissioner may make representations or recommendations to any body or person about any matter concerning the rights or best interests of children and young persons."

9. General review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities

10. Review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in individual cases

These are two vital powers of investigation for the Older People's Commissioner which are included in the legislation for both the Children's Commissioner and

the Welsh Commissioner for Older People legislation. However, they are subject to two sets of restrictions.

The first is set out in Article 9(3)⁴⁴ which provides:-

“(3) The Commissioner shall not exercise his power under paragraph (2) in relation to any arrangements made by a relevant authority unless he has reasonable grounds to believe that -

(a) the arrangements in question are ineffective in safeguarding and promoting the rights and best interests of children and young persons; or

(b) those arrangements have not been operated, or have been operated incorrectly.”

It is typical, for example in ‘named person’ formal investigations by the ECNI to have a threshold of evidence before an investigation can be launched. This is therefore a reasonable restriction on this power.

However, Article 9(4) provides:-

“(4) The Commissioner shall not review the operation of the inspection arrangements made by a relevant authority unless he is satisfied that no other body or person has power under any statutory provision to review those arrangements.”

Although this restriction only applies to inspection arrangements and not advocacy, complaint and whistle-blowing arrangements, it is an unnecessary restriction upon the OPC’s powers.

11. Assistance with complaints to relevant authorities

This is an important representative power on the part of the Older People’s Commissioner.

Articles 11(1) and (2) provide:-

“(1) Subject to paragraph (3), the Commissioner may provide assistance (including financial assistance) to a child or young person in making a complaint to a relevant authority -

(a) that the rights of the child or young person have been infringed by any action taken by that or another relevant authority; or

(b) that the interests of the child or young person have been adversely affected by any such action.

(2) Subject to paragraph (4), the Commissioner may act on behalf of a child or young person in -

(a) making such a complaint to a relevant authority; and

(b) any investigation or other proceedings conducted by that authority pursuant to the complaint.”

However, once again both sets of powers are subject to restrictions.

Article 11(3) provides:-

“(3) The Commissioner shall not provide any assistance to a child or young person under paragraph (1) unless it appears to the Commissioner that there is no other person or body likely to provide such assistance.”

Article 11(4) similarly provides:-

“(4) The Commissioner shall not take any action on behalf of a child or young person under paragraph (2) unless it appears to the Commissioner that there is no other person or body likely to take such action.”

It is again an unnecessary restriction upon the OPC’s powers. The Older People’s Commissioner cannot make strategic decisions on representing older people if s/he has to assess whether any other body is likely to do so.

⁴⁴ Similar provision is made in Article 10(2) in relation to ‘individual case’ reviews.

12. Investigation of complaints against relevant authorities

13. Actions which may be investigated: restrictions and exclusions

The main investigative power is set out in Article 12 but subject to restrictions in Article 12(2) and Article 13.

Article 12(1) and (2) provide:-

“(1) Subject to paragraph (2) and Article 13, the Commissioner may conduct an investigation into a complaint made by a child or young person -

*(a) that his rights have been infringed by any action taken by a relevant authority; or
(b) that his interests have been adversely affected by any such action.*

(2) The Commissioner shall not exercise his power under paragraph (1) in relation to a complaint unless he is satisfied that -

(a) the complaint raises a question of principle; and

(b) the complaint does not fall within an existing statutory complaints system.”

It can be seen that the requirement in Article 12(2)(a) is a reasonable one but that Article 12(2)(b) sets out an unnecessary restriction upon the OPC’s powers.

‘Existing statutory complaints systems’ may not view the complaint from the perspective of an older person. So also the Older People’s Commissioner may see great strategic value for older people in such an investigation but is prevented from undertaking it.

There is a range of restrictions on investigations in Article 13, some of which might not be contentious, e.g. investigations into the commencement of legal proceedings in Article 13(2) or where there has been a public inquiry in Article 13(3). However, Article 13(1) places another substantial restriction on the OPC’s powers of investigation. It provides:-

“The Commissioner shall not conduct an investigation in respect of any action in respect of which the complainant has or had -

(a) a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise; or

(b) a remedy by way of proceedings in any court,

unless the Commissioner is satisfied that, in the particular circumstances, it is not reasonable to expect the complainant to resort to or have resorted to the right or remedy.”

This is not an absolute ‘residual clause’ but there may be situations in which litigation or potential litigation alerts the Older People’s Commissioner to issues concerning both rights and interests of older people. It may be severely limited in its powers of investigation by this clause.

14. Power to bring, intervene in or assist in legal proceedings

15. Assistance in relation to legal proceedings

One of NICCY’s widest powers is in Article 14. Paragraph 1 provides:-

“14. - (1) Subject to the following provisions of this Article, the Commissioner may in any court or tribunal -

(a) bring proceedings (other than criminal proceedings) involving law or practice concerning the rights or welfare of children or young persons;

(b) intervene in any proceedings involving law or practice concerning the rights or welfare of children or young persons;

(c) act as amicus curiae in any such proceedings.”

However, an extensive power to assist individuals in legal proceedings, which is otherwise modelled on the legal assistance powers of the NIHRC and the ECNI, is subject, once again, to a residual clause which significantly limits the OPC's power of legal assistance. Article 15(3) provides:-

“(3) The Commissioner shall not grant an application for assistance under paragraph (2) unless it appears to him that there is no other person or body likely to provide such assistance.”

Once again, the Older People's Commissioner is given a secondary role, only able to act where bodies such as the NIHRC or the ECNI are unlikely to do so.

Articles 16-23 : Formal investigations

The Older People's Commissioner should have powers of formal investigation, equivalent to the powers of a High Court judge, in relation to all of its investigative powers as is enjoyed by bodies such as the NIHRC and the ECNI. NICCY enjoys formal investigation powers in relation to Article 9 (General review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities), Article 10 (Review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in individual cases) and Article 12(1) (Investigation of complaints against relevant authorities).

However, formal Article 9 investigations are subject to a significant restriction,⁴⁵ namely they cannot be conducted against a range of bodies set out in Part II of Schedule 1 of the Order. These bodies are:-

Justice and policing

11. The Northern Ireland Court Service.
12. The Northern Ireland Policing Board and the Chief Constable of the Police Service of Northern Ireland.
13. The Juvenile Justice Board and any other body or person with whom the Secretary of State has made arrangements for the provision of juvenile justice centres or attendance centres under the Criminal Justice (Children) (Northern Ireland) Order 1998 (NI 9).
14. The Probation Board for Northern Ireland.
15. The Chief Inspector of Criminal Justice in Northern Ireland.
16. The Northern Ireland Legal Services Commission.
17. The Northern Ireland Law Commission.

Others

18. The Police Ombudsman for Northern Ireland.
19. The Parliamentary Commissioner for Administration.
20. The Information Commissioner
21. The Qualifications and Curriculum Authority.
22. The Northern Ireland Office.

The Older People's Commissioner would still have the power to investigate these bodies and it is only in relation to Article 9 general reviews that this restriction applies. Nonetheless, it is difficult to see why the OPC should not have full powers of formal investigation in these circumstances.

⁴⁵ The ICOP also could not conduct a formal investigation, according to Article 17, if it has been involved in legal proceedings on the same matter under Articles 14 or 15.

Schedule 1 Part I: Relevant authorities

The existing NICCY powers are largely directed towards ‘relevant authorities’ which includes a wide range of public bodies but also includes some private providers such as set out in paragraph 2 of part I of Schedule 1:-

*“An independent provider, that is to say a person (whether an individual or a body) -
(a) providing services of any kind under arrangements with a health and social services body or a general health services provider; and
(b) not being a health and social services body or a general health services provider.”*

However there are many circumstances in which the rights and interests of older people will be adversely affected by the actions of those in the private sector and also the community and voluntary sector. It is therefore essential that the Older People’s Commissioner enjoys full use of its enforcement powers in these sectors also.