



**Northern Ireland
Assembly**

**COMMITTEE
FOR THE OFFICE OF THE
FIRST MINISTER AND DEPUTY
FIRST MINISTER**

**OFFICIAL REPORT
(Hansard)**

Commissioner for Older People

20 January 2010

NORTHERN IRELAND ASSEMBLY

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DEPUTY FIRST MINISTER**

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Members present for all or part of the proceedings:

Mr Danny Kennedy (Chairperson)
Mrs Naomi Long (Deputy Chairperson)
Ms Martina Anderson
Mr Alex Attwood
Mr Tom Elliott
Mr Francie Molloy
Mr Stephen Moutray
Mr George Robinson
Mr Jim Shannon
Mr Jimmy Spratt

Witnesses:

Ms Jane Corderoy) Office of the First Minister and deputy First Minister
Mr Chris McCafferty)
Dr Gerry Mulligan)
Mr Stephen Orr)

The Chairperson (Mr Kennedy):

Good afternoon. I welcome Dr Mulligan, Chris McCafferty, Jane Corderoy and Stephen Orr. You are here to brief us on responses to the consultation on proposals to establish a commissioner for older people. The session is being reported by Hansard. I will ask you to make an opening statement, and then make yourselves available for questions.

Dr Gerry Mulligan (Office of the First Minister and deputy First Minister):

I will take a few minutes to provide the Committee with some initial feedback from the public consultation on our proposals to establish a commissioner for older people. Before I do that, I will outline my colleagues' roles: Jane Corderoy is head of the Bill team, Stephen Orr is a member of the Bill team, and Chris McCafferty managed the consultation exercise. I will speak briefly about how the consultation went and then outline some of the key issues that emerged from it.

It is important to mention that we attempted to ensure that the consultation was as inclusive and accessible as possible in respect of attendance, depth of engagement and cost. In particular, we believe that the public consultation events that were held in November and facilitated by the Older People's Advocate, Dame Joan Harbison, were highly successful. I wish to express our thanks to Dame Joan, who chaired all the events and provided advice on how best to consult with older people.

The consultation period ran from 1 October 2009 and concluded on 7 January 2010. It was agreed with Dame Joan to hold nine events, including at least one in each county and two in Belfast. Alongside that, it was agreed that two of the events should take place in the evening to accommodate those who could not attend during the day and to try to capture the views of interested parties outside the main client group. We wanted the consultation to be meaningful, and we held discussions with both the aged sector and the advocate about innovative ways of reaching vulnerable older people, including ethnic minorities and disabled people, as well as the more normal modes of public advertising and publicity associated with public consultation. More than 400 people attended the series of events, and the level of engagement and participation by older people was very encouraging. Indeed, Dame Joan wrote to the Department expressing satisfaction with the overall consultation process.

To date, we have received 80 substantial written responses to the consultation, 66 of which have been provided to the Committee. The remainder, which were received after the deadline, will be forwarded to the Committee. In addition to the written responses that were submitted, the team has written up the factual data from each of the nine public events and will continue to consider the comments that were made. We felt it important that the responses be fully considered, along with the analysis of the consultation processes. Many consultees made a big effort during a very rainy November to come to the events and present their views.

Although it is too early to reach conclusions on the basis of an analysis of the consultation responses that have been received to date, the interim report that has been provided to Committee members provides a preliminary flavour of the emerging issues. A further detailed report will be published in due course once a thorough and careful analysis of all the consultation responses that have been received has been considered. At the events, and in the majority of written responses, there was overwhelming support for the appointment of a commissioner, and endorsement of the proposals in the consultation document. It is fair to say, however, that some organisations and individuals who wrote to the Department did not accept the need for a statutory commissioner for older people.

Our initial collation of the responses indicates the following emerging issues, which are addressed in the consultation document: whether or not the commissioner's powers and duties should extend to people in residential nursing homes that are self-funding; the need for older people to be able to access the commissioner; the accountability of the commissioner to older people; the need for the commissioner to be powerful and have a strong voice; the proposal that the commissioner should promote positive attitudes towards older people, challenge negative stereotypes and be able to influence Ministers, which was extremely well received; and possible incompatibility between the advocacy and investigatory roles. Mediation was raised both in public events and from initial responses, although there seems to be support for the idea that the commissioner's role could be in making arrangements or facilitating mediation, rather than undertaking the mediation. Victim standing was raised at some of the public events, although there was some misunderstanding over the term "victim standing", which pertains only to human rights cases and not every legal case. Effective implementation of the commissioner's recommendations was also raised, as was the issue of potential overlapping responsibilities with other agencies.

In light of those emerging issues and the different preferences expressed on some of them, we need to provide advice to Ministers. A comprehensive list of the emerging issues has been provided to the Committee. We are happy to provide you with further information if required.

Following the end of the consultation, all stakeholder responses will be carefully considered before Ministers make decisions about the role, remit, scale and scope of the commissioner's powers and duties. In making decisions, the Ministers will want to consider carefully the views

of the consultees, this Committee, the Executive, wider public and existing statutory bodies, the aged sector and the Older People's Advocate.

The Department will publish a response to the consultation in due course, and it will take account of the Committee's response. It is our aim to bring forward to the Executive a Bill for introduction to the Assembly before the summer recess. Subject to the consideration of the Assembly, we are hopeful that the Bill will be passed by February 2011, and, subsequently, the commissioner will be appointed. It is our intention that the OFMDFM Committee will have the opportunity to comment on the draft Bill and amendments, prior to its introduction.

I thank the Committee for giving us the opportunity to hear its comments on the consultation. Any further comments that Committee members wish to be considered will be welcome, by 27 January, if possible, to enable the team to consider fully the Committee's views, alongside the other responses during our consultation analysis.

The Chairperson:

Thank you. A number of members have indicated that they wish to ask questions, but I will make a start. You said that some of the statutory agencies had expressed a view that they did not see a need for a statutory role for a commissioner. Which organisations expressed that view?

Dr Mulligan:

When questioned about whether there was a distinctive statutory role for a commissioner, the two bodies that come to mind that expressed concerns were the Northern Ireland Ombudsman and the Equality Commissioner. I confirm with colleagues that the Equality Commissioner also questioned whether the appointment of a statutory commissioner was the most appropriate way of supporting the interests of older people.

The Chairperson:

On what did they base their objection or argument?

Dr Mulligan:

We will forward you their detailed comments; they are in the public domain. Common to both was a concern that their organisations provided support to older people, particularly in respect of investigatory powers that were being proposed for the Bill. They were concerned about the

extent of overlap and duplication. That is the best way of summarising it.

The Chairperson:

Was it a case of: “Get your tanks off our lawn”?

Dr Mulligan:

You could describe it in that way, but that might imply that they did not accept that the tanks on the lawn would have a useful purpose. They acknowledged that the commissioner could serve a useful purpose, but they were worried about the extent of overlap.

Mr Shannon:

This is a big issue for us as elected representatives. One of the key areas that arises in any conversation that I have with senior citizens who come to my office is the issue of money. That is always an issue; we cannot get away from it. That is not because they are consumed with the issue, but it is a basic fact of life. Yesterday, the Assembly held a debate on the warm homes scheme and, for some people, it is a case of “heat or eat”. The press provided an example last week in which one pensioner had £2 left after spending his or her week’s allowance, and another had 47p left. How on earth do they make do?

Your research papers contain information on such areas as pension advisers in Northern Ireland, pensioners who fall below the eligibility criteria, and details and minutes on pensioner poverty. It is clear that you are focused on the fact that there has to be an emphasis on finance. What feedback has been received from Government bodies, such as DSD and social security offices? Do they grasp the fact that constituents are telling us that the issue is about how to improve the benefits system so that people know what they are eligible for? They also want to ensure that there is contact that helps them feel that the Government care.

Dr Mulligan:

On departmental engagement, in all of our work, but in particular with the Department for Social Development, we are aware of efforts to address pensioner poverty, whether through easing fuel poverty or by encouraging benefit uptake.

The Department for Social Development has strategies to tackle those issues. It and other Departments have been involved in the preparation of the Bill, and are fully behind the

consultation and proposals. In as much as they see a commissioner adding value to that process, the Departments are engaged and are aware of the problems.

Mr Shannon:

Will the Departments come up with new initiatives? Perhaps the commissioner for older people will be the driver for that, but it would be good if Departments at least acknowledged that there are issues for the commissioner to focus on immediately. I know that members will agree with me that many people do not know what benefits they should be receiving, what they need to get, and where to go for help. I am not disparaging anyone, because pension advisers are the first people to help, and they will go wherever they are asked. However, how do we make sure that our senior citizens get the help that they need straight away? I am not sure whether we have reached that point.

Dr Mulligan:

Having a commissioner and associated office with an advisory role will create significant added value for older people who need advice on how to address their problems. The departmental-facing element of the role will also allow a commissioner to advise and press Ministers on particular areas of interest to older people. I would expect our commissioner to engage directly with all Ministers in the same way as the Older People's Commissioner for Wales.

Ms Jane Corderoy (Office of the First Minister and deputy First Minister):

I would add that that issue came up time and again during our public meetings last November. At each public meeting, we ensured that pension and benefit advisers were present who were able to deal with individual queries. The plethora of evidence that we gathered on those issues has been given to the Older People's Advocate and will be passed to the commissioner once he or she is in post.

Mr Shannon:

That must be the commissioner's top priority.

Mr Stephen Orr (Office of the First Minister and deputy First Minister):

The Older People's Advocate mentioned at the meeting that she has already made representations to the relevant Minister of State at the Department for Work and Pensions in England that the commissioner must be empowered, through legislation, to make representations on behalf of

older people.

Mrs Long:

I would like, briefly, to raise three issues. The matter of overlap and duplication is something that we highlighted in our submission to the Department. We thought that that would probably have to be dealt with through a mechanism such as a memorandum of understanding among the various bodies. For example, there could be significant overlap between the Equality Commission or the Human Rights Commission and the work of the commissioner for older people. It would have to be clear that there is no duplication. That is tied to my next point, which concerns the standing of victims.

Page 11 of the report summary states:

“the NI Human Rights Commission would have the relevant powers”
to take a human rights case on victim standing.

I discussed that issue with a number of people because I wondered what would be the purpose of a commissioner for older people if all of those powers were available to existing commissions and bodies. I have been told that, although existing bodies may have the relevant powers to take a case — and that would apply to the Equality Commission — there would be a query about whether a body had sufficient interest in the case to justify intervention. Therefore, although an organisation has that power, it may not have sufficient interest to justify taking a case or incurring the necessary expense. Obviously, bodies must prioritise cases that may address new points of law, etc, given restricted budgets. Has that been taken into consideration in deciding whether a commissioner for older people should have victim standing? A commissioner for older people is the answer to the question of who has sufficient interest to take cases on behalf of older persons.

My final point, which is not mentioned in the consultation summary, deals with an issue that some of the age-sector groups raised during the consultation period about the independence of the commissioner and his or her perceived independence from the Department that sponsors the commission. They sought reassurance that the commissioner would be able to robustly challenge OFMDFM without making enemies of the Department and precluding him or her from serving a further term in office. There was an issue about where and how that should be structured, but that does not seem to have come through in the written submissions. Some of the age-sector groups raised that issue with me, and I wondered whether that came through in their written submissions

or whether it was not strongly voiced by a wider group of people.

Dr Mulligan:

I will deal with those questions in reverse order. First, on the issue of independence, the model that is proposed and reflected in the Bill is the same as that which applies to other independent commissioner bodies, such as the Equality Commission, whereby the Department is responsible only for pay and rations issues and the proper corporate governance of the organisation. In our experience, that in no way inhibits the Equality Commission in expressing its forthright views on the Department's policies. The same model applies to the Children's Commissioner. We are, therefore, adopting a similar approach. We can look for opportunities to make assurances that OFMDFM is involved only in corporate governance and financial probity, rather than anything that compromises the commission's independence.

Secondly — I might ask colleagues to speak about this, because they have greater knowledge of the detail — the restriction on victim standing relates to cases in which human rights issues are involved. In all other areas, the commissioner will have standing. The commissioner will, at his or her discretion, take cases to court or tribunal on principle if the interests of older people are at issue. I may be wrong, but I think that if there were an interest issue with taking a human rights case, the legislation as it stands would not allow the commissioner to take a human rights case in respect of victim standing, because that would require a change in the primary legislation. We would, therefore, look to the Human Rights Commission to follow up on human rights cases in which older people's interests are at stake. To do otherwise, by giving victim standing to a commissioner for older persons, would require a change in primary legislation. Given that that is an excepted matter, we do not have the authority to legislate for that.

On the third issue of overlap and duplication, a number of clauses specify when the commissioner may not act. Those residual clauses specifically reduce or eliminate the risk of duplication. Therefore, a commissioner can intervene only when an organisation that has existing powers is not taking on a relevant case. We anticipate that those residual clauses should reduce, if not entirely eliminate, that overlap.

Mr Spratt:

Gerry, you know that the Committee has raised this issue on a number of occasions: what legal powers and status will the Bill give to a commissioner, if appointed? For instance, I have raised

concerns with you about the proposal for the commissioner to have powers to investigate allegations of abuse of elderly people. The dangers of vast amounts of money being spent on legal fees have already been demonstrated, and that can make a mess of what should be a criminal investigation to be dealt with by the police.

I have some concerns about the possible inclusion in the legislation of measures on service-level agreements for the Police Service. Service-level agreements are good, but they can allow the Police Service, for instance, a get-out clause. I am concerned by that, because there has been a consistent trend, not only with the Police Service here but with police services across the United Kingdom, of abdication of some responsibilities. For instance, the police sometimes appear happy to push the responsibility for such matters as road traffic accidents, parking offences and antisocial behaviour to local authorities. I am concerned about how service-level agreements might be laid down or drafted, because there are inherent dangers on both sides that one will try to outmanoeuvre the other, given the current economic circumstances for police services and everyone else.

I am concerned that, as soon as a criminal allegation is made, it should be handled by the proper authorities. Criminal allegations must be exclusively for the Police Service to deal with. When other people start to tinker around in that area, it too often leads to a trial by media in the public domain, as opposed to the investigation being done properly and the proper assumption that everyone is innocent until found guilty.

Dr Mulligan:

Mr Spratt raised that issue earlier, and we raised it with the Department's legislative counsel. It was agreed that, as with any comparable body, there would be a general duty to report a criminal offence to the PSNI. However, as is the case with comparable bodies, it was not considered necessary to include that in the legislation. The expectation is that, if a commissioner were to become aware of a criminal offence or if they were to suspect that a criminal offence had been committed, they would be obliged to report that to the PSNI. That should ensure that, to use your expression, no tinkering would take place and that there would be no undue influence on the course of a criminal investigation as a result of the commissioner's investigation.

Mr Spratt:

I have heard some concerning conversations on service-level agreements that the Police Service

will possibly be required to meet. Can you assure us that the commissioner will not have full-blown legal powers to carry out investigations or to take cases through civil courts?

Dr Mulligan:

The draft Bill outlines the nature of an investigation that the commissioner may undertake. That does not include investigations into alleged criminal activity. A number of clauses specify the parameters of any investigations, but it may be that, during an investigation, the commissioner becomes aware of a potential criminal act. In that case, he or she would be obliged to report that to the PSNI.

Mr Spratt:

We have seen abuses by ombudsmen in their use of inquiries and lawyers. What sort of powers are envisaged for the commissioner in the carrying out of investigations and getting satisfaction for complaints through the courts? Will any such powers be introduced?

Dr Mulligan:

I may invite colleagues to summarise the position on that matter.

Mr Spratt:

For Northern Ireland plc, there is a large cost involved.

Dr Mulligan:

Absolutely. The draft Bill carefully constrains the commissioner to a particular type of investigation. The areas that a commissioner may investigate are specified in the draft legislation. Stephen will go over those.

Mr Orr:

First, the commissioner would have the power to bring legal proceedings on any case that affects the interests of older people, but he would not have the power to bring legal proceedings that involve criminal matters. That is explicitly stated in the draft Bill. The commissioner would have the power to carry out investigations into complaints raised by an older person about the “relevant authorities” listed in schedule 3 to the draft Bill. Therefore, the commissioner would have investigatory powers. The commissioner could carry out an investigation but could not take a case that involves criminal proceedings.

Dr Mulligan:

To return to Naomi's point, if there were a particular method of making a complaint prescribed in law that required another organisation to follow up on it, the commissioner would not be the appropriate person to conduct the investigation. If human rights or maladministration issues were not engaged, the case would come before the Northern Ireland Ombudsman.

However, if in other cases it were felt that the interests of older people were at stake, the commissioner could act. Take a hypothetical example: some research was published recently that suggested that there were instances of overmedication of older people in residential care. That is potentially an area that the commissioner for older people might wish to investigate. It is not necessarily the case that human rights issues are at stake, or that degrading or inhuman treatment is involved. Those sorts of issues might well prompt the commissioner to hold an investigation. However, if there were some suggestion of illegality, the commissioner would refer the matter to the PSNI, as the appropriate body to follow up on a criminal investigation.

Ms Corderoy:

In Dr Mulligan's example of elder abuse, if it were a criminal issue, the commissioner would not have the expertise to follow that through. The PSNI would have the expertise and remit to pursue a criminal issue. The commissioner would focus on the interests of older people and their investigations. Is that right, Stephen?

Mr Orr:

Yes.

Mr Attwood:

Thank you for your presentation. I was intrigued by the comment that you made that one or two organisations, including the Northern Ireland Ombudsman, queried the statutory requirement for the proposal.

Further to a speech that he gave at a conference, Maurice Hayes wrote an article in 'The Irish News' recently, in which he called for the Prisoner Ombudsman for Northern Ireland to go into the commissioner's office. To return to the comments that the Chairperson made, let me put down a marker: whatever the Northern Ireland Ombudsman says, there must be no rowing back

in this regard. The ombudsman appears to be trying to influence decisions in other respects as to who should have responsibility for complaints.

How do you now perceive the Northern Ireland Ombudsman's submission to the consultation on 11 January? Can you reassure me that no attempt is being made to drive a coach and horses through the proposal?

My second concern is that in the consultation at the public event, the first issue that you flag up is that it is argued that the remit includes people in nursing and residential homes that are self-funding. Presumably, that is because they feel that, under the legislation as it is currently drafted, "relevant authorities" does not extend to them.

Dr Mulligan:

Yes; that is correct.

Mr Attwood:

That leads me to the question: given that it is self-evident that private nursing homes that are self-funding should fall under "relevant authorities", has there been any further consideration of extending "relevant authorities" to include all public, private and voluntary organisations? Otherwise, the legislation will have a gaping hole in it. The consultation demonstrates that.

Thirdly, if there were three issues that arose from the consultation that you could advise Ministers on with regard to what the legislation currently looks like and what it might eventually look like, what would they be?

Dr Mulligan:

I will deal with those questions in the order in which they were asked.

The Chairperson:

There is quite a lot there.

Dr Mulligan:

We received a thoughtful and constructive submission from the Northern Ireland Ombudsman's Office. As I said, that office raised the issue of duplication. I would not characterise that as an

attempt to roll back proposals; it was a valid point that we have to consider. As I have already told the Committee, our view on duplication is addressed — at least in part but hopefully largely — by the residual clauses. We will offer some feedback to all the people who made points on the issue, and we will be discussing further whether the residual clauses are sufficient.

The waste of public money owing to organisations duplicating one another's efforts is something that we want to avoid. We also want to avoid confusion. There is an issue about the public not knowing who should legitimately do the work.

Therefore, duplication is an issue that we will have to address in our advice to Ministers. We will also be offering feedback to organisations that have made points on the matter, but I would not characterise the situation as a roll-back.

The issue of private homes is very important. As members will know, there is provision in the draft Bill for older people in private homes to come under the scope of the commissioner's powers and duties in cases in which the private homes provide a service to a public authority, such as a health trust. However, homes that operate exclusively as private homes are outwith the scope of the legislation. In answer to your question, Mr Attwood, we will give the matter further consideration. In the light of points that were made in the consultation, we must return to the issue. Forgive me for not giving you anything by way of conclusion at this stage.

I request that we are not asked to prioritise the issues at this stage. Of the issues that I have identified, it would be wrong to say that one is more important than another, because each one is extremely important to the person who raised it.

Mr Attwood:

The Ministers are going to ask you to prioritise the issues pretty soon.

Dr Mulligan:

We will be anxious to give Ministers advice on all the issues. We have to provide as balanced a view as we can. In so doing, we do not necessarily have to prioritise issues, because we are trying to address them all.

Mr Attwood:

It is a no-brainer that private sector organisations should be subject to the provisions in the draft Bill. I do not understand how that can still be a matter of discussion.

The Chairperson:

That is your view.

Mr Molloy:

Thank you for the presentation. I want to ask about the power of the commissioner. Although people wonder why there is duplication, it is also important that the commissioner have the power to follow on and investigate properly. I do not want to see a hierarchy of commissioners, with one telling another what he or she can do, because, otherwise, we will finish up with nobody taking action when it is required. A rubber-stamping exercise that results in a commissioner without teeth will be pointless.

Mr Attwood raised the point that the commissioner should also have responsibility for the private sector. That is very important, because, as we have found in some cases, questions have been raised about the treatment and care received by people in private homes. Somebody has to have the power to address problems in homes, whether they are under Health Service control or not.

The independence of commissioners to take criteria-based action cannot be subject to demarcation. It is important that one set of commissioners does not be allowed to protect their respective domains by excluding the commissioner for older people or by restricting what he or she can do.

Dr Mulligan:

In no responses from any of the organisations that raised the duplication issue did I sense a desire to protect particular domains. Their arguments tended towards avoiding duplication of effort and possible confusion. By and large, the objectives that we are trying to achieve through the draft Bill were recognised as being valuable.

We suggest that the draft Bill would give the commissioner significant power, and, in some

respects, even more than the Older People's Commissioner for Wales. The commissioner would enjoy the protection of the High Court, and if the commissioner felt that he or she were being frustrated, for whatever reason, he or she may refer the matter to the High Court, where it will be treated as contempt of court. Therefore, there are substantial and very significant powers already in the draft Bill.

The Chairperson:

Thank you. That completes the questions from members. Thank you, Dr Mulligan and your colleagues. You indicated that you would like a response from the Committee by 27 January 2010. That may not be possible, because we have to see the additional submissions that you received and allow members a chance to gather their thoughts. However, we will endeavour to provide you with a response as quickly as possible.

Dr Mulligan:

I appreciate that commitment. Thank you.