

EQUALITY COMMISSION FOR NORTHERN IRELAND

Response to OFMdFM consultation on a Commissioner for Older People in Northern Ireland

January 2009

1. Introduction

- 1.1 The Equality Commission for Northern Ireland (the Commission) is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.
- 1.2 The Commission's remit also includes overseeing the statutory duties of public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act and the positive disability duties under the Disability Discrimination Act 1995.
- 1.3 The Commission's general duties include:
 - working towards the elimination of discrimination
 - promoting equality of opportunity and encouraging good practice
 - promoting positive/affirmative action
 - promoting good relations between people of different racial groups
 - overseeing the implementation and effectiveness of the statutory duty on relevant public authorities
 - keeping the legislation under review.

2. Our response

- 2.1 The Commission welcomes the opportunity to respond formally to the consultation setting out proposals for establishing a Commissioner for Older People in Northern Ireland. We welcome the focus on older people that this represents and the commitment to encourage a greater participation in society. We agree it is important to ensure that older people have a strong, independent voice to represent their interests.
- 2.2 In general terms, the Commission supports measures that will enhance the position of older people in the life of Northern Ireland. We believe that one of the most effective means of securing such enhancement would be the introduction of legislative change, as we have recommended to OFMdFM.¹ We believe that the extension of protection against discrimination in respect of the provision of goods, facilities and services on grounds of age is one of the most important measures that the Executive should take in the interests of older people and, indeed, those of all ages. Any move to establish a Commissioner for Older People in Northern Ireland is not a reason to delay making progress with this key aspect of legislative reform.
- 2.3 In making our response to this consultation, we draw on our particular experience in relation to equality and anti-discrimination legislation, including the Section 75 provisions. We should say, at the outset, that we envisage no alteration in our relationship with, or responsibilities for, the current or future age legislation or the provisions in any of the other anti-discrimination legislation that may be relevant to older people.
- 2.4 The Commission also wishes to set out clearly its understanding of the Draft Bill and the related material, which is that nothing in the proposed statute or in the proposed operation of the Commissioner's office alters the underlying and enduring responsibilities of the Equality Commission.

¹ Priorities for Legislative Reform, February 2009, ECNI

2.5 Finally, by way of preliminary comment, we would raise the question of whether, especially in current circumstances in respect of public expenditure, the creation of a new Commission is the best way forward. We would invite consideration of whether a strengthened office of Advocate for Older People, with statutory links to other bodies, might be just as effective in meeting the Executive's goals in respect of addressing the concerns of older people, influencing policy and service delivery and being a strong independent voice to represent the interests of older people. As is indicated in some of the later observations in this response, the Bill, as drafted, has the real potential to represent a duplication of existing functions and to represent a source of confusion to older people as to how most effectively to secure their rights and entitlements. Strengthening the office of the Advocate could help to ensure the avoidance of overlaps with other bodies, secure the advancement of the interests of older people and avoid adverse public perception regarding potential duplication.

3. Specific issues

As to the specific elements raised in the consultation and embodied in the draft Bill, we have focused attention on the following clauses of the Bill:

Duties of the Commissioner

By way of general comment, the Commission recommends that every effort should be made to clarify the range of roles (and their interrelationships) envisaged for the Commission so that there is no inherent conflict between such roles – for example, engagement in advocacy and investigation in respect of the same issue and in complaints handling generally.

3.1 Clause 3(4)

The Commission notes the difference between 'promoting the provision of opportunities for older people' envisaged for the

Commissioner for Older People and promoting equality of opportunity which is one of the Commission's duties under the Age Regulations and other legislation. We recognise that this substantive difference will assist in avoiding potential conflict. We welcome the obligation on the Commissioner to promote the elimination of discrimination, which mirrors that of the Commission, believing that the broader the range of action against discrimination, the better the outcomes will be. However, we consider that it is important that the continuing role of the Commission in this regard is reinforced and that effective measures be put in place to avoid any unnecessary or confusing duplication.

3.2 Clause 3(5)

We note the duty to encourage best practice in the treatment of older persons and the potential for this to overlap with our work to encourage best practice by employers in respect of workers whatever their age and would want to work to ensure no unnecessary or confusing duplication.

3.3 Clause 5

There is the possibility of some overlap and confusion between this section and the role of the Commission in respect of Section 75 arrangements, including measures to consult with persons directly affected by the Section 75 duties. The Section opens the possibility of overlap with the responsibility of designated public authorities to develop Equality Schemes and with the role of the Commission in approving them. On the face of the section the complaints issue at Clause (1)(b) looks like a duplication although that may be resolved by later provisions; (1) (d) (ii) also has an Equality Scheme dimension; and we consider that Clause 5 (2) could overlap with aspects of Schedule 9 of the Northern Ireland Act 1998.

3.4 Clause 7(1)

On the face of it, this could be seen to intersect with the legal assistance provisions of existing, and any future, anti-discrimination legislation and, perhaps, with the handling of

Section 75 complaints. It has the potential to be a source of uncertainty and confusion for older people who wish to exercise their legal entitlements.

While the provisions of Clause 7 (3) and (4) represent some mitigation measures, the qualifications “appears to the Commissioner” and “likely to provide” seem a little uncertain. We recommend that consideration should be given to making it a requirement that the Commissioner needs to satisfy himself/herself to this effect.

3.5 Clause 8(2)

The provision at sub-paragraph (b) seems to remove any potential for clash with the Commission’s role in respect of investigation of complaints.

3.6 Clause 10

This provision seems to duplicate a capacity already possessed by the Commission. That, in itself, may not be an issue but care will be required to avoid unnecessary or costly duplication or confusion as to which approach best meets the needs of older people.

3.7 Clause 11

This provision has, in stronger form, the same potential for confusion as in Clause 7. Subsection (2) is a duplication of the legal assistance powers of the Commission, not just in respect of the age legislation but across the entire range of law. In this case, the provision at 11(3) appears inadequate to avoid duplication and there should be a clear requirement that, in any given case, the Commissioner satisfy herself/himself that no other body is considering an application, or that such consideration has resulted in a decision not to assist, together with a parallel requirement for the other body (ies) to respond to the Commissioner within a specified timescale.

3.8 Clause 12

This section has the potential to clash with investigation powers of the Commission but perhaps only to a limited extent. Complaints by individuals that could be investigated by the

Commission are precluded. We recommend that consideration be given to making it a requirement that the Commissioner satisfy herself/himself that the matter is not the subject of investigation by any other body, without intending in any way to trench on the independence of the Commissioner

3.9 Clause 17

This is a valuable power as are the related provisions in respect of places where older people reside or are detained, although we would query whether it might overlap with powers residing in other statutory bodies and highlight the need to avoid unnecessary duplication or confusion.

3.10 Clause 24

The Commission has some concerns about the definition of an older person as a person over 60. The assumption that everybody over 60 is an older person for the purposes of the legislation seems to fly in the face of much contemporary experience. The entire measure is premised on the notion that older people require special protection. While we recognise the origin of this definition, whether those who are well, working and willing to live actively for as long as possible should be included as coming within the remit of the Commissioner just because they are over 60 is questionable. A fortiori, the idea that somebody at the age of 50 could, however exceptional the circumstances, be considered “older” seems to defy logic. Whatever their circumstances may be, it is difficult to imagine that they derive from their age.

3.11 Clause 26

The definition of “complainant” is markedly different from the “directly affected by” requirement of schedule 9. The Commission welcomes the definition of complainant as including somebody who makes a complaint on behalf of an older person. Such a facility might well be considered for extension to other areas and the Commission will urge that, if adopted here, a similar position be reflected in the 1998 Act..

4. Conclusion

- 4.1 The Commission wishes to express its concern about the approach of consulting on policy and draft legislation at the same time. This is not an approach which the Commission recommends. Initial consultation on the policy principles might have allowed an interesting and valuable debate on purpose, structures, powers, sharing and duplication before the Bill was drafted. Consulting on both simultaneously risks the virtually inevitable consequence that, whatever the character of the response to the consultation, a developed structure is already in contemplation and thus unlikely to be amenable to much by way of substantive change.
- 4.2 The Commission considers that the 'champion' role in respect of older people is a good concept and believes that this might be a primary and powerful focus of the Commissioner. There remain issues of concern about duplication and public moneys and we would welcome the opportunity to discuss further with OFMdfM the various potential statutory means of addressing such concerns.