

Commissioner for Older People
Legislation Team
Office of the First Minister and
Deputy First Minister
Block E, Castle Buildings
Stormont Estate
Belfast BT4 3BR

6 January 2010

Dear Ms Corderoy

**Consultation Response for a Commissioner for Older People
in Northern Ireland**

Please find attached the Committee on the Administration of Justice's response to the consultation on the introduction of a Commissioner for Older People in Northern Ireland.

Should you require any further information, please do not hesitate to get in touch.

Yours sincerely

Debbie Kohner
Equality Programme Officer

Consultation Response for a Commissioner for Older People in Northern Ireland

Committee on the Administration of Justice ('CAJ')

1. Summary

Although CAJ welcomes the proposal for a Commissioner for Older People in Northern Ireland ('COPNI'), some points raise concerns. First, there is insufficient consideration of how the COPNI's work would interact with the implementation of s75 of the Northern Ireland Act 1998 ('s75'). Secondly, there is inadequate analysis of how other organisations' work could be affected by the introduction of the COPNI.

Thirdly, CAJ believes that older person's rights should be recognised and the COPNI should operate within a human rights framework. Finally, we propose that the COPNI should have stronger enforcement powers, to ensure the effectiveness of its role.

2. Introduction

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ works on a broad range of human rights issues and its membership is drawn from across the community. Its activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice.

CAJ's areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize. Together with UNISON, we co-convene the Equality Coalition.

For some time CAJ has been involved in the process of furthering the mainstreaming of equality in Northern Ireland and we are keen to forward our views on as many equality related documents as possible. This is particularly the case where the documents concerned have important implications for the delivery of greater equality, as is the case for the proposed COPNI.

CAJ welcomes the Office of the First Minister and Deputy First Minister's ('OFMDFM') proposal for a COPNI ('the Proposal'). We also acknowledge the extensive consultation and research that has taken place. We have read and support the position paper prepared by the Age Sector. However, there are a number of additional areas of concern to CAJ, which are set out below.

3. Relationship with s75 Northern Ireland Act 1998

The Proposal only makes passing reference to s75, as part of the 'backdrop' of national law (see 3.5). However, as s75 requires all relevant authorities to factor older people's equality of opportunity into policy, its operation would be critical to the working of any eventual COPNI.

First, as the COPNI's principal aim is to "*safeguard and promote the interests of Older People*" (at 7.1), s75 offers the most concrete and legally binding opportunity to forward this goal.

Secondly, the Proposal states that "*when considering what the interests of older people are, the Commissioner must have regard to the United Nations Principles for Older Persons*" (at 3.3 and 7.4). This includes that older persons should "*participate actively in the formulation and implementation of policies that directly affect their well-being*" (at para 7 of UN Principles).

Given the consultation process inherent in the s75 duty, it represents an invaluable opportunity for older people to become actively engaged in the development of policies. It is not clear from the Proposal whether or how this role would be supported by the COPNI. It is important to consider this detail to ensure that the

COPNI does not restrict older people's direct access to policy making or duplicate support work done by other organisations.

Thirdly, s75 places a positive duty on over 180 designated public authorities to consider the promotion of older people's equality of opportunity. However, only 11 public bodies were listed as 'relevant organisations' "*which are already undertaking duties in relation to older people*" (see 9.1 and annex 5). It is essential that the COPNI has a keen understanding of the need for each public authority to undertake s75's positive duty and that its work with these bodies is coordinated accordingly.

Finally, as s75 has been in place for nearly 12 years, and provides a strong duty to mainstream equality of opportunity for older people, it is crucial that this duty remains central to any work that promotes the interests of older people. CAJ believes more emphasis should be placed on realising s75's great potential, rather than creating new duties that could distract, confuse or overburden relevant authorities.

4. Relationship with other Relevant Organisations

CAJ notes the efforts made to avoid duplication or confusion of work carried out by other organisations. The consultation paper states: "*[w]e do not think that the Commissioner should replace or duplicate the duties of existing statutory or voluntary organisations. Indeed, in some cases this could cause confusion or it could even be unhelpful for the Commissioner to intervene in or investigate a case which another body might be better equipped to deal with.*"

However, we fear that OFMDFM has not fully achieved this aim. We appreciate that the Proposal allows for consultation on this matter, but it also allows for the eventual COPNI to choose its own remit and manage coordination once in place. This creates a real danger that other relevant organisations may neglect to consider aspects of older people's interests, which the COPNI does not, or will not, address. This is a particular concern given that the Proposal does not clarify exactly which 'gap' the COPNI would fill.

The Equality Commission ('ECNI') is charged to oversee the effective implementation of the s75 duty and "*to advance equality, promote equality of opportunity, encourage good relations and challenge discrimination through promotion, advice and enforcement.*" It is not clear how this duty would interact with the COPNI's "*duty to promote the provision of opportunities for and elimination of discrimination against older people*" (at 8.3).

CAJ is concerned that aspects of the s75 duty could be duplicated or (most likely) neglected due to the unclear division of work between the COPNI, the ECNI and designated public authorities. In addition to this, it is not clear how the COPNI's duties would interrelate with those of the Northern Ireland Human Rights Commission ('NIHRC').

In particular, clarification of the respective duties of the COPNI and other organisations is required in relation to Article 33 of the United Nations Convention on the Rights of Persons with Disabilities. This requires "*due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.*" The Proposal is entirely silent on this point, despite its clear relevance, given the number of older people who have disabilities.

Finally, there is no mention in the Proposal of whether the COPNI would have a role in holding the government to account for its treatment of older people. Although there is no international body with primary responsibility for older people, there are many international treaty bodies for whom older people's interests may be relevant, such as the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination Against Women and many others.

There is a danger that, once the COPNI is established, other statutory bodies will not include concerns relating to older people in their own reports to international treaty bodies. At the same time, it is not clear that the COPNI would report to every or any international body, particularly when they relate primarily to other

sectors. As a result, the international audit of our treatment of older people could be neglected.

This is particularly likely given that there is no specific international monitoring body for older people, as is the case for children and young people (the UN Committee on the Rights of the Child).

5. Recognition of Older People's Rights

CAJ is disappointed that the Proposal refers only to the 'interests' of older people and makes no specific allowance for the COPNI to safeguard older people's rights. Although we note that the Welsh Parliament found that, in relation to the Older People's Commissioner for Wales, "*interests*" were regarded as being broad enough to include both "*rights*" and "*needs*" (see 7.4), this is not explicitly the case for the COPNI.

By comparison, the principle aim for the Northern Ireland Commissioner for Children and Young People ('NICCY') is "*to safeguard and promote the rights and best interests of children and young persons*". CAJ believes that the COPNI's duties should be based on the rights of older people, as well as their interests. If this is already the case, it should be made explicit in the Bill.

We appreciate that, while young person's rights are clarified in the UN Convention on the Rights of the Child, there is no equivalent convention for older people. However, this does not mean that older people do not have identifiable rights.

Older people's rights are listed in many general human rights instruments and are recognised in primary legislation, such as the Human Rights Act 1998 (as noted at 3.5). The general nature of these rights does not restrict their application to older people. Indeed, the courts (both national and regional) have recognised their specific application to older people in various cases.

Furthermore, older people in Northern Ireland enjoy specific rights, such as in s75 Northern Ireland Act 1998 and the Employment Equality (Age) Regulations (Northern Ireland) 2006. The UK also

contributed to the drafting of the European Charter of Fundamental Rights ('ECFR'), Article 25 of which states “[t]he 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.”

It is not clear to CAJ why the COPNI will not operate within this strong human rights framework for older people. We believe that the recognition of older people’s rights in the COPNI’s principle aim, duties and powers will underline the importance of the issues faced by older people and the COPNI’s commitment to supporting them.

Furthermore, the Proposal recommends giving the COPNI extremely wide powers, including “*powers equivalent to those of the High Court to call for documents and witnesses and powers to enter premises, take copies of documents, interview in private any older person present and any person employed on the premises. Anyone who obstructs the Commissioner in this regard could be guilty of contempt of Court*” (at 11.14). CAJ maintains that, if the COPNI is to have such wide powers, it must work within a strong human rights framework.

Indeed, as the proposal stands, the COPNI would have “*greater powers than those of any other Commissioner body in the UK (other than NICCY which has similar powers)*” (at 11.2). However, as noted above, NICCY works within a rights framework. It is wholly inappropriate that bodies which work within human rights principles, such as ECNI and NIHRC, could have fewer powers than the COPNI, which only recognises ‘interests’.

6. The Need for Enforcement Powers

CAJ believes that the COPNI must have some enforcement powers to fulfill its mandate of safeguarding the interests of older people. We welcome the COPNI’s ability to conduct investigations, make recommendations and publish reports, including to the Assembly. However, we believe that public criticism alone cannot ensure action. Indeed, the COPNI’s extensive investigative powers could be in vain if the COPNI cannot then enforce its findings.

The Proposal suggests that the COPNI's enforcement powers should be limited to moral pressure in order to preserve the "[t]he neutrality... [which is] vital to the proper functioning of the institution of ombudsman" (at 11.21). However, the COPNI is charged with furthering older person's interests and so cannot, and should not, be truly neutral.

The Proposal itself states that "[i]t would be unlikely in a dispute involving an older person, that the other individual or organisation involved would regard the Commissioner for Older People as being neutral" (at 10.7). Also, the Proposal allows for the COPNI to bring, assist or intervene in legal proceedings, which would inevitably involve acting against relevant authorities and in favour of older people.

Therefore, we believe that it would be consistent with the COPNI's role to have stronger enforcement powers. For example, the ECNI not only promotes and advises on equality duties, but also enforces those duties. In a 2006 review, Dickson and Harvey found "*there is no intrinsic tension between these roles*" (at page 129).

We believe that it is important to learn from the success and failings of other Commissioner bodies. Dickson and Harvey noted that "*the Health and Safety Executive can issue 'improvement notices' and 'prohibition notices', and initiate prosecutions. Operators of work places know full well that the Health and Safety Executive has 'teeth'; it seems that public authorities do not view the Equality Commission in the same light.. This perception will need to be rectified if the Commission is to become truly effective*" (at page 122).

Furthermore, we believe that the COPNI should be given victim status under the Human Rights Act ('HRA') so as to enable it to take cases under this HRA itself. This power is already accorded to the NIHRC, and would reinforce the centrality of human rights to the remit of the COPNI.

While we understand the legislative competency issue, there is nothing to prevent a recommendation being made to Westminster that a legislative amendment be made to the HRA. This amendment process is straightforward, as demonstrated in the case of the NIHRC. Indeed, the current shortfall in the powers of NICC, as identified in the case described at 12.2 of the Proposal, could be remedied in the same legislative amendment.

Should you require any further information in relation to any of the above, please don't hesitate to contact Debbie Kohner, Equality Programme Officer.

CAJ
6 January 2010