

*These notes refer to the Public Services Ombudsman Act (Northern Ireland) 2016 (c.4) which received Royal Assent on 19 February 2016*

# Public Services Ombudsman Act (Northern Ireland) 2016

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## EXPLANATORY NOTES

### COMMENTARY ON CLAUSES

#### **Part 1: The Northern Ireland Public Services Ombudsman**

Part 1 of the Act establishes the office of the Northern Ireland Public Services Ombudsman ('the NIPSO') and sets out how it is constituted.

#### ***Section 1: The Northern Ireland Public Services Ombudsman***

This section provides that there is to be a Public Services Ombudsman. Schedule 1 sets out the administrative details about the NIPSO and provides that the NIPSO is to be a corporation sole. The main function of the NIPSO is to investigate alleged maladministration in government, public and quasi-public bodies (these are collectively referred to as listed authorities and the full list of them is contained in Schedule 3).

#### ***Section 2: Independence***

The NIPSO is independent of government. There are some exceptions to this, for example the Assembly Commission sets the NIPSO salary and other terms and conditions; the Assembly may request that the NIPSO be removed from office and the NIPSO is accountable for his or her budget.

#### ***Section 3: Appointment***

The Assembly and the Assembly Commission are responsible for determining who is nominated for appointment as the NIPSO. The formal appointment is by Her Majesty. Appointment is for a single seven year term. Schedule 1 sets out how the NIPSO may leave office.

#### ***Section 4: Abolition of existing offices***

As a consequence of the establishment of the NIPSO, the existing offices of the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints are abolished. Those offices were regulated by the Ombudsman (Northern Ireland) Order 1996 and the Commissioner for Complaints (Northern Ireland) Order 1996. Both these Orders are repealed by

this Act. Schedule 2 sets out how the staff, assets and liabilities of those existing offices are transferred to the office of the NIPSO.

## **Part 2: Investigations**

The main power of the NIPSO is to investigate listed authorities. Part 2 sets out how this power is to be used. Part 2 is further sub-divided under several cross headings. The first cross heading deals with the power of the NIPSO to investigate. The second cross heading deals with the authorities who can be investigated. The third cross heading deals with the subject matter which can be investigated. The next three cross headings set out the different procedures involved for each different type of investigation. The final cross heading sets out the way in which investigations must be conducted.

### ***Section 5: Power to investigate complaints made by a person aggrieved***

The key investigatory power is the power to investigate a complaint made by a member of the public. Section 5 is a framework section. It sets out the key criteria for the exercise of this power and points to the other sections where the details on those criteria may be found. The key criteria are:

- The complaint is made by a member of the public
- The complaint relates to a listed authority
- The complaint must be about maladministration or injustice consequent on the exercise of professional judgement in health and social care
- The correct procedure has been followed

The person making the complaint is referred to as the person aggrieved.

### ***Section 6: Power to investigate complaints referred by a listed authority***

The NIPSO can also investigate a complaint referred by a listed authority. Section 6 is also a framework section, setting out the criteria and pointing to where the details on those criteria may be found. The key criteria are:

- The complaint made by the person aggrieved to a listed authority
- The listed authority is not able to resolve the complaint
- The complaint is about maladministration or injustice consequent on the exercise of professional judgement in health and social care
- The correct procedure has been followed

### ***Section 7: Acting on behalf of a person aggrieved***

Other people can act on behalf of the person aggrieved (for example where the person aggrieved has authorised this, or the person aggrieved cannot act). There is a broad range of people who can act on behalf of a person aggrieved:

- MLAs
- Personal representatives
- Family members
- Others

In some cases, the NIPSO will need to first confirm that the person is suitable to act on behalf of the person aggrieved.

### ***Section 8: Power to investigate on own initiative***

This is another key investigatory power – the power for the NIPSO to launch an investigation without waiting for a complaint from a person aggrieved. This is a new power which isn't possessed by the existing offices. The criteria are similar to the criteria for ordinary investigations. The key difference is that the NIPSO can only launch an own initiative investigation where there is a reasonable suspicion of systemic maladministration or systemic injustice (injustice consequent on the exercise of professional judgement in health and social care).

### ***Section 9: Criteria for own initiative investigations***

The NIPSO must establish, and have regard to, further criteria for when to launch an own initiative investigation and publish them.

### ***Section 10: Alternative resolution of complaints***

The NIPSO has the flexibility to use alternative methods of resolving complaints made about listed authorities.

### ***Section 11: Purposes of investigation***

This section summarises some of the purposes of an investigation. These are to check if the complaint was justified and how it can be resolved.

### ***Section 12: Listed authorities***

A body is a listed authority if it is listed in Schedule 3. This list can be updated by OFMDFM after consultation with the NIPSO and the body in question. A body can only be added to the list if it has some sort of public or governmental dimension.

### ***Section 13: Meaning of action taken by a listed authority***

This section provides that action is taken by a listed authority if it does the action itself, or it is done on its behalf. The NIPSO can also investigate a failure by a listed authority to act.

***Section 14: Matters which may be investigated: general***

The standard jurisdiction of the NIPSO is to investigate alleged maladministration through action taken in the exercise of administrative functions by listed authorities. Subsequent sections set out some specialised cases where the jurisdiction is slightly different.

***Sections 15, 16 and 17: Matters which may be investigated - professional judgement***

Under these three sections, the NIPSO can also investigate the merits of a decision of a body to the extent that it was taken in consequence of the exercise of professional judgement. This can only be done in the health and social care field, in relation to three specific types of bodies:

- health and social care bodies (see the definition in section 59),
- general health care providers, and
- independent providers of health and social care.

***Section 18: Matters which may be investigated: universities***

The NIPSO is given a new power to investigate students' complaints of alleged maladministration through action taken by universities in the exercise of administrative functions. This relates to students enrolled in courses provided or validated by the University of Ulster and Queen's University Belfast. This supersedes the existing power of the visitor of a university to investigate complaints by students. If the NIPSO doesn't have jurisdiction in a matter relating to universities, the jurisdiction of the visitor is unaffected. This section also contains a transitional provision in subsection (6) to deal with complaints made to the visitor but unresolved before this Act becomes law.

***Section 19: Administrative functions of staff of tribunals***

Court proceedings are not subject to the jurisdiction of the NIPSO, see paragraph 4 of Schedule 5. However, section 19 provides that the NIPSO may investigate some of the administrative work done by staff working in courts or tribunals. Schedule 4 lists these tribunals.

***Section 20: Exclusion: public sector employment***

This section and the following two sections set out some areas where the NIPSO does not have jurisdiction to investigate. Under section 20, the NIPSO cannot investigate a complaint relating to public sector employment.

***Section 21: Exclusion: other remedies available***

The NIPSO cannot investigate a complaint if the person aggrieved has a right to take a case to court instead. However, this rule can be waived if the NIPSO thinks it is not reasonable to expect the person aggrieved to take a case to court.

### ***Section 22: Other excluded matters***

This section introduces Schedule 5. That Schedule sets out other instances where the NIPSO does not have jurisdiction.

### ***Section 23: Decisions taken without maladministration***

This section reiterates that the prime function of the NIPSO is to investigate maladministration, save in the cases where the investigation concerns professional judgement. There is no definition of maladministration in the Act. There was no definition in previous legislation in Northern Ireland, England, Scotland or Wales on the meaning of maladministration. When the Parliamentary Commissioner Act 1967 was being debated in Westminster Richard Crossman MP made this statement:

A positive definition of maladministration is far more difficult to achieve. We might have made an attempt in this Section to define, by catalogue, all of the qualities which make up maladministration, which might count for maladministration by a civil servant. \_ It would be a wonderful exercise— bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on. It would be a long and interesting list.” (HC Deb 18 October 1966 vol. 734 cc42 – 172)

This has become known as the Crossman catalogue and is normally taken to be a fair summary of what comprises maladministration.

### ***Section 24: Complaint handling procedure to be invoked and exhausted***

This section and the following three sections set out the procedure which must be followed for a complaint to be made to the NIPSO under section 5. Under section 24, the person aggrieved must first make the complaint to the listed authority and give the authority a chance to resolve the complaint. The NIPSO has discretion to waive this requirement.

### ***Section 25: Duty to inform person aggrieved about the Ombudsman***

The listed authority must tell the person aggrieved when they have exhausted the complaints handling procedure, and must also tell the person aggrieved that it is possible to refer the complaint to the NIPSO.

### ***Section 26: Form and time limit for making complaint***

It is for the NIPSO to determine the way in which complaints are to be submitted. For example, the NIPSO could allow complaints to be made in writing, by email or online. This could include a special procedure for allowing oral complaints in special circumstances as long as these are subsequently reduced to writing. The ordinary time limit for making a complaint to the NIPSO is 6 months from the day that the complaints handling procedure has been exhausted. If the NIPSO has decided to accept a complaint which hasn't exhausted the internal complaints handling procedure, the time limit is

12 months from the day that the person aggrieved first became aware of the problem.

***Section 27: Meaning of exhausting the complaints handling procedure***

Section 24 states that the complaints handling procedure must be exhausted. Section 27 sets out how that is done. Normally a complaints handling procedure is exhausted when the listed authority makes a final decision on a complaint.

***Section 28: Procedure for complaint referred to the Ombudsman***

This section sets out the time limit for complaints referred to the NIPSO by a listed authority. The NIPSO may waive these time limits if there are special circumstances which make it proper to do so.

***Section 29: Procedure for own initiative investigations***

The procedure for own initiative investigations is quite different from that for other investigations. The NIPSO must send an investigation proposal to the listed authority. The proposal must state how the criteria for an own initiative investigation have been satisfied.

***Section 30: Investigation procedure***

This section sets out how the NIPSO must carry out investigations. It contains procedural rules to ensure that the investigation is fair to all parties. For example, if an allegation is made against a person, that person will have a right to hear that allegation and counter it. The NIPSO has a power to allow parties to an investigation to be legally represented in that investigation. There is also a power to pay expenses or allowances to witnesses.

***Section 31: Information, documents, evidence and facilities***

The NIPSO is entitled to request documents and seek assistance from the persons being investigated. The NIPSO also has the power to compel people to give evidence or provide documents.

***Section 32: Privileged and confidential information***

The normal rules on confidential information and legal privilege do not apply for the purposes of the NIPSO investigating a listed authority. Normally, a listed authority could refuse to disclose this sort of information. However, the NIPSO can insist on seeing it in the course of an investigation. There are safeguards for this later on in the Act. Under section 47, information subject to legal privilege cannot be included in a report. Under section 56, this information cannot be used in court proceedings.

Sections 49 and 50 contain further provision on disclosure of information obtained by the NIPSO in the course of an investigation.

### ***Section 33: Obstruction and contempt***

It is an offence to obstruct the NIPSO in course of his or her work. This is treated as the equivalent to contempt of court.

### **Part 3: Complaints Handling Procedure**

Part 3 establishes the NIPSO as a complaints standards authority modelled on the provisions introduced for the Scottish Ombudsman in the Public Services Reform (Scotland) Act 2010. Sections 34 to 42 introduce provision for the NIPSO to establish principles of complaints handling and issue model complaints handling procedures with which listed authorities' procedures must comply.

### ***Section 34: Meaning of complaints handling procedure***

Section 34 defines a “*complaints handling procedure*” for the purposes of the Act as the procedure of a listed authority for examining complaints in respect of matters which the Ombudsman may investigate.

### ***Section 35: Statement of principles***

The NIPSO must consult Ministers and others on a draft statement of principles concerning complaints handling procedures and have regard to any representations made. The NIPSO must then lay a draft statement of principles before the Assembly for approval and, subject to that approval, publish it. A similar process applies to any revision of the principles.

### ***Section 36: Obligation for listed authority to have complaints handling procedure***

A listed authority must have a complaints handling procedure which complies with the statement of principles.

### ***Section 37: Model complaints handling procedures***

The NIPSO may publish model complaints handling procedures (model CHPs) which comply with the statement of principles after consultation with such listed authorities and others as the NIPSO thinks fit. Any revisions must follow a similar process.

### ***Section 38: Obligation for listed authority to comply with model CHPs***

Where the NIPSO specifies a listed authority to which a model CHP is relevant then the authority, when notified of this, must ensure that its procedure complies with the model CHP and send a description of its procedure to the NIPSO within 6 months.



***Section 39: Declaration of non-compliance of complaints handling procedure***

The NIPSO may make a declaration that a procedure doesn't comply with a specified model CHP or with the statement of principles. The NIPSO must give reasons and specify required modifications. A listed authority must re-submit its procedure within 2 months, having taken account of the modifications.

***Section 40: Submission of description of complaints handling procedure; general***

A listed authority must submit a copy of its complaints handling procedure to the NIPSO within three months of the NIPSO requesting it and such additional information as the NIPSO requests.

***Section 41: Application***

This section provides that the duties in sections 36 and 38 do not apply where this would be inconsistent with any other statutory provision or where the listed authority lacks the necessary powers to ensure compliance with the duties.

***Section 42: Promotion of best practice etc.***

The NIPSO must monitor the complaints handling practices of listed authorities and identify trends, promote best practice and encourage cooperation and sharing of best practice. Listed authorities must cooperate with the NIPSO unless they lack the power to do or doing so would be inconsistent with any other statutory provision.

**Part 4: Miscellaneous and General**

Part 4 contains other miscellaneous provisions about the functions of the NIPSO. It obliges the NIPSO to make reports. It gives the NIPSO protection from defamation proceedings for statements made in exercising the functions of the office. It regulates the disclosure of information by the NIPSO. It obliges co-operation with other ombudsmen. It also sets out the power for the NIPSO or a person aggrieved to apply to a court, following an investigation, in order to remedy any maladministration discovered by that investigation.

***Section 43: Reports on investigations***

The NIPSO must send a copy of a report on an investigation to the people concerned with that investigation.

***Section 44: Publication of reports on investigations in the public interest***

The NIPSO may publish a report if it is thought in the public interest to do so. The NIPSO must first consult with any persons that the report is about.



***Section 45: Publication of reports on own initiative investigations***

If the NIPSO has launched an own initiative investigation, a report on that investigation must be published.

***Section 46: Reports to the Assembly***

The NIPSO has several reporting obligations to the Assembly. Firstly, the NIPSO must lay an annual report before the Assembly on what the NIPSO has done during the year. Secondly, in a particular case where an injustice has been uncovered by the NIPSO but not remedied, a report on that case can be laid before the Assembly. Thirdly, if an own initiative investigation has been launched, the NIPSO must report on this to the Assembly. Finally, the NIPSO has discretion to make any other reports to the Assembly thought suitable.

***Section 47: Reports and privileged information***

A report must not disclose the content of information subject to legal privilege.

***Section 48: Privilege for certain publications***

The NIPSO is protected from defamation proceedings for statements published in connection with the performance of functions under the Act. A person aggrieved is protected for publication, in the course of communication with the NIPSO, in connection with an investigation.

***Section 49: Disclosure of information***

Information obtained by the NIPSO is to be kept confidential, save for certain purposes. Those purposes include making decisions about investigations, publishing reports, giving assistance in the prosecution of certain criminal offences, protecting the health or safety of the public, etc.

***Section 50: Disclosure contrary to public interest***

This section gives a power to Ministers and the Secretary of State to prevent the NIPSO disclosing information where it is not in the public interest to do so. It also requires the Secretary of State and the NIPSO to agree a memorandum of understanding concerning the exercise of their functions in relation to this section. This memorandum of understanding could make it easier for the NIPSO and Secretary of State to liaise in advance over material which it would not be in the public interest to disclose. The NIPSO must lay a copy of the agreed memorandum, and any revisions to it, in the Assembly.

***Section 51: Consultation and co-operation with other ombudsmen***

If the NIPSO is investigating something that another ombudsman is investigating, the NIPSO must consult that other ombudsman. Furthermore, the NIPSO may co-operate with that other ombudsman, for example by disclosing information, working together or jointly publishing a report. This consultation and co-operation only applies where the other ombudsman is one of those

referred to in subsection (4). Subsection (4) lists ombudsmen and commissions from Northern Ireland, Scotland, Wales and England. The NIPSO can also work with the Ombudsman from the Republic of Ireland where the investigation concerns a North / South Implementation body.

***Sections 52 and 53: County court applications by a person aggrieved***

These two sections grant a person aggrieved the right to apply to the county court for compensation. There must first have been a finding by the NIPSO that the person has suffered an injustice. The action is against the listed authority which has caused the injustice. In addition to ordering compensation, the county court can make any other order it thinks appropriate (for example directing the listed authority to do something to right the wrong). The claim itself must be made by an individual.

***Sections 54 and 55: High Court applications by the Attorney General***

These two sections grant the right to the Attorney General to apply to the High Court in cases of systemic maladministration. There must first have been a finding by the NIPSO of systemic maladministration and a request from the NIPSO to the Attorney General to make this application. Unlike applications to the county court, this type of application is not made by an individual complainant but by the Attorney General. The High Court has the power to order the listed authority involved to do, or not to do, a particular thing. Where the matter being investigated relates to professional judgement (see sections 15, 16 and 17) then rather than looking at systemic maladministration, the test is whether systemic injustice has been sustained as a result of this judgement.

***Section 56: Court proceedings and privileged information***

Information which is subject to legal privilege (for example lawyer/client advice) cannot be used in any of these two types of court proceedings.

***Section 57: Supplementary provision in relation to court proceedings***

The court may rely upon what the NIPSO states in any report as being correct, unless there is some evidence to the contrary.

**Part 5: Northern Ireland Judicial Appointments Ombudsman**

This Part only has one section, **section 58**. It provides that the office of the Northern Ireland Judicial Appointments Ombudsman is automatically to be occupied by the person who is currently the NIPSO. Schedule 6 sets out more detail on how this is to work in practice.

**Part 6: Supplementary Provisions**

***Section 59: Interpretation***

This section defines terms used elsewhere in the Act.

***Section 60: Power to make further provision***

This gives the Assembly Commission power to make further provision in order to give effect to this Act. The Act authorises the making of subordinate legislation in several instances.

***Section 61: Orders***

This section states what procedure is to be followed in making that subordinate legislation; in particular the degree of control the Assembly has over this process.

***Sections 62 and 63: Consequential amendments***

As a consequence of the changes made by this Act, there is a need for a large number of consequential changes to other pieces of legislation. Sections 62 and 63 together with Schedules 7 and 8 make these changes. These amendments are contained in two separate schedules to make it easier to administer and see the nature of the changes made.

***Section 64: Commencement***

This section sets out when the various provisions of the Act come into operation (i.e. the law comes into effect). The structural provisions of the Act (things like the title of the Act, the power to make Orders etc.) and the provisions allowing for the establishment and appointment of the NIPSO come into operation on the day after the Act is made. The bulk of the Act then comes into operation on 1 April 2016. At this point, the NIPSO can exercise the main functions of receiving complaints, commencing investigations etc. The NIPSO's remit over further and higher education bodies only comes into operation on 1 October 2016. Remit over grant-aided schools, only comes into operation on 1 April 2017. Part 3 dealing with complaints handling procedure, other than section 34, will be commenced by order to be made by the Assembly Commission. Finally, the power to investigate on his or her own initiative comes into operation on 1 April 2018.

***Section 65: Repeals***

As well as the consequential changes discussed above, there are repeals which are also consequent upon the making of this Act. This section and Schedule 9 set out those repeals. For example, the legislation regulating the existing offices of the Ombudsman and Commissioner is repealed.

***Schedule 1: The Northern Ireland Public Services Ombudsman***

This Schedule is introduced by section 1. It sets out the administrative detail of the establishment of the NIPSO. The NIPSO is not an agent of the Crown. There are conditions of eligibility for appointment which prevent the NIPSO from having other jobs or appointments which may conflict with the independence of the office. The Assembly Commission is to determine the salary, with a

safeguard that the salary must not exceed the maximum salary payable in the Northern Ireland Civil Service. The Assembly has the power to remove the NIPSO, but only on the grounds of ill-health or misconduct, and only with a two-thirds majority. The NIPSO is restricted for a period in terms of the jobs that can be done after ceasing to be NIPSO. If there is a vacancy, there can be the short term appointment of an Acting NIPSO. The NIPSO can appoint staff and advisers and may delegate functions to staff and, in special circumstances, to other suitably qualified persons. The expenses of the office are to be paid by Act of the Assembly, but the NIPSO must provide budget estimates and accounts each year.

***Schedule 2: Transfer of assets, liabilities, staff and other transitional and savings arrangements***

This Schedule is introduced by section 4. The main function of this schedule is to transfer the property of the existing offices of the Ombudsman and the Commissioner to the NIPSO. There are also transitional arrangements to govern the handover from the existing offices to the new office. If a person made a complaint to the existing offices but that complaint was not resolved before the establishment of the new office, then the old rules continue to apply, but the NIPSO steps in as the investigator. Provision is also made to ensure a person aggrieved is not disadvantaged, for a transitional period, by the change in the time limit for making a complaint from 12 months to 6 months. Paragraph 12 ensures that the definition of “public appointment” in the Commissioner for Public Appointments (NI) Order 1995 is not affected by the repeal of the Commissioner for Complaints (NI) Order 1996.

***Schedule 3: Listed authorities***

This Schedule is introduced by section 12. It lists all the authorities within the NIPSO’s remit.

***Schedule 4: Tribunals referred to in section 19***

This Schedule is introduced by section 19. It lists the tribunals where the NIPSO has jurisdiction in respect of their administrative functions (not their judicial functions).

***Schedule 5: Other excluded matters***

This Schedule is introduced by section 22. It sets out other areas where the NIPSO does not have jurisdiction. For example, the NIPSO cannot investigate a complaint about public inquiries or court proceedings.

***Schedule 6: Amendments consequent upon the Ombudsman being the Northern Ireland Judicial Appointments Ombudsman***

This Schedule is introduced by section 58. The Northern Ireland Judicial Appointments Ombudsman (NIJAO) was established and is regulated by the Justice (Northern Ireland) Act 2002. Under section 58, the NIPSO automatically

becomes the NIJAO. This Schedule makes the necessary changes to the 2002 Act consequent upon this. Under the 2002 Act, if a person has ever practised law or held judicial office, the person is ineligible to be the NIJAO. If the NIPSO has this legal background, then he or she is ineligible to exercise certain NIJAO functions. In this case, the NIPSO must appoint another person to carry out those particular functions. This Schedule also amalgamates certain of the administrative functions of the two offices. DoJ commented:

**In particular this Schedule amends Schedule 3A to that Act. Paragraph 4 of this Schedule substitutes for paragraph 1 of Schedule 3A new paragraphs 1, 1A and 1B and 1C. New paragraph 1(1) and (2) specifies various conditions that will make the NIJAO ineligible to exercise specified functions. New paragraph 1(1), (3), (4) and (5) requires him or her to consider if certain past experience or service would make it inappropriate for him or her to exercise specified functions, and that he or she may consult the Department of Justice as part of such consideration. New paragraph 1A requires the NIJAO, where he or she is ineligible under paragraph 1, to direct an appropriate eligible person or persons to exercise these functions; and new paragraph 1B specifies the eligibility criteria for a person so directed. New paragraph 1C provides that specified functions are those relating to the investigation of judicial-appointments complaints and to the convening of a removal tribunal. Paragraphs 5-11 of this Schedule omit or amend various provisions of Schedule 3A to take account of the effect of section 49.**

***Schedule 7: Amendments to Part 9 of the Local Government Act (Northern Ireland) 2014***

This Schedule is introduced by section 62. The Local Government Act (Northern Ireland) 2014 gave the Commissioner additional functions in respect of investigations into local government. With the abolition of the office of the Commissioner, there is a need for consequential changes to the 2014 Act. This Schedule contains those consequential amendments. In broad terms, the consequential amendments fall into two categories. Firstly, in exercising functions under Part 9 of 2014 Act the NIPSO is to be known as the Northern Ireland Local Government Commission for Standards and references to the Commissioner are now to be read as references to the NIPSO. Secondly, in investigating local government matters, the NIPSO has powers contained in the 2014 Act along with other powers applying to those investigations contained in this Act. Provision is also made in the 2014 Act for adjudication hearings and related powers, the publication of reports on the NIPSO's website and consultation and cooperation with the C&AG and the local government auditor.

***Schedule 8: Other minor and consequential amendments***

This Schedule is introduced by section 63. It contains other changes to legislation consequent upon the making of this Act.

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***Schedule 9: Repeals***

This Schedule is introduced by section 64. It contains all the repeals which are necessary in consequence of the making of this Act.