

These notes refer to the Commissioner for Older People Act (Northern Ireland) 2011 (c.1) which received Royal Assent on 25 January 2011

Commissioner for Older People Act (Northern Ireland) 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1- The Commissioner for Older People for Northern Ireland

This means that there will be a Commissioner for Older People for Northern Ireland (the Commissioner) who will be appointed by the First Minister and deputy First Minister jointly. This section also makes provision for Schedule 1 of the Commissioner for Older People Act (Northern Ireland) 2011 which deals with the establishment and operation of the Commissioner and his or her office, for example, general powers, finances, tenure of office (4 years, renewable once), staffing matters and accountability. Schedule 1 also allows the Commissioner to cooperate with other bodies, whether in the UK or elsewhere, which exercise functions relating to older persons or their interests. The appointment of the Commissioner will be after both Ministers have taken account of the views of older people.

Section 2- Principal aim of the Commissioner

This sets out the main aim of the Commissioner, which will be to safeguard and promote the interests of older people. Importantly, in considering what the interests of older people are and in the course of carrying out his or her work as a Commissioner, the Commissioner is required to take account of the United Nations Principles for Older Persons.

In response to points raised during the public consultation, OFMDFM will draw the Commissioner's attention to other international agreements, protocols and relevant documents such as the UN Paris Principles and the EU Employment Framework Directive.

This section also makes it clear that, in deciding whether or how to act in relation to a particular older person the interests of that older person are to be the Commissioner's main consideration. The Commissioner must also work within all other relevant laws.

Section 3 - Duties of the Commissioner

This paragraph sets out a series of important duties which the Commissioner must perform. These include duties to:-

- Promote an awareness of matters relating to the interests of older people and of the need to safeguard those interests ;
- Keep under review the adequacy and effectiveness of the law and practice relating to the interests of older people;
- Keep under review the adequacy and effectiveness of the services provided to older people by relevant authorities;
- Promote the provision of opportunities for, and the elimination of discrimination against, older people;
- Encourage best practice in the treatment of older people;
- Promote positive attitudes towards older people and encourage participation by older people in public life;
- Advise the Assembly, the Secretary of State and a relevant authority on matters concerning the interests of older people (this could cover any issue);
- Take reasonable steps to make older people aware of the existence and functions of his/her office and its location;
- Take reasonable steps to encourage older people to communicate with the Commissioner and his or her staff and to seek the views of older people; and
- Make themselves or their staff available, as far as is practicable, at a place convenient for older people.

Section 4- General Powers of the Commissioner

This gives the Commissioner powers to do a number of things to help him/her fulfil the aim of protecting the interests of older people. These powers (including the power in this Section to carry out informal investigations) enable the Commissioner to carry out a wide range of activities. This means the Commissioner will be able to influence the actions of many organisations and individuals that affect older people's lives in many different ways.

The general powers include:

- Undertaking, commissioning or providing assistance for research or educational activities concerning the interests of older people;
- Issuing guidance on best practice in relation to any matter concerning the interests of older people;
- Conducting investigations in relation to any matter;

- Compiling, providing and publishing information on matters concerning the interests of older people; and
- Making representations or recommendations to any body or person about any matter concerning the interests of older people.

This Section at 4(6) specifically provides for the advocacy powers and role of the Commissioner. This Section also gives the Commissioner the power to carry out a formal investigation in relation to two of his/her duties which are listed in Section 3(2) and 3(3) of the Act. The procedures to be followed when doing this are set out in an Annex to the Commissioner for Older People Act (Northern Ireland) 2011 (known as Schedule 2). There is further information on Schedule 2 towards the end of this document.

Section 5 - General review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities

The Commissioner's powers contained in this section enable him/her to review a range of activities carried out by a group of organisations and individuals that are known in the Commissioner for Older People Act (Northern Ireland) 2011 as relevant authorities (see Section 26 and Schedule 3). The purpose of these reviews is to enable the Commissioner to discover whether the procedures that these organisations have in place have been effective in promoting and protecting the interests of older people.

However before the Commissioner is able to use these powers he/she must first confirm:

1. that he/she has good reason to believe that the organisation's procedures are not working properly or are not working at all; and
2. in the case of inspection arrangements, that there is no other organisation or person that is likely to review the inspection arrangements. This is to avoid the Commissioner reviewing inspection arrangements when there is already an organisation that has the legal power to undertake this and has done so or is planning to do so.

In the case where an organisation does not have appropriate procedures in place at all, the Commissioner can carry out a review to see what the effect of this is on older people

Section 6 - Review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in individual cases

This Section is similar to Section 5. Whilst Section 5 enables the Commissioner to carry out general reviews of an organisation's procedures as listed in Section 5(1), this particular Section gives the Commissioner the power to carry out such reviews whilst specifically looking at the effect of those procedures on a *particular person or at a particular location*. Again the Commissioner must confirm the two points listed above at Section 5 before he/she can act.

Where an organisation does not have these procedures in place, the Commissioner can review what the effect of this is on a particular older person.

Section 7 - Assistance with complaints to relevant authorities

This Section gives the Commissioner the power to provide whatever help an individual older person needs, and that includes financial help, to enable the older person to bring a complaint to the organisation or organisations involved (the ‘relevant authority’). This includes acting on behalf of an older person both in making the complaint and in any investigation or other proceedings conducted by the organisation or authority following the complaint.

However in deciding whether to provide assistance to an older person the Commissioner may take account of whether there is another organisation or person likely to support the older person in taking a complaint.

For the purposes of this section alone, the term “relevant authority” also includes the Northern Ireland Office, the Northern Ireland Commissioner for Complaints, the Assembly Ombudsman for Northern Ireland, the Information Commissioner and the Pensions Ombudsman. This will enable the Commissioner to be able to help an older person bring a complaint to these bodies within the remit of their statutory complaints provisions.

Section 8 - Investigation of complaints against relevant authorities

Sometimes complaints do not get sorted out to the satisfaction of the older person making them. This Section gives the Commissioner the power to investigate a complaint made by an older person against one of the organisations known as “relevant authorities”.

To make sure that only the most serious cases come to the Commissioner, the Commissioner must be satisfied that the case raises a question of principle.

Also the Commissioner must check that the complaint is not covered within an existing statutory complaints system.

The purpose of the paragraph 8(2) (b) of this Section is to avoid duplication of the Commissioner’s work with that of other bodies which already possess the responsibility, the expertise and the resources to act on a complaint raised by an older person.

In addition in relation to the public bodies referred to in the Act as relevant authorities, if the Commissioner believed that such a body did not take action or did not, in a timely manner, adequately investigate a complaint coming under its responsibility, the Commissioner may challenge that organisation by making representations or recommendations as empowered under Section 4(6) of the Commissioner for Older People Act (Northern Ireland) 2011 and also has the power under Sections 5 and 6 of the Act to formally Review the complaint procedures of the organisation. This Review could be focussed on an

individual older person's case and the Review could be the subject of the Formal Investigatory powers contained in the Act.

However should paragraph 8(2) (b) in practice cause the Commissioner significant difficulties in acting in the interests of older people, then this issue can be raised through the provisions in the Act which enable the Commissioner to carry out Reviews of the Act on its adequacy and effectiveness with recommendations for amendments to this legislation if appropriate. Ministers could also move ahead of the Review process to address and remedy the problem, if necessary by an amendment to the Commissioner for Older People Act (Northern Ireland) 2011.

Section 9 - Actions which may be investigated: restrictions and exclusions

This Section of the Commissioner for Older People Act (Northern Ireland) 2011 provides that the Commissioner is not able to carry out an investigation in a case where the older person involved has a right of appeal, complaint or review to a tribunal set up by law or to a court.

The Commissioner can however act if he/she believes that it is not reasonable to expect the older person to have used the right to appeal or complaint or review or to take the case to court.

Another case in which the Commissioner could not carry out an investigation is in those cases involving criminal proceedings or civil proceedings by any person other than a relevant authority. The Commissioner would not be able to investigate these cases because they will be dealt with by the court.

Finally, the Commissioner would not be able to investigate any cases that a local or public inquiry is investigating or any case where there has been an unreasonable delay in making the complaint.

Section 10 - Power to bring, intervene in or assist in legal proceedings

This Section sets out the power of the Commissioner to bring civil proceedings relating to the law or practice relating to the interests of older persons, and to assist in or intervene in any legal proceedings which relate to the interests of older people.

There may be problems that arise for older people in which the law may have been broken. If a case like this were brought to the Commissioner, this section states that the Commissioner must consider the following questions:

- does the case involve a question of principle?
- are there special circumstances involved?

If the answer to either of these questions is yes, this section gives the Commissioner the power to take the case to court so that the court can decide the case. This does not apply to cases involving criminal law where there are separate procedures for taking cases.

This Section also gives the Commissioner the power in any court cases (except for criminal cases) to act as a “friend of the court” by giving information to the court on matters affecting older people, for example as an expert witness. The legal term for doing this is *amicus curiae*.

Section 11 - Assistance in relation to legal proceedings

This Section sets out the scope of the Commissioner’s power to assist an older person in relation to certain legal proceedings, that is proceedings which involve law or practice concerning the interests of older people.

This section is different from section 10 because it deals with cases where it is actually the older person (not the Commissioner) who has brought a case to court involving the interests of older people but the older person would like the help of the Commissioner with their case.

This section gives the Commissioner the power to help an older person in these circumstances. But before the Commissioner is able to help he/she must consider the following questions:

- Does the case involve a question of principle?
- Is it unreasonable to expect the older person to deal with the case on their own, because it is very complicated, or because of a relationship with some other person involved, or for some other reason?
- Are there any special circumstances which the Commissioner believes make it appropriate for him/her to help?

If the answer to any of these questions is yes, then the Commissioner may help. The final point that the Commissioner must check is whether there is another organisation or person who is able and likely to help the older person with the court case. If there is, the Commissioner must not act in the case.

The power of the Commissioner to help an older person involved in a court case could take the form of whatever help the Commissioner thinks is necessary and includes arranging for someone qualified to give legal advice or arranging for a solicitor or barrister to represent an older person.

The Commissioner would be able to recover costs/expenses from the older person as part of the arrangement to provide assistance, if the Commissioner thinks that this is reasonable in the circumstances of the case.

Section 12 – Conciliation of disputes

This Section gives the Commissioner the power to commission conciliation services in relation to disputes that may lead to court action. Conciliation services means services provided—

- (a) by a person who is not a party to a dispute;
- (b) to the parties to the dispute; and

- (c) with the aim of enabling the dispute to be settled by agreement and without proceedings.

These services include conciliation and mediation. This provides an alternative and hopefully faster method of resolving disputes than legal proceedings.

Section 13 - Formal investigations

This Section gives the Commissioner the power to conduct formal investigations of the actions of those organisations known as relevant authorities (see Section 26 and Schedule 3).

These formal investigations differ from the informal or general investigations that the Commissioner has the power to do (see Section 4) in relation to any organisation.

The Commissioner would have the power to carry out a formal investigation of the following actions of relevant authorities both generally and in relation to cases involving individual persons:

- their advocacy arrangements;
- their complaints procedures;
- the inspection procedures to examine how they manage and treat older people;
- their “whistle blowing” arrangements.

The Commissioner also has the power to carry out a formal investigation of a complaint made by an older person against a relevant authority (Section 8).

This section gives detail on the procedures that should be followed when a formal investigation is being carried out. For example, terms of reference of the investigation must be written and sent to the relevant authority involved. Also the Commissioner must give the relevant authority the opportunity to give its opinion on the investigation and to offer evidence for this. All formal investigations must be carried out in private (see also Section 16). Apart from the procedures set down in this Section of the Commissioner for Older People Act (Northern Ireland) 2011 (see also Section 14) the Commissioner has the flexibility to carry out the investigation in the way that he/she believes is best. The Commissioner may obtain the information that he/she needs for the investigation from the people who hold it. The Commissioner is not required to arrange formal meetings at which people can speak and provide evidence.

Because attendance at meetings with the Commissioner can be expensive, the Commissioner is given the power to pay expenses or allowances for the loss of time of a person involved in a formal investigation.

Section 14 - Formal investigations: exclusions

This Section prevents the Commissioner from carrying out a formal investigation into a matter in respect of which he or she has previously brought,

intervened in, or provided assistance with legal proceedings. This is to ensure that there is no conflict between the Commissioner's legal and investigatory roles. However if the Commissioner, through Section 10 acts as *amicus curiae* in a court case (see notes on Section 10 for what this means) this does not prevent the Commissioner from carrying out a Formal Investigation.

Section 15 - Report on formal investigation

This section sets out more detail on the procedures that should be followed when the Commissioner carries out a formal investigation of the actions of a relevant authority. It states the Commissioner must prepare a report on the investigation and also states what persons or organisations the Commissioner must send a copy of the report to. The Section contains a confidentiality requirement in that the Commissioner's report must not name individual people or contain any details which might help to identify that person, unless the Commissioner believes that it is necessary to do so. The Commissioner's report may include recommendations for action to be taken by a relevant authority. The Commissioner must give reasons for the recommendations in the report. In relation to a report following an investigation into how a complaint made by an older person was actually handled by an authority, the Commissioner may recommend that the relevant authority consider the complaint again. The relevant authority involved in the case must consider the report and decide what action to take on the Commissioner's recommendations.

Section 16 - Further action following report on formal investigation

This section follows on from Section 15 and relates to follow-up action which the Commissioner can take after he/she has published a report on a formal investigation. In cases where the Commissioner has made a report which recommends that a relevant authority take a particular action, the Commissioner is given the power in this Section to issue a formal Notice to the organisation involved. This Section requires the organisation to write back to the Commissioner within three months explaining either what it has done to follow the Commissioner's recommendation or if it has decided not to follow the recommendation, to explain the reasons why.

If the organisation has not followed the Commissioner's recommendation and the Commissioner considers that the reason given is inadequate, the Commissioner can again issue a further Notice to the organisation setting out the inadequacy and requiring the authority to reconsider the matter and reply within one month.

The Commissioner is also given the power in this section to publish information on:

- the recommendations he/she has made;
- how the Commissioner may have followed them up with letters to the organisations involved;

- what the organisation did or did not do in response to the Commissioner's letters and/or recommendation(s).

This information will be kept in a register and the Commissioner can arrange for copies of the register to be made available for public inspection in any way he/she believes is appropriate.

Section 17 - Evidence in formal investigations

This Section sets out the type of evidence or information which the Commissioner may have access to in order to conduct a formal investigation.

In this Section the Commissioner is given the power, when carrying out a formal investigation, to obtain the information he/she needs from the person who holds it. The Commissioner is given powers equivalent to those of the High Court when it comes to interviewing people and requiring documents or other papers to be disclosed and released.

Section 18 - Powers of entry and inspection for purposes of formal investigation

In this Section the Commissioner is given the power when carrying out a formal investigation to at any reasonable time enter premises managed by a relevant authority in which an older person lives or is being held or is receiving for example care or education. This power may be used in relation to a review of arrangements (Sections 5 and 6) or the investigation of a complaint (Section 8). The Commissioner can inspect the state of the building, how it is managed, and can take copies of important documents (if the Commissioner considers it necessary). The Commissioner can also interview in private any older person in the building, who consents to be interviewed, or anyone who works there. The Commissioner does not have the power to enter a building that is someone's private home.

Section 19 - Obstruction and contempt in relation to formal investigation

This Section provides a sanction against obstruction of the Commissioner as he or she conducts a formal investigation. If anyone, without lawful excuse impedes the Commissioner in the conduct of the investigation or acts in a way which would otherwise constitute contempt of court, the Commissioner can report the matter to the High Court, and it can be dealt with as contempt of court.

Section 20 - Disclosure of information by Commissioner

This Section provides for restrictions on the disclosure of information obtained by the Commissioner during a formal investigation. He or she can only disclose such information for:

- the purposes of the investigation and the report of an investigation;
- any civil proceedings or court proceedings involving a criminal offence;

- any enquiry with a view to the taking of proceedings for a criminal offence;
- any proceedings related to obstruction of the Commissioner; or for
- health and safety reasons of a person at risk.

Section 21 - Review of this Act

This Section provides that three years after the passing of this Act, [The Commissioner for Older People Act (Northern Ireland) 2011], and no earlier than every three years or later than five years after that, the Commissioner must review the workings of this Act and send a report to the First Minister and the deputy First Minister. The report should contain the Commissioner's views as to the adequacy and effectiveness of the legislation and may contain the Commissioner's recommendations for improvement. The report must then be laid before the Assembly by the First Minister and the deputy First Minister acting jointly.

Section 22 - Privilege for certain publications

This Section provides that any report which the Commissioner is required or permitted to publish is exempt from challenge under the law of defamation

Section 23 – Application of this Act: relevant authorities with mixed functions

This Section provides that for a general health care provider, the relevant authority provisions of The Commissioner for Older People Act (Northern Ireland) 2011 apply only to the general health care provided by the provider.

In relation to an independent provider, the relevant authority provisions of this Act apply only to the service the independent provider was providing (or which it was its function to provide) under arrangements with a health and social care body or a general health care provider.

In relation to any other relevant authority, (except a nursing or residential care home) the relevant authority provisions of this Act apply only to the public functions exercised by the relevant authority.

All nursing and residential care homes, whether in the public, private or voluntary sector are included as relevant authorities for the purposes of the Commissioner for Older People Act (Northern Ireland) 2011.

Section 24 - Application of this Act: matters arising before commencement

This provides for the retrospectivity of the Commissioner for Older People Act (Northern Ireland) 2011, i.e. that the Commissioner would be able to look at issues which happened before the Act passed into law.

Section 25 - Interpretation: “older person”

This Section defines the use of the words “older person” to mean a person aged 60 or over. It also proposes that the Commissioner could deal with a matter raised by someone aged 50 or over if it was an issue that raised a question of principle affecting people age 50 or over generally or there were exceptional circumstances.

It also proposes that where an older person has died or is for some reason incapable of representing himself/herself, a representative acting on their behalf should also be able to do anything under this Act that can be done by an older person.

This Section also provides that the age ranges (60 and over and 50 and over) can be changed by Order.

Section 26 - Interpretation: “relevant authority”

This Section defines the term “relevant authority”, for the purposes of the Commissioner for Older People Act (Northern Ireland) 2011. It includes any authority which falls within the purview of the Assembly Ombudsman or the Commissioner for Complaints. It also includes other organisations which carry out work directly relevant to the lives of older people and which are specifically listed in Schedule 3. This list includes a number of bodies in the area of health. This Section provides that it is possible for the Office of the First Minister and deputy First Minister to add, modify or remove a body from the list. The Section specifies that any reference in the Act to action taken by a relevant authority relates to action taken regarding Northern Ireland.

Section 27 - Interpretation: general

This Section defines a number of terms used throughout the Commissioner for Older People Act (Northern Ireland) 2011. It includes the definition that any reference to older persons’ interests in the Act includes their rights.

Section 28 - Commencement

This Section provides for a number of the provisions of the Commissioner for Older People Act (Northern Ireland) 2011 to come into operation 2 weeks after Royal Assent, namely, sections 1 and 25 (together with Schedule 1) which make provision for the establishment of the office of the Commissioner including funding and staffing arrangements; sections 25 to 27 (together with Schedule 3), the interpretation provisions; this Section (commencement) and section 29 (short title). It provides for the other provisions to come into operation by subordinate legislation.

Section 29 - Short title

This Section provides for the short title of the Commissioner for Older People Act (Northern Ireland) 2011.