



Strasbourg, 18 October 2021

CDL-AD(2021)041

Opinion No. 1044/2021

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UNITED KINGDOM

OPINION

**ON THE POSSIBLE EXCLUSION
OF THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION
(THE PARLIAMENTARY OMBUDSMAN)
AND HEALTH SERVICE COMMISSIONER
FROM THE “SAFE SPACE”
PROVIDED FOR BY THE HEALTH AND CARE BILL**

**Adopted by the Venice Commission
at its 128th Plenary Session
(Venice/online, 15-16 October 2021)**

on the basis of comments by

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Mr Johan HIRSCHFELDT (Substitute Member, Sweden)
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I. Introduction

1. By letter dated 14 May 2021, Mr Rob Behrens, Ombudsman and Chair, Parliamentary Health Service Ombudsman (hereafter “the PHSO”), requested the opinion of the Venice Commission on the proposed exclusion of the PHSO from ‘safe space’ investigations in the National Health Service, as foreseen in the Health and Care Bill (CDL-REF(2021)071), hereinafter “the Bill”.
2. Mr Jan Helgesen, Mr Johan Hirschfeldt, Ms Claudia Monti and Mr Jørgen Steen Sørensen acted as rapporteurs.
3. On 6.09.21, 14.09.21 and 21.09.21 the rapporteurs, along with Ms Caroline Martin and Ms Tanja Gerwien from the secretariat, had online meetings with members of the PHSO’s Office, members of the Healthcare Safety Investigation Branch (hereafter “the HSIB”), representatives of the Department of Health and Social Care Department and of the Cabinet Office. Meetings with the House of Commons were not made possible.

The Commission would like to thank the Permanent Representation of the United Kingdom in Strasbourg for its contribution to the organisation of the meetings with the authorities.

4. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings. Following an exchange of views with Mr Rob Behrens, the PHSO, and Mr William Vineall, Director, NHS Quality, Safety, Investigations, Department of Health and Social Care this Opinion was adopted by the Venice Commission at its 128th Plenary Session (Venice/online, 15-16 October 2021).

II. Preliminary remarks

A. Scope of the opinion

5. The main objective of this opinion is to respond to the UK Ombudsman's request concerning the exclusion of the PHSO from the “safe space” created by the Health and Care Bill (hereafter “the Bill”).
6. To this end, it should be noted that the Commission has only examined those articles of the Bill which concern the question raised by the Ombudsman in his request. These provisions have been analysed in the light of international standards for Ombudsman institutions. The relevant articles have been highlighted in the CDL-REF reference document.
7. Consequently, this opinion does not aim to analyse the Bill as a whole, and even less to give an opinion on the health policy choices provided for in the Bill. Nor is it the purpose of this opinion to analyse the entire status and competences of the PSHO or other bodies concerned by the Bill, nor in general.
8. Nevertheless, for a better understanding of this opinion, a brief description of the general framework of the different actors and of the main issues at stake will be briefly presented after the international and national reference texts that have served as a basis for the analysis that follows.
9. The Commission would like to thank all the stakeholders for their availability and all the documentation provided, which made it possible to understand the complex context of the issue at stake, the following analysis shall not be considered exhaustive, though.

B. International standards

10. On 16 December 2020, the United Nations General Assembly adopted Resolution A/RES/75/186 on “The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law”.

11. At the level of the Council of Europe:

- on 16 October 2019, at the 1357th meeting of the Ministers’ Deputies, the Committee of Ministers adopted Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution to member States on the development of the Ombudsman institution¹;
- on 2 October 2019, the Parliamentary Assembly, adopted Resolution 2301 (2019) on “Ombudsman institutions in Europe – the need for a set of common standards”;

The Venice Commission adopted the Principles on the protection and promotion of the Ombudsman Institution (the “Venice Principles”), at its 118th Plenary Session (Venice, 15-16 March 2019). The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345th Meeting of the Ministers’ Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, Resolution 2301(2019), on 2 October 2019 ; by the Congress of Local and Regional Authorities of the Council of Europe, Resolution 451(2019) on 29-31 October 2019². The UN Resolution A/RES/75/186, which was adopted by consensus in the General Assembly on 16 December 2020, in its Preamble acknowledges “ the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)”; in operative §2, strongly encourages Members States to create and strengthen Ombudsman institutions “consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)”; in operative § 8 “Encourages Ombudsman and mediator institutions, where they exist, (a) To operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles”.

C. National legal framework of the PHSO

- The Parliamentary Commissioner Act 1967
- The Health Service Commissioners Act 1993

III. Background

A. The Bill

12. According to the documentation provided by the authorities, the purpose of the Health and Care Bill is to give effect to the policies that were set out as part of the National Health Service’s (hereafter “the NHS”) recommendations for legislative reform following the Long Term Plan and

¹ See Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution* (Adopted by the Committee of Ministers on 16 October 2019 at the 1357th meeting of the Ministers’ Deputies), available at <https://rm.coe.int/090000168098392f>

² European Commission for Democracy through Law (Venice Commission), *Principles on the Protection and Promotion of the Ombudsman Institution (“The Venice Principles”)*, adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019) Endorsed by the Committee of Ministers at the 1345th Meeting of the Ministers’ Deputies (Strasbourg, 2 May 2019) Strasbourg, 3 May 2019 Opinion No. 897 / 2017 CDL-AD(2019)005, Principle 3, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e)

also in the White Paper 'Integration and Innovation: Working together to improve Health and Social Care for all', published in February 2021.

13. The Bill builds on the recommendations for reform made by NHS England in the NHS Long Term Plan published in 2019. Embedding the NHS Long Term Plan in legislation was also a commitment in the Government's 2019 General Election manifesto.

14. The Bill creates a 'safe space' within which participants can provide information to the Health Services Safety Investigations Body (hereafter "the HSSIB") for the purposes of an investigation without fear that it will be disclosed to others. It prevents the HSSIB, or any individual connected with the HSSIB, from disclosing "protected material" held by the HSSIB in connection with its investigatory function.

15. In this context, protected material includes any information, document, equipment or other item which is held by the HSSIB (or a connected individual) for the purposes of the HSSIB's investigation function.

16. Information held in safe space will only be disclosed by the HSSIB in certain limited circumstances (§§ 106-109 of the Bill).

17. The HSSIB is hence meant to have the power to investigate patient safety violations within a safe space. This means that evidence may be collected by the HSSIB under the restriction that no one else (private individual or public authority) will have access to that evidence.

18. The policy to establish the 'safe space' provision is comparable to similar legal provisions for bodies that investigate air, rail and marine accidents. These investigation branches look to use 'safe space' principles to improve safety, by promoting learning and not attributing blame, and this is a founding principle behind establishing a 'safe space' for investigating qualifying incidents. The creation of safe space within the NHS would have the same objective, namely to create a safe space to receive information in order to improve the services provided. There is an important difference between the transport sector and the health sector (HSSIB), though. The PHSO has no competence to investigate into the transport sector. Within the transport sector, there are thus no implications to the Ombudsman oversight.

19. There are certain exceptions to the restrictions on access within the safe space. They apply to the Senior Coroners in the Administrative Justice System. This means the Senior Coroners will have access to the safe space.

B. The PHSO

20. The Office of the PHSO was originally established under the Parliamentary Commissioner Act of 1967. The Health Service Commissioner for England was first established in 1973, and its powers set out under the Health Service Commissioner's Act 1993. The Parliamentary and Health Service Ombudsman, as it is colloquially known, combines the two statutory roles of Parliamentary Commissioner for Administration (the Parliamentary Ombudsman) and Health Service Commissioner.

21. The Parliamentary and Health Service Ombudsman was set up by Parliament to provide an independent service to handle complaints about the NHS in England, UK Government Departments and other UK public organisations. The PHSO is the final stage for complaints that have not been resolved through the organisation's own complaints process.

22. The legislation governing the powers of the Parliamentary Ombudsman and the Health Service Ombudsman is materially the same³ with two exceptions.

23. First, the MP filter (requiring complainants to approach the Ombudsman through their Member of Parliament) does not apply to Health cases.

24. Second, the PHSO's role in health is primarily to investigate independently individual and group complaints against health service providers where the complainant has sustained injustice or hardship in consequences of a service failure or maladministration (a term which is not defined in legislation but has broad application), or clinical care. This is by virtue of amendments made to the 1993 Act in 1996, to empower the Ombudsman to investigate the merits of an action taken by a medical practitioner in the exercise of his or her clinical judgment⁴. This means the PHSO can consider complaints about unsatisfactory care or treatment⁵.

25. Investigations must be conducted in private⁶, and working methods are set out on the PHSO's website⁷, together with PHSO's 'Information Promise'⁸. There is also provision in the Act not to disclose information if it is contrary to 'public interest.'⁹

Section 15 which provides that (so far as relevant):

"Information obtained by [the Commissioner] or his officers in the course of or for the purposes of an investigation shall not be disclosed except—

(a) for the purposes of the investigation and any report to be made in respect of it,

(e) where the information is to the effect that any person is likely to constitute a threat to the health or safety of patients as permitted by subsection (1B).

(1B) In a case within subsection (1)(e) the Commissioner may disclose the information to any persons to whom he thinks it should be disclosed in the interests of the health and safety of patients in which case the affected person and the person from whom the information was obtained must be informed.

³ NHS COMPLAINTS AND THE HEALTH SERVICE COMMISSIONER By Hannah Gibbs, Landmark Chambers March 2018 <https://www.landmarkchambers.co.uk/wp-content/uploads/2018/06/16.-18-03-08-Complaints-Chapter-NHS-Law-and-Practice-Book-v5.pdf> As a general rule, case law applicable to one ombudsman is applicable to any discussion of the powers of the other.

⁴ NHS COMPLAINTS AND THE HEALTH SERVICE COMMISSIONER By Hannah Gibbs, Landmark Chambers March 2018 <https://www.landmarkchambers.co.uk/wp-content/uploads/2018/06/16.-18-03-08-Complaints-Chapter-NHS-Law-and-Practice-Book-v5.pdf>, section (3(7)).

⁵ Ibid, para 52. <https://www.landmarkchambers.co.uk/wp-content/uploads/2018/06/16.-18-03-08-Complaints-Chapter-NHS-Law-and-Practice-Book-v5.pdf>

⁶ [Health Service Commissioners Act 1993 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1993/41/section/11/2) 11(2)

⁷ [Health Service Commissioners Act 1993 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1993/41/section/11/2) 11(2)

⁸ <https://www.ombudsman.org.uk/about-us/corporate-information/freedom-information-and-data-protection/our-publication-scheme/information-promise>

⁹ **16.— Information prejudicial to the safety of the State.**

(1) A Minister of the Crown may give notice in writing to the Commissioner with respect to any document or information specified in the notice that in the Minister's opinion the disclosure of the document or information would be prejudicial to the safety of the State or otherwise contrary to the public interest.

(2) Where such a notice is given to the Commissioner, nothing in this Act shall be construed as authorising or requiring him or any of his officers to communicate to any person or for any purpose any document or information specified in the notice.

(3) References above to a document or information include references to a class of document or a class of information.

(2) Neither the Commissioner nor his officers nor his advisers shall be called on to give evidence in any proceedings, other than proceedings mentioned in subsection (1), of matters coming to his or their knowledge in the course of an investigation under this Act.”

26. If PHSO requires access to any information held by a body within its jurisdiction for the purpose of an investigation, it can use statutory powers under section 12 of the Health Service Commissioners Act 1993.¹⁰ For the purposes of an investigation the Commissioner shall have the same powers as the High Court in respect of—(a)the attendance and examination of witnesses (including the administration of oaths and affirmations and the examination of witnesses abroad), and (b)the production of documents.¹¹

27. The Ombudsman also has the power under section 14 of the 1993 Act to lay reports before each House of Parliament, either in relation to a specific case where the injustice sustained has still not been remedied or pursuant to any of his functions.

28. In 2014 a reform package on the PHSO was introduced but has never been further developed, nor adopted.

C. The Healthcare Safety Investigation Branch (the HSIB) and the HSSIB

29. The HSIB became operational in April 2017 as part of NHS Improvement, to conduct high-level investigations into patient safety incidents in the NHS.

30. HSIB is funded by the Department of Health and Social Care and hosted by NHS England and NHS Improvement.

31. Its remit is to undertake national investigations based on the scale of risk and harm, the impact of individuals and the potential for learning, until now without any safe space protection. A 2018 Direction gave the HSIB additional responsibilities to conduct local investigations into maternity incidents that meet the criteria specified in the Direction.

32. The Bill intends to transform the HSIB into a statutory Body, the Health Services Safety Investigations Body (“the HSSIB”)¹².

33. According to the documentation provided, the Bill would respond to long-standing demands to give the HSIB an independent statutory footing and would take up earlier proposals introduced in October 2019 in the Health Service Safety Investigations Bill ,in order to investigate incidents which occur in England during the provision of health care services which have, or may have, implications for the safety of patients (called “qualifying incidents”).

34. The HSSIB according to the Bill would become an independent executive departmental body (§ 93 of the Bill) to investigate qualifying accidents, with the right powers to investigate (§§ 94-96 of the Bill).

¹⁰ “For the purposes of an investigation pursuant to a complaint under section 3(1) may require any officer or member of the health service body concerned or any other person who in his opinion is able to supply information or produce documents relevant to the investigation to supply any such information or produce any such document.” <https://www.legislation.gov.uk/ukpga/1993/46>

¹¹ [Health Service Commissioners Act 1993 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1993/46) 12(2)

¹² See Schedule 13 of the Bill

35. Hence the provisions within the Bill will enable the new HSSIB to carry out its own investigations in 'safe space' (§§ 102-105 of the Bill).

More precisely §101 provides that the HSSIB reports are not admissible in proceedings (1) unless the High Court so orders (3).

§ 106 (1) and (2) contain a complete prohibition on disclosure of any protected material held for the purposes of an HSSIB investigation. §97 (5) and (6) also contain exceptions with reference to reports from HSSIB.

§107 introduces exceptions to prohibition to disclosure, the PSHO is not included in it.

36. This is meant to help to drive improvements in the NHS through promoting a culture of speaking up and learning from mistakes.

It is expected that the new body will carry out around 30 investigations a year.

37. There is a Memorandum of Understanding between the PHSO and the HSIB signed in 2019.¹³

38. The HSIB and the HSSIB fall into the jurisdiction of the PHSO.

IV. The exclusion of the PHSO from 'safe space' investigations in the national health service

39. As a preliminary point, it is important to note that the exclusion by the Bill of the PHSO from the "safe space" is not to be found explicitly in the Bill, but follows from the reading of the text and therefore is an induced rather than an explicit exclusion.

40. It is also deduced from § 106 (1) and (2) which contain a complete prohibition on disclosure of any held for the purposes of an HSSIB investigation.

41. Indeed, the induced exclusion is deduced from §101 which provides that the HSSIB reports are not admissible unless the High Court so order, hence the PHSO would need an order from the High Court to get access to the reports.

42. While §107 (and § 97) introduce exceptions to prohibition to disclosure, the PSHO is not included in it.

43. § 109 restricts all statutory powers requiring disclosure of HSSIB document, the PHSO is affected by this restriction.

44. Although, at first glance, it does not appear that the intention of the Bill was to undermine the PHSO, the problem seems to arise as a reflex of a general concept intended to improve the NHS in the UK. The PHSO is one of many authorities equally affected by this concept.

45. Furthermore, in order to give a more accurate picture of the situation generated by the Bill, it should be added that the PHSO is not definitely excluded from safe space. The PHSO may have access through the High Court, and it is difficult to conclude to what extent this procedure will not in fact grant the PHSO access to the necessary information. Any application to the High Court would only be possible if the PHSO were aware that there was information in existence about which they could make an application.

¹³ https://hsib-kqcco125-media.s3.amazonaws.com/assets/documents/hsib_mou_phso_uVd8lwX.pdf

46. To end up, this possible exclusion is of importance in several aspects and deserves an in-depth analysis of its consequences.

These aspects will be analysed at the international level first and second at the national level.

A. International standards with regard to the Ombudsman Institution

1. The fundamental principles

a. The UN Resolution ARES/75/186

47. Five main elements can be cited from the UN Resolution A/RES/75/186 on “The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law”.

48. First, it recognises in its Preamble “the long history of mediation institutions and subsequent developments around the world to create and strengthen ombudsman and mediator institutions, and recognises the important role that such institutions can play, in accordance with their mandate, in the promotion and protection of protection of human rights and fundamental freedoms, promoting good governance and respect for the state of and respect for the rule of law by redressing the imbalance of power between the individual and public service providers”.

49. Second, the UN Resolution states also further “Acknowledging the importance of affording these institutions, as appropriate, the necessary mandate, including the authority to assess, monitor and, where provided for by national legislation, investigate matters on their own initiative, as well as protection to allow action to be taken independently and effectively against unfairness towards any person or group and the importance of State support for the autonomy, competence and impartiality of the Ombudsman and of the process,”.

50. Thirdly, the UN Resolution stresses also “that these institutions, where they exist, can play an important role in advising Governments with respect to drafting or amending existing national laws and policies, ratifying relevant international instruments and bringing national legislation and national practices into line with their States’ international human rights obligations”.

51. Fourth, the UN Resolution also “3. Recognizes that, in accordance with the Vienna Declaration and Programme of Action, it is the right of each State to choose the framework for national institutions, including those of the Ombudsman and the mediator, which is best suited to its particular needs at the national level, in order to promote human rights in accordance with international human rights instruments.

52. Last but not least, the UN Resolution “Strongly encourages Member States: (a) To consider the creation or the strengthening of independent and autonomous Ombudsman and mediator institutions at the national level and, where applicable, at the regional or local level, consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles), either as national human rights institutions or alongside them;”.

b. The Council of Europe’s the Parliamentary Assembly Resolution 2301 (2019)

53. The Council of Europe’s the Parliamentary Assembly Resolution 2301 (2019) on “Ombudsman institutions in Europe - the need for a set of common standards” endorses the Venice Principles and calls on member States of the Council of Europe to: 9.1. ensure that the Venice Principles and other relevant recommendations of the Council of Europe are fully implemented in practice; 9.2. take all necessary measures to ensure the independence of ombudsman institutions; 9.3. invite their national parliaments and relevant governmental bodies to systematically refer to the Venice Principles when assessing the need for and the content of

legislative reform concerning ombudsman institutions; 9.4. refrain from any action aiming at or resulting in the suppression or undermining of ombudsman institutions and from any attacks or threats against such institutions and their staff, and protect them against such acts; 9.5. promote an “ombudsman-friendly climate” in particular by guaranteeing easy and unhindered access to ombudsman institutions, providing sufficient financial and human resources to those institutions and allowing them to co-operate freely with their peers in other countries and with international associations of ombudspersons.”

c. The Venice Principles

54. The Venice Principles emphasize that the Ombudsman is an important element in a State based on democracy, the rule of law, the respect for human rights and fundamental freedoms and good administration; recall that the Ombudsman is an institution taking action independently against maladministration and alleged violations of human rights and fundamental freedoms affecting individuals or legal persons; stresses that the right to complain to the Ombudsman is an addition to the right of access to justice through the courts; states that governments and parliaments must accept criticism in a transparent system accountable to the people.

55. Ombudsman institutions are at times experiencing attacks in some Council of Europe member States (and beyond); the importance of the international standards becomes all the more important in these situations. Deviating from them requires special justification.

2. Applicable international standards to the possible exclusion of the PSHO from “safe space”

56. The Venice Principles consist of 25 basic principles for the promotion and protection of the Ombudsman institution; they have been established as the new global standard for the ombudsman institutions by UN Resolution A/RES/75/186.

57. The exclusion of the PSHO from “safe spaces” is the result of a reform which lies outside the Ombudsman itself. However, even though it cannot be regarded as an attack on the Ombudsman institution, it affects some of these Principles in different ways, some of them negative.

a. Principles of a general nature

58. The Venice Principle are in some aspects very general, the Venice Commission accepts that many different interpretation of the Venice Principles are acceptable.

59. Principle 1 states: “1. Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms. While there is no standardised model across Council of Europe Member States, the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence.”

This principle does not call for any particular comment other than to assess whether in this case the undue effects of the Bill on the PSHO can be considered to reduce the PSHO’s independence or even mandate. It will be seen below (§§ 77-83) whether the independence of the PSHO is affected as such by the provisions of the Bill, and whether other aspects of the PSHO may be also affected.

60. Principle 2 states: “The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.”

This principle implies that any change in the status and functions of the PSHO should preferably have the most stable legal basis possible, and should not, for example, be dealt with in secondary legislation.

61. Principle 4 states : "The choice of a single or plural Ombudsman model depends on the State organisation, its particularities and needs. The Ombudsman Institution may be organised at different levels and with different competences." While this article opens the way for different models, organisation and competencies of an Ombudsman institution, it does not pave the way for a downward transformation of the existing model.

This principle recalls the discretion of States to choose the most appropriate model of Ombudsman. In this case, it is not a question of the Venice Commission assessing the model chosen, but of assessing whether, within the framework of the model chosen, some of the principles relating to the powers which the Ombudsman should enjoy have been respected.

62. According to Principle 5 , "States shall adopt models that fully comply with these Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country."

63. Finally, Principle 12 stating that "The mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms" recalls the general functions of the Ombudsman; the PHSO fits perfectly into this description.

b. Specific principles pertinent to the exclusion of PSHO from "safe spaces"

64. According to Principle 13, "The institutional competence of the Ombudsman shall cover public administration at all levels. The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities. The competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system".

65. According to the Commission's understanding of the Bill, the HSSIB will, like the HSIB today, be under the jurisdiction of the PHSO.

66. The HSSIB hence seems not to be excluded from the investigations of PSHO. PSHO will have the same competence/mandate to deal with complaints against HSSIB as with ordinary complaints on health care matters whether such matters are dealt with by HSSIB or not.

67. The PHSO mandate as such is not affected by the Bill, but the independent investigatory powers would appear to be affected and become limited.

68. Indeed, if a complaint concerns HSSIB itself or is/has been a healthcare case also dealt with by HSSIB then PSHO is not allowed to get access to the documents and information held within the Safe space by HSSIB without a decision by High Court. Even if such investigations by the Ombudsman would primarily deal with procedural matters without a need to enter the safe space, a need for information also on the material merits of the cases could not at all be excluded.

Investigatory powers are specifically dealt with by Principle 16 of the Venice Principles.

69. According to Principle 16, "The Ombudsman shall have discretionary power, on his or her own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies. The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant

documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty. The Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector”.

70. It is a very fundamental principle that an ombudsman must have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. There is no evidence to support that access for the PHSO (the institution itself being covered by provisions guaranteeing confidentiality) to the safe space will jeopardize the purpose of the general concept. The impact is on HSSIB conduct, but also on investigations where both bodies are investigating the same matter which require access to overlapping evidence.

71. Since prevention and correction of maladministration and provided that the mandate of an Ombudsman shall cover public administration at all levels as prescribed by Principles 12 and 13, complaints about malfunctioning within a body as the HSSIB require full and immediate investigatory powers of PSHO according to Principle 16.

72. In the Commission’s view, the proposed arrangement by the Bill, if it resulted in a limitation of the PSHO’s investigatory powers in respect of complaints directed against HSSIB, would be in conflict with the letter of Principle 16. The PSHO would then not have “unrestricted access “ to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential.”

73. The Venice Commission would hence recommend revising this aspect of the Bill in order to grant the PHSO “unrestricted access” to the HSSIB in order to avoid any restrictions in the investigatory powers of the PHSO, as provided for in Principle 16 of the Venice Principles.

B. The exclusion of the PSHO from “safe spaces”, the concerns at the national level

74. The Venice Commission acknowledges that it is a sensitive matter to draw the line between two very different interests, a health reform with HSSIB that seems well prepared and needed on the one hand, and the preservation of the investigatory powers of the PSHO on the other hand. It is not the task of Venice Commission to assess the health reform, HSSIB and the safe space as such, that is a matter of domestic policies.

75. Similar reforms are being introduced or already exist in other European countries, as for example in Denmark, Norway and Sweden. In Sweden for example a special governmental board (IVO) is supervising the health service and its personnel under a law on the safety of patients. The introduction of IVO did not result in any changes of the Parliamentary ombudsman’s full and independent access to information from the public health service or the mandate of the Ombudsman in that area. The Ombudsman also supervises IVO as other governmental boards.

76. Without going into an in-depth analysis of all the constituent elements of the PHSO institution, some deserve to be raised in order to better understand the ins and outs of the possible exclusion of the PSHO from safe spaces.

1. The infringement of the mandate of the PHSO

77. Maintaining jurisdiction of the PHSO over the HSSIB while at the same time limiting its access to relevant evidence would lead to wrong conclusions and would in any event seriously undermine public confidence in these conclusions. In time, this may lead to a more general undermining of the PHSO’s credibility. Ombudsman institutions do not have powers to make

binding decisions, and the “real” power of the ombudsman lies in persuading and convincing the authorities, the media and the public at large that he/she is right. This is a quite demanding task for the ombudsman if opponents can argue that the ombudsman’s findings are not based on all relevant evidence. When generally investigatory powers of an Ombudsman are affected it will also harm the general perception of the mandate of the Ombudsman.

78. Moreover, the mandate may thus be seen as lacking a core element of the concept of an Ombudsman. If such restrictions of access are introduced also in other fields it would undermine the independence of the institution.

79. It is not sufficient for the PHSO to have access to the High Court. Under principle 16, ombudsman institutions shall have a “legally enforceable right to unrestricted access”, and it will generally make the work of the ombudsman very difficult if he/she has to go through the courts to gain access to relevant information.

80. In addition, it does not seem unlikely that courts will take a careful approach, hesitating to overrule an argument that it is imperative to effective investigations that a safe space is preserved.

81. If, moreover, we consider that the Senior Coroner will have full access to information within the “Safe space”¹⁴ without the permission of the High Court but not PSHO, this further weakens the institution of Ombudsman as such but also in the eyes of the public. It is difficult to understand why such a distinction has been made. PSHO is after all a Parliamentary institution on a solid legal base in primary legislation that has had such access to information concerning the whole public sector for its supervision for a long time. Furthermore, the Commission were informed by the PHSO that the Senior Coroner cannot access information held by PHSO as part of investigations.

82. In the current situation, the argument is that it will not be possible for the HSSIB to obtain evidence unless involved NHS staff can be absolutely sure that such evidence does not fall into the hands of others, including the PHSO. However, nothing but assumptions have been presented to support this argument. On the contrary, as the PHSO has a statutory obligation to investigate in private, the institution can provide strong assurances that any protected information disclosed by the HSSIB would not enter the public domain as it is protected from disclosure under the Freedom of Information Act¹⁵ and as described above under § 25.

83. The Venice Commission reckons that even if the reform envisaged by the Bill was not in itself aimed at the PSHO, the powers and mandate of the latter may be affected by the possible exclusion of the PSHO from “safe spaces”. The effectiveness of its action and also the credibility of the institution as well as the PHSO’s image could be weakened by the probable exclusion from safe spaces.

2. The interest of citizens

84. As all general Principles on the Ombudsman state, the Ombudsman has a major role in protecting the fundamental rights of individuals.

85. Access to the Ombudsman is free of charge and, unlike access to the courts, does not require great financial resources or in-depth knowledge for citizens to see their rights respected.

¹⁴ See Schedule 14 of the Bill

¹⁵ See description § 25 above

86. If the institution of Ombudsman benefits from such Principles as those developed by the Venice Commission, it is also and above all because these institutions protect the rights of individuals in the end.

87. It is in the interest of the citizens to have a strong Ombudsman institution with all the means to carry out its missions. It is also in the interest of the citizens to be able to benefit from an adequate public health system, the improvement of which must be at the center of public policies.

88. Although on first sight the intention of the Bill was not to undermine the PSHO, it follows from the provisions and choices made that the mandate, independence and credibility of the PSHO are affected. It also results that there will be a difference in the treatment of cases depending on whether citizens contact the HSSIB or the PSHO; this is not an appropriate solution either in the citizen's perspective.

V. Conclusion

89. The Commission recalls that it is not its role to evaluate the choices on health policies that the Health and Care Bill provides. The analysis of this Bill has been made from the point of view of the possible exclusion of the PSHO from the safe space created by this Bill and the potential consequences for the PSHO as well as for the citizens whose rights it is the duty of the PSHO to promote and protect.

90. The recently adopted international standards were an opportunity to recall the importance of the Ombudsman Institution in a democracy and in the protection of human rights.

91. These texts were also an opportunity to remind States of their duty to support the institution and not to hinder or diminish its missions and mandates.

92. In terms of international standards, the exclusion of the PSHO from the safe spaces possibly created by the Bill would be at odd with Principle 16 of the Venice Principles, which were established as the new global standard for the ombudsman institutions by UN Resolution A/RES/75/186.

93. On the national level, even if the reform envisaged by the Bill was not in itself aimed at the PSHO, the powers and mandate of the latter might be affected by this project. The effectiveness of its action and therefore the credibility of the institution as well as the PSHO's image might be weakened by the possible exclusion from "safe space".

94. With regard to the interests of citizens, although it is not for the Venice Commission to assess the benefit to them of the health policy as provided for in the Bill, it notes that the possible harm done to the mandate, to investigative powers, to the image of the PSHO such as the difference in treatment depending on whether or not it is seized, can lead to infringements of the interests and equal treatment of citizens in the defense of their rights.

95. The Commission therefore invites the authorities to:

- Grant the PSHO "unrestricted access" to the HSSIB in order to avoid any restrictions in the investigatory powers of the PSHO, as provided for in Principle 16 of the Venice Principles.

The Venice Commission remains available for any further assistance.