



Northern Ireland  
Assembly

Committee for the Office of the First Minister  
and deputy First Minister

# OFFICIAL REPORT (Hansard)

Inquiry into Historical Institutional Abuse Bill:  
Clause-by-clause Scrutiny

10 October 2012

# NORTHERN IRELAND ASSEMBLY

## Committee for the Office of the First Minister and deputy First Minister

Inquiry into Historical Institutional Abuse Bill: Clause-by-clause Scrutiny

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**Members present for all or part of the proceedings:**

Mr Mike Nesbitt (Chairperson)  
Mr Chris Lyttle (Deputy Chairperson)  
Mr Colum Eastwood  
Ms Megan Fearon  
Mr Paul Givan  
Mr Alex Maskey  
Ms Bronwyn McGahan  
Mr George Robinson

**Witnesses:**

Mr Michael Harkin	Office of the First Minister and deputy First Minister
Mrs Cathy McMullan	Office of the First Minister and deputy First Minister
Ms Maggie Smith	Office of the First Minister and deputy First Minister

**The Chairperson:** We welcome Mr Michael Harkin, Mrs Cathy McMullan and Ms Maggie Smith from the Office of the First Minister and deputy First Minister (OFMDFM).

Maggie, I am not trying to blindside you, but we were just discussing the idea of a room. Would you be content if we had a brief discussion about that first?

**Ms Maggie Smith (Office of the First Minister and deputy First Minister):** Yes, certainly.

**The Chairperson:** I am just trying to get my head around what happens when someone turns up at the building that will host the inquiry and the acknowledgement forum. For instance, if I were to arrive, could I bring someone with me?

**Ms Smith:** Yes. You would have an appointment to come and speak. Is that the scenario we are in?

**The Chairperson:** Yes, just talk us through that.

**Ms Smith:** First, people will have the opportunity to register, as you know. When they come to give their testimony to the forum, it will be by appointment. From the beginning of their contact with the forum, dedicated witness support officers will make sure that people understand what is going to happen, when and where they have to come, and so forth. When people come to the acknowledgement forum on the day of their appointment, the officer will be there to meet them and to make sure that they are comfortable beforehand and that they have access to some private space.

Afterwards, the officer will make sure that they are comfortable before they leave, and if they want to sit and have a rest before they go, they can have the opportunity to do that. The witness support officers will also be able to provide tea, coffee and biscuits, and so on, just to look after them throughout the process.

**The Chairperson:** So, if they want private space, it is available?

**Ms Smith:** For the people who have an appointment with the acknowledgement forum, yes.

**The Chairperson:** If that was me, and I said to the support officer that I need to be alone, that is not an issue either?

**Ms Smith:** I would not think that it would be an issue.

**The Chairperson:** OK. I am a lot clearer.

**Mr G Robinson:** Do you mean a private waiting room of some description, where, perhaps, the person could be accompanied by a relative to talk things over?

**The Chairperson:** If I said that I wanted to be alone, there is a room?

**Ms Smith:** There is a space, yes.

**The Chairperson:** A space?

**Ms Smith:** Well, a room, yes?

**Mr G Robinson:** Is it private?

**Ms Smith:** Yes.

**The Chairperson:** That seems reasonable. Alex, did you want to bring up anything else on that?

**Mr Maskey:** No, I am happy enough from what I have heard so far that there will be facilities. From day one, you could end up having another discussion, but you are just going to have to deal with that as it arises, I presume. You can make all the best preparations, but if they do not work, you will know about it from the first victim who comes into the building for their first appointment. I do not know that you can do much more.

**Ms Smith:** Yes. What I am saying to you now is the bare bones of what is going to happen. Clearly, the detail of the arrangement is something that the acknowledgement forum will have worked out very carefully. As you know, there are people on the forum who have a huge amount of experience of doing this sort of work. They have worked all this out very carefully. Obviously, I do not know all the fine details of how it is going to work.

**The Chairperson:** Without asking where the inquiry will be based, will there be a reasonable amount of room for these sorts of things?

**Ms Smith:** Yes.

**The Chairperson:** You do not have any concerns about that.

**Ms Smith:** No, none whatsoever.

**The Chairperson:** OK. Thank you.

**Mr Eastwood:** Did Alex say that a meeting had already been set up? I am not sure. Unless you have already organised it, have you met victims' representatives to talk them through all this stuff? It would be useful to walk them through the whole process that they are going to have to go through.

**Ms Smith:** We are always happy to meet victims' representatives.

**The Chairperson:** Maggie, can I ask you about the Safeguarding Board Act (Northern Ireland) 2011? The Committee for Health, Social Services and Public Safety alerted us to it. Are you aware of any correlation that we should bear in mind?

**Ms Smith:** I would bow to the Health Committee's greater knowledge of the matter. The Safeguarding Board Act (Northern Ireland) 2011, as I understand it, is there to prevent maltreatment currently, rather than deal with the effects of historical abuse. The 2011 Act is about making sure that children are safe now. I can see that there is a connection, because the 2011 Act is part of the improvements — the new, more recent developments — that have been put in place to keep children safe and prevent abuse, but it does not map on to the Bill that we are looking at today.

**The Chairperson:** OK. We will move on to the question of amendments. There has been quite a lot of correspondence, as might have been expected.

**Ms Smith:** There has been, yes.

**The Chairperson:** May I invite you to walk us through the changes in the first instance?

**Ms Smith:** Certainly. I will highlight the changes first of all, if that would be convenient. Do you want me to go through the Bill?

**The Chairperson:** We should look at the changes first.

**Ms Smith:** OK. I will summarise those first, and then we can look at them individually in detail.

I have a list of issues that you asked us for after the previous meeting. First, there was the issue of the time parameters and our Ministers' willingness to remove 1945 as the beginning of the period of interest and change it. The Committee proposed that it should be changed to 1922, and we have sent you amendments to make that change. That change affects the Bill, but also the inquiry's terms of reference, because, as you know, it was first mentioned in the terms of reference. Again, we have sent you amended terms of reference.

When the inquiry chairman was here, you talked about the publication of the report and you had asked us to ask Ministers for an amendment to make it clear that the inquiry chairman would be publishing the report. Ministers have provided that amendment as well as two additional amendments to go along with it. So, there is a sequence of amendments after clause 10, which deal, first of all, with the inquiry chairman giving the report to the First Minister and the deputy First Minister, the publication of the report and the laying of the report in the Assembly by the First Minister and the deputy First Minister.

**The Chairperson:** From memory, Maggie, the report is to be given to the First Minister and the deputy First Minister at least a fortnight —

**Ms Smith:** Yes, it says two weeks or a period to be agreed between them.

**The Chairperson:** — ahead of publication.

**Ms Smith:** Yes.

**The Chairperson:** Was there a timescale for publication?

**Ms Smith:** No, there is not.

**The Chairperson:** OK.

**Ms Smith:** The chairman will give the report to the First Minister and the deputy First Minister about two weeks in advance. The date for publication is open, but the onus will be on the First Minister and the deputy First Minister to lay it in the Assembly as soon as is practicable after it is published. The idea is that the Assembly will officially get the report as soon as possible after it is published.

**The Chairperson:** OK. Are members content?

*Members indicated assent.*

**Ms Smith:** You had also asked — and Ministers have agreed — to bring forward an amendment to clause 1(3) to provide that any amendment to the terms of reference should be by affirmative action. You will see that that amendment is included among the various amendments that we have provided to clause 1. Basically what it is saying is that the First Minister and the deputy First Minister can amend the terms of reference at any time, but rather than just stopping there, it now goes on to say:

*"if a draft of the Order has been laid before, and approved by resolution of the Assembly."*

So, the Assembly will need to vote in order to bring in the change, and that makes the terms of reference extremely stable.

**The Committee Clerk:** Members may want to have a look at the wording of that in the letter of 9 October, which is in annex 1 of the tabled items. Members may want to cross-reference that with the Bill to see where those clauses will be inserted into the Bill.

**The Chairperson:** Are members content?

*Members indicated assent.*

**Ms Smith:** It is worth mentioning that, as a consequence of that, we also need to change clause 1(2). At the moment, the terms of reference that the Bill refers to are those that the First Minister and the deputy First Minister published on 31 May. Clearly, we now have amended terms of reference, because we have changed the date from 1945 to 1922, so the new date will have to be inserted while the Bill is in the process of going through the Assembly.

**The Chairperson:** That obviously begs this question: when and how will the amended terms be put into the public domain?

**Ms Smith:** Effectively, people will know now, because we are talking about this, that the Committee and the First Minister and the deputy First Minister are agreed that the terms of reference are changing.

**The Chairperson:** Will the amended terms go to the Floor of the Assembly? Will they be put in Member's pigeonholes? How will that actually be done?

**Ms Smith:** We will need to go back to Ministers about that as a result of this meeting.

In respect of the terms of reference, you asked us whether the chairperson and the panel would have the scope to make recommendations on preventing future abuse. The recommendations are really about current law, practice, policy, and so on. As I said the last time, the Ministers' view is that that is within the scope of the terms of reference as drafted, but they took the point that it is worth bringing out the fact that the panel should be thinking about preventing future abuse. So, in the terms of reference, they have inserted some new text that asks the panel to bear in mind the need to prevent future abuse when they are thinking about their findings and recommendations. It is marked in red in the amended terms of reference.

**The Chairperson:** Members, that is in the tabled papers. The amended terms of reference are on the third page under the headline, "Investigation inquiry panel".

Maggie, I appreciate that we are getting there. I just want to read out the amended text. It says:

*"Bearing in mind the need to prevent future abuse, the report will make recommendations and findings on the following matters:*

*An apology — by whom and the nature of the apology;*

*Findings of institutional or state failings in their duties towards the children in their care and if these failings were systemic;*

*Recommendations as to an appropriate memorial or tribute to those who suffered abuse;*

*The requirement or desirability for redress to be provided by the institution and/or the Executive to meet the particular needs of victims."*

It says:

*"Bearing in mind the need to prevent future abuse, the report will make recommendations and findings on the following matters".*

However, none of the four bullet points that follow seems to me to offer the ability to make a forward-looking recommendation for future actions.

**Ms Smith:** These four things are central to the recommendations and findings that the panel will make, but the Ministers and the inquiry chair have said that, within that, it is implicit that it would be acceptable for them to make recommendations that would prevent future abuse. The purpose of that additional text was to bring that point out more strongly.

**The Chairperson:** I thought that there was a feeling, perhaps among a majority, if not unanimously in the Committee, and also from Sir Anthony that making it explicit would be desirable.

*"Bearing in mind the need to prevent future abuse, the report will make recommendations and findings on the following matters".*

Can you say which of the four bullet points you would use to make those recommendations?

**Ms Smith:** I cannot.

**The Chairperson:** Could it be an apology?

**Ms Smith:** I cannot pre-empt how the inquiry is going to frame its recommendations or what it is going to make recommendations about.

**Mr Eastwood:** My reading of it is that it only really allows the inquiry chair to make observations on what happened in the past. I do not see why it would be very difficult to put in an extra bullet point that allows the inquiry to make any recommendations on law, practice or procedure. To me, that would make what we had asked for far simpler and more explicit.

**Mr Maskey:** I am, to some extent, guided by Anthony Hart, who sat in this room and told us that there was nothing in the terms of reference that precluded him from doing anything. There is a danger in putting the terms of reference up for discussion by everyone, quite frankly, because you could spend a week getting a form of words, which, we would all be satisfied, allows you to do something.

If I were conducting the inquiry and compiling findings about institutional or state failings, and so forth, I would have plenty of scope to make recommendations if I thought that it was necessary to make them. I am not looking at this from a minimalist point of view. I accept entirely that people might be worried that these terms of reference preclude something, but I have been assured by the chair of the panel that they will not preclude him from doing anything.

I would be aghast if such a report, after such an exhaustive inquiry, did not produce recommendations. Can someone tell me that the inquiry is not allowed to do so? I do not read that into it. I think that the four points allow us to do an awful lot. If I were on the panel, I would be saying, for example, on point two, that I would be doing what I want on point two. There is no full stop and then, "in their care, and if". It goes on to say, "and if there are failings". To me, that reads like two parts. There is no comma there, nor is there a full stop. Are we going to get into that type of discussion?

I think that the terms of reference are fine. More importantly, I have heard from the chair of the panel, who has said that he will proceed alongside his panel members. I am satisfied that we will get a result that will also bring forward recommendations. Of course, even when the report concludes, everyone

else will have a job of work to do afterwards, including the First Minister and the deputy First Minister, because the report will be handed to them by the panel to be published, and so forth.

People will have to make their minds up about what they are going to do afterwards. It does not stop with the report. The report, when it is finally produced, does not mark the end of the process. People will have to act on the back of the report. We are satisfied that the terms of reference do not preclude the types of things that we are looking for. I accept entirely that everyone wants to make sure that we get recommendations to prevent future abuse.

**The Chairperson:** From memory, you are right to say that Sir Anthony said that the terms of reference did not preclude him, but I think that he also went on to say that he saw no harm in making it explicit.

**Mr Lyttle:** Concerns were raised by Amnesty International, Barnardo's, Contact, etc, that the Bill does not provide for making recommendations beyond that. The Department's response contained the phrase:

*"This provides broad scope for the Inquiries recommendations and does not exclude the Inquiry making recommendations about the future."*

Perhaps that sentence would be worth considering for inclusion in the terms of reference. If there are people with concerns, it would make it explicitly clear that those types of recommendations would not, in any way, be prohibited.

**Mr Eastwood:** Like you Chair, Sir Anthony said that it would, maybe, be a good idea if it were explicit. We are going to pay these people, who are experts in the field, a lot of money, spend a couple of years doing it and take all the evidence. If we are all agreed that we want recommendations to come out of it, I do not see the harm in adding an extra line to make it explicit. I do not think that anybody will lose from that.

**Mr Lyttle:** It is in there already.

**Mr Givan:** Chairman, to be honest, I think that we are splitting hairs. I was not here for Sir Anthony Hart's comments, but I heard what Maggie said. If they can do that, why does it need to be explicit?

I think that Alex made a relevant point. When the work is done, it will be for others to take forward and implement, and it will not just be down to the group to recommend how this type of thing should never happen again. There will be a duty on others to do all that work. As it is, I think that it is sufficient. It does not preclude it.

**The Chairperson:** Does anyone have a fundamental objection to a fifth bullet point?

**Mr Maskey:** I do not object to it, and we can put in another 20 paragraphs for all I am concerned. I am satisfied that it can do the job, but I am just pointing out that, if we go down this line, we will spend a month looking over this or that wee sentence. I am satisfied that it addresses our needs. If OFMDFM wants to include another line in it, so be it; I am happy. I am not against it.

**The Chairperson:** Colum, are you suggesting that we should insert a fifth bullet point that says something like "lessons to be learned where appropriate"?

**Mr Eastwood:** I would be content with that. We have spent a month on this and we are not looking to add a whole lot of paragraphs. It is one sentence. I do not see the problem with it if everyone agrees.

**Mr Lyttle:** There is a fairly tidy sentence that the Department has coined that I think could be useful. It is in the table of responses.

**The Chairperson:** Throw it out again, Chris.

**Mr Lyttle:** It is:

*"This provides broad scope for the Inquiries recommendations and does not exclude the Inquiry making recommendations about the future."*

I take the point about splitting hairs. The only reason why I think it is worth considering is that a number of organisations that presented to the Committee raised concerns that there was confusion about whether that was going to happen. Given that there is a tidy sentence available, I do not think that its inclusion would, in any, way cloud the brevity of the section.

**The Chairperson:** Maggie, do you think it would cause the Department concern or difficulty to add a fifth bullet point?

**Ms Smith:** The amendments that were provided were those agreed by the Ministers. However, if you want to write to us about it, we will certainly pass your thoughts to the Ministers.

**The Chairperson:** Are members content?

**The Committee Clerk:** There was a suggested form of words previously for members to consider.

**The Chairperson:** We have not come to that yet.

**Mr Eastwood:** Was that your proposed amendment? Is that 2B?

**The Committee Clerk:** Yes.

**The Chairperson:** Yes.

**Mr Eastwood:** That is sensible. It only says "may report" as well.

**The Chairperson:** That is one of the draft Committee amendments. It reads:

*"Clause 1, page 1, line 7*

*At end insert—*

*...(2B) The Inquiry may report recommendations on changes to law, practice and procedure."*

**Mr Maskey:** Sorry, where is that?

**The Chairperson:** It is in Bill, Alex.

**The Clerk of Bills:** These are draft Committee amendments that were prepared for the Committee, based on the decisions it took in principle last week. They are suggested texts that could achieve the objectives, as I understood them, from your decisions last week. However, we understood at that time —

**Mr Maskey:** Are they in this folder?

**The Committee Clerk:** They are in members' packs at tab 5.

**The Clerk of Bills:** I was aware that amendments may be coming from the Department, but I prepared these ones in advance just in case members needed them. Given what the Department has put forward, a lot of this will not now be required. It is proposed that a draft subsection could be inserted into clause 1 simply stating that the inquiry may report recommendations on changes to law, practice and procedure. That is one way of achieving the aim that has been discussed.

**The Chairperson:** That sits separately from the terms of reference.

**The Clerk of Bills:** It could. There is a little paving amendment just above that, at clause 1, line 5, page 1, that would insert the phrase:

*"subject to this section, the terms of reference are as stated in the statement".*

That leaves the way clear for you to put in that little statement clarifying that the inquiry could do that. The reason for that approach is that the Committee clearly does not have within its gift the power to directly amend or influence the new statement, but it could insert that into the text of the Bill to clarify its intention.

**Mr Givan:** Let me just clarify, you want us to put one bullet point into the Bill.

**The Clerk of Bills:** No. Clause 1 deals with the inquiry and makes a number of broad overarching structural points, including a reference to the terms of reference. So given that clause 1 reads the terms of reference and the ministerial statement into the Bill, that is where you would go if you sought to make any changes to that. Indeed, that is where the Department's amendments will go to change the reference to 1922, and so on, and to refer to the new statement. If the Committee wished to do anything else on the broad overarching powers and functions of the inquiry, such as providing for this additional power, that is one place where it could register its desire to do so. If a further amendment were made to the terms of reference that achieved that by other means, the Committee would not need to pursue its amendment.

**Mr Givan:** Just to be clear, we would not include the other four bullet points in the Bill, just this one bullet point, because that is the only way that we can enforce that upon the terms of reference. Is that the tactic that is open to the Committee?

**The Clerk of Bills:** This is a legislative mechanism that is open to the Committee. Given that the terms of reference are referred to in clause 1, the Committee could say, "The terms of reference are in the statement subject to the following: the inquiry may also report on x, y and z". It is a legislative mechanism. Clearly, if the Committee had the power to amend the terms of reference directly, we would do that in preference.

**Mr Givan:** It is clever device to get that forced upon the terms of reference. My only issue with that approach is elevating one issue from the entire terms of reference and putting that into the Bill. I do not think that that is right. If you were going to put the terms of reference in the Bill, you would put all of them in. I do not think that it would be wise for the Committee to take one bullet point because that is the only tactical way, legally, that we could get that in the terms of reference. That is my only observation on that.

**Mr Eastwood:** That goes back to the original problem at the beginning of all this: the terms of reference are not in the Bill. There are reasons for and against that. So, I suppose that we have no other choice, unless the Department accepts our amendment as its amendment to the terms of reference.

**Mr Maskey:** Taking on board some of the observations that have been made, I would prefer to ask the Department whether it wants to put in another point. I appreciate that the Clerk of Bills prepared this; it is very helpful, so thank you for that. However, if we go down the road of changing the terms of reference by way of legislation, we will start opening other doors. I do not think that that is the right way to go, so I do not support it at this point in time. If, next week, we are really concerned that the terms of reference as they are preclude the type of outcome we want, I am happy to support something else. However, at this stage of the game, I would prefer to ask the Department to reconsider this. Perhaps an extra sentence would satisfy people, but I would prefer to let the Department reconsider it and come back next week. Then, we will look at the legislative alternatives if needs be.

**The Chairperson:** We will be looking for agreement next week.

**Mr Maskey:** Absolutely.

**The Committee Clerk:** To clarify, for a decision next week, we can have an amendment of this sort and we will see what the Department's reaction is as well.

**Mr Givan:** Just to be clear on this, Chairman, we will not support the inclusion of the terms of reference in the Bill, nor will we support a particular bullet point if you get it forced on the terms of reference by including it in the Bill.

**The Chairperson:** Would you look at a fifth bullet point in the terms of reference?

**Mr Givan:** I am happy for the Committee to ask the Department whether it would willingly put that in as part of their terms of reference. What I would not agree to — I think it is very clever and I am quite impressed with how you came up with this idea — but I would not support that approach.

**The Clerk of Bills:** To clarify, the third option is, of course, to leave this as a recommendation in the Committee report. If the Committee does not wish to recommend an amendment and has not had satisfaction from the Department on the issue as it sees it, the Committee can make a recommendation that this be addressed by way of an amendment directly to the terms of reference in the forthcoming statement, which it understands to be coming from the Department.

**The Chairperson:** Which has to come anyway.

**The Clerk of Bills:** That would move away from the legislative approach on which some members are not so keen.

**The Chairperson:** We have clarified where we all stand, I think.

**Ms Smith:** The next clause for which you specifically asked for amendments was clause 21. You used clause 21 to raise the issue of changing the term "presiding member" and replacing it with "chairperson". Several pages of amendments have been provided to do that and to make sure that the term "chairperson" is defined and that that person is defined as a member of the panel as well.

**Mr Lyttle:** I am sorry to have to throw a slight spanner in the works, although it is positive. The OFMDFM letter says that the First Minister and the deputy First Minister believe that the terms of reference already cover the explicit provision for making recommendations. However, they:

*"are content to make this more explicit to clarify the issue."*

They are, it would appear, content to make that change, but we will go back to them anyway.

**Mr Givan:** They did. That is why they put in the words:

*"bearing in mind the need to prevent future abuse".*

**Mr Eastwood:** There is a difference between more explicit and explicit enough.

**The Chairperson:** We will certainly put that in the letter back to them. However, the change from "presiding member" to "chair" is agreed.

**Ms Smith:** Yes, it certainly is.

**The Chairperson:** It is entirely uncontroversial and unanimously accepted. Everyone is smiling.

**Ms Smith:** Also at clause 21, we have provided a departmental amendment that makes clear that harm or damage includes death or injury. It says specifically:

*"harm" includes death or injury;"*

We have also —

**The Chairperson:** Why was that clarification put in?

**Ms Smith:** The chairperson asked us to put that in.

**The Chairperson:** Can you inform us about his thinking?

**Ms Smith:** In particular, it was to do with the reasons for restriction orders at clause 8. One of the reasons for which he is permitted to make a restriction order is in the case of harm or damage. He wanted to make it clear that it included death or injury. We put it into clause 21 to make sure that it

would apply to any point in the Bill where the word "harm" is mentioned. In that way, it will apply to other clauses as well.

Talking of clause 8, we have a departmental amendment that affects clauses 8 and 18, the purpose of which is to protect witnesses' anonymity. If someone is called to the inquiry to give evidence but is concerned that they may be subject to harm as a result of people even knowing that they are going to give evidence, observing them giving evidence or knowing later that they have given evidence, the chairperson will have the option to make a restriction order saying that their identity cannot be disclosed or published. At clause 18, we have provided that —

**The Chairperson:** Sorry, Maggie. I think that the Committee Clerk wants to make sure that everybody is on the right page.

**The Committee Clerk:** Members, it is the letter of 10 October. The last page of that letter deals with clauses 8 and 18.

**Ms Smith:** First, we have proposed an amendment to clause 8 to allow for a restriction order to prevent the:

*"disclosure or publication of the identity of any person":*

We have also proposed an amendment to clause 18, so that rules can be made to give the chairperson power to make orders to protect witnesses' identity. Those orders will be based on orders that already exist in the criminal justice system.

Lastly —

**Mr Givan:** Maybe it has been covered in previous hearings, but where did that come from?

**Ms Smith:** Again that came from the chairman.

**Mr Givan:** So, did he specifically ask for that?

**Ms Smith:** Yes.

**Mr Givan:** When this is used, will it be based on the same criteria as are contained in the Criminal Evidence (Witness Anonymity) Act 2008?

**Ms Smith:** It will be similar. It will provide for orders to be made in situations in which people believe that they may be at risk, another person may be at risk or there is a risk of damage to property. It is a fairly wide-ranging definition of harm. There are various mechanisms for protecting people's identity under those orders, such as the use of pseudonyms or screening. It is about, if necessary, keeping the name of the person and who they actually are from the public while they are giving evidence.

What I should say is that the chair does not envisage using those powers very often. The way that he explained it to us was that he feels that they will be rarely used, but he sees it as an important safeguard in case it is ever needed.

**Mr G Robinson:** If it is there, it will be at his disposal.

**Ms Smith:** Yes.

**The Chairperson:** Is everyone content?

*Members indicated assent.*

**Ms Smith:** Before I move on, it is probably worth highlighting that OFMDFM will be required to make rules so that, in turn, the chairman can make orders. In the normal way of subordinate legislation, those rules would be subject to public consultation and scrutiny by the Committee. They will be laid in the Assembly and go through the normal process for subordinate legislation.

There will be people who want to or who are being asked to give evidence to the inquiry, who are, perhaps, unable to come to the inquiry. That may be because they are not so well, are old or live a very long way away and it would be very difficult for them to travel. The chairman has been very clear that he wants to use live TV links to facilitate those types of situations.

Clause 6(1) already gives the chairman a lot of scope in how he hears evidence. However, there is an issue about what happens when people are outside Northern Ireland, and he wants to take evidence under oath. Therefore, the Department has proposed an amendment to clause 6 at page 3, line 40 of the Bill. The amendment will apply our perjury laws to anyone who gives evidence under oath from somewhere outside Northern Ireland. It will be as if they are here when they give evidence.

There is some more text in that amendment, but, really, it will just put an explanation of what we mean by live TV links in the Bill.

**The Chairperson:** Is that common practice? Would the Perjury (Northern Ireland) Order 1979 conflict with any laws that apply in the country the witness might be speaking from?

**Ms Smith:** No. The law that will apply will be Northern Ireland law. They will be taking part in a judicial proceeding that is taking place in Northern Ireland under Northern Ireland law.

**The Chairperson:** Right. I presume that the implications would extend to asking for a person's extradition.

**Ms Smith:** That would be in criminal circumstances. The proposed amendment would apply to the inquiry. As it stands, and as you know, under the Bill, the chairman can hear evidence under oath from someone here. Really, the proposed amendment will extend that power to hear evidence from someone who is not physically in Northern Ireland.

**The Chairperson:** OK. Are members happy?

*Members indicated assent.*

**The Chairperson:** Is that it?

**Ms Smith:** That is all that we have brought for you today.

**The Chairperson:** I think that you have covered all the issues.

**Mr Eastwood:** I have a couple of other points. Clause 5 deals with the end of the inquiry. In the same way as you have done with the terms of reference, is there any way that you could bring the Assembly in, rather than it just being left up to OFMDFM? If, for some reason that is not envisaged, the inquiry was to be closed down, the Assembly would have a say in that, rather than it just being laid before the Assembly. I think that the Assembly should be entitled to a view, for whatever reason.

**Ms Smith:** You asked us about that last week, and, as I explained then, we do not expect to have any agreement on that.

**Mr Eastwood:** Is there any reason for that?

**Ms Smith:** The Ministers feel that it is sufficient as drafted.

**Mr Eastwood:** I am just thinking about any future inquiries. It gives quite a significant amount of power to any Minister who has instituted an inquiry to stop it at any given time. In this case, I do not see any real need for it, but we need to be aware that we are laying down a fairly significant precedent. I do not see why you would not envisage the Assembly having any kind of role.

**Mr Lyttle:** I want to seek clarification. Through the Chair, Colum are you suggesting that the affirmative resolution that is used for amending the terms of reference could be used to bring the inquiry to an end?

**Mr Eastwood:** Yes.

**Mr Lyttle:** OK.

**The Chairperson:** The only issue Colum is that the research paper said that that power is consistent with the Inquiries Act 2005.

**Mr Eastwood:** Yes; I know. However, I am still not very comfortable with the precedent that it lays down. That is my position.

**The Chairperson:** The research paper suggests that it is not, in fact, a precedent. It states:

*"In 2007 the Northern Ireland Court of Appeal ruled that the independence of an inquiry could not be said to have been compromised by section 14 of the Inquiries Act 2005".*

As I understand it, clause 5 mirrors that.

**Ms Smith:** I am not sure that it absolutely mirrors it, but it is certainly similar.

**The Chairperson:** Yes, but there would be an expectation that if it went to the Court of Appeal, there may well be the same result.

**Ms Smith:** Absolutely.

**Mr Eastwood:** Fair enough, Chair, but I do not see the harm of putting that extra safeguard in the Bill. It is my position. You do not have to agree with it.

**The Chairperson:** That is fine.

Maggie, are there any more amendments to come from the Department? Is that possible?

**Ms Smith:** Yes, there is a possibility of some more coming, and we will communicate those to you as quickly as we can.

**The Chairperson:** Actually, did you indicate last week that there will be an amendment to clause 19, which deals with applications to the Crown?

**Ms Smith:** I did.

**The Chairperson:** If you cannot give us the wording, can you give us the thought process behind what principles are likely to underlie that? We want to close this off next week.

**Ms Smith:** Yes, and I understand that and appreciate it.

We expect to bring forward a bit of clarification to clause 19. Also, we are looking at some further protection just to copper-fasten the privacy of the acknowledgement forum. That is basically what we are looking at.

**The Chairperson:** Can you say anything more about clause 19? I cannot process what is required here or what you are trying to achieve. Can you give us any clarity?

**Ms Smith:** The wording used at the moment is quite old fashioned and opaque, so we really just want to modernise the language and clarify what is actually meant there.

**The Chairperson:** Right, OK.

**Mr Eastwood:** Regarding clause 6, which, I think, we talked about last week, too. Clause 6(3) states:

*"In making any decision as to the procedure or conduct of the inquiry, the presiding member"*

— who is probably the chairperson now —

*"must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."*

Surely the line about unnecessary cost is unnecessary? Should it not be more about "must act with fairness"? I think that the rest of that is a given. I would rather see the emphasis put on that than on the cost to the public purse, not that I am not considering the cost to the public purse. The concern arises that that leaves the possibility for people not to get particular legal advice or whatever depending on what is decided by the inquiry or, as it seems to be in a lot of this, OFMDFM?

**Ms Smith:** Clause 6 is extremely important because really what it is saying is that the chairperson is the person who directs the inquiry, so he is in charge of the evidence, the procedure and the conduct of the inquiry. What clause 6(3) does within that is extremely important. The two parts are what really need to be absolutely central to his thinking. The reference to fairness means that the chairperson, in all his decisions, must always be conscious of the need for people to be able to give their best case and to avoid self-criminalisation. So, it is about making sure that people understand what is being said to them and that they have an opportunity to reply and to explain their position as best they can.

Besides that, every decision that the chairman makes will have cost implications. So, as chair of the inquiry, he is effectively the chair of a small organisation that has all sorts of budgetary considerations, and so on. So, it is doubly emphasising the fact that he is in charge, that he has to take account of all those issues when making decisions and that they are all important.

**Mr Eastwood:** I appreciate that, but my concern is that the second part of the sentence should not impact on the first. People should be entitled to what they need in respect of legal representation or whatever, whatever the cost.

**Ms Smith:** So you are saying —

**Mr Eastwood:** I am trying to get to this point: will cost become an issue? Will somebody be denied their rights on the basis of cost?

**Ms Smith:** That is not what this is saying at all. What the clause does is set the parameters within which the chair will run the inquiry. It is saying that both factors must be taken into account. It is about the whole design of the inquiry: the way it is conducted; what its procedures are; and how it gathers evidence. So it is about the tone of the whole inquiry. It does not say anything about individual rights. It really just sets the framework.

You may be interested to know that among the rules that we will bring forward later on — I think that I mentioned this previously — there will be ones on the way in which decisions are made about witness expenses, including legal expenses, and the administration of expenses. We will be bringing those rules to the Committee.

**The Chairperson:** Thank you very much, Maggie, Cathy and Michael. Can I ask you once again to be available to us next week?

**Ms Smith:** Certainly.

**The Chairperson:** Members, I am minded to say that it would be better to go through the formal clause by clause next week, given the amount of necessary toing and froing there has been. Are members content?

*Members indicated assent.*

**The Chairperson:** I just want to emphasise this again. Members have clearly stated their positions on certain issues. Paul has been very clear, for example, on the terms of reference, where there is flexibility, where there is a position. That is perfectly right and proper. I just do not want somebody coming in next week with a new set of proposals or a new line in the sand.

**Mr Eastwood:** I mentioned before that I have some concerns about witnesses' expenses. I am also concerned about the fact that "chairperson" is not written in here anywhere and that it is all about OFMDFM. I do not want to open a can of worms. I just want to —

**The Chairperson:** You have put down a marker.

**Mr Givan:** You do not want to pay them too much.

**The Chairperson:** Are you going to propose an amendment next week?

**Mr Eastwood:** I will do so if that is necessary.

**The Chairperson:** Perhaps you could do that in advance, if you can.

Members, I know that we have a lot of papers here, but are you content with annexes 1, 2 and 3 of the letter in your tabled papers dated 9 October, with the proviso on annexe 3 that we will write to the Department to see whether it would consider a fifth bullet point in the paragraph headlined, "An investigation inquiry panel"?

*Members indicated assent.*

**The Chairperson:** Perfect. Thank you very much.

**Ms Smith:** Thank you very much, Chair.

**The Chairperson:** Are members also content with annexe A of the letter dated 10 October, which we just talked about?

*Members indicated assent.*

**The Chairperson:** Thank you.