



Northern Ireland
Assembly

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

OFFICIAL REPORT (Hansard)

Inquiry into Historical Institutional Abuse:
Draft Inquiry Rules

1 May 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Chris Lyttle (Deputy Chairperson)
Mr Leslie Cree
Mr Colum Eastwood
Ms Megan Fearon
Mr Alex Maskey
Mr Stephen Moutray
Mr George Robinson
Mr Jimmy Spratt

Witnesses:

Ms Roberta Dalton	Office of the First Minister and deputy First Minister
Mrs Cathy McMullan	Office of the First Minister and deputy First Minister
Ms Kerry Morrison	Office of the First Minister and deputy First Minister
Ms Maggie Smith	Office of the First Minister and deputy First Minister

The Deputy Chairperson: We welcome to the Committee Maggie Smith, Cathy McMullan, Kerry Morrison and Roberta Dalton, who are officials from the Office of the First Minister and deputy First Minister (OFMDFM). Maggie, would you like to set the context and remind us of the purpose of the draft rules? Perhaps you could take us through them. I note that the draft rules are organised beneath headings in bold type. Perhaps you could take us through them on that basis.

Ms Maggie Smith (Office of the First Minister and deputy First Minister): Thank you for inviting us here to talk about the draft rules. As you know, they are out for consultation. That consultation closes on Friday 24 May. I understand that you have invited us back after that to talk about the rules again. We certainly look forward to coming back to talk to you about the outcome of the consultation.

We are conscious that the rules are quite detailed and not the easiest read. We will try to give you a tour through the rules so that you have a route map that will make it easier for you to read them. As you know from all the previous work that you did on historical institutional abuse, the framework for the inquiry is already set out to a certain extent in the terms of reference, and particularly through the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013. The draft rules complete the picture. As you probably remember from previous discussions, they add detail to the information that is in the terms of reference and the Act.

Of course, the rules are supplementary to the Act. Section 21 of the Act sets out OFMDFM's rule-making powers. It is permitted, under the Act, to make rules on matters of evidence and procedure;

on the return or keeping, after the end of the inquiry, of documents given to or created by the inquiry; and on awards made to witnesses under section 14. I will refer to each of the groups of rules in turn. Those are the only areas in which OFMDFM can make rules.

Before we turn to the rules, it might be helpful if I take you back to the Act and say something about the role of the chair. Section 6 provides:

"Subject to any provision of this Act or of rules under section 21, the procedure and conduct of the inquiry are to be such as the chairperson may direct."

It also states:

"In making any decision as to the procedure or conduct of the inquiry, the chairperson 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)."

It is in that context that the rules are being made. They are designed to assist and support the chair. Within that statutory framework, he is, of course, responsible for directing the inquiry.

First, we will look at rules 3 to 35, which are on matters of evidence and procedure. I suggest that we do not refer to every rule in turn; there are quite a lot. If you are content, I will highlight some particular points, and then we can come back to areas that members would like to explore further. Almost all the rules refer to the oral hearings, which is where the chairperson and panel will examine evidence in public. There are a couple of references to the acknowledgement forum, which rule 19 deals with. The terms of reference, as I am sure you remember, are very clear. They say that the acknowledgement forum is a confidential environment where people can talk about their experiences. For that reason, the Act permits OFMDFM to make rules to the effect that evidence given for the purpose of any particular part of the inquiry must not be disclosed:

"in the proceedings of any other part of the inquiry unless the chairperson so orders".

It also says that they cannot be disclosed:

"in any criminal or civil proceedings in Northern Ireland unless it is necessary to avoid a breach of Convention rights (within the meaning of the Human Rights Act 1998)".

Rule 19 makes clear that every member of the acknowledgement forum has an individual responsibility for confidentiality owed to the victims and survivors who speak to the forum. It makes clear, as the Act says, that the evidence that is given in the acknowledgement forum cannot be disclosed, even within the inquiry, unless it is directed by the chair. So, that gives a real measure of confidence to all the victims and survivors.

The terms of reference state that the inquiry will be inquisitorial, which is something that we talked about previously. That means that the chairperson is very much in charge of proceedings. He directs proceedings and, in particular, controls the questioning of witnesses. So, the inquiry asks the questions of witnesses. That is completely different from the standard adversarial court approach in which you have two parties' barristers arguing the points in front of a judge who, for most of the proceedings, is relatively passive. Our chairperson — our judge — is very much in command of everything that happens.

That is the way that it is set out in the terms of reference, but that is not reflected in the Act. As I mentioned, the Act makes it clear that the chair is responsible for the procedure. However, it is in the rules where we make it very clear that it is the chair who directs the questioning. In particular, you might be interested in looking at rule 10. Rule 10 deals with oral evidence and makes it very clear that the inquiry, through either a member of the inquiry panel or counsel to the inquiry, will ask the questions of witnesses. There is also an allowance within that rule whereby the chairperson may, if he so chooses, permit certain people to suggest to the panel questions to ask or even to ask questions themselves. However, generally speaking, the rule will be that the inquiry asks the questions. That is very much in line with the ethos, which has been there from the beginning, that the process should be inquisitorial, absolutely fair to everybody and not over-lawyered.

In the rules, provision is made for what are termed core participants. There will be certain organisations or individuals who have a particular interest in the inquiry processes, the outworkings of

the inquiry and the report. Those will be people who have played, or might have played, some sort of role in the events that are being investigated. They have a direct and significant role or interest in the matters being inquired into, or they might be subject to explicit criticism during the inquiry's proceedings or in its report. Clearly, those people or organisations will want to make sure that they are protected and protect themselves. As we discussed before, the principle of fairness is extremely important in the inquiry. Rule 5 allows the chairperson to designate people who have a particular interest in the inquiry as core participants. Doing that benefits or assists those people because they get some special treatment. For example, they are able to be informed of the dates when witnesses will appear. They can have the opportunity to suggest a question to the panel, if the chair allows it. If the chairperson so decides, they may be permitted to make opening and closing statements to the inquiry. If appropriate, they can also be provided with pre-publication copies of any inquiry report. Clearly, they would not get their copies until after the report had been provided to the First Minister and deputy First Minister. However, they would have the opportunity then, for fairness, to see what criticisms had been levelled in their direction.

Among the amendments discussed at Committee Stage was one that deals with anonymity orders. The reason why that amendment was made is that the chair recognised that there may be situations in which a witness is unwilling to come forward to the inquiry because they feel that they or their family could be at risk of harm or damage to their property. The chairperson asked, and the Committee agreed, that there should be an amendment to allow OFMDFM to make provision for orders similar to anonymity orders within the meaning of section 86 of the Coroners and Justice Act 2009. The rules that honour that are 22 to 35, which are very detailed. They set out a process by which people would apply for an anonymity order and the process by which the chairperson would make the decision. In essence, what those rules do is allow people who are concerned about their personal safety to make an application. If the chairperson is convinced of the case, he can allow their anonymity to be protected. That can be done by the use of pseudonyms, by voice modulation when they are giving evidence and by screening. As required, the rules are based on that particular legislation.

The second area in which OFMDFM is permitted to make rules under the Act is the return or keeping, after the end of the inquiry, of documents given to or created by the inquiry. As you can imagine, there will be a huge number of documents. In fact, I think that they already have a substantial number of documents. Rule 20 requires the chairperson to make sure that the record of the inquiry is kept in good order and to transfer the record of the inquiry to the Public Record Office of Northern Ireland (PRONI) at the end of the inquiry. Just as the terms of reference state that the acknowledgment forum must be confidential, they also state that the records of the acknowledgement forum must be used only for the purposes for which they were originally intended and that they must be destroyed at the end of the inquiry. Again, that is not provided for explicitly in the Act, but it is provided for explicitly in the rules. Rule 21, therefore, provides the chairperson with the ability to direct destruction of acknowledgement forum records. He can do that during the inquiry, but he must do it at the end of the inquiry so that the record that transfers to PRONI at the end of the process does not include any records for the acknowledgement forum.

The third area in which rules can be made is for witness expenses. That is dealt with in rules 36 to 48. When you come to read those rules in detail, it is important that you also have your copy of the Act or at least section 14 of the Act, because that section and these rules complement each other quite closely. Section 14(1) of the Act provides:

"The chairperson may, with the approval of OFMDFM, award such amounts as the chairperson thinks reasonable to a person—

(a) by way of compensation for loss of time; or

(b) in respect of expenses properly incurred, or to be incurred,

in attending, or otherwise in relation to, the inquiry."

So, basically, if somebody has lost money because they have lost time, or if they have incurred expenditure, they have the opportunity to apply for an award.

The Act also makes clear who is eligible for an award. It says that a person is eligible only if they are actually:

"giving evidence to the inquiry or attending the inquiry to produce any document or other thing",

or if, in the chairperson's opinion, they have such an:

"interest in the proceedings or outcome ... to justify ... an award."

Generally speaking, it would be people or parties who are actually called to come to answer points that are being put to them by the inquiry.

Clearly, as it is set out in the Act, the chairperson has fairly broad discretion. Rules 36 to 48 lay out the process sequentially: first of all, the process by which people will apply; the process of determination; the process for notifying an applicant of whether they have been awarded an amount; the process for dealing with bills, and the process to be used if a bill is disputed. So, although the chairperson's discretion is very broad in the Act, the detail is very much in the rules. In applying for an award, clearly, applicants will be expected to provide information to justify their applications. The rules make clear that there will be an expectation that people will produce that information at the time.

Rule 37 is important because it proposes some general criteria that the chairperson must use in deciding whether an applicant should have an award. There are two general criteria. The first is the financial resources of the applicant, and the second is whether making an award is in the public interest. Both of those criteria need to be considered — not either/or; both. That rule spells out additional detail in relation to institutions. In particular, it makes clear that institutions will not be able to get awards for loss of time.

If an applicant gets an award, it will come with a lot of conditions. The chairperson must put conditions on an award. Rule 38 lists the minimum conditions that must be put on an award in respect of legal expenses. He must specify the nature and scope of the legal work to be funded and the hourly rates that will be paid. The rules actually set out the maximum hourly rates for different members of the legal professions. The chairperson must put an upper limit or limits on the sums or number of hours that are to be funded, and state the days and times for which attendance at the inquiry by recognised legal representatives, paralegals or trainee solicitors will be funded. So there cannot be a situation in which people turn up at the inquiry with their lawyers and the lawyers then send in a bill for simply observing what is going on at the inquiry. They will be funded only on the dates which are set out in the letter of award that they receive. The actual legal representatives who will be in attendance at the inquiry will be named. The frequency with which bills must be submitted to the inquiry will also be set out. The idea of that is to make sure that solicitors or barristers actually send in their bills in a timely way, rather than saving them all up and sending in huge bills at the end. That is the minimum set of conditions that the inquiry will put on any award.

There is no scope in this framework for legal expenses or, indeed, any expenses. That is, there is no scope for retrospective applications. Everything has to be authorised in advance. So, if an applicant anticipates expenditure, it is incumbent upon them to put in an application to the inquiry before the work is done or the money is spent. They can put in applications at any time. So, as soon as they know that they will incur costs, they can put their applications in and the system will run from there. They cannot come along at the end and say, "Well, I employed a barrister for 20 hours or 20 days, and here is my bill". There is no scope for that whatsoever.

The Deputy Chairperson: Maggie, will that be made crystal clear to people in advance of the process?

Ms Smith: Yes; that is all set out in the rules. What I should also say is — going back to the whole idea of section 6 and the chair's responsibilities in directing the inquiry — that the terms of reference, the Act and the proposed draft rules are what is being put in place by government. That is the framework, obviously, within which the chairman will operate. However, he will also make his own decisions about the way things will operate within that framework. The inquiry has a website, and the chairperson has already published some things on the website about how he envisages things working. He will publish more in the future. So, we are making information very public and crystal clear through proposed rules and, if they are agreed by the Assembly, the final version of the rules, but also the inquiry is setting out information publicly.

Mr Spratt: On a point of order, first, Chair. Sorry, Alex, for jumping in. I have concerns. We have heard the briefing on the document. At present, this document is in public consultation. I am uneasy, to a degree, that we say or do something today in relation to something that is in the public domain on consultation until we hear what the result of the public consultation process is. Perhaps, Chair, you

would rule or the Committee Clerk would advise. Has legal advice been sought? Should we really be meddling in something that is so close to closure? Did somebody say that it was 29 June or 29 May?

Mrs Cathy McMullan (Office of the First Minister and deputy First Minister): The closing date for the consultation is 24 May.

Mr Spratt: So, we are within days of closure of the public consultation process, which we will then have to look at. We will have to go through it bit by bit. My previous understanding is that any time that we go through Bills that will go in front of the Assembly, and for which the Committee has a scrutiny responsibility, those issues were done in closed session. That is the norm. I think that it still is the norm for Bills. I am putting on the record my concerns about a public consultation process that is ongoing and to which the public have every right. Something could be said here today that could — I am not saying that somebody would — maybe, in some way, muddy the waters in the public consultation process. That is my concern and worry. On that basis, I will certainly not be asking any questions about it today. We all need to be extremely careful.

The Deputy Chairperson: It is helpful to put that on the record, Jimmy. The purpose of today's meeting is obviously to get a briefing on the consultation process and to have a greater understanding about the rules.

Mr Spratt: I am concerned about the questioning of the officials.

The Deputy Chairperson: It is quite a detailed document. You are right to say that we should pay proper care and attention not to overstep the mark of just receiving an outline briefing on the consultation framework.

Mr Maskey: I take Jimmy's point, but I am not sure where that leaves us. I only want to get a bit of clarity on one of the rules. I am more than happy to wait until the public consultation is over so that we can have an analysis from the officials.

My wee inquiry is just around how a very important dimension of this it to try to keep costs down and all the rest of that, so we clearly do not want an open-ended situation where people turn up with lawyers or whoever and put a claim in for money. However, are there not likely to be positions where somebody does not see a need to get some bit of legal advice or whatever, but something turns up the following week in an inquiry, so that person then may think they need to double up on that. At that point, can they then make a claim to the chairperson for legal advice?

Ms Smith: Yes. I directed your attention particularly to rule 10 because that deals with the process in the actual inquiry room. There is, however, a process that comes before that. The inquiry will first of all write to people — organisations or individuals, whoever they are — and to the parties from whom it believes it will need to get information to set out the points and invite them to provide evidence. They will have the opportunity, first, to provide evidence in written form, which the inquiry will look at before making final decisions. So people or organisations will know that they are in the frame because they will receive a letter. It is important, also, that people have the opportunity to apply for expenses at any time during the inquiry. These letters will be going out to different parties at different stages; things will come to light, and situations will change.

Mr Maskey: Thanks very much for that.

Mr Cree: This has been helpful from the point of view of clarification, which is a good thing. Some questions come to mind, but perhaps they are better left until after the consultation, on another day.

The Deputy Chairperson: Maggie, the consultation is scheduled to close on Friday 24 May. It was our intention to invite you back for a more detailed analysis of the issues that will have been raised in the consultation and to give us an opportunity to respond to those. Will you be happy to come back after the closing date?

Ms Smith: Absolutely.

The Deputy Chairperson: Thank you very much for your briefing today. It is quite a detailed set of rules, and it has been helpful to get your outline of them.

Mr Spratt: Should we not consider dealing with that in closed session? I know that we do not like doing closed sessions, but this is a crucial and delicate matter. Our Committee scrutiny of the legislation is crucial.

The Deputy Chairperson: I will make that point to the Chairperson and come back to you, Jimmy.