Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Briefing by the Attorney General on Clause 34 of the Justice Bill

18 January 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Lord Browne
Mr Paul Givan
Mr Alban Maginness
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:

Mr John Larkin	)	Attorney General for Northern Ireland
Ms Claire Duffy	)	Office of the Attorney General for Northern Ireland

The Chairperson (Lord Morrow):

As agreed at the meeting on 11 January, the Attorney General for Northern Ireland is in attendance to brief the Committee on clause 34 of the Justice Bill. I remind members that clause 34 places a requirement on Departments and public bodies to have due regard to crime, antisocial behaviour and community safety implications when exercising their duties. Some Ministers were concerned about the implications and requirements that might arise for Departments, and the Minister of Justice has given an undertaking that he will go back to the Executive once the Committee has considered the clause.

I welcome the Attorney General for Northern Ireland, Mr John Larkin QC, and Claire Duffy, head of division of the Office of the Attorney General. Perhaps the Attorney General will outline his views on clause 34, after which members may wish to ask some questions.

The Attorney General for Northern Ireland (Mr John Larkin):

It is a pleasure to have an opportunity to speak to the Committee, and I am grateful to do so in respect of clause 34. Before I invite the Committee to look closely at the text, which I assume you all have before you, it is right that I compliment the Justice Minister for providing the occasion for this discussion, because, as will become clear shortly, I have significant reservations about clause 34, so it is a tribute to the Minister's openness to debate that he has encouraged this exchange between us today.

I invite the Committee to engage with me in a glossed reading of the clause. As we know from clause 34(4), a "public body" is defined broadly. Some witnesses referred jocosely to public bodies being hard to identify, and many of them do not fall within the definition. Interestingly, I do not think that the police would be included, but that is probably because they have a like or analogous duty in other respects. Of course, it includes Departments.

"A public body", as defined in clause 34(4), must exercise its functions "with due regard". That is a classic public law formulation that one finds throughout our body of legislation. Then there are a number of matters to which regard has to be had. At this point, I should say that, where a public body fails to have regard to a statutorily relevant consideration, its decision is susceptible to being quashed in an application for judicial review. Indeed, it could be further argued that it creates a duty that might be owed to the public at large and that, therefore, might conceivably and independently support an action for damages against the public body that it was suggested had failed to comply with the duty. I pause to observe that such a clause is often described, not unkindly, as a mom and apple pie clause, and I suspect that everyone is broadly supportive of the kind of objective that is at issue here. Most public bodies working in this field are already thinking or should be encouraged to think along those lines. I invite the Committee to reflect on whether more would be gained by advancing that public duty in other ways than by creating the potential for vast expense, which, in my view, would certainly be experienced by public bodies that have to defend — sometimes successfully, sometimes not — applications for judicial review or other actions founded on clause 34. Indeed, we can see how difficult the exercise in which they have to engage is.

Clause 34(1)(a) refers to:

"the likely effect of the exercise of those functions on crime and other anti-social behaviour in that community".

The phrase "the likely effect" would involve people engaging in a predictive exercise, which, of course, is not always readily or easily done.

Secondly, in addition, clause 34(1)(b) refers to the need for a public body to:

"do all that it reasonably can to enhance community safety."

That is a positive duty: it is not merely to protect what we have or to protect the public but to "enhance community safety". That is amplified in clause 34(3), which states:

"References in this section to enhancing community safety in any community are to making the community one in which it is, and is perceived to be, safer to live and work, in particular by the reduction of actual and perceived levels of crime and other anti-social behaviour."

There are two references to "perceived", which is significant and begs the question: perceived by whom?

In summary, I consider that that is likely to give rise, given the appropriately rights conscious, and, perhaps, not so appropriately, litigious culture that we have in this jurisdiction, to a great deal of problems and claims without necessarily generating positive outcomes in improved policymaking or thinking by those various public bodies.

One example, which has often been discussed in this context, is that of local government refuse collection. A council could, for example, arrange refuse collection times that result in bins being left out overnight in an area of significant student social activity and in the vicinity of places where students have frequent resort with access to alcohol and so forth. Those bins could be pushed over. That is the kind of thing that a council might well want to reflect on and to correct in due course. However, would it be right for a council that had inadvertently not done so to lie open to the prospect of being judicially reviewed or having an action maintained against it for its failure under clause 34?

There are, I suppose, two alternative positions. One relates to section 37 of the Garda Síochána Act 2005. That section states:

"A local authority shall, in performing its functions, have regard to the importance of taking steps to prevent crime, disorder and anti-social behaviour within its area of responsibility."

It is confined to local government, but it says something along the same lines of clause 34(1) of the Justice

Bill, albeit in a slightly pared down version. Subsection (2) of the 2005 Act states:

> "Subsection (1) is not to be taken to confer on any person a right in law that the person would not otherwise have to require a local authority to take any steps referred to in that subsection or to seek damages for a local authority's failure to take such steps."

Therefore, section 37(1) imposes the duty, and subsection (2) essentially results in the duty not being actionable. That may be attractive on one view. However, I think I have picked up a thread that has been expressed by a number of Committee members in recent times, which is that one should legislate to a purpose and for a purpose. Section 37 strikes me as a monument to legislative futility, because, one has on the hand a duty, but a duty that is enforceable by no one. A via media might be that, if one goes down the road of clause 34, one ensures that the duty can be made justiciable only by, for example, the Minister or, alternatively, the Minister and/or the Attorney General. The latter reference to the function of the Attorney picks up the kind of theme that one sees, for example, in the Contempt of Court Act 1981, which states that contempt of court proceedings cannot be brought save by or with the consent of the Attorney General. It also reflects the role of the Attorney with respect to relater action or, for example, in bringing an injunction to enforce civilly breaches of the criminal law or public law duties.

The three possible approaches are clause 34 as it is at present; clause 34 undone, as it were, by the addition of something like section 37(2) of the Garda Síochána Act 2005; or via media, where there is a duty but there is a sieve to its enforcement and public bodies — I am thinking particularly of local councils — are not subjected to essentially mischievous and frivolous litigation simply because of a little inadvertence on their part.

There might well be a case for enforcing a duty if — to use the example of refuse collection again — councils, despite having the problem repeatedly drawn to their attention, continually create a situation which is, to use the fashionable word, "crimogenic" and likely to give rise to antisocial behaviour. It seems appropriate that, when going down this road, there should be a vehicle for making clause 34 workable.

Mr Givan:

Thank you for that. Everything you said seems to make a lot of sense. To get it a little bit more down to my level and beyond the legal jargon, I will summarise what you said. Currently, clause 34(1)(a) refers to "the likely effect". What is that? Clause 34(1)(b) contains the word "reasonably". There could be a lot of argument as to what would be deemed reasonable. Clause 34(3) contains the word

"perceived", but the question is: perceived by whom? Those are the three main points that I have picked out. If it were taken to court, there could be a lot of argument. As it is worded, it could leave public bodies open to litigation.

You said that section 37(1) of the Garda Síochána Act is cancelled out by subsection (2).

The Attorney General:

It is.

Mr Givan:

So, that is outlining something but it is legally unenforceable. Therefore, what is the point? Am I right that you think that the better option would be to retain clause 34 but add another element to say that it is enforceable either by the Minister or by the Minister and the Attorney General.

The Attorney General:

And/or the Attorney General, yes.

Mr Givan:

Is that your preferred option?

The Attorney General:

On balance, it probably is. In fairness, it is something that has only very recently arisen in discussions. It strikes me as having comparable models with the Contempt of Court Act and the other enforcement roles of the Attorney General. The dual control mechanism might be preferable, because one can see why the Justice Minister is going to have access to fully developed policy support in the field, but there might be occasions when, for a variety of reasons, the Minister might feel constrained to act, and the Attorney General, appropriately, could act independently in that setting.

Mr Givan:

How does that work? I take it that schools and education boards will be regarded as public bodies?

The Attorney General:

The education boards certainly will be.

Mr Givan:

So, if someone took a case against an education board because a school had not properly secured its grounds and something happened, would that come to the Minister through the court, and the Minister and the Attorney General then would need to give their consent for a case to proceed?

The Attorney General:

Suppose, for the sake of argument, that a board does not put in place sufficient security measures at a school that is close to a bail hostel and there are, perhaps, legitimate concerns on the part of parents about the safety of their children. If the parents wished to raise an issue, instead of kicking off litigation that might be ill-founded, they would, I suggest, write to the Justice Minister. The Minister would look at the matter, and he might be firmly of the opinion that the measures in place at the school were quite enough to address all the concerns. One of the interesting points that would then arise is the issue of perceived levels of crime. There is a free-standing problem with the use of the word "perceived", because even though the Minister might say, entirely accurately, that there was really no objective problem, if there was an ill-founded perception, someone could get something up and running based on clause 34, unless there was a safeguard against litigation simply being kicked off without the control mechanism.

The Chairperson:

Will you elaborate a little more? Clause 34(1)(b) refers to the need for a public body to:

> "do all that it reasonably can to enhance community safety."

That could come down to interpretation, could it not?

The Attorney General:

Yes.

The Chairperson:

What you might perceive to be reasonable, somebody might feel was not reasonable.

The Attorney General:

Indeed. I think it was Lord Hailsham who, as Lord Chancellor, said that two people might take diametrically opposite views without either of them losing their title to be regarded as reasonable.

The Chairperson:

Therefore, you could have this protracted debate and dialogue to find out whether, in fact, all reasonableness has been applied, and then you could make a decision after that deliberation as to whether you take the step. Is that right?

The Attorney General:

Courts have traditionally been appropriately sensitive to judgements about what is reasonable. The difficulty is that, when you tie "reasonably" to "perceived", as in clause 34, you create potentially an enormous problem. It is not that, in every case, a public authority would in fact be acting unlawfully, but that the impression could reasonably be given to citizens that it had not done all it reasonably could in the context. Hence, unless you have the kind of sieve mechanism that I am suggesting, or something similar, public authorities could indeed face a huge number of actions that are, perhaps, doomed to failure, but nonetheless were legitimately brought on one view and, however one looks at is, would certainly result in huge expense for the public authorities concerned.

Mr A Maginness:

The Attorney General's comments are very helpful. I am unhappy about the creation of yet another duty on public authorities that would, perhaps, add an excessive burden. I am sympathetic to the idea of an amendment to this clause. In addition, it is very useful to highlight a potential conflict between reasonableness and perception.

I welcome these comments, but would it not be more straightforward to adopt section 37(2) of the Garda Síochána Act 2005, which qualifies 37(1)? Would that not be a more preferable way of dealing with it? It makes it straightforward. It says, effectively, that a public body has an obligation to take measures to reduce criminality and antisocial behaviour, but it is not actionable. It is not something that somebody can go to court with and get damages. Would that not be a preferable situation, rather than a less clear position in which you are inviting either the Minister or the Attorney General to make some sort of adjudication?

The Attorney General:

Obviously, these are policy matters in which the judgement of the Committee and, in the fullness of time, the Assembly as a whole is paramount. However, I think that legislation should be for a purpose. It should do something; it should achieve a measurable result.

The structure of section 37 is a classic case of "on the one hand, and on the other". Section 37(2)

literally cancels out 37(1). It is the kind of exercise that is likely to promote a good deal of cynicism on the part of the public. A public authority, of whatever kind, falling within clause 34 could, if it had the benefit of such a provision, literally fold its arms cynically and do nothing.

Mr A Maginness:

Section 37 seems to be an encouragement to a local authority to carry out certain responsibilities. That is an important thing for the law to state. I think that that is the purpose of section 37.

Would it not be preferable for the Attorney General, who is an independent law officer serving the Executive and the Government at large, to make the decision on any action for damages or on breach of duty, rather than the Minister of Justice or any other Minister, who might not be considered independent enough to make a proper assessment?

The Attorney General:

I can see the force in that position.

Ms Ní Chuilín:

Thank you for the presentation. I share your thoughts on section 37 of the Garda Síochána Act. I think it is a bit cynical and very cute. I am not from a legal background, but on the one hand, it is saying what we will do something and on the other hand it says that we will really do nothing. If anything, regardless of where people are coming from, they want to see changes that can be clearly understood. If part of the legislation is to do nothing on subsection (a), people will understand that. It is a much more honest position.

The definition of "antisocial behaviour" has come up here time and again. If that was clearly defined, perhaps the whole area of what "perception" might be would be more limited and narrow. Perception is mine, yours and everybody else's. That is an issue. Some people who responded to the consultation also felt, not about clause 34 but in general, that it really should be down to the police to define or act on antisocial behaviour, rather than anyone else, because it then becomes arbitrary. For example, young people hanging around may just be hanging around, but the perception of other people might be that they are being antisocial.

There is no point in asking a public body to do something if we are tying its hands as to what it can reasonably do.

The Attorney General:

I am grateful for that question, because it raises again the issue of the problem with "perceived". One of the issues that police officers constantly record is the acronym YCA — youths causing annoyance. One can understand how elderly persons might be a little unnerved simply by the presence of young people at street corners, whether or not the young people are actually doing anything. On the other hand, if they are creating a good deal of noise, kicking balls against walls, and so forth, one can quite see how pensioners in particular might be alarmed by that.

Good architecture can avoid those kinds of arrangements. It might be entirely appropriate for good, intelligent planning to take account of those kinds of considerations. However, it should do so against a fairly objective substratum of data. That is why I do have a problem with "perception" as found in that clause, as I think Ms Ní Chuilín has.

I am grateful for your comments about section 37. I do think it will promote a climate of some cynicism about legislation.

The educational objective can be achieved in other ways. Although there is a vestigial educative function for some forms of legislation, I think that, when you create a duty, there should be someone who is at least capable of trying to enforce it.

Ms Ní Chuilín:

Thank you.

The Chairperson:

Would three teenagers standing at a gate at the bottom of someone's path be antisocial behaviour?

The Attorney General:

You ask me a difficult question, which I will duck by referring to the word "perceived" in clause 34. Those young people may be behaving entirely lawfully; nonetheless, if I was of a particularly nervous disposition, I may resent their presence and regard it as antisocial.

The Chairperson:

Would the legislation, in its present form, be enforceable in such an instance?

The Attorney General:

Are you talking about clause 34?

The Chairperson:

Yes.

The Attorney General:

If, for example, the particular behaviour was facilitated by the opening hours of council facilities, it may give rise to a person saying that the behaviour happened only because those facilities are open at a particular time and get the children coming home from school or coming from another place of public resort. You might then have the council being carted off to court, rightly or wrongly, simply on the basis of perception.

The Chairperson:

While we have the Attorney General here, does anyone else have any questions?

Mr McCartney:

Not on clause 34. Are we —

The Chairperson:

We are really now in the hands of the Attorney General. It depends on whether he is prepared to take questions about other clauses. We know that you came to address clause 34.

The Attorney General:

I did. It is probably better if we confine it to that. I certainly found this useful in getting feedback from members. However, there are some areas of the Bill that there is a keen interest in, and rightly so, but, I suspect those are the very areas that, for a variety of reasons, I probably cannot talk about. Rather than go into that, it might be preferable to simply keep it to clause 34.

The Chairperson:

I have not read his mind, but I suspect that the member is not going to ask about the parts that are maybe in another arena or will be soon. Am I right, Mr McCartney?

Mr McCartney:

Yes, absolutely. However, it might be unfair as the Attorney General may not have been briefed on

the subjects that I wanted to ask about.

The Chairperson:

Mr Larkin, thank you for your attendance here today. We appreciate it, and it was very useful.

The Attorney General:

Thank you, Chairman.