



Northern Ireland  
Assembly

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COMMITTEE FOR JUSTICE

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**OFFICIAL REPORT**  
(Hansard)

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**Justice Bill:  
Formal Clause-by-Clause Scrutiny  
(First Session)**

8 February 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  
Mr Conall McDevitt  
Mr David McNarry  
Ms Carál Ní Chuilín  
Mr John O'Dowd

**Witnesses:**

Ms Nichola Creagh	)	
Mr David Hughes	)	Department of Justice
Mr Gareth Johnston	)	
Mr Dan Mulholland	)	
Mr Robert Crawford	)	Northern Ireland Courts and Tribunals Service
Mr John Halliday	)	

**The Chairperson (Lord Morrow):**

Today is the Committee's last scheduled opportunity to consider the clauses of the Justice Bill. I remind members that a number of issues with the Bill were parked. Part 3 of the Bill on policing and community safety partnerships (PCSPs) was decided on informally by the Committee. The Department has tabled a number of additional provisions that the Committee has yet to take a

view on. A paper outlining the outstanding issues is in members' packs. We will go through each outstanding clause in turn.

On 27 January, members indicated that they were not in a position to formally consider the clauses in Part 3 of the Bill on PCSPs. The Committee took its decision on those clauses informally. A record of the Committee's informal decisions on clauses 20 to 25 and schedules 1 and 2 and the minutes of the meeting is in members' packs.

We welcome Gareth Johnston, who is head of justice strategy division, David Hughes, who is head of the policing and policy strategy division, and Dan Mulholland and Nichola Creagh from the policing policy and strategy division. We will proceed through the issues as detailed in the Committee Clerk's memo.

There has been some consideration about the definition of antisocial behaviour, as raised by Include Youth in its submission. The Department has provided a copy of the definition of antisocial behaviour as used in the Anti-social Behaviour (Northern Ireland) Order 2004. I ask members to look at the definition, although you have probably already done so, and to make any comments that you have on that issue. The departmental officials have indicated that they do not want to add anything.

***Clause 20 (Establishment of PCSPs and DPCSPs)***

**Ms Ní Chuilín:**

We are abstaining.

**Mr O'Dowd:**

We will be abstaining on this section.

*Question, That the Committee is content with the clause, put and agreed to.*

*Clause 20 agreed to.*

***Clause 21 (Functions of PCSP)***

**The Chairperson:**

The Committee agreed that clause 21(1)(d) should be amended as proposed by Include Youth in its written submission to insert "and fully considering" after "to make arrangements for

obtaining". The Department has provided a draft amendment to that effect and a consequential amendment for clause. A copy of the draft amendment is attached to the Department's letter in members' packs.

**Ms Ní Chuilín:**

We abstain.

*Question*, That the Committee is content with the clause, subject to the Department's proposed amendment, *put and agreed to*.

*Clause 21 agreed to.*

**Clause 22 (Functions of DPCSP)**

**The Chairperson:**

Are there any comments on this clause?

**Ms Ní Chuilín:**

We abstain.

*Question*, That the Committee is content with the clause, *put and agreed to*.

*Clause 22 agreed to.*

**The Chairperson:**

We will take clauses 23 to 33 together because no issues, of substance, anyway, were raised when we did our informal consideration.

**Ms Ní Chuilín:**

We are abstaining.

**Mr McNarry:**

We are abstaining from the votes on clauses 30, 31, 32 and 33.

**The Chairperson:**

Mr McNarry is abstaining from the votes on clauses 30, 31, 32 and 33.

*Question, That the Committee is content with the clauses, put and agreed to.*

*Clauses 23 to 33 agreed to.*

***Clause 34 (Duty on public bodies to consider community safety implications in exercising duties)***

**The Chairperson:**

The Committee has not reached a decision on this clause. At its meeting on 27 January, the Committee considered a proposed amendment from the Department to address the concerns of members regarding the statutory duty arising from clause 34. The Committee agreed to make a decision on clause 34 today to provide members with more time to consider the issue.

The Department has now provided a further proposed amendment requiring it to seek the approval of the Attorney General before issuing any guidance as to how a public body should comply with a duty that it hopes will offer sufficient reassurance. The amendment also proposes to change the term “in any community” to “in any locality” for the sake of clarity. Perhaps we could hear from the officials on this.

**Mr David Hughes (Department of Justice):**

Since the papers were given to the Committee, the Department has heard from the Attorney General, who has seen the amendment that you have in front of you. He said that he approves the intention behind the Department’s proposed amendments, particularly his role in approving the guidance. He has made suggestions about how the duty could be more firmly tied to the guidance, including one that the guidance should set out the extent to which failure to adhere to it might be relied upon in proceedings. He believes that, if the amendment is made, it will be better than the filter mechanism that he proposed and briefed the Committee on previously. We think that his approval that the amendment is heading in the right direction should offer assurance. In his view, the guidance would be sound and would offer sufficient protection.

If the Committee is content to approve the proposed amendment, it will enable us to continue to take it in the direction that the Attorney General has indicated so that we can bring an amendment for consideration that continues with the movement that you see in the amendment that we have provided to date. In those circumstances, the Committee could carry out its report on the Bill to the effect that it approves the amendment on the grounds that a further amendment could be made to satisfy the Attorney General’s concerns.

**The Chairperson:**

Does anyone wish to comment or to ask any questions?

**Mr O'Dowd:**

It is a bit convoluted.

**Ms Ní Chuilín:**

So, we are proposing an amendment that needs to be amended?

**The Chairperson:**

It is slightly confusing.

**Ms Ní Chuilín:**

Is that what is happening?

**The Chairperson:**

Maybe it us, rather than it being that you are not explaining it well enough.

**Mr Hughes:**

I will explain it more clearly. The Attorney General has said he approves of the way that the further amendments that you have in front of you are going and that they are beginning to meet the intention behind the Department's amendments, but he thinks that it should be taken a further step in two ways. He suggested that, instead of it just being a duty on a public body to have due regard to the likely effect of the exercise of its functions, and so on, it would be better if the duty was on the body to have due regard to guidance that sets out how antisocial behaviour can be taken into consideration in exercising its functions. The duty would be dependent on the guidance, and, because the guidance would need the approval of the Attorney General, he would then give an assurance about the nature of the guidance, and it would give sufficient weight to the way in which the duty can be exercised.

When he gave evidence to the Committee, he raised a concern about the importance of preventing unnecessary and wasteful litigation as a result of that duty, and he suggests that the guidance could set out the extent to which that failure could be relied on in legal proceedings

against that public body if it failed to adhere to the guidance.

It is quite complicated. We have not come to you with a draft amendment to reflect that because we are still trying to make sure that we can instruct an amendment to be drafted, which achieves what the Department and the Attorney General agree is a way forward, but it is quite complicated.

**Ms Ní Chuilín:**

I do not mean to sound facetious, but the amendment is going in the right direction but it needs to be amended. Therefore, the amendment needs to be amended. The duty is not tied into the guidelines tight enough, so they also need to be amended, and there is no suggested amendment of what needs to be amended. Is that right? So, what are they saying?

**The Chairperson:**

When are we likely to see the amended amendment, or are we likely to see it?

**Mr Hughes:**

We need to be satisfied that the amendment that we finally hope to bring forward is drafted to capture what we want to achieve. The Department and the Attorney General are looking at the same thing. We would need to ensure that the Attorney General is satisfied that it is capturing what he thinks it is trying to achieve.

I know that the Bill, in all its parts, goes to the Executive, and this is the part of the Bill to that the Executive have paid particular attention to. We, therefore, want to make sure that there is satisfaction there, too. The amendment would be brought forward at Consideration Stage, but I will stand corrected on that from anyone who knows the procedure better than I do. However, we would have to have gained the satisfaction and approval that it is going in the right direction prior to that.

**The Chairperson:**

Are you finished on your point?

**Ms Ní Chuilín:**

So, it is four weeks.

**The Chairperson:**

Yes. That is a good point.

**Mr McDevitt:**

If the Department is proposing to bring forward an amendment at Consideration Stage, and the Committee cannot consider that as part of the report, it will have to take its chances in the Assembly. That is basically it. I do not mean this in a light-hearted way, but I would not feel comfortable making a commentary on any half-baked amendment. The best the report could be is silent, or it could offer some very general commentary on the context of the conversation. It would be impossible for us to be able to provide any definitive opinion at our report stage, if you are not proposing to bring it to the Assembly until Consideration Stage. That is the problem for us.

**The Chairperson:**

It certainly is. Do you want to comment on that, Mr Hughes?

**Mr Hughes:**

Would it be possible for the Committee to take a view on the amendment that is in front of you, which is moving closer to —

**Mr McDevitt:**

As a Committee member, my problem with this relates to the report that we have to agree to. If the amendment is not going to be tabled, we cannot have an opinion on it. That is the problem. We are caught in that.

**The Chairperson:**

Mr Hughes, do you take the point that is being made?

**Mr Hughes:**

I entirely understand that it is impossible for the Committee to take a position on an amendment that it cannot see and that is based on, what I admit, is a rather convoluted explanation. However, it is a convoluted suggestion and policy. We have taken the amendment that you see in front of you, and the Attorney General has seen it and has commented on it positively. At the points at

which it is amending the Bill, as introduced, it is negating some of the issues that he has raised. Would it be possible, then, to take a view on this amendment? If the Committee sees that the amendment is going in the right direction, it will assist in bringing an amendment in the same direction later on.

**Mr A Maginness:**

The problem with that is that we are not sure what this means. It is convoluted; it is not crisp, clear and transparent, as far as the Committee or individuals are concerned. We discussed this. When the Attorney General discussed it, he referred to subsection 2, I think, of the Garda Síochána Act 2005. That was clear. If we are going to make law here, we have to have certainty. We have to have a public body that is able to read the law and say what we have to do in particular circumstances. That is not clear, as far as I can see. It may be moving in the right direction. I do not know whether it will hit the right point, but, at this time, it is convoluted. Furthermore, as far as the Department and the Attorney General are concerned, it is a work in progress. It is impossible for us to give a judgement on it.

**The Chairperson:**

The Committee can comment or take a position on what is in front of us, not on what might be there one day.

**Mr Hughes:**

I agree, but if the Committee is able to take a view on the amendment that is before it today, these amendments would still form the basis of the amendment that the Department would be seeking to meet the Attorney General's concerns. There would be further elaboration and further developments on it. What has been provided to the Committee amends the Bill, as published, in a useful way, and there may be some additional amendment to take it further. Nevertheless, we are still seeking the amendments on the reference to locality, the requirement for the Attorney General to give approval to the guidance, and so on. Those things would still stand.

**The Chairperson:**

Yes, but the Committee will be left with no alternative but to seek its own amendment on it.

**Mr McDevitt:**

I want to be sure that I understand Mr Hughes correctly. Is Mr Hughes saying that the current

amendment — the one that is before us — will be proposed formally by the Department and that the Minister will propose the amendment at Committee Stage?

**Mr Hughes:**

No, because we want to make some changes to it. However, the changes in the amendment will still be there, although it will be more than that, as it were. It will be this amendment plus.

**Mr McDevitt:**

If the amendment were actually tabled, the Committee could form a view. Even if the Minister had every intention of scrubbing it a week later and tabling another one, the Committee could form a view at Committee Stage. If it is not being tabled, we just cannot do that.

**Mr Gareth Johnston (Department of Justice):**

For clarity: this amendment has been tabled by the Department. We are simply saying that it may not be the final answer.

**The Chairperson:**

We were going the wrong way about trying to make that point, but you have made it well.

**Mr Johnston:**

Essentially, the Department will be inviting the Committee, if it were willing, to reach a decision and to take a vote on that amendment. We have said that more will be brought at Consideration Stage in light of the further discussions.

**The Chairperson:**

Is it going to be tabled at Consideration Stage?

**Mr McCartney:**

It is like 'Blue Peter' in reverse.

**Mr Johnston:**

An amendment will be tabled at Consideration Stage.

**The Chairperson:**

I know that. You are taking me into Alice in Wonderland stuff here. *[Laughter.]*

**Mr Johnston:**

With respect, I wonder whether the question is not so much about what would be tabled at Consideration Stage but what is being proposed now to the Committee, which is what the Committee reports on.

**Ms Ní Chuilín:**

That is not the procedure.

**The Committee Clerk:**

The Committee will report on its consideration of the clause, whether it agrees with the clause as it stands in the Bill or whether it agrees the clause as amended. If so, it has to spell out the exact amendment that it is agreeing to. It may also reject the clause entirely. The only way that the Committee can make a decision on the Department's proposal is to know the exact wording. In the report, the Committee will have to say that it agrees to the clause as amended by the Department. If the Department does not table that amendment, it will cause a problem.

**Mr Hughes:**

If I may, —

**The Committee Clerk:**

If the Committee agrees to the clause as amended, it has to spell out in its report the amendment that it has agreed to. It will be either an amendment that the Department will table or one that the Committee will table. If the Committee agrees to the Department's amendment today, knowing that the amendment will change —

**Mr Hughes:**

The critical part is that the amendments to what was originally published and are contained in the text include the actual elements of substance that will still be followed through. The changes to the Bill, as published, are around limiting the scope to prescribed organisations, ensuring that the guidance is approved by the Attorney General, and changing the reference from "community" to "locality". There will also be a couple of other changes. All those changes will still be followed

through. However, we are saying that we are looking at the possibility of taking further changes beyond that but in the same direction. We will not be stepping away from the changes that are contained in the amendment. We will still follow them through.

**The Chairperson:**

The amendment that is out there somewhere is in the making. Is that right? I suspect that you are trying to get agreement here with the Attorney General. What happens if you do not get agreement?

**Mr Hughes:**

The position is that the Attorney General has set out quite clearly what he thinks is an effective way of amending this clause. We have considered and can see precisely what he is suggesting and we think that it is a way forward. Therefore, we are working on the basis that we are heading in the same direction.

**Mr McNarry:**

In a Justice Committee in particular, one expects honesty to be the best policy, but I am afraid that Mr Hughes's policy of honesty has tripped him up. I would have abstained on clause 34, anyhow. *[Laughter.]* However, there is no way that I would be able to change my judgement on that based on something that I cannot even see. We can wrap this up: procedurally, we cannot go down that route. It would be the most dangerous precedent that any Committee could establish. As somebody said, it would be like 'Blue Peter' in reverse — they are saying, "Here's one I haven't prepared yet, but I am going to prepare it for you later." I think that you recognise that we are in dangerous territory, Chairman.

**Mr O'Dowd:**

As the Committee Clerk laid it out, the Committee can vote on the amendment. In the normal course of events, the Department would come back at a later stage to say that it wanted to move beyond where it was at Committee Stage. That would and can happen, though it is not the best way to do things. Alternatively, the Committee can state to the Department whether it is travelling in the right direction. I do not think "take a view of it" is the right terminology, but, for the purpose of its minutes, the Committee can tell the Department that it is in the right direction of travel — the Committee's general opinion is that the involvement of the Attorney General and so on is a better way forward — but we did not take a formal vote on the clause.

**Mr Hughes:**

Mr O'Dowd's suggestion that the Committee expresses a view as to whether we are going in the right direction helps in the work that still needs to be done. Were the Committee able to take a view on the amendment that is before it, it would give us a clear indication as to whether we are heading in the right direction away from the original clause. That amendment considerably changes the clause, as introduced. Ultimately, whatever view the Committee takes of the amendment in front of it will be helpful.

**The Chairperson:**

It does not get any simpler the more we talk about it, does it? However, I think that the Committee must make its views known. I am informed that members could, if they wish, agree that it is content with clause 34, subject — maybe with some relief to the Department — to the Department bringing forward an amendment that encompasses the issues that it has highlighted for the Attorney General. However, the Committee may state that it also wants to see the draft amendment as soon as possible. Would Thursday be too soon to ask for it, Mr Hughes? Are you waiting for an Executive meeting?

**Mr Johnston:**

We are increasingly under pressure of time and are keen for the Committee to complete its consideration of and to vote on the various clauses today so that they can be taken to the Executive on Thursday. We recognise that the Committee can work formally only with what it is presented. The Committee may reject that clause, or its members may choose to abstain or to approve it. It would certainly be helpful for the Committee to state in the text of its report that it felt that additional changes were needed. However, a definite decision from the Committee today on clause 34 would be particularly helpful to us in getting the entire Bill through.

**The Chairperson:**

We have to move on one way or the other. I will put the recommendation that the Committee is content with clause 34, subject to the Department proposing an amendment that addresses the issue that it highlighted and that the Attorney General wishes to see those draft amendments as soon as is humanly possible. Do Committee members agree?

**Ms Ní Chuilín:**

Chairperson, although we do not want to be disruptive, we will abstain. Through no one's fault, this has been a convoluted conversation. I am not content with clause 34.

**The Chairperson:**

With any part of it?

**Ms Ní Chuilín:**

Not from what I have seen. I would prefer to abstain, let it go forward and see what is there.

**The Chairperson:**

I cannot direct any Committee member on how they should vote. The position of the Committee was that it was content with most of clause 34, but that there were aspects of it that it wanted to be changed. Are members now saying that it does not matter what way the clause is amended, because they will not be content with it?

**Ms Ní Chuilín:**

No.

**The Chairperson:**

Committee members have heard what has been said and what I proposed as a possible way forward. Some members wish to abstain. What do other members feel about clause 34?

**Mr A Maginness:**

If clause 34, as amended, still creates a new statutory duty on a public body, and that statutory duty is not sufficiently qualified, the clause will not be acceptable. I, Lord Empey and others expressed the view that we do not want an additional statutory duty that will further burden public bodies. That is the essence of the argument.

**Mr Givan:**

I concur with Alban's views about creating a statutory duty. It concerns me that that new duty would be put on any public body. I do not need to elaborate, because I share the same concerns as Alban. I am content to vote down the clause or to abstain, but it is not something that I enthusiastically support.

**The Chairperson:**

Members can do all those things. They could agree, although I suspect they will not do so. They could also vote against or reject the clause. That would give the Department some time to come back on the clause at a later date, and it does not need to be told that we are running out of time. If I have read the mood of the meeting correctly, I am right in saying that different members have different problems with different aspects of clause 34.

**Ms Ní Chuilín:**

For different reasons.

**The Chairperson:**

It is up to members how they want to vote.

*Question, That the Committee is content with the clause, put and negatived.  
Clause 34 disagreed to.*

**Mr McCartney:**

Sinn Féin members abstained.

**The Chairperson:**

OK. Clause 34 is not agreed. I am sure that the officials will take cognisance of that decision, and will come back to the Committee.

**Clause 35 (Functions of joint committee and Policing Board)**

**The Chairperson:**

Is the Committee content with clause 35 as drafted?

**Ms Ní Chuilín:**

We will abstain.

*Question, That the Committee is content with the clause, put and agreed to.  
Clause 35 agreed to.*

**The Chairperson:**

We now move to schedules one and two, which are virtually the same. Is the Committee content with paragraphs 1 to 3 of schedule 1 as drafted?

**Ms Ní Chuilín:**

We are abstaining.

*Members indicated assent.*

**The Chairperson:**

Are members content with paragraph 4 of schedule 1?

**Ms Ní Chuilín:**

We are abstaining.

*Members indicated assent.*

**The Chairperson:**

Are paragraphs 5 and 6 of schedule 1 agreed?

**Ms Ní Chuilín:**

We are abstaining.

*Members indicated assent.*

**The Chairperson:**

We move to paragraph 7 of schedules 1 and 2. I remind the Committee that we have discussed the issue of designated organisations, and the Department has now proposed two alternative amendments for the Committee to consider. Alternative A allows for a list of specified organisations for inclusion in every PCSP to be made by affirmative resolution as requested by the Committee. Alternative B is the Department's preferred option, and it believes that it meets the Committee's concern but maintains the flexibility of individual PCSPs. I ask the officials to comment.

**Mr Hughes:**

Following extensive discussions, we thought it would be useful to put forward these two alternatives setting out the Department's preference for a system that allows for a degree of discretion on the part of local partnerships, since that underpins the value of local partnership working where circumstances in that district are taken into consideration first rather than a solution being dictated by the Department and the Policing Board. We put forward the second alternative as our preference, but we also provide the Committee with a first alternative. It sets out the conclusion of the Committee's previous deliberations, which was that an Order designating organisations that must be represented on a PCSP must be made by affirmative resolution. That is what the Committee was seeking.

We want to flag that we think that the mechanism for making that Order is somewhat cumbersome. There would be a considerable issue around the timeliness of the first Order that would need to be made for the PCSPs to be in operation. We heed the clear views that the Committee has taken on this previously.

**The Chairperson:**

Does any member wish to comment or ask a question? You know what the alternatives are. Alternative A allows for a list of specified organisations for inclusion in every PCSP to be made by affirmative resolution, as requested by the Committee. That is what we asked for. Alternative B is the Department's preferred option, and the Department believes that it meets the Committee's concerns but retains the flexibility of individual PCSPs.

**Mr McDevitt:**

Although I am sympathetic to Mr Hughes's argument to some extent, alternative B fails the basic test that the Committee set; namely that we wish to see a list of core organisations that will automatically be members of PCSPs. As much as I understand the arguments about flexibility, alternative B certainly does not meet the test that the Committee collectively set some time ago.

**The Chairperson:**

Does any other member wish to comment? Are members content to adopt the Committee's original position of alternative A, under which the Order would be subject to affirmative resolution, as requested by the Committee?

**Ms Ní Chuilín:**

We abstain.

*Members indicated assent.*

**The Chairperson:**

Are members content with paragraphs 8 to 9 of schedule 1?

**Ms Ní Chuilín:**

We abstain.

*Members indicated assent.*

**The Chairperson:**

We move to paragraph 10 of schedule 1. I remind the Committee that we requested that the Department look at amending this paragraph to ensure that the chairperson of the PCSP is an elected member. The Minister indicated that he is not minded to make that amendment. The Committee, therefore, agreed to request a draft amendment to be prepared for consideration. We are told that the draft amendment is on its way to us, so we had better wait until we have sight of that. We will move on and return to paragraph 10 when we are in possession of the text of the draft amendment.

We move to paragraphs 11 to 16. The Committee indicated in the past that it is content with these paragraphs. Is the Committee agreed on paragraphs 11 to 16?

*The following members indicated assent:*

*Lord Browne, Mr Givan, Mr A Maginness, Mr McDevitt*

**The Chairperson:**

The Committee indicated that it was content with paragraph 17 of schedule 1. Is that still the case?

*The following members indicated assent:*

*Lord Browne, Mr Givan, Mr A Maginness, Mr McDevitt*

**The Chairperson:**

The Committee indicated in the past that it is content with paragraphs 18 to 21. Are members agreed on paragraphs 18 to 21?

*The following members indicated assent:*

*Lord Browne, Mr Givan, Mr A Maginness, Mr McDevitt*

**The Chairperson:**

We move to schedule 2. As I said at the start, the two schedules are virtually the same. Are members agreed on paragraphs 1 to 3 of schedule 2?

**Ms Ní Chuilín:**

We abstain.

*Members indicated assent.*

**The Chairperson:**

The Committee intimated in the past that it was content with paragraph 4 of schedule 2. Are members agreed on paragraph 4?

*The following members indicated assent:*

*Lord Browne, Mr Givan, Mr A Maginness, Mr McDevitt*

**The Chairperson:**

We indicated that we were content with paragraphs 5 and 6 of schedule 2. Are members agreed on paragraphs 5 and 6?

*The following members indicated assent:*

*Lord Browne, Mr Givan, Mr A Maginness, Mr McDevitt*

**The Chairperson:**

We move to paragraph 7. Is paragraph 7, as amended, agreed? There are abstentions.

*Members indicated assent.*

**The Chairperson:**

Are paragraphs 8 and 9 agreed?

*The following members indicated assent:*

*Lord Browne, Mr Givan, Mr A Maginness, Mr McDevitt*

**The Chairperson:**

Paragraph 10 should come next, but we are waiting for the draft amendment. We will come back to that in a moment or two.

The Committee indicated that it was content with paragraphs 11 to 16. Is the Committee agreed on paragraphs 11 to 16? There are abstentions.

*The following members indicated assent:*

*Lord Browne, Mr Givan, Mr A Maginness, Mr McDevitt*

**The Chairperson:**

Is paragraph 17 of schedule 2 agreed?

*The following members indicated assent:*

*Lord Browne, Mr Givan, Mr A Maginness, Mr McDevitt*

**The Chairperson:**

Are paragraphs 18 and 19 agreed?

**Ms Ní Chuilín:**

We abstain.

*Members indicated assent.*

**The Chairperson:**

At this stage, we would normally thank the officials for being here. However, we will perhaps

retain you for a moment or two until we get a look at the amendment to paragraph 10. We will pause here for a moment or two. Do not let the officials out.

We are going to have to move on. Perhaps the officials should leave the table, but not leave the room. We would like to retain you for a few moments. We will move on to our consideration of Part 7 of the Bill, which comprises the legal aid clauses 85 and 89.

I welcome Robert Crawford and John Halliday from the Northern Ireland Courts and Tribunals Service. I remind members that, at its meeting on 3 February, the Committee agreed to make a decision today on clauses 85 and 89 so as to allow members more time to consider a draft amendment proposed by the Committee and an alternative amendment from the Department concerning the requirement for affirmative resolution in relation to a fixed means test for criminal legal aid.

The Committee had wished to see an amendment that would ensure that all regulations on a fixed means test are subject to affirmative resolution. The Department of Justice is proposing an amendment that will allow the first rule to be subject to affirmative resolution and subsequent rules to be made by negative resolution. The correspondence from the Department sets out the reasons for that preferred approach. The relevant summary papers and the draft amendments have been tabled.

I now ask the officials to comment.

**Mr Robert Crawford (Northern Ireland Courts and Tribunals Service):**

I have not seen the Committee's amendment. We are still of the view that our amendment would spare the Committee and the Assembly from having to take time to make simple changes.

**The Chairperson:**

We will have to stop you there. The Division Bells are ringing.

**Ms Ní Chuilín:**

It is for the legislation on dangerous dogs. How appropriate. *[Laughter.]*

**The Chairperson:**

We will check whether they are ringing for a Division or because the House is inquorate.

*Committee suspended.*

*On resuming —*

**The Chairperson:**

The meeting is reconvened. We were with you, Mr Crawford, when we suspended.

**Mr Crawford:**

I have a couple of points to make, Chairperson. As we said at the last meeting, we do not resist the principle of affirmative resolution in respect of this particular clause. However, we have been advised by legislative draftsmen that there were some complications of a practical nature, and we attempted to explain what those might be. In particular, there could well be quite a number of frequent amendments to these regulations; for example, amendments to take account of changes in social security legislation. We felt, therefore, that the Committee might be attracted to the idea of using affirmative resolution on the first occasion only, and we have offered an amendment on that basis.

**The Chairperson:**

Members, you have heard what Mr Crawford said. Does anyone wish to comment?

**Mr O'Dowd:**

I want to ask about the process. If we go for affirmative resolution for all the rules, in line with the Committee's proposal, would the rules come before the Committee for it to decide whether a vote is required? Could the rules be dealt with at Committee rather than going to the Assembly on each occasion?

**The Committee Clerk:**

Under the affirmative resolution procedure, they would have to go to the Floor of the Assembly. The amendment that the Committee is looking for would require any proposals or changes regarding means testing to be decided by affirmative resolution. The Department has advised that its draftsman thinks that amending the clause in such a way may have consequential or knock-on effects for other legal aid regulations. Those regulations may now have to be agreed by

affirmative resolution, whereas they are currently subject to negative resolution. The draftsman is saying that, from the Department's point of view — I may not be phrasing this right — it is too difficult to put it through as a draft, and that is why it is suggesting that affirmative resolution be used on the first occasion only.

**Mr McDevitt:**

Could I ask for some clarification from officials, Chairman? Would the Department's draft amendment not capture the means test? In other words, the first set of rules would have to, by definition, include the means test.

**Mr Crawford:**

That is what clause 85 does; it is all that it does. It gives us the power to set the means test, and that would involve setting the means test at a particular level or threshold. Subsequent regulations could amend that threshold, but, after that first occasion, there would be a means test in place — or not, if it were rejected.

**Ms Ní Chuilín:**

Does that mean that, if it is set once, it would be unlikely that an affirmative resolution would be ignored if we were just to go for negative resolution in any other instance?

**Mr Crawford:**

In subsequent instances under negative resolution procedure, regulations would still be subject to consultation and would still come before the Committee. So, the Committee could pray against them in the normal way under negative resolution procedure. It would still have the power to prevent a change. However, if a test were in place, that would continue unaffected. For example, if the Department's proposals were to reduce the thresholds so that more people would move out of legal aid, the Committee could reject that and leave the existing threshold in place.

**Ms Ní Chuilín:**

So, this really just sets the power to means-test legal aid?

**Mr Crawford:**

We are saying that, if the Committee were minded to accept clause 85, on the first occasion that the proposals for regulations were brought forward, there would be public consultation and

Committee scrutiny of the level of that threshold. That would then go to a vote in the Assembly under affirmative resolution procedure. So, it gives maximum protection for the first time that the level is set.

**Mr A Maginness:**

Are you saying that the first set of regulations would provide the template for the threshold, and so on, and that subsequent changes would be incidental amendments to various aspects of that but would not affect the substance?

**Mr Crawford:**

They could, but they would be subject to negative resolution. The most obvious occasion that the legislative draftsman had in mind was if there was significant inflation in a particular year and there was a desire to increase fees across the board for legal aid. The power that is being amended in article 36 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 is the power that drives all the legal aid fee-setting at present. An inflationary increase would be made to all regulations under that power. If one area required affirmative resolution, that would have to be debated on the Floor of the House, even for something as simple as, for example, a 5% increase across the board. We are inviting the Committee to consider whether that is what it wishes to do or whether it is more concerned with the structure of a threshold. Members might recall the seven possible options that we presented to the Committee. The way that we go about it may be what the Committee really wants to see, in which case using affirmative resolution on the first occasion would provide that protection.

**Mr A Maginness:**

That seems OK.

**The Chairperson:**

Are you saying that the draftsman has not come up with the wording yet?

**Mr Crawford:**

The draftsman has, in fact; we put a proposed amendment before the Committee last week.

**The Chairperson:**

But there is a distance between us and you.

**Mr Crawford:**

We have not seen the Committee's amendment, but we understand that it would provide for affirmative resolution on every occasion that regulations are made.

**The Chairperson:**

Could the draftsman not draw up words to reflect that adequately?

**Mr Crawford:**

The draftsman advised against it. He said that it would create great practical difficulties. That is the advice that we have brought back to the Committee.

**Lord Browne:**

It seems that we are setting a precedent here. If we use affirmative resolution for the first set of rules, what is the difficulty in using that for future changes? Legal aid seems to be an extremely important issue that goes through not just the Justice Department but right through society. If we are setting the precedent of using affirmative procedure for the first set of regulations, I cannot see what difficulty there would be in bringing regulations to the Assembly for a vote each time. I am thinking about welfare reform and so on. I cannot see what practical difficulties there would be.

**Mr Crawford:**

The practicality that the draftsman has in mind is simply the effect that that would have; it would make the general operation of, for example, legal aid subject to affirmative resolution, because the clause would then apply to that. The question is whether that is, indeed, the contention that the Committee wishes to apply. The Courts and Tribunals Service has no objection to including affirmative resolution in that particular area. We have heard the Committee's views, and we understand the sensitivity of the situation, but the practicality is more about the time that it will take to debate every change on the Floor of the Assembly.

For example, as we said the last time, if there is a change in social security and we need to change the way in which benefits are counted in, although it may be obvious that one thing changes to another, as may happen with the introduction of universal credit, the Committee might well be happy to deal with that change through negative resolution. However, if affirmative

resolution is specified for every occasion, the Committee would have no choice but to use that.

**Mr A Maginness:**

What you are really saying is that the adjustments to the scheme are relatively minor and that it would be impractical to come back all the time to deal with things through affirmative resolution.

**Mr Crawford:**

We are asking for the Committee's view, because we are suggesting that, potentially, we will have to bring in regulations in that area every year to reflect, for example, social security changes. We wonder whether that will require a debate on the Floor of the House on each occasion.

**Mr A Maginness:**

If the adjustments to the scheme are relatively minor, I do not see why they have to be made by way of affirmative resolution.

**The Chairperson:**

Yes, because we could have negative resolution, as proposed by the Department.

**Mr McDevitt:**

I am sensitive to the Department's solution, because clause 85 would make a substantial policy change, namely the introduction of a means test, and that is what concerns the Committee. As I see it, the Department is proposing that we get the chance, through affirmative resolution, to express our opinion on the substantial issue in clause 85, which is the introduction of a means test, but that we do not seek to set a precedent so that every minor change to the outworkings or implementation of the means test must also be subject to affirmative resolution. The Department seems to have met us halfway, which is probably where we want to be.

**The Chairperson:**

That begs the question, Mr Crawford, of what would happen if, after the first occasion, the Department wanted to change the levels substantially.

**Mr Crawford:**

The Committee would still be able to engineer a debate on the Floor of the House by praying against a rule. However, before that could happen, we would have to come to the Committee

with proposals for public consultation. At that stage, we would, in effect, find out whether the Committee has concerns, which we would have to deal with before moving to public consultation.

**Ms Ní Chuilín:**

Would you bring a prayer of annulment?

**The Chairperson:**

Yes, but there would be no obligation on the Department to come to the Committee. You could just say, “Tough; that is what you signed up to. That is the way it is, and that is the way it is going to be”, although you might not adopt that attitude.

**Mr Crawford:**

We must come to the Committee when we make regulations, and we must carry out public consultation, which begins with us coming to you with proposals for the consultation.

**Mr A Maginness:**

Perhaps the Committee Clerk will tell us the difference between the Committee’s amendment and the Department’s amendment.

**The Committee Clerk:**

The difference is that the Department’s suggested amendment would allow regulations to be subject to affirmative resolution the first time that they are brought through for means testing. Subsequent regulations would be subject to negative resolution. The difference is that matters subject to affirmative resolution would have to be debated and approved on the Floor of the House.

**Mr A Maginness:**

So, what is our amendment?

**The Committee Clerk:**

The Committee asked that any regulations relating to means testing be adopted by affirmative resolution, and that is the aim of the amendment that has been prepared. The Committee was not looking at the wider aspects of legal aid. It looked at the means test and the impact that any fixed

means test is likely to have. Witnesses had suggested that that impact could be substantial. Therefore, the Committee looked at it and decided that it should be subject to affirmative resolution. The Examiner of Statutory Rules also highlighted in his report to the Committee that the Department will be taking on a substantial new power under clause 85 and that, in his view, it should be subject to affirmative resolution. That was the background to the Committee's writing to the Department initially to ask for affirmative resolution to be used. The Department has suggested that draft amendment.

**Mr A Maginness:**

If we were to adopt our own amendment, would that be permanently subject to affirmative resolution?

**The Committee Clerk:**

Yes. Any regulation to do with means testing would be introduced by affirmative resolution procedure. We asked the Bill Office to prepare a draft amendment on that basis.

**Mr A Maginness:**

It strikes me that the Department has come up with a compromise that seems to meet our concerns at first instance. I am concerned about the establishment of the means test and whether it is fair and allows people proper access, and so on. If that is established as a template — excuse the phrase — any subsequent changes would be by way of adjustments for inflation.

**The Chairperson:**

We will have to decide what way we want to go forward: do we want to go back to the position that the Committee had adopted or are we content with what we have been told today? You have heard Mr Crawford outline the clause in some detail.

*Question, That the Committee is content with the clause, subject to the Department's proposed amendment, put and agreed to.*

*Clause 85 agreed to.*

**The Chairperson:**

Thank you very much, gentlemen.