Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Justice Bill: Clause 34

17 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)
Mr Thomas Buchanan
Lord Empey
Mr Paul Givan
Mr Alban Maginness
Mr Conall McDevitt
Mr David McNarry
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:
Mr David Hughes) Department of Justice
Mr Dan Mulholland)

The Chairperson (Lord Morrow):

The Department was unable to provide the Committee with its proposed amendments to clause 34. The Committee, therefore, agreed that, if the amended clause still places a statutory duty on public bodies that is not sufficiently qualified, it will not be acceptable. In the absence of a suitable amendment from the Department, the Committee agreed to reject the clause as drafted.

The Department has now provided proposals for a new clause 34. Officials are with us today to brief the Committee on that matter. I welcome again David Hughes, head of policing policy and strategy division, and Dan Mulholland, who is also from that division. Mr Hughes, I invite you to outline your new proposal.

Mr David Hughes (Department of Justice):

Last week, we briefed the Committee on the state of play on clause 34. At that stage, a further amendment was being considered in light of comments and views of the Committee, the Attorney General and others. The final text was not available. We now have the proposed text of a new clause 34. The Minister has secured the agreement of the Executive for the Justice Bill to go to Consideration Stage without clause 34. That clause has been decoupled from the body of the Bill with the intention that we will take the new draft of clause 34 to the Executive next Thursday, enabling it to be tabled at Further Consideration Stage. It is very helpful that the Committee is happy to look at it again so that its views can be expressed when the clause goes to the Executive.

The paper that was provided sets out the changes that have been made to clause 34 since it was first introduced. They are quite extensive. We believe that those changes mitigate the risks that the Committee and others have identified, particularly around legal challenge and the administrative burden that might be created by the statutory duty.

In particular, I draw the Committee's attention to subsections (3) and (4) in proposed new clause 34. Subsection (3) sets out that, if legal proceedings are brought against a public body calling into question its compliance with the statutory duty, it would be a defence for that public body to show that it had due regard to the guidance issued under clause 34(2). That guidance would be issued by the Department but with the approval of the Attorney General and following consultation with the other Northern Ireland Departments. The intention is that the guidance would provide a very clear indication of what a public authority should understand it is required to do to demonstrate that it has fulfilled the duty.

The draftsman has been asked to prepare subsection (4), which is in square brackets in the proposed new clause before you, as an illustration of the filter mechanism that the Attorney General referred to when he briefed the Committee. The subsection would mean that any legal

proceedings being brought against a public body could not proceed without the Attorney General's initiating those proceedings. So, it provides that the Attorney General acts as a filter for any legal proceedings calling into question a public body's compliance with the duty. The Department does not believe that subsection (4) is strictly necessary and would prefer that clause 34 be inserted back into the Bill without it. Subsection (3) already provides a defence in the event of a legal challenge. Subsection (4) would simply prevent a legal challenge being brought if it were deemed to be ill-founded by the Attorney General.

So, we are bringing this before the Committee today to hear members' views, to answer any questions and to explain further, if necessary, our intentions. As has already been set out, the intention is to go to the Executive next Thursday with exactly what is set out in the paper in front of you but with the caveat that subsection (4) is not necessary but that subsection (3) is. That is the Department's preference.

The Chairperson:
Thank you, Mr Hughes.

Mr O'Dowd:
The general principle of a duty on public bodies to deal with antisocial behaviour is a good idea. However, I am not sure that we have fine-tuned that enough in the legislation. I am concerned about subsection (4). I know that it is in square brackets. However, you are asking the Attorney General, who is the legal adviser to the Executive, to decide whether or not a citizen can bring a Department to court. That surely denies a citizen the right to take legal action.

Mr Hughes:
It would be very unusual to include such a provision. There is some precedent for that under charity law whereby legal proceedings can proceed only with the approval or initiation of the Attorney General. However, that is a different context, which the Department acknowledges. It would be unusual.

Mr O'Dowd:
Surely it should be up to a court to decide whether there are grounds for legal proceedings.

I am also concerned about subsection (3) in proposed new clause 34, which states:

"it is a defence for the body to show that it had due regard to the guidance".

Surely that should read: "A Department shall have due regard to the guidance". The Department would be able to use that as a defence in any case. It would have to show that it had due regard to the guidance through whatever procedures it had in place. It could make the argument in front of a judge that it had due regard to the guidance and then show how it did that. The way in which subsection (3) is penned is strange, because it means that it is a defence for a body to show that it had due regard.

Mr Hughes:

What you are describing would create a double duty. Are you saying that there would be a duty to exercise functions in a certain way and a duty to have due regard to the guidance? The intention is to ensure that the duty remains to exercise functions in a certain way. That duty bites more effectively on organisations to ensure that they fulfil their duty. Having due regard to the guidance that the Department issues is a critical part of delivering the duty and can be tested in court. That gives the guidance the weight that I think you are implying it needs. I understand what you are saying: the clause does not specifically say that a public body shall have due regard to the guidance.

Mr O'Dowd:

I am not arguing that both should be included; I am arguing that one or the other should be included. I would like to know which places the stronger duty on the Department when dealing with antisocial behaviour. In the use of public expenditure, which of the two would best ensure that frivolous claims were not taken against the Department? Surely drafting the clause to say that "a Department shall have due regard to guidance" would also allow the Department to use that as a defence in any case brought against it.

Mr Hughes:

A duty to exercise functions is stronger than a duty to have due regard to guidance. It may take a lawyer to explain precisely how that works, but that is the advice that we are working on. The guidance carries a considerable weight of authority because of the Attorney General's approval role, and a defence in legal proceedings would be whether due regard had been given to guidance.

That gives weight to the guidance and also ensures that the duty itself is the duty to exercise functions in a certain way. That is a considerably more effective duty to get public bodies to contribute to the delivery or support of community safety outcomes.

Mr O'Dowd:

I suspect that you would get a whole lot of lawyers to argue over that one, but I will let other members in.

The Chairperson:

Proposed new clause 34(3) states:

"in relation to any matter, it is a defence for the body to show that it had due regard to the guidance".

However, 34(4) says:

"shall not be entertained by any court…unless the proceedings are initiated by the Attorney General".

Mr Hughes:

Sorry?

The Chairperson:

I know why you say that, Mr Hughes. I am struggling to find the words to explain why the new clause is so explicit:

"shall not be entertained by any court…unless the proceedings are initiated by the Attorney General".

You can have choice, provided that it is my choice. Is that the case?

Mr Hughes:

The Department's view is that you would not need both subsections (3) and (4); you would need one or the other. It is the Department's view that subsection (3) is preferable to subsection (4).

The Chairperson:

The Department prefers subsection (3) over subsection (4).

Mr Hughes:

Yes.

The Chairperson:

Let us take subsection (4) out and leave (3). In that case, the Attorney General will not be the final arbiter.

Mr Hughes:

That is right. It means that legal proceedings could be brought against a public body for failure to fulfil its duty to exercise its functions in the way described. That public body could use the defence that it had had due regard to the guidance that sets out how to fulfil that duty. If the public body could show that it had had proper regard to how its functions were exercised and that it had thought through whether it should change its policy or adopt a policy in a certain area because of the impact on crime and antisocial behaviour, that would be a defence in legal proceedings.

The Chairperson:

So, subsection (4) is out, but subsection (3) stays in. Let us move on to subsection (2).

"The Department must, with the approval of the Attorney General, issue guidance to prescribed public bodies as to their compliance with the duty in subsection (1).

If you take subsection (4) out, you can have all the work done at clause 34(2) because the compliance will involve the Attorney General anyway. Therefore, if you take out subsection (4), the duty will be covered in subsection (2).

Mr Hughes:

The intention is to keep in subsection (3) because it makes it very clear; it gives weight to the guidance that is issued under subsection (2). It is given particular standing and weight, and not just because the Attorney General has approved it. For example, a public body may follow the guidance and come to the conclusion that it will not change its policy. Subsection (3) gives that body a defence if someone challenges it and says that it should have changed its policy. The public body can come back and say, "We followed and considered the guidance, and we followed a process that has been set out, which is helpful, but we have still reached the conclusion that we will not change our policy in light of the duty". That is a defence for that organisation. Therefore, even if a legal challenge were brought, there would be a clear defence so that that body would not then be tied up in legal proceedings.

The Chairperson:

It strikes me that subsection (4) is not necessary or preferable.

Mr Hughes:

The Department would say that subsection (4) is not necessary.

The Chairperson:

As a precaution, you tided it all up at clause 34(2).

Mr Dan Mulholland (Department of Justice):

There are a number of controls. The concerns expressed by the Committee and others were that the scope of the clause was too wide. The principle behind the clause is that a lot of stakeholders really want something in the Bill to try to bind together other Departments and public bodies to deliver community safety and to consider crime and antisocial behaviour. A number of controls are being put in place. One of those controls will be the guidance that will be developed, and it will be developed in consultation with other Departments. As a further control, the Attorney General will approve the guidance that is finally produced. The thinking around the duty on the guidance is that, if someone takes an action against a body, the courts will initially look to see whether that body has complied with any guidance issued. Subsection (3) copper-fastens that and puts a particular emphasis on the guidance, which courts may have done anyway. The purpose of the subsection is just to put in legislation a duty on a public body to have due regard to the guidance issued.

The Chairperson:

The whole engine room of clause 34 is subsection (2). I do not like the wording in subsection (4). It has a belligerent ring to it. Maybe I should not say this, but I suspect that it was put there in the knowledge that it would raise a hackle and would probably not survive. However, we have our work done in clause 34(2).

Mr Givan:

I am trying to get back to the core reason why it is necessary to have clause 34 in the Bill. That dictates my attitude to the whole clause. On the evidence that has been put forward, it would

appear that this is being driven by the stakeholders involved, who feel that public bodies are not exercising their duties in the way in which they feel they should be exercised. This legislation would give them a vehicle through which public bodies or stakeholders could legally challenge one another because they have their own particular agenda. My fear is that we would be legislating to give organisations or groups of bodies a tool to take everybody to court. My base fear is that that is what this clause is all about. It has not been my experience — limited as that experience is — that public bodies do not have a desire to make sure that whatever they do has regard for the implications of crime and antisocial behaviour. To include this clause in the Bill would infer that public bodies do not consider crime and antisocial behaviour. We are doing something at the behest of lobby groups. That is my concern.

Subsection (4) of proposed new clause 34 would put an extreme amount of power in the hands of the Attorney General. One the one hand, I might think that, if the Attorney General is going to protect public bodies from frivolous action, that might be good. On the other hand, if the Attorney General were to decide to throw his weight behind a case — bearing in mind that it is the Attorney General who initiates proceedings before the court — the person or body taking the case would get pretty strong representation. A public body would struggle to defend itself successfully in a case that the Attorney General has taken forward against it. Subsection (3) of clause 34 would still allow frivolous actions to be taken. A public body could use the defence that it has complied with the guidance, but it could still end up in court. There would still be public bodies that would govern themselves by legal writ rather than by wit. That is a problem that society faces all the time. However, there may be other comments and views.

Mr Mulholland:

I will try to clarify a wee bit of the background to this. My background is in the community safety unit, working with partnerships. You mentioned lobby groups, but the breadth of support for this provision comes from both community safety partnerships (CSPs) and district policing partnerships (DPPs), as well as from the councils, the police and the Policing Board. They all support the provision; in fact, some of them wanted to see it strengthened. So, it is not just some isolated lobby groups who want this; there are others who support it. They see this clause as establishing a principle of support for the work of bodies that interface with communities and deal with crime and antisocial behaviour.

The example that I would give is of work in which I was involved in the Holylands area. The work was carried out with Belfast City Council, the community safety unit and a whole host of other public bodies. That partnership, which involved a conglomerate of different interests, came together and worked well together. The thinking was that a principle could be established and that it would be helpful to place a duty on public bodies to participate, facilitate, change and work towards community safety in a general way. That is where a lot of the organisations are coming from.

I understand the concerns about the litigious culture that could arise. Although we can never eliminate that, we think that we can significantly reduce the risk of it arising through the guidance, and we will work to do that with the Department. We also want to limit and narrow the provision so that it impacts on those bodies that are most likely to have the most influence on community safety issues such as crime and antisocial behaviour. It will not be the full breadth of it, but it helps to clarify some of it.

Mr McDevitt:

The Attorney General's initial problem with clause 34 was that it would open up the floodgates that Mr Givan talked about. So, you went back and had conversations with his office, and subsections (2), (3) and (4) arrive for drafting. Subsection (2) gives the Attorney General control over guidance, as the Chairperson suggested, and subsection (4) gives him a veto over any litigation. You say in your note that he favours subsection (4) but that you quite like subsection (3). The fact is that, if the Attorney General is to support this and be happy with it, he must lay down the conditions. He has to set the guidance, and he has to have a veto over who gets prosecuted.

Mr Hughes:

It is important that we have heard and taken on board the concerns that the Attorney General has raised, particularly about the prospect of litigation. Subsection (4) would put into the Bill what the Attorney General described in a narrative form when he gave evidence to the Committee. It is there to ensure that the matter is given consideration alongside the other provisions in the draft new clause. As I said, the Department does not feel that subsection (4) is necessary as it feels that

there is sufficient weight in subsection (3). Whether or not the amendment is brought forward at Further Consideration Stage depends on the outcome of the discussion in the Executive, where, of course, the views of the Attorney General will be expressed. The Ministers there will have that discussion.

Mr McDevitt:

Is it fair enough for us to conclude from reading the draft clause that the Attorney General does not feel that guidance can be written in a tight enough way to avoid the prospect of spurious litigation? He is saying that he would like to approve the guidance, which is fair enough, but he is also asking for what is, effectively, a veto over potential litigation, because, in his best legal opinion, he does not believe that the guidance will ever be watertight enough to stop the floodgates being opened.

Mr Hughes:

I am not aware that the Attorney General has expressed a view as to whether or not he thinks that subsection (2) and subsection (3) would be completely inadequate. However, he has set out to the Committee the idea of a filter, and subsection (4) illustrates that. He said that that is his preference.

Lord Empey:

Mr Mulholland will be aware that, two years ago, I established a forum to deal with the Holylands issue, although there had already been some activity based around the council. Some of the recommendations that came out of the work that was done referred to the powers that the police had — or did not have — at the time. One was that they could not enter somebody's garden where students were sitting with a pile of drink. They had no power like they do in England to close down an area around football grounds to stop drink being sold. Have you brought forward any proposals to deal with that?

Mr Mulholland:

I am not up to speed with what came out of the recommendations. You are right in that existing legislation was looked at.

Lord Empey:

The work looked at the fact that there is no legislation to deal with the issues that are causing a lot of the trouble. The Department has known about that for at least 18 months, so I could legitimately say that, if this Bill were passed, I could sue you, because 18 months ago you knew for a fact that the police lacked powers to go into somebody's front garden and take drink off people. You knew that you could not close down shops selling alcohol in the vicinity, and you had 18 months to do something about it, but you did nothing. Therefore, if my shop were wrecked by those people, I could say that you knew perfectly well that an issue of public safety was at stake, that you had ample evidence, which was contained in a written report, and that all the stakeholders were at that meeting and had all agreed the report. I could say that, as you did nothing during that time, I am going to sue you.

Mr Mulholland:

You would have to demonstrate that you had had due regard to the guidance and that you had followed it.

Lord Empey:

Yes, but my point is that, as things stand, without clause 34, nobody can sue you. With this clause, you have given people the stick, but you have not given them the carrot. In other words, we now have a power that places public bodies under an obligation, and they can be sued if they fail to honour it. I have given one example where I know for a fact that the Department has known for some time that that power has not been there. It could have been in the Bill. I could make a legitimate case that the Department is failing in its duty to instigate legislation to ameliorate a problem that everyone agrees exists.

Getting bodies to think and act together is fundamentally a good idea, and that is precisely what that forum on the Holylands was designed to do. It indicated a number of legislative flaws, including planning, housing, and law and order, among others, yet, as far as I know, not one scintilla of legislation has flowed from it. That being the case, I wonder whether we are making a stick to be beaten with in that we done a great deal of work but have done nothing to fix the issues that were identified in a process that lasted nine months.

The group was cross-departmental; it involved the council, the Department for Social Development, the Housing Executive, the Northern Ireland Office, the police — uncle Tom Cobley and all were sitting around the table. There were two conferences in Malone House under the auspices of a facilitator; reports were drafted after evidence was taken, yet we are still sitting here. There has been some co-operation between the various bodies, the students and the universities, and I hope that on 17 March it will bear fruit. However, the fundamental weaknesses that were identified and recorded have not been addressed. That is my worry.

The Attorney General may write guidance, but what does he know about designing a housing estate to avoid black spots and bad lighting? That would require huge skills across various disciplines. The idea is good. However, it would not be too difficult for someone to figure out grounds upon which to challenge it. I agree with the Chairman that clause 34(4) grates somehow.

The Chairperson:

Did the Bill not provide an opportunity to address some of the issues that Lord Empey flagged up? After all, the first meeting was 18 months ago.

Lord Empey:

The first meeting was in June 2009; there was a second in the autumn of 2009 when a report was produced. All the stakeholders, including the NIO and the police, were at the table.

Mr Hughes:

I am afraid that I cannot respond to the recommendations flowing from that work; it is not something of which I was aware from where I have been in the Department.

Mr McNarry:

Are you saying that you have or have not considered the report to which Reg referred?

Mr Hughes:

I am saying that I am probably not the person to answer questions on it because I have no particular brief on those points.

Mr McNarry:

If you have not considered the report personally, has the Department considered it?

Mr Mulholland:

I am not sure. I am aware of the report. I was involved in the early work when the incidents happened a couple of years ago and many of the parties came together. Some very good work was done, although there were frustrations about how agencies worked together. In some respects, a duty on public bodies to consider crime and antisocial behaviour implications might have helped the situation. I thought perhaps that that was what you were getting at.

Lord Empey:

Maybe I am not making myself clear. I am not opposed to the concept of having a duty; if it encourages agencies to co-operate, that is positive. I assure you that I wrote to the Secretary of State and the Chief Constable at the time, and both organisations were there, along with all the devolved arrangements. There was very keen interest from public representatives in the area. Alex Maskey was very active, and your colleagues were there. There was a lot of interest, and a lot of people were there.

I want to know how we can introduce legislation that encourages something without creating another problem, which is that someone could legitimately take action against a public body. Take, for example, the Holylands local residents' body; under this arrangement, that extremely active and articulate group of people could have said that they could prove that the agencies did not co-operate because they were part of an organised process yet did not act. The agencies could be sued under this clause. That is the point that I am trying to make. I am not against the idea; I am just giving an example.

Mr Mulholland:

Presumably, as a defence, that public body might say that, yes, it did consider the guidance.

Lord Empey:

You are vulnerable in that you knew what the weaknesses were because they were identified in the report. The Justice Bill is 2 ft thick, yet there is nothing in it about that issue. You knew that

the issue was there, and it has not been addressed. That is the point that I am trying to make.

The Chairperson:

It is quite clear what you are saying. Mr Mulholland, do you wish to comment on that?

Mr Mulholland:

I am not in a position to comment on the report or on any action taken or not taken.

The Chairperson:

We thought, Mr Mulholland, that we were getting to the stage where some joined-up thinking was going on. It seems that the joined-up thinking goes so far, but, when it comes to closing the gap, it does not always work. Maybe there was an opportunity to do that in this Bill, but that opportunity has been missed. From listening to what Lord Empey said, we have discovered that, despite the different groups working collectively over all those months, the gap could have been closed but was left open. However, we are coming up to 17 March, and I accept that this Bill would probably not have been ready by then anyway.

Mr McNarry:

I want to see whether we can come to some sort of conclusion. Now that we know about the report, could we ascertain whether the Department has considered it? Has it an opinion to offer, and will it have any bearing on what we are discussing? Given that it is a report of such importance, I would like to know whether you did or did not consider it.

Mr Hughes:

Can we take that question away and find out what was done following the report?

The Chairperson:

OK.

Mr O'Dowd:

To look at the issue from a different angle; surely an argument has just been made for having the clause. The residents' groups and local politicians did all that work but the statutory agencies did

not act, so surely this clause is the one that would hold them to account.

Lord Empey:

I am not opposing the concept. I have said that.

Mr O'Dowd:

OK, I accept that. In the broader conversations that we have had in the past few weeks, we have concentrated on the idea of a lot of frivolous claims being made, and we have asked for the legislation to be framed in such a way as to rule that out, which is a responsible piece of work. However, if we are going to have a clause that holds Departments to account for designing out antisocial behaviour, it should not be drawn up in such a way as to make it impossible for a citizen to bring them to court. The Chairperson may be right about subsection (4). It may have been put in there for us to think that, if we take it away, we would miss the point of the rest of the clause. I am concerned that the Department is now in a situation in which it is designing legislation that looks good on the statute books but that can never be used. The provision is framed in such a way that a citizen cannot bring a Department to court in the first place.

Mr Hughes:

We are very keen to ensure that the duty is enforceable. There needs to be a safeguard against an excess of litigation and unmerited litigation, but the way that the clause is currently cast will ensure that the duty is enforceable. That is important, otherwise it would be pointless. Safeguards have been set up to prevent unmerited litigation. In the engagement on clause 34 over the past weeks, there was a very clear message that there were concerns about the possibility of it giving rise to litigation.

Mr O'Dowd:

If the clause becomes law, how would someone take a Department to court under its provisions? What would the stepping stones be?

Mr Hughes:

There may be a number of different ways to do that. However, the most normal way would be through an application to the court to bring a judicial review of a decision.

Mr O'Dowd:

That is very expensive. Not everyone will do that.

Mr Mulholland:

I suppose that, on a practical level, you would want some sort of internal process so that a citizen could write to a Department or a public body that he or she felt had not complied with a duty. If the issue involved were one that the body had not thought of but that could impact on crime or antisocial behaviour, you would expect the Department or public body to say that it would look at the issue and do what it could to address those concerns. I would like to think that, if the Department or public body did not do that or persisted in not dealing with the concerns or did not demonstrate that it had given sufficient weight to them, the citizen could take the next step.

Mr O'Dowd:

Say the citizen goes through that process, manages to save up for a judicial review, gets to court and the judicial review is successful, would the outcome be only that an onus is placed on the Department to reconsider its decision-making process? The Department may be found guilty of lacking proper procedure, but would there be any sanction, financial or otherwise, against that Department? Would it be forced to do something?

Mr Hughes:

I wish I had a lawyer sitting next to me to keep me straight. We are talking about a challenge to the exercise of an organisation's function. I think that I am right in saying that, if the organisation exercised its functions in a way that was demonstrably contrary to the duty and could provide no defence, the court could order the organisation to reverse its decision. However, if the duty were merely to have due regard to the guidance, the court would order the organisation to do that. Casting the duty in the way that is has been cast will create a stronger duty. It means that the duty to exercise functions in a certain way will be enforceable through the courts. As Dan said, that is a matter of last resort.

We are in a difficult position. We have taken clause 34 out if its context, which is the setting up of policing and community safety partnerships (PSCPs). Those bodies are the ideal vehicle for bringing

issues to the attention of public authorities. Say, for example, that a community or a district feels that there is a real problem with joyriding in an area and that there would not be a problem if a particular road were not so easy to drive down at great speed. That community could draw the matter to the attention of those who are responsible for speed bumps. If a PCSP operates effectively, contacts can be made across the public sector. Bodies can be told that they can contribute to the improvement of community safety in an area by doing such-and-such or by considering certain actions. In the context of the partnership, that is the mechanism by which things are brought to the attention of organisations. The duty will bind. If an issue were raised with a public authority through a partnership, it would become virtually impossible for the organisation to ignore that, and it would certainly have to consider it, maybe in the context of a wider strategy.

Mr McDevitt:

Has clause 34(1) changed?

Mr Hughes:

It is not the same as the one that was originally introduced, which had two parts.

Mr McDevitt:

Looking at this through the lens of the Holylands, representation of which, as Lord Empey rightly points out, I inherited from my predecessor Carmel Hanna and other colleagues, people feel that a number of statutory bodies have let down the Holylands over the past decade. As a result, a situation has now evolved in which way too many houses in multiple occupation (HMOs) are in densely populated streets. So, I am looking at clause 34(1) and wondering whether the Planning Service or the Department of the Environment would be a prescribed public body under that clause?

Lord Empey:

They would have been hanged by now.

Mr McDevitt:

An Uncle Tom Dooley would have sued the Planning Service because it breached its own guidelines on HMOs in the Holylands.

Everyone knows the connection between HMOs and the number of students and young people living in the Holylands, and everyone knows that there is a direct connection between the number of students and young people living in the Holylands and the fact that the Holylands is perceived to be somewhere that people can go to party with impunity.

Although I agree with the principle of what we are trying to achieve, I am just wondering whether the Department of the Environment has ever expressed an opinion on clause 34(1) during any conversations about the Bill. I know the residents' association very well, and — Lord Empey is correct — its members are very responsible people. The association has become exceptionally expert in public policy over the past five years, has done a lot of fund-raising and has recruited the support of the universities. It would, therefore, be the type of organisation that would consider moving for a judicial review, given that it now has the means to do so, if it thought that that would achieve something. That is where the rubber hits the road.

Mr Hughes:

I am not able to speak about the Department of the Environment specifically. However, a number of Departments have expressed the view that they are very much looking forward to seeing this go through, assuming that it does so in some shape or form, and they are very interested in the production of the guidance, because they expect that to be able to help them to exercise the duty in a proportionate way. Some Departments and other public authorities will be concerned about that duty because their day-to-day functions may very occasionally touch on matters of crime and antisocial behaviour. I understand that. They do not want a huge administrative structure or a compliance mechanism regime that they have to comply with just to demonstrate that they have thought about it.

I am sure that other Departments will that know that that is their bread and butter and that they will, of course, have to comply. It will become increasingly clear to them that they need to bear in mind the impact on crime and antisocial behaviour in the exercise of their functions. That is why the guidance is so important: it ensures that there is a way for those authorities to begin to apply that duty. That having been said, the guidance relates only to those authorities listed in the regulations issued by the Department, and those regulations can be issued only after the Department has consulted. So, some steps need to be taken before it becomes clear which

organisations would be caught by this in the first instance.

Mr McDevitt:

There would have to be a very long list for the clause to have meaning. Again, for argument's sake, because it is often useful to think about things practically, if you drew up the list and did not include the Planning Service, people in the Holylands would say, "Well, that is a lovely clause and nice legislation, but it does not address one of the underlying fundamental causes of our problem here". I do not think that anyone in the Department of the Environment would be too keen on a clause such as that getting onto the statute book.

Mr Hughes:

The two issues that have arisen — the prospect of a compliance regime and the prospect of litigation — have arisen almost everywhere. The Department's intention is to mitigate those two risks as far as possible. The mitigation comes in the guidance. The guidance will be very carefully prepared, because it will need to satisfy a lot of different people who it affects.

Mr McCartney:

I have a number of questions. The proposed new clause 34 states:

"'prescribed' means prescribed by regulations made by the Department".

Does that mean regulations made by the Department and its agencies or just the Department?

Mr Hughes:

The regulations will be made by the Department.

Mr McCartney:

In terms of prescribed organisations?

Mr Hughes:

Effectively, the Department will issue regulations that list the public authorities that are caught by that duty.

Mr McCartney:

They will not be listed in advance?

Mr Hughes:

It will be subsequent to commencement of the legislation. There will need to be consultation and agreement on that list before the regulations can be made. The duty itself will not be commenced until the guidance and the legislation prescribing the organisations are in place.

The Chairperson:

What way will the regulations come to the Assembly?

Mr Hughes:

I will have to check my papers. They will be subject to negative resolution.

The Chairperson:

Handy enough; that is the route of least Assembly control, right?

Mr Givan:

Yes.

The Chairperson:

Thank you, Mr Givan. I just wanted the Department to say it.

Mr Givan:

They seemed reluctant.

The Chairperson:

Anyway, the point is made.

Mr McCartney:

Will the Planning Service and the Housing Executive be included, for example?

Mr Hughes:

There will need to be a process whereby the list of organisations is agreed. We do not want to

pre-empt that process.

Mr McCartney:

Are those not already agreed in schedule 2 to the Commissioner for Complaints Order 1996, or can they added to?

Mr Hughes:

What we are saying is that it will be a list taken from the Departments and bodies listed in schedule 2 to the Commissioner for Complaints (Northern Ireland) Order 1996, which is the full list of public authorities. It will be from that list, which captures those public authorities.

Ms Ní Chuilín:

I would like it to be affirmative resolution rather than negative resolution.

The Chairperson:

The Committee would like to see that too. I am sure that Mr Hughes will take cognisance of that and inform the Minister accordingly.

I thank the officials for coming. Just before you go, Mr Hughes, I will ask you about next week's procedure in the House. Will you tell us how this will be dealt with at Consideration Stage? How does the Minister intend to take this forward? Will he not move clause 34 next week or will he oppose it and then introduce the new clause at Further Consideration Stage? If you will tell us the procedure from here on in, it would be useful.

Mr Mulholland:

I stand to be corrected, but I understand that the Committee has opposed it. If the Committee had not done that, when it came to the vote on whether the clause stand part of the Bill, the Minister would have spoken against it anyway. He would have had to do that on his own. However, given that the Committee has opposed it, the Minister will speak on that and say that he will be bring it to the next Executive meeting and seek permission to bring an amended version to Further Consideration Stage with Executive colleagues' approval. That is what he will plan to say at Consideration Stage next Tuesday.

The Chairperson:

Will the Minister support the Committee's position?

Mr Mulholland:

He will say just that. He will propose to bring the amendment that you have seen to the Executive and seek their approval to propose it at Further Consideration stage.

Mr Hughes:

No one will move the version of clause 34 that exists in the Bill, as published. I think I am right in saying that.

Mr Mulholland:

The Minister will not.

The Chairperson:

Will he not formally move that?

Mr Hughes:

I think that is right.

Mr McDevitt:

If, at Consideration Stage, when that clause is taken, the Minister stands up and says, "not moved", at Further Consideration stage, there will be no clause 34 in the Bill; it is gone. You cannot amend something that does not exist. Am I getting this wrong?

The Committee Clerk:

From my understanding, the Department is suggesting a new clause 34 rather than amending the existing clause 34. The issue at Consideration Stage next week is that clause 34 as it stands needs to be removed from the Bill. If it is endorsed by the Assembly next week, it stands at Further Consideration stage, and all you can do it is amend it; you are left with it. Therefore, the Committee needs to oppose it next week so that the Assembly agrees and the clause is removed.

The issue is how the Minister approaches it and whether he agrees that the clause should be taken out. Otherwise, if the Assembly does not support the Committee's position and does not remove the clause, clause 34 will still be there at Further Consideration Stage and that decision cannot be undone; all you can do its try to amend it. You cannot take the original clause out at that stage.

Mr Hughes:

I am reluctant to say anything because I know that the Bill manager and others know about this. I am assured of that.

The Chairperson:

You are happy to take their word for it. *[Laughter.]*

Mr Hughes:

Yes. *[Laughter.]*

The Chairperson:

OK; we will stop there.

Members, I draw your attention to the last paragraph of the correspondence from the Minister, which states:

"I would welcome the opportunity to reflect the Committee's views on the amended clause 34 when the Executive discusses it on 24 February."

He would like to hear what we have to say. We have heard what has been said and the explanations and questions etc. What do members feel now that you have heard all this?

Lord Empey:

I have mixed feelings. The general idea to get bodies to do something and to think laterally is good. I do not have a problem with that. However, the Holylands happened to be one example. The main culprit was the Planning Appeals Commission, which started the rot in the first place, and the Housing Executive was involved. I may be able to get that report for the Committee, which would serve as a practical example. I could probably get it from the Department for Employment and Learning. It was sent to other public bodies; it is not secret.

Legislation was clearly outlined as something that was required. Legislation concerning the police was factored in, and it was Dan who raised the issue. They obviously do not know what they were obliged to do and nothing has been done about it. That was in circumstances in which different representatives were present, including a representative of the police. At that stage, nobody was talking about this particular type of clause. This has leapfrogged one example where there was a clear need to do something. It worries me a wee bit. I accept what John O'Dowd says that you can put an obligation on them. The Chairman knows how Departments work. Given that we had all the key agencies together, I wonder why the key legislative elements did not flow from that.

The guidance is the key; the legislation means nothing without it. The Attorney General will decide what happens, as he decides what is in the guidance, although where he gets the expertise to do that, I do not know. There are zillions of public bodies that could be involved. We have the kernel of a good idea, but I am not convinced that it has been pulled together. With the greatest respect to the officials, I am not sure that they were fully across some of the issues because of the complexity of them. Generally speaking, it is a good idea, but I am not sure that the clauses are the right ones. However, that is something that we can hammer out.

The Chairperson:
Should the Committee not ask that the draft guidance be brought to the Assembly?

Lord Empey:
The ability of a citizen or organisation to challenge public bodies hangs on the guidance. Is that not correct?

The Chairperson:
I think so.

Lord Empey:
Therefore, whatever is in the guidance will be the determiner. Clause 34 is meaningless without the guidance; it has no substance; it is a shell. Everything relates to the guidance and not to the mechanism.

Mr McNarry:

It would be helpful to find out from the Attorney General's office that it is content that there is no concern that the number of legal challenges — and the associated costs — against public bodies will increase. We know what the figures are at present.

Ms Ní Chuilín:

It would be an idea to get the Attorney General in again. If guidance is coming forward, it would be included without his prior knowledge. I am sure that a 'Blue Peter' is being done on it as we speak.

The Chairperson:

Should the guidance not —

Ms Ní Chuilín:

The guidance should have come with the clause.

The Chairperson:

There is no question about that, but that is not how it was done. To coin a phrase: we are where we are.

Mr McNarry:

Is it not true that the Attorney General is going to approve any guidance?

Mr McCartney:

It is only approval.

Mr McNarry:

That seems an extreme measure. How quickly can he do it?

The Chairperson:

As the occasion arises.

Ms Ní Chuilín:

As I read it, the Attorney General will issue the guidance, but it will involve the negative resolution procedure in the Assembly.

The Chairperson:

Yes; that is another downside.

Lord Empey:

Therefore, the Committee sees nothing.

Ms Ní Chuilín:

The Committee sees nothing, has no role in scrutiny and has to just live with it. I am not calling witnesses for the sake of it, but I feel that there is an issue here. We will either agree clause 34 or we will not. However, given its present shape and what may result from it, and it looks as if there may be some sort of guidance for public bodies, it is appropriate to ask the Attorney General in.

Mr McNarry:

We seem close to getting there; but, there are an awful lot of niggling issues.

The Chairperson:

The more we study it, the further away we get from it.

Ms Ní Chuilín:

The issue for us is that we will miss Consideration Stage. Further Consideration Stage will come soon, and I would like to see the guidance before we sign off on the clause.

The Chairperson:

This is a chicken-and-egg situation. Will the provisions come into existence before the guidance or will the guidance come in first?

Ms Ní Chuilín:

Should they not be together?

The Chairperson:

The ideal way is for them to come in tandem. If I was cynical, and you all know that I am not, I would be saying that it might not be done that way.

Ms Ní Chuilín:

So, that means nothing. If you have no guidance, you cannot do anything anyway. Is that what a cynical person would think?

The Chairperson:

Not being in that camp, I just do not know. *[Laughter.]*

Mr A Maginness:

You have always had a great sense of humour, Chairman.

Mr Givan:

I expressed the view that I am very reluctant to have this clause, and that remains my view. However, it will be someone in a pay grade above mine who will look at that at the Executive. I do not think that the Committee will be able to say that it supports it.

Mr McCartney:

The other side of that is that you are trying to put an onus on public bodies to have due regard, and that is when lawyers come in. There are excellent examples of local initiatives by the Housing Executive trying to design out dark alleys and electricity boxes. However, if that is not a policy or practice, the very next estate could be poorly designed simply because there is lobbying or whatever. It is about trying to introduce that in such a way that it can be practical, and that is where the gap exists. This is a good idea —

Mr McNarry:

We are close but we are not there.

Mr McCartney:

We heard about legislation that tries to stop people from taking alcohol onto buses. Will Kerr of the PSNI said he would possibly never use the provision. Yet, we have no legislation to stop people from drinking in gardens, which is an annual event. It is a case of trying to ensure that the Department knows where we are going with this. The idea is right but it is a question of how we match it.

Mr McNarry:

The Attorney General gives advice to the Executive on every Bill. It is unlikely that he would give the Executive and the Committee different advice. However, at what stage will he give the advice to the Executive meeting and when will the Minister bring it forward? What is the time gap between him giving the advice to the Executive, them accepting it or not —

Lord Empey:

He sits on the Executive.

The Chairperson:

He is on call.

Mr McNarry:

So, he will there next week and will give the advice, and it is hardly likely to change from what we get.

The Chairperson:

Not dramatically, I would have thought.

Mr McNarry:

You would think that the Executive might raise some of the queries that we are raising.

Mr McCartney:

Proposed clause 34(4) nearly places too much responsibility. Proposed clause 34(2), which refers

to the guidance being issued with the "approval of the Attorney General" is trying to tighten that up so that the Department does not have a low threshold. The Attorney General will be saying, "In terms of due regard, your threshold is too low."

Lord Empey:

John O'Dowd's point was interesting. They figured out the risks for litigation, and they have raised the bar. I suspect that it would be beyond the reach of all but the most sophisticated and well-organised individuals and groups. However, the fundamental idea of forcing public bodies to co-operate is a good one. That is the point. We have the genesis of a good idea, but we need to see the guidance to see who is in the firing line and who is not. We do not know who will be on that list. I find it hard to imagine that they drew up such a clause without having some idea of what the guidance will be and to whom it will apply.

The Chairperson:

Our immediate concern is that the original clause 34 will be debated next week. We, of course, are not supporting that; we have rejected it. Therefore, the Minister will not move it. David Hughes was careful, because this looks to be as near to being a minefield as you will get. The following week, at Further Consideration Stage, the new clause 34 will be proposed.

Lord Empey:

By then, it will have been approved by the Executive, presumably.

The Chairperson:

Yes, or not approved. We are saying that we want proposed new clause 34(4) out, if I am reading the minds of the Committee members. Then, of course, it will be up to us to decide whether we will support it at Further Consideration Stage. The point is made that, by that stage, it will have been approved or not approved by the Executive. Should we not also be asking for an affirmative resolution for the regulations and draft guidance to be brought before the Assembly?

Ms Ní Chuilín:

Absolutely.

Mr McCartney:

Sir Reg is right. It strikes me that this might be above the the ordinary citizen. What role would scrutiny Committees have if this were put into legislation?

Ms Ní Chuilín:

If it is done through negative resolution, we would have none.

The Chairperson:

There would be no role based on the way that it is proposed.

Mr McCartney:

There would be no role on the implementation of the guidelines. If the clause were enacted, would the Committee be able to bring the Housing Executive, for example, to the Committee and ask it why it had not fulfilled the legislation on an issue such as the Holylands? We might be putting this on citizens by judicial review, but a scrutiny Committee might have a role to say that to an organisation such as the Housing Executive, and I do not want to single out any organisation.

Mr McNarry:

That is a valid point. That is where we get disturbed about it. Are we able to see the advice that the Attorney General gives to the Executive?

The Chairperson:

No, that is privileged. It has been made quite clear that we would not get that.

Mr McNarry:

If he were to come here, would we be able to ask him what advice he had given to the Executive?

The Chairperson:

You could ask him, but I know the answer that you would get.

Mr McDevitt:

He would say that it is privileged.

The Chairperson:

He would say that it is privileged advice to the Executive.

Mr McNarry:

Therefore, we are being asked to accept that, if the Executive have accepted this, they have done so on the basis of his advice.

The Chairperson:

I suspect that that is right.

Mr McNarry:

Is that good enough for everybody?

Lord Empey:

As I said, there is the kernel of a good idea here. I understand Mr Givan's concerns that it is not properly cooked up yet, and I have some sympathy with that argument. Is it possible for us to get access to any draft guidelines that might be around the Department and even a draft list of those that might be included in them? We are talking about an enormous spectrum of public bodies right across the board, so there will be some amount of guidelines.

The Chairperson:

Yes. Moving on to the proposed new clause 34, I take it that we are all saying that we believe in the merits of clause 34 and that it has to be there. It is its form that we are concerned about and, of course, we are not happy with the legislative process that all aspects of it will come through, including the guidance and the regulations. Why can we not amend the proposed new clause 34(4) to articulate the Committee's views and get in, as Reg keeps mentioning, before the Executive meet?

Mr McDevitt:

Will that be technically possible? If the clause is moved only at Further Consideration Stage, it becomes a clause only then.

Mr McNarry:

That is one stage before Final Stage.

Mr McDevitt:

That is what worries me. It is a good idea that we think about that.

Mr McNarry:

We do not know what it is.

Mr McDevitt:

We do not know what it is formally.

The Chairperson:

We have some shape of the animal.

Lord Empey:

If you were to ask me right now to put my hand up for that, I would not do it.

The Chairperson:

I can see why.

Lord Empey:

However, if you were to ask me to support that the clause be obliterated, I would not do that either. Before the Executive take a decision, they need to know the Committee's view, which is that there are still huge issues. It may be that, by next week, we could get access to the guidelines and we could persuade them to change the legislative route through which the regulations would go. That would address Carál's point about the affirmative resolution process. That could be helpful. If we see the guidelines, which is the critical point, a lot of our concerns may be

alleviated.

The Chairperson:

The Executive meet next Thursday, on the same day as the Committee meeting. If the guidelines are not even in the making at this stage, and we accept that they are going to be substantial, how will they be hatched up so mysteriously and quickly after all that?

Mr McNarry:

We are very close, and we can all agree with that. It seems to me that we are being asked that, if there is anything wrong with the law that we are going to pass, we will look to the Attorney General to bail us out. However, we are not being told along what lines he might bail us out, or what he is thinking of. There needs to be a little bit more information coming in our direction.

The Chairperson:

We have to move on today. Are members agreed that we will still oppose the original clause 34?

Members indicated assent.

The Chairperson:

We have a little bit of breathing space for the proposed new clause 34. We can all do our thinking —

Ms Ní Chuilín:

Between now and next Thursday.

The Chairperson:

Yes. I know that we will be in new territory then.

Mr McDevitt:

If that new clause is introduced only at Further Consideration Stage, what route, if any, is available to amend it? Could the Committee Clerk clarify that?

The Committee Clerk:

I will probably need to check with the Bill Office. The only thing on the table next week will be the original clause 34. As no one was content with it, the position that the Committee will take is to oppose it. I will check with the Bill Clerk as to whether, in a situation in which the Department tables its new clause, the Committee can table an amendment to it. The Committee can table a new clause.

Mr McDevitt:

Which would, effectively, be the clause as amended?

The Committee Clerk:

Yes. That may be the route that the Committee will have to take. I will need to check that. However, there would be an opportunity to table some sort of new clause. The issue is that you have to get rid of clause 34 next week. Otherwise, if a decision is made in the plenary sitting next week on clause 34 as it stands, that decision has to be carried over to Further Consideration Stage. All that the Committee could then do would be to amend the original clause 34.

My assumption is that the Department has looked at that and has decided that that is not the way to take it forward, and that a new clause would have to be inserted. In other words, from a drafting point of view, it is very difficult to amend the original clause. It is easier to take the original clause out and put a new clause in. If, for example, clause 34 was adopted during next week's plenary sitting, it cannot be rejected at Further Consideration Stage, because a decision that has been taken cannot be undone. You will then be left with trying to amend the original clause 34.

Ms Ni Chuilín:

At Further Consideration Stage?

The Committee Clerk:

You could do it at Further Consideration Stage, but you cannot go into Further Consideration Stage wanting to reject the original clause 34 and bring in a new clause. The tidier way to do it will be to reject the clause as it stands next week and introduce a new clause at Further

Consideration Stage. If the way to do it was to amend clause 34, drafting-wise, the Minister would not be not moving it next week. The assumption would be that the Department would have given us amendments to the original clause. It must not be able to draft it properly.

Mr McNarry:

Will there be time to table amendments to the new clause 34, once it is proposed?

The Committee Clerk:

That is what I would need to check with the Bill Office. I am not sure whether you can put down an amendment. It depends when it is tabled. The issue for the Committee will be whether, if you have reached a view on what you want to see in clause 34, we can draft an amendment that reflects what you want. That can be tabled, if necessary.

Mr McNarry:

It is quite crucial. I do not know whether we would or not, but —

The Committee Clerk:

If, for example, the Committee ended up being reasonably content with the draft but there were two things that it wanted to change in it, our advice would be that we will speak to the Bill Office and we would draft the new clause with the two bits that you want in it.

The issue is one of whether the Minister and the Department are prepared to take that on board and incorporate the Committee's views. It is a bit like what we did earlier in the process, which is why I suspect that the Minister is quite keen that you feed in any views that you have on this draft as it stands. He can take those on board now, and, if necessary, feed them into the Executive next week. Therefore, you may want to reflect, for example, that the regulations should be by affirmative rather than by negative resolution. If the Committee decides that proposed new clause 34(4) is not appropriate, it may want, at this stage, to indicate that.

The other part, to do with the —

Mr McNarry:

I understand all that. Is there any other guidance that the Committee can receive on this? I am not saying that I do not believe them, but I am being asked to believe them and to do everything blindly. Are any other resources available from which we can seek an opinion on the situation?

The Committee Clerk:

There is another thing that the Committee could do, if it wants. The Attorney General discussed clause 34 with you on the basis that the Minister was content for him to do so. If it wanted to, the Committee could go back and ask the Minister whether the Attorney General can come back to discuss the proposed new clause.

The Chairperson:

I suspect that he would, but we should check that.

Mr Buchanan:

We are still not happy with what is front of us. Therefore, can the Committee not agree on what it wants?

The Chairperson:

It can.

Mr Buchanan:

Can the Committee draw up what it wants and let the Executive know its view? Then, when the Attorney General comes, at least the Executive will know what our view is compared to the Attorney General's. Is that putting the cart in front of the horse? Is it the Executive's job to bring this to the Committee and let it scrutinise it?

The Chairperson:

I think that we can do what you said. Procedure is the only problem. Will we get caught between two stools here? Having rejected the original clause 34, maybe we want to ask ourselves which is the lesser of the two evils: proposed new clause 34, as you read it there, or no clause 34 at all? Which can you live with better? You might have to live with one or the other.

Lord Empey:

In the absence of the guidelines, I worry that this is a shot in the dark. Albeit, I think that there is the kernel of a good idea in it. As I said earlier, Chairman, were you to ask me to put my hand up to support clause 34, I would not.

The Chairperson:

Sir Reg, the question that I am really asking you is: now that we have —

Lord Empey:

One or the other?

The Chairperson:

Yes. Supposing that we were not to get the halfway house —

Lord Empey:

At present, I would do without.

The Chairperson:

Is that what others are saying?

Ms Ní Chuilín:

Yes, but it is not my preferred option.

The Chairperson:

We are just not at that position, but lest we find ourselves in that position, we could decide to do that. Does the Committee Clerk wish to say anything further around that, because this is getting very technical?

Mr McNarry:

It is important that you have established that there is the potential for the Committee to reject the clause. The Minister should know that and take on board how we reached that conclusion.

The Chairperson:

That may have the same effect as it did on our friends in the legal profession.

Ms Ní Chuilín:

Give them a bit of focus.

The Chairperson:

Really concentrate minds.

Ms Ní Chuilín:

Yes.

The Chairperson:

No disrespect intended, Mr Maginness. *[Laughter.]*

Mr McNarry:

No money is involved in this one, though.

Mr McDevitt:

We are on a roll, Mr Chairman.

The Chairperson:

Obviously, we will write to the Minister again about this. So that everyone is on the same hymn sheet, the Committee Clerk will briefly outline what we will write.

The Committee Clerk:

The current position on the new draft clause 34 is that the Committee appreciates and accepts the underlying principle. However, in the absence of the guidance, it still has concerns regarding the outworkings of the clause and therefore, at this stage, has not reached a decision to endorse it. If the Committee were to go ahead with the clause as drafted, it would want the regulations to be subject to affirmative resolution rather than negative resolution. I am not sure whether the

Committee wants to indicate at this stage whether it thinks draft clause 34(4) is appropriate or whether its preference is not to go with it.

The Chairperson:

If I have read the meeting right, our preference is not to go with proposed new clause 34(4). We have some reservations about proposed new clause 34(2), but I think it is going to be there, because without one or the other, the whole thing is going to be slightly meaningless. Am I right to say that we want to exclude clause 34(4)?

Members indicated assent.

The Committee Clerk:

You are also requesting site of any draft guidance as soon as possible?

The Chairperson:

Yes.

The Committee Clerk:

I am not sure whether you want to suggest that any draft guidance should be laid in the Assembly.

The Chairperson:

Yes; we should say that.

Mr Givan:

We should also say that the clause cannot commence until guidance has been produced and agreed.

The Chairperson:

Are members agreed on that way forward, and we will see where it takes us?

Members indicated assent.