Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Role of the Northern Ireland Ombudsman

1 February 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Conor Murphy (Chairperson)
Mr Dominic Bradley (Deputy Chairperson)
Mr Leslie Cree
Mr Paul Girvan
Mr David Hilditch
Mr Paul Maskey
Mr Mitchel McLaughlin
Mr Adrian McQuillan

Witnesses:

Ms Marie Anderson	Northern Ireland Ombudsman's Office
Dr Tom Frawley	Northern Ireland Ombudsman's Office

The Chairperson: Our next evidence session is on the role of the ombudsman in public procurement disputes. The ombudsman has submitted an updated briefing paper. I welcome Tom Frawley, the ombudsman, and Marie Anderson, the deputy ombudsman. I will ask you to make an opening statement. The Committee for Finance and Personnel has been concerned about the issue at hand, because there appears to be, if not confusion, some divergence between your role and those of other bodies in dealing with disputes over public procurement. The Committee is keen to get some clarity on the issue. We hope that today's evidence session can help us with that.

Dr Tom Frawley (Northern Ireland Ombudsman's Office): I am grateful for the opportunity to explain to the Committee the unique role of my office in examining complaints from individuals who believe that they have experienced injustice as a result of the actions of Departments and public bodies in Northern Ireland. In particular, I note the Committee's interest in that role for public procurement processes.

This is a complex area of my jurisdiction. Therefore, I should acknowledge that, in many instances, procurement and contractual issues are properly matters for a court to decide by way of a judicial review through the submission of a legal claim for breach of contract. I emphasise that it is not my role to interpret the clauses of a particular contract that may be the subject of a dispute.

As you said, Chairperson, I have already provided a detailed briefing note to the Committee, which outlines the background to some of the issues. I hope that that may also assist the Committee in having a more complete understanding of my role. Today, however, I will address the Committee on a

certain more high-level aspect of that role, which is that of Assembly Ombudsman for Northern Ireland and Northern Ireland Commissioner for Complaints, which is part of the problem. People use the title "ombudsman" but — I do not plead for any recognition of this — there are two roles: the original ombudsman role, which was created, as some of you may remember, in 1969 as a direct response to civil rights unrest, as it was described at that time, by the Stormont Government. That was followed by the creation of another office a short time afterwards, which is separate and is called the Commissioner for Complaints. The distinction is that the ombudsman looks after Departments and their agencies. For example, agencies such as Roads Service or the Planning Service would be covered by the ombudsman's office, but that is separate from the second office that was created, that of the Commissioner for Complaints, which looks at public bodies such as local government, the Housing Executive, the health trusts, the former health boards and a whole raft of other public bodies such as the Arts Council, the Tourist Board, and so on. All those are part of the jurisdiction of the Commissioner for Complaints.

Let me focus on that. The Northern Ireland Ombudsman is the popular name given to two offices: the Assembly Ombudsman for Northern Ireland, which was formerly known as the Northern Ireland Parliamentary Commissioner for Administration, and the second office, the Northern Ireland Commissioner for Complaints. In my role as Assembly Ombudsman for Northern Ireland, I investigate complaints of maladministration relating to the administrative actions of all 12 Northern Ireland Departments and their agencies — for example, the Planning Service, Roads Service, and so on. The legislation that underpins my investigation of complaints concerning that type of body is the Ombudsman (Northern Ireland) Order 1996. In my separate role as Northern Ireland Commissioner for Complaints, I deal with complaints of maladministration by bodies such as local councils, health and social care trusts and general health service providers such as GPs and dentists, as well as the Housing Executive and registered housing associations. The relevant legislation for that jurisdiction is detailed in the Commissioner for Complaints (Northern Ireland) Order 1996.

I will give a little more detail on general background. The Committee may be aware that the word "ombudsman" is Swedish and is translated as a "trusted official". Interestingly, Sweden was the first country to establish an ombudsman's office, the primary role of which was impartially to investigate complaints against public bodies on behalf of individual citizens. In Northern Ireland, both those offices were first established, as I said, in 1969, and the legislation that created the offices was closely based on the Parliamentary Commissioner Act 1967, which established the first UK ombudsman. You may be interested to note that the first Northern Ireland Parliamentary Commissioner for Administration — now the Assembly Ombudsman — was the UK Parliamentary Commissioner, Sir Edmund Compton. Since 1972, the offices of both the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints has been held by a single person. So there is one person and two offices, which partly contributes to the complexity of the issue.

Although I hold both statutory offices, I do so, as I explained, under two separate pieces of legislation that, although broadly similar, have some significant differences. With complaints about procurement, for instance, I can investigate such issues under the Commissioner for Complaints legislation, but I have particular limitations on my ability to investigate procurement issues in my role as Assembly Ombudsman. The Ombudsman (Northern Ireland) Order 1996 contains a statutory bar excluding the ombudsman from investigating complaints about procurement issues involving Departments and their agencies. That bar prevents me from investigating any matter that relates to "contractual or other commercial transactions" to which a Department is a party. That provision is to be found in paragraph 5 of schedule 4 to the 1996 Order.

As I explained, I have a statutory remit to examine complaints of maladministration. The word "maladministration" is not defined in either piece of legislation. In introducing the legislation to the House of Commons, Richard Crossman gave a list of what could be constituted as maladministration. It covers the following forms of administrative failings: avoidable delay; faulty procedures; failure to follow correct procedures; taking into account irrelevant factors or ignoring relevant factors in decision-making; unfairness or bias; and providing misleading or inadequate information or advice. I have a wide discretion to decide whether a particular action or omission constitutes maladministration, but I am empowered to investigate matters relating to administrative actions only. Therefore, my primary concern is often to do with the policy, process and procedure that inform decision-making. In general

terms, I cannot challenge the merits of any decision taken without maladministration. Therefore, if the administrative process and procedure is right, I cannot say that I did not think that someone was the right person to whom to award a contract. I am not able to make that judgement.

I will return to the Assembly Ombudsman jurisdiction. As I explained, my role as Assembly Ombudsman does not permit me to investigate matters that are properly "justiciable" by a court. I will deal with that word later. The accepted interpretation that has been adopted around the statutory bar in relation to commercial and contractual issues contained in schedule 4 to the ombudsman legislation is in itself somewhat restrictive. It is the accepted interpretation that that bar does not allow the ombudsman to investigate matters relating to the actual merits of a decision to award a public procurement contract. Neither does it permit me to investigate complaints about the performance by any party in a public procurement contract. The bar also prevents me from investigating any issue regarding the actual terms or conditions of a contract.

However, as I explained in my briefing note to the Committee, I consider that, in my Assembly Ombudsman role, when investigating complaints about public procurement issues, I can investigate the administrative actions of Departments and their agencies up to the point when a contract is awarded. In other words, I can investigate failings in the procurement process. It may be helpful if I give the Committee an example of that. When, for example, a Department or agency provides inaccurate information in an information pack relating to a tender exercise, I would consider that to be a failure in process, and that failure may constitute maladministration. Further examples in a procurement process could include a Department or agency failing to notify a party that a suspended tender competition was being readvertised, or when a late tenderer is permitted to participate in a procurement exercise without good reason.

I reiterate that, in my role as Assembly Ombudsman, I am allowed to examine only the administrative processes relating to a procurement exercise. I do not challenge a decision regarding the awarding of a contract, which is a judgement more appropriate to the courts.

I will now focus on the role of the Northern Ireland Commissioner for Complaints, whereby I have a broader remit in respect of procurement issues within the jurisdiction of the Commissioner for Complaints (Northern Ireland) Order 1996. Although I have drawn to the Committee's attention the statutory bar in schedule 4 to the ombudsman legislation, there is no similar provision in the Commissioner for Complaints legislation. I therefore have the statutory authority under that office to investigate complaints of maladministration relating to commercial or contractual transactions, subject to the limits imposed on my role where a complainant may have a legal remedy.

In the area of legal remedy, the role of the ombudsman, as originally conceived, was established to deal with grievances in which no remedy was available in court because the subject that was the basis of the complaint was not justiciable, as no legal right had been infringed. Therefore, in both the Assembly Ombudsman and the Commissioner for Complaints legislation, I am unable to investigate complaints where an individual has a legal remedy or may bring a reference or appeal to a tribunal. That statutory restriction on my ability to investigate, where a legal remedy exists, would cover procurement decisions where a remedy by way of judicial review exists. For example, the Committee may be aware of a recent judicial review application heard by Mr Justice McCloskey, in which he criticised the relevant selection criteria for a tender for contracts that had been initiated by the Department for Employment and Learning (DEL). In that instance, the High Court's oversight jurisdiction by way of judicial review provided a remedy that allowed a challenge to DEL's decision at that time.

In practice, when considering whether or not to investigate any complaint about procurement, I must consider, for instance, whether the individual or company concerned may have a legal remedy. That issue is complex, because, as I said, the restriction is not absolute. I have a residual discretion to consider complaints where it is not reasonable for an individual to resort or have resorted to the courts to obtain a remedy. I will give an example: such circumstances might include an unsuccessful tenderer in a procurement exercise not having sufficient financial means to bring judicial review proceedings.

Despite the complexity of the legislation, I have investigated complaints from unsuccessful parties to a tender under Commissioner for Complaints legislation. A case that illustrates that aspect of my jurisdiction involved Belfast City Council, which was found to have been guilty of maladministration in the handling of a tender process when a contract was awarded to the wrong tenderer. The council had also failed to meet its statutory obligations to publish the results of the tendering exercise. That deprived the other tenderers of their right to be properly informed of the outcome of the procurement exercise that would have enabled them to make a decision about whether they wanted to challenge the decision. The council accepted my predecessor's recommendation and agreed to pay £50,000 in respect of the loss suffered by the complainant and £10,000 for the loss of professional fees that were expended. I am happy to take any further questions on that complex area. However, I ask members to recognise the fact that the legal complexities of public procurement law make it difficult to deal with individual cases of which people may be aware in a forum such as this.

Before I finish, I remind the Committee that the legislation was passed in 1969. It was of a different time and dealt with a very different set of circumstances. The world has moved on significantly since then. Members may be aware that the Committee for the Office of the First Minister and deputy First Minister (OFMDFM) is looking at the legislation that informs my office. Therefore, I think that it is timely for this Committee to take its mind, in a sense, on the issue. The Committee may be concerned about aspects of the legislation and feel that the Committee for the Office of the First Minister and deputy First Minister should consider those in modernising the legislation and reshaping the jurisdiction to today's circumstances.

The Chairperson: Thank you very much. You said that the Committee for the Office of the First Minister and deputy First Minister is looking at the legislation that governs you. Is that for both the offices that you hold?

Dr Frawley: Yes. In fact, for your information, the Committee is minded to create a single office, as it feels that the presence of the two offices is confusing for ordinary members of the public. Some of you will be aware that if someone wants to complain about a Department or an agency, he or she must have MLA sponsorship. It is proposed that that sponsorship would not be required. However, if someone wants to go to an MLA and ask him or her to look at an issue, that would be perfectly reasonable. People would be encouraged to do that, but it would not be a prerequisite to making a complaint. The same model would apply to a single office. Under current Commissioner for Complaints legislation, people do not need sponsorship. The proposed changes would harmonise the two offices into a single office. A single-office model applies in the devolved Parliament in Scotland and in the Assembly in Wales.

The Chairperson: You have addressed some of the Committee's issues. There was certainly a sense that there were gaps and confusion. You outlined how you have more power to investigate some of those issues under one set of statutes than you do under the other. For the Committee, the gaps were in your ability to treat with Departments and other public bodies that spend a substantial amount of public funding and the differences in your ability to approach them. Your explanation was useful in that regard. We are heartened by the fact that the Committee for the Office of the First Minister and deputy First Minister is looking into that issue. This Committee will want to communicate its experiences to that Committee.

You answered quite a few of the questions that I had considered asking you. I was struck by your saying that you cannot normally take cases in situations in which people had a remedy to go through the courts. The obvious issue that arises — you referred to it — is people's financial ability to take cases through the courts, particularly small contractors who feel that they have been badly done by. I am conscious of the health warning that you gave, and I do not want you to give specific examples. However, has your office looked into people's financial ability to take a case through the courts, decided that they did not have the wherewithal to do so and pursued the case for them?

Dr Frawley: With your permission, I will allow Marie to answer that.

Ms Marie Anderson (Northern Ireland Ombudsman's Office): Although our investigations are conducted in private, I can quote a case on which Tom reported in his annual report. That case involved Coleraine

Borough Council and a failed tenderer, who indicated to us that they could have challenged the decision to award a tender to another person and could have gone to a judicial review.

They had sought legal advice and had been advised that they would not be successful. Also, for a small business such as theirs, the stress, the impact on the business of being in court for several weeks, the possible reputational damage and the legal costs involved made going to court prohibitive. Therefore, we took the case on, investigated it and found maladministration, although there was no injustice in that instance.

The Chairperson: Is that a frequent experience for your office?

Ms Marie Anderson: It would be, but probably more on the health side. Tom, do you want to talk about that?

Dr Frawley: It would be. We get many people for whom the prospect of a court and the law is intimidating and hard to access. Increasingly, the issue of free legal aid will be redefined and restructured; Assembly Members are working on that issue. Increasingly, the opportunity to go to court will be reduced for people in particular circumstances, and it will be much harder to secure any type of public funding for those issues. My office will increasingly come into play.

I will come back to your point. It is timely that one begins to make the process much more accessible and straightforward to allow people to come and judgements to be made without a sense of barriers being in place.

It might be helpful — I am not doing this to read it into the record, Chairman — to look at some of the notes and clauses that inform this legislation, and remember that they were written in 1969 by a classical civil servant. Nevertheless, they give a sense of a language that is now very alien to us. The following quotation concerns the statutory bar to challenging Departments:

"Briefly, the thinking behind this is that commercial judgements, whether made by public or private interests, are, by nature, discriminatory. To allow the commercial judgements of Departments to be examined for fairness to private interests, assuming this to be practicable, while leaving those interests themselves free from investigation, would amount to putting Departments and, with them, the taxpayer, at a general disadvantage."

The whole thing is written in a way that protects a Department from that sort of challenge and scrutiny, which is perfectly understandable if the legislation is in your gift and you are writing it in that way. Of its time, that was the way in which legislation would have been written. We are now looking at a very different set of circumstances, which is why the Committee for the Office of the First Minister and deputy First Minister, in re-examining the issue, needs the advice of Committees such as this one to look at specific aspects in which you have a direct interest to see that those alternatives and options are properly developed within the framework of the office's jurisdiction.

The Chairperson: My assumption is that you welcome the fact that there may be a change and that an examination of two offices with different statutes is timely. If that were corrected, it would result in being able to work on a more straightforward basis.

Dr Frawley: Absolutely.

Ms Marie Anderson: We have recommended to the Committee for the Office of the First Minister and deputy First Minister that one possible model is the Public Services Ombudsman (Wales) Act 2005. In that legislation, there is no statutory bar in relation to commercial or contractual matters. When the offices are merged, we recommend that there be no such bar. The only bar will be when there is a potential for a legal remedy. As Dr Frawley said, increasingly, people do not have access to legal aid, so access to justice in this arena will be narrower in the future, and the significance of having a free and impartial investigation service in this office becomes more significant.

Mr McLaughlin: Hello. It is good to see you again, Tom. I am delighted to meet you, Marie.

In my roles as a councillor in Derry and as an MLA, I have engaged with your office on a number of occasions. I have always found it to be very fair and helpful, particularly when dealing at a local level with individuals coming up against public authorities. Generally, people have a very positive perspective on the ombudsman's role and office, and rightly so.

I came across a case that perplexed me. I will not go into all the details, but it involved an Executive Department and a tendering process. The Central Procurement Directorate (CPD) guidance on grievance procedures explained how CPD would work its way through a process. CPD said that, if at the end of it, individuals are still dissatisfied, they can, through their MLA, contact the ombudsman's office. That is how this case ended up, but the individual then received a letter from you stating that you did not have the jurisdiction. A public body was referring people to your office, whom you were then referring back, saying that the issue was outwith your authority. You gave us some detail of the statutory basis for that.

In this instance, the broad circumstances were that a tender process involving two separate tenders was initiated for freight services to one of the Departments. The individual concerned — a small operator applying for the first time — pointed out that contracts were merged into one within 24 hours of the deadline, which he argued put him at a severe disadvantage. That person runs a small operation and, therefore, had to work at home on weekends to prepare some of the documents. He does not run a big organisation and does not have staff. He believed, therefore, that he was disadvantaged, in the first instance, by that sudden change of direction.

He also requested details on volumes and weights — reasonably so, I thought. He said that he did not know whether he needed to buy a motorbike, a closed van or a three-ton lorry. CPD came back and said that the Department had not given it that information. Given the fact that the only person who had that information was, in fact, the individual who won the previous five-year contract with a two-year extension, is it the case that there is a fault with the procedures? That person knew exactly what he needed. However, someone who wanted to bid for the contract needed that information to be able to inform his tender bid.

On a procedural basis, it seems to me that there is a reasonable case for somebody to take a look at that. I have to say that I eventually made some progress on it, by working with Des Armstrong and his colleagues. On the face of it, the advice on CPD's grievance procedures is that we can go to you, but almost as a court of last resort. I do not understand why that did not apply in these circumstances. It seems to me that the procedures are wrong. I do not even know why the contact was allowed to go to tender if the information was not there.

Ms Marie Anderson: The procedures are not wrong. What we have attempted to do is to explain that, even though there is a statutory bar, Dr Frawley interprets that statutory bar narrowly in order to allow some cases in which the tender process itself has failed. The legislation can be interpreted in two ways. It can be interpreted quite broadly, so that anything to do with a procurement exercise is not looked at by the ombudsman. However, the purpose of the office is to provide remedies to citizens and redress for injustice. Dr Frawley interprets the bar quite narrowly and, therefore, investigates complaints about the tender process. Strictly speaking, CPD is right to refer complaints to us. We then decide whether or not to accept them. Dr Frawley, do you want to say anything about that individual case?

Dr Frawley: Part of the problem with such cases is that they go to different directors in my office, and it is difficult to get a standard response. I do not see every complaint that comes past my desk. At times, other people decide whether a complaint is in or out of jurisdiction, and this is probably one such case. When you describe it in that wonderfully effective, eloquent way of yours, Mr McLaughlin, it sounds like an open-and-shut case. I would, of course, like to hear the other side of the argument. Far be it from me —

The Chairperson: You have missed your vocation.

Dr Frawley: I would not say that, Chairman; you could say that. Your putting the circumstances to me in that way is beginning to make me feel failed in front of you. I would, however, like to see the case in the round. I would have thought that that is the sort of case that we should be looking at, particularly given the fact that the contracts were, as you put it, merged 24 hours before the submission deadline. Secondly, the detail that you clearly describe, and the way in which you describe it, hugely advantaged the existing provider and made it a huge disadvantage for anyone else who was trying to judge how they were required to respond meaningfully to the contract. Those are two issues. I would not, as you put it, have allowed the bar to apply in that circumstance.

Mr McLaughlin: In that case, the individual accepted that they had taken the case as far as they could. I do not know what they are doing about it. Anyway, they have left me: they are not coming back to me for any more advice. I have actually engaged with CPD. It accepts that the tender process should, perhaps, not have started unless it was able to answer certain reasonable questions.

Dr Frawley: Correct.

Mr McLaughlin: Therefore, it will amend its process.

Dr Frawley: It is interesting that, increasingly, CPD acts as the expert adviser in procurement circumstances. That brings in another complexity. Therefore, whether Departments like it or not, they are accountable for decisions, even though CPD takes a firm view about the standards and requirements of a tender. I do not know how long ago that case happened. Certainly, it surprises me that CPD would have failed to recognise the issue of volumes.

Mr McLaughlin: It happened in 2011.

Dr Frawley: Well, then, real issues need to be answered. If it would facilitate you and you want to go back to those people, I would certainly look at the case again with regard to the advice that I have discussed with you today, rather than take up more of the Committee's time, Chairman.

The Chairperson: Fair enough. You have the door open. You can now follow through.

Mr McLaughlin: In that wonderfully eloquent way that you have, Tom. *[Laughter.]*

Mr Girvan: The foot is well stuck in. *[Laughter.]*

Mr D Bradley: Good morning. Thank you for your presentation. In some cases, procurement is carried out on a combined basis for Northern Ireland, Scotland and Wales. I believe that that is practised in the medical field in particular. If a complaint is made about a procurement process by a Northern Ireland business that competes for a tender, are you empowered to deal with that complaint, or would it be dealt with by the ombudsman in the location of the procurement, be it Scotland or Wales?

Dr Frawley: What happens in those major health tenders is that individual jurisdictions subordinate their primary interest to the big contract, if you like, which is then operated by one of the individual Departments. As ombudsmen, we tend to take the view that, in that situation, a complaint would be dealt with in the jurisdiction in which that particular Department is located. It is similar with regard to the North/South bodies in Northern Ireland. I have an agreement with the Republic's ombudsman that if a person who resides in Northern Ireland makes a complaint about a North/South body, I will look at the complaint. If the person who makes the complaint resides in the Republic of Ireland, she will look at it. Therefore, in that instance, it would be the primary tender supervisor, even though people from Northern Ireland sit on their advice panel to make the final decision.

Mr D Bradley: Even though they are acting on behalf of Northern Ireland.

Dr Frawley: Absolutely, because they have chosen to subordinate their primacy to the greater good. You make a very powerful point, Mr Bradley. Sometimes, you worry whether it is the right solution for Northern Ireland or its business. It may be the right solution for an individual hospital that gets a very expensive piece of technology. However, what price will we pay for that in the wider scheme of things?

Ms Marie Anderson: I would like to add to that, Chair, if I may. One proposal in the new legislation is that ombudsmen in the jurisdictions of Northern Ireland, Scotland and Wales could initiate a joint investigation. That provision currently does not exist. Perhaps, therefore, you could see that, if it were a multifaceted tender, there would be merit in its being approached from a Northern Ireland perspective and a Scottish perspective and resources used effectively for a joint investigation. That proposal is before the Committee for the First Minister and deputy First Minister at present. It may resolve some of your concerns.

Mr McQuillan: Tom, can you tell me about the size of your office? How many staff do you have, and what sort of budget are we talking about? Secondly, do you see your workload increasing because of changes in the justice system?

Dr Frawley: The office is made up of 29 people including me. The budget is currently £1·5 million, which is not a small sum of money — I do not claim that it is — but it is commensurate with the task in considering the scale of our oversight. As you said, Mr McQuillan, the new jurisdiction for justice, which has brought the Prison Service, the Department of Justice and the Legal Services Commission into our jurisdiction, means that the scale is broadening.

Members will be aware that one part of the jurisdiction that has hugely expanded in recent years is health. We get a tremendous number of challenges on health and on social care. Increasingly, those challenges — in the area of childcare, for example — are incredibly complex with a whole range of different perspectives wanting to be heard. All of that produces a level of complexity that we would not have seen 10 years ago, but, as I said, it is an integral part of the architecture of accountability of the ombudsman's office.

One issue that interests me is that, up until very recently, the appointment of the ombudsman was seen as the business of OFMDFM. What is important about the Committee sponsoring this legislation is that it is an Assembly office, because the legislature is examining the performance of the Executive Departments by ascertaining whether citizens are getting what we expect them to get from the public services that our Executive is delivering. It is an important independent office, but part of the architecture, alongside, I would say, the Comptroller and Auditor General (C&AG), is that one looks at the volume of money and investment, while the other — my office — looks at the individual experiences of citizens and whether they are getting what everyone claims they should be getting. It is crucial to a modern democracy to have an office such as that. Therefore, I do not believe that we need more money.

I get frustrated by another aspect. It is absolutely right that confidentiality informs everything that we do. This is the business of ordinary people; it is not the business of the media. If ordinary people want to go to the media, that is their choice; I do not do that. However, on the other hand, I think that I need to publicise the office more. I need to explain its role, and removing the complexity will make that much easier for me. I think that we need to engage in outreach and to explain our role. I know that this will appeal to my articulate and eloquent colleague from the north-west: I am thinking of going out to local councils, setting up there for a day, taking advice and presenting to the wider public in those arenas. There is a perception that the office is Belfast-centric because it is located in Wellington Place, and it is hard for people in Newry, Enniskillen, Derry or Tyrone to access it. Although we are getting into new technology in a different way, we have a lot of work to do to heighten the profile of the office. That would be much easier under the auspices of the Assembly than within OFMDFM.

It is not my business to go out and canvas for complaints. That would be wrong, and it would put the office in the wrong place. My office is independent. I will look at an issue not only from the view of the complainant or the body complained of; I look at the issue independently and objectively in order to come to a conclusion about whether someone has had fairness and has been treated reasonably.

Mr McQuillan: Our previous evidence session was about home working. How many, if any, of your employees could work from home?

Dr Frawley: It would be very hard for any of them to work from home, primarily because complainants, when they reach us, need an answer. They need to be able to be told where their complaint is. It is not helpful to tell them that no one is in the office today and that they will have to ring back for an answer tomorrow. There are issues about home working. We get a lot of external advice from professional advisers, particularly on clinical matters in health, professional social work matters or if we needed expertise in contracting, for example, but that would be off site. However, our core workforce is office-based.

Mr P Maskey: Thank you, Tom and Marie. We all look forward to the new legislation. I am concerned that the current legislation is outdated; it is the same age as me —

Dr Frawley: It is very old then.

Mr P Maskey: Yes, it is quite old all right. You said that even the wording of the legislation is outdated. I surmise that bodies such as CPD will tell people who complain that it has taken their cases as far as it can and that they should now go to the ombudsman. CPD will do that in the knowledge that you can do nothing about it. It is an excuse for those bodies to tell those people that they can complain if they want, but that the decision was right. The decision may not be right, and it may not have been taken in their best interests. However, the fact that your response is that you cannot look into a case gives a Department an excuse to say that its decision was right. Departments have not changed their systems over many years. Have you found instances such as that?

Dr Frawley: No. I think that it would be unfair to presume that. When there are increasing challenges, part of the problem is that CPD does not understand the legislation particularly well.

Mr P Maskey: I think that it understands it very well.

Dr Frawley: You may attribute that motive. I am merely saying that what happens — I see this in public bodies — is that people are told that, if they are not happy, they should go to the ombudsman. That is not done with the motive that, if they send people there, Frawley will be unable to judge it and the problem will go away; rather, they do that to get complainants off their case and onto someone else's. That is my sense of it, Mr Maskey, but you may have a different view.

In the main, we have very positive relationships with Departments. They do not come back to me and tell me that I have no jurisdiction and should mind my own business. That is not the way that they deal with me. They are very open to debate, and it tends to be me who says that I do not want to get involved.

We increasingly find ourselves involved in judicial reviews. It may be a personal thing, but I have a huge issue with, and feel strongly about, two public bodies, in the form of my office and a Department or a local authority, spending fortunes of public money contesting space together in the High Court. Who benefits from that? If people take me to a judicial review, I have no choice but to respond. However, there is always a judgement to be made. If we do go to a judicial review, which is the ultimate test, I ask Marie whether we should go for it, and I am told that, if I am challenged, a court could look at the law as it is written and tell me that I have no right to be there. There are real issues, but natural justice demands that I become involved, and sometimes we will move and push things, as Marie said, to the limit. As the accounting officer, I have to make a judgement about whether to expose the office and the public purse to significant costs that we will ultimately lose. It is easy to be defensive and draw back because it is not worth it. However, people will then ask whether there is any point in coming to me. They would view me as another man in a suit — a bureaucrat who will not push where they need me to go. It is a fine judgement, and it is not always easy.

Ms Marie Anderson: Paul, you raised a valid point in that bodies should deal with complaints first and should not pass the parcel automatically. That applies across the board. Our approach is to ask whether bodies have exhausted their internal complaints procedures and genuinely to look at the issue again, rather than simply passing the parcel to the ombudsman. That is an important message. We have issued guidance on effective complaints handling. We tell bodies that they are the first port of

call for complaints and that they should deal with them rather than passing the buck. Sorry, I interjected there.

Mr P Maskey: No, that was a valid point. The complaint that most of us will have dealt with is the fact that people cannot even start to tender. Will the legislation deal with that?

Dr Frawley: That will be part of the administrative process. One thing that understandably worries me about the modern delivery system is the select list. It is not the case now, but how people got onto the Irish rugby team used to be a huge mystery, and then they could never get off it. Sometimes, select lists are a little like that. We are continually saying that we must have new businesses and entrepreneurs, and they suddenly look around and say that they would love to get involved in that, but they do not even know how to start. There are real issues and challenges.

An interesting aspect of the new legislation is that my colleague in Dublin, Emily O'Reilly, has a right to do an own-initiative investigation. Currently, I cannot do an investigation unless I receive a complaint, whereas in Dublin, she can do an own-initiative investigation if she sees a pattern or a trend. She can say that she thinks that there is a systemic problem in a particular area. For example, there is no point in simply looking at a select list. It would be better to look at how the whole process works and whether it is working in favour of the taxpayer, the public or a vested interest. Those would be really good judgements. In your own arena, Mr Maskey, I can see a very powerful joint examination by the ombudsman and the Comptroller and Auditor General of how select lists work and whether they deliver what you as members want them to deliver for the public, the bodies and the business community. Looking at one-off select lists would not help you to do that. You would need to look at the whole issue in a major review. That idea of own-initiative investigations is very important.

Westminster is very uncomfortable with own-initiative investigations because it thinks that they would politicise the office because newspaper editorials would say that there should be an ombudsman's investigation of this matter or that matter. I believe in own-initiative investigations, but they should be used very sparingly, carefully and discriminatingly. They should be targeted and focused, and it should not be the case that an own-initiative investigation is undertaken every couple of weeks. It promotes a level of accountability on a scale that allows those big issues that concern members.

I should also say, finally — not that I am finished; you will tell me when I am finished — that my understanding of the process is that the Bill will come before the Committee for Finance and Personnel. Given that the Committee for the Office of the First Minister and deputy First Minister is not a Statutory Committee, as I understand it, this Committee may be running the Bill.

The Chairperson: That Committee now has statutory powers. It changed from being the Committee of the Centre to the Committee for the Office of the First Minister and deputy First Minister, but this Committee obviously has an interest, particularly in relation to procurement. At the end of this evidence session, I will suggest to my colleagues that we liaise very closely with the Committee for the Office of the First Minister and deputy First Minister to get sight of some of its propositions. If need be, we can have some input into that.

Dr Frawley: If we can help in any way to support your staff in developing your thinking, we would be happy to do so.

The Chairperson: I will bring in Leslie, and then we will finish this session, because I am conscious that we are overrunning.

Mr Cree: I am glad that you mentioned the Coleraine case, because, to my mind, that was a watershed. Your briefing note states that you are unable to investigate complaints when there is a legal remedy. It goes on to say that you have a "residual 'discretion'" where it is not reasonable. I think that there is a tension there. I have two questions. Were there any cases in the past that you decided were not reasonable? Do you intend to try to clarify the legislation so that it is a clear-cut issue?

Dr Frawley: The answer to your second question is yes. Drafting the legislation will be difficult, but because of the dynamic to which we referred about it becoming more difficult for people to acquire the means to put in a judicial challenge, the expense of that challenge and, indeed, in smaller communities, the reputational risk, businesses do not want to transact those challenges in public because they will find themselves trying to do business with the people whom they are challenging. That is the nature of small communities. If a council does a lot of business, a particular sector cannot afford to say that it will not deal with that council again, so people want to try to protect relationships. I hope that the process with which the office and I are engaged does not destroy relationships. That is a protection. We would like the legislation to be remade to become much more clearly in favour of our becoming involved, as distinct from a bar from getting involved in those situations. We would like the legislation to be written in that permissive way rather than in a restrictive way. We have become involved in other cases relating to local authorities and contracting. We took another big case with a local authority. Again, a contract failed to deliver, despite our being told that it was the right tenderer. We looked at the issue in detail. Without our even reaching a conclusion, the council decided that it would revisit the case and reopen the problem.

I will go back to Marie's point. Sometimes our intervention will allow issues to be resolved without a major investigation; that is our preference. We prefer it if people reopen the debate and discussion, and the issues that have been identified by the challenge are addressed in that new approach that is adopted. We would like to think that, increasingly, and without going to the full force of an investigation, we will be able to mediate with parties to encourage them to co-operate rather than going off in different directions. That is a better outcome for us.

Mr Cree: It is also easier, because there is no question of dodging the issue.

Dr Frawley: That is correct.

Ms Marie Anderson: The position with the statutory bar is that virtually every complaint for which there is a potential legal remedy could be refused. The ombudsman's approach is to interpret that bar narrowly, so that although there may be a legal remedy in theory, we invite people to give us some information about why it would not be reasonable for them to pursue that legal remedy. I just want to reassure you that we do not immediately shut down a case because there is a potential legal remedy.

Mr Cree: You did that in the past, I can assure you.

Dr Frawley: We have done that in past. We lived in a particular time, and we have a particular corporate memory. I am not judging how others would have done this job or how they lived in a particular set of circumstances. We came to this with an approach of "let's keep people out". It is much easier to deal with the issues when we say that we have no jurisdiction rather than to become involved and have the complexity of unravelling some fairly difficult issues.

As we tried to explain in our briefing note, it is a very complex area for us. We also have to build up our expertise. That is happening; I think that we are getting there. In the past, perhaps we have taken a more restrictive view than has been the case in the past three or four years.

The Chairperson: Thank you for that; it was very useful for us.

I suggest that the Committee liaise with the Committee for the Office of the First Minister and deputy First Minister on the powers of the ombudsman regarding procurement disputes. That will give us the flexibility to consider the detail of any new provisions and take further evidence as necessary. We have an interest in an area that another Committee is dealing with, but if we liaise with that Committee, we will take it forward from there.

Are members content with that approach?

Members indicated assent.