



**Northern Ireland
Assembly**

**COMMITTEE
FOR THE OFFICE OF THE
FIRST MINISTER AND DEPUTY
FIRST MINISTER**

**OFFICIAL REPORT
(Hansard)**

Commissioner for Older People Bill

30 June 2010

NORTHERN IRELAND ASSEMBLY

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DEPUTY FIRST MINISTER**

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Members present for all or part of the proceedings:

Mr Danny Kennedy (Chairperson)
Dr Stephen Farry (Deputy Chairperson)
Ms Martina Anderson
Mr Tom Elliott
Mrs Dolores Kelly
Mr Barry McElduff
Mr Francie Molloy
Mr George Robinson
Mr Jimmy Spratt

Witnesses:

Ms Roisin Devlin)	
Dr Nazia Latif)	Northern Ireland Human Rights Commission
Professor Monica McWilliams)	
Mr Duane Farrell)	Age NI
Mr Francis Hughes)	Age Sector Platform
Ms Michele Smyth)	Age NI
Dr Tom Frawley)	Northern Ireland Ombudsman
Ms Michaela McAleer)	Office of the Northern Ireland Ombudsman

The Chairperson (Mr Kennedy):

I welcome Professor Monica McWilliams, who is here with her colleagues to give her views on the Commissioner for Older People Bill. This session is being recorded by Hansard for the

Committee's consideration. Professor McWilliams, we ask you to make an opening statement, and then make yourself available for questions.

Professor Monica McWilliams (Northern Ireland Human Rights Commission):

Thank you very much. I am the Chief Commissioner of the Northern Ireland Human Rights Commission (NIHRC). My opening statement will be short, because members all have a copy of our submission. To my left is Dr Nazia Latif and to my right is Roisin Devlin, both of whom are from the investigations policy unit in the commission. Having prepared the response to the legislation, they will answer any questions on the more detailed matters that members may have.

The Committee knows of the work of the commission. However, in brief, it was given very strong powers under the original Northern Ireland Act 1998, which were then extended under the Justice and Security (Northern Ireland) Act 2007. The commission's functions are to review the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights. We advise, as we are doing today, on legislative and other measures that have to be taken to protect human rights, and on whether a Bill is compatible with human rights. The commission also has a promotion and awareness function in relation to the importance of human rights in Northern Ireland. In all that work, we base our practice on international human rights standards and, in particular, on the European Convention on Human Rights.

We welcome the opportunity to respond during the Committee Stage of the Commissioner for Older People Bill, and to draw your attention to a number of issues that we raised in our submission.

One of our concerns is the lack of legal certainty attached to the concept of interests. We believe that if that is to be included in the legislation, there may be some concerns, on behalf of those being investigated, if investigations are to be based on the concept of interests rather than rights. We say that based on our practice and based on the investigations that we have undertaken to date. The commission uses its very extensive powers to compel evidence and documents, and to take testimony. Having such strong powers, one would want, before investigating an institution or body, legal certainty over what it is that is being investigated. Therefore, the term "interests" should have more certainty attached to it than it currently does. We suggest that the term be displaced and replaced with the term "rights".

In clauses 3 and 4, on duties and general powers, we suggest that the focus should be more on duties. Again, the word “interests” is used. We are more than happy to discuss that issue further when answering your questions.

We have some concerns with clause 8 and the issue of complaints. We understand that some consultees believe there to be a gap in the complaint-receiving function, and we wonder where that gap lies. The Committee will later be taking evidence from the Northern Ireland Ombudsman. However, that gap needs to be identified if the Commissioner for Older People is to have a complaints-receiving function. We are a complaints-receiving body and, therefore, understand that, to avoid duplication, the office will need to be very clear about what complaints it receives. That way, anyone coming to the commissioner with a complaint, and who perhaps does not understand the office’s functions, can be told what the commissioner is, and is not, set up to do under statute. Therefore, everyone would understand the role of the ombudsmen that are currently in existence and, indeed, what other ombudsmen would be expected to do.

We want to know why clause 12, on conciliation of disputes, proposes to involve the services of a third party to ensure that there is no compromising of the office’s role if it were not to reach a resolution itself. That is not a conciliation function that we have. Our commission has very strong litigation functions in that it can take cases to court, and act as a third party in court. We do make referrals, but that is a very different role. Although we do not have that conciliation role, we ask that that be clarified so that there is no issue around compromising the office’s role if a third party is then brought in.

Clause 13 deals with formal investigations. Again, there must be clarification around the term “interests”. Also, if an investigation is declared, there is an issue around making publications public. If an ombudsman is given strong powers, it is only right that they publish their findings and that those findings are shared. Learning must spread across other organisations, and will sometimes go beyond the institution under investigation, perhaps to Departments or to other agencies. Therefore, it is extremely important that any investigation would not be left private or at the discretion of the ombudsman. It may be that material has to be redacted for the purposes of confidentiality or legal privilege. However, the findings of reports should be published.

Victim standing is the issue on which we have most to say, particularly given that the legislation makes reference to our commission. We are not devolved. The Northern Ireland

Human Rights Commission remains with Westminster, is accountable to Parliament and is funded, through the Secretary of State, by Parliament. Therefore, all funding has to be accounted for to Parliament. If we take cases to court, on behalf of a victim or with a victim standing in their own name, accountability is a core function of our role under the power that was given to us by the Justice and Security (Northern Ireland) Act 2007. Therefore, we would have some concerns if this legislation were to look to our commission to take a case. To be mandated in any way by another piece of legislation would sit uneasily with us, because we have to account for our funding in every case. Therefore, it would be very difficult for us to account for a case that came from outside the commission.

The commission was set up under United Nations principles — known as the Paris Principles — and, therefore, cannot be seen, at any stage, to be inappropriately engaged with any other body, agency or non-governmental organisation. That goes for campaigning, lobbying or having an interest that could be seen to fetter in any way our independence or discretion. I have already explained how the issue of our funding relates to that. That remains a concern for us.

We have memorandums of understanding with many of the bodies that currently exist and meet regularly to avoid duplication, to ensure that when we publish our strategic plans each of us knows what we are going to investigate next year, and to ensure that there is never a question of two bodies undertaking an investigation in the same institution at one time. For all those reasons, we have memorandums of understanding. However, this is different and goes beyond memorandums of understanding. This Bill speaks to the commission taking up a case and using its power of victim standing on behalf of another body.

We very much welcome the inclusion of individuals who are private fee-paying residents in residential or nursing homes. That is a really important inclusion, because no one should fall outside the human rights radar. The Committee is probably aware that it is only recently that the Human Rights Commission has been able to go into private nursing homes and that it took a change in UK primary legislation to allow us that power. Until then, we could investigate only those homes that were deemed to be public bodies. Private homes with public contracts were deemed not to fall under the designation of a public body. They are now, and, in fact, a current investigation is into the rights of older people in nursing homes, particularly focusing on dementia. We have been in private homes, but the element of private fee-paying residents is an important inclusion.

Finally, given the concerns that we have raised, the Executive might be minded to maintain the focus on interests. If they are to maintain that focus and not to move away from it to give more legal certainty in respect of rights, they should focus on a general review of advocacy, complaint inspection, whistle-blowing arrangements, assistance with complaints and promotional or educational activities. Those are our key concerns, which are based on our 10-year experience of undertaking investigations, receiving complaints, giving assistance and having victim standing.

The Chairperson:

Thank you for that overview. I will invite questions from members, and I will start. You appear to be concerned about possible duplication of the role that a Commissioner for Older People might have with some of your organisation's responsibilities. Is it the case that you consider your body to be superior and that you are almost adopting an attitude of, "Get your tanks off our lawn"?

Professor McWilliams:

Far from it. We welcome the legislation and the introduction of an older persons' ombudsman. Indeed, we noted the Deloitte consultation, which suggested that an ombudsman was needed to focus on the needs of older people. When something new is being established, everyone will ask what it will do differently from what is in place already. Our commission is focused on ensuring that no overlap or duplication takes place in our current functions. That is part of our work every day.

The Prisoner Ombudsman, Criminal Justice Inspection and our organisation have separate powers, and, recently, all three of us had to come together in light of an emergency and a crisis in Northern Ireland prisons to work out who should do what and whose responsibility it was to act on the issue. That is how we do our work. We do not suggest for one minute that, as a consequence, any of those other bodies are not needed. Duplication is not always a bad thing. If I were to come out with a set of findings on juvenile justice based on my powers, it might help the Children's Commissioner, who has a responsibility for juveniles, because she could back up those findings or validate them and take on the work that is relevant to her responsibilities.

It would not be anything new for us to work regularly with other ombudsmen, and we can see our organisation working easily with the Commissioner for Older People. All that we are saying

is that, if the Commissioner for Older People is given powers, legal certainty must exist in respect of those powers so that, if someone were to come to us and ask what the individual does that is different from us, or anyone else, we could be clear about what that commissioner does.

The Chairperson:

Is there any type of danger that the number of commissioners and commissions that have been appointed is offsetting the work and, if not quite undermining, taking away from the work of the elected representatives at Stormont?

Professor McWilliams:

That is a judgment for you; not for us. I reiterate that we do not fall under the remit of the Northern Ireland Assembly. We are under the authority of Parliament at Westminster, so it may be that you will wish to look at the bodies that fall under the authority of the Northern Ireland Assembly.

However, given the consultation that has taken place to date, and on reading the transcripts and Hansard reports to date, I assumed that that was one of the issues that individuals had been consulted on, and that political representatives had also stated their minds. It is not for us to comment on whether there are too many commissions or ombudsmen. That is entirely your call by way of the introduction of new legislation.

Ms Anderson:

Go raibh míle maith agat. Thank you; it is nice to have you back again. I would like you to expand on some of the comments that you made. I have read the explanatory notes with the consultation and your response. A pre-consultation took place with stakeholders' organisations — were you involved in that? Had you, at that point, raised your concern with regard to the clauses that you identified as making particular reference to interests, as opposed to rights? It seems the issue is that the term “interests” in the Bill is defined in a way that is not as broad as “rights”. I wonder whether, had that been brought up earlier, the officials who carried out the consultation could have explained what consideration they had given to that, because it did not find expression then when the actual Bill was produced.

Professor McWilliams:

We did raise those issues, because they are the key issues that we focused on. My recollection of

meeting the officials was that we were asked to tell them about our experience: what works, where the gaps were, and what more we sought to do. Those questions were asked so that they could build on the role of commissioner, and indeed other ombudsmen. We laid all that out, but also highlighted the very issues that you referred to at that stage.

Both Nazia and Roisin were included in those discussions, so perhaps Roisin might take up the detail on those discussions with the OFMDFM officials.

Ms Roisin Devlin (Northern Ireland Human Rights Commission):

The OFMDFM consultation document was issued towards the end of last year. We responded to the consultation and we welcomed the commitment to establish a commissioner for older people, but we outlined some concerns, including the exclusive focus on interests. We recommended that, as well as interests, the principal aim of the commissioner should be to promote and safeguard the rights of older people. The reason that we say that is because rights are codified and set out in domestic, regional and international instruments, whereas interests are not so clearly defined. We felt that it would be appropriate to set out the human rights that older people have.

Dr Nazia Latif (Northern Ireland Human Rights Commission):

Just to reiterate: that was not the first time that the commission has had to raise those points, and, unfortunately, they have not been positively addressed in the Bill.

Mr Elliott:

Thank you for your presentation. I will make two brief points. Monica, you mentioned the issue about the term “interests” a number of times. Are you clearly saying that that is not specific enough, and that the specific roles in relation to that need to be more clearly identified? The second point that I hope that you can clarify for me is that you mentioned your concerns that there could be direction from the Commissioner for Older People to you in relation to pursuance of cases — legal cases, I presume. Can you expand on that a bit more?

Professor McWilliams:

Sure. I will ask Roisin to comment on the first point on rights versus interests, and Nazia can give you the actual detail in relation to victim standing.

Ms Devlin:

Our concern about the focus on interests is that the concept itself is not clearly defined, whereas rights are more clearly defined because they are already set out in international, regional and domestic instruments. The Bill states that, when interpreting the interests of older people:

“the Commissioner will be required to have regard to the UN Principles for Older Persons”.

We welcome that, but the UN principles are not binding, and they do not clearly set out what interests mean. We go back to our original recommendation, which is that the focus should also be on the rights of older people. Our concern with “interests” is that, because it is not clearly defined, there are two possibilities: first, people might not know what to expect from the commissioner in what he or she can and cannot do. On the other hand, when relevant authorities are being investigated, they will want to know against what standards they are being investigated. Our concern is that, if that is against the concept of interests, there is no clear definition of what that might mean.

Mr Elliott:

Obviously, it would take a test case to determine that — would it? How is it ever going to be determined if it is not set out somewhere?

Ms Devlin:

That is our concern. How will it be determined? In fact, it might take up some of the commission’s own time; if it is to initiate an investigation, it may first have to determine what standards it is going to use and what the interests of the older person are. That level of inquiry would not be required if international human rights standards were used.

Professor McWilliams:

Perhaps I can give you an example. When we undertake an investigation, we inform the body that we are going to investigate. We draft and share the terms of reference, in which we highlight the issues in relation to the rights that we are going to be investigating, so the individuals know what we are going to examine or investigate. Obviously, under the legislation, they also have an opportunity to contest any of that. That has never been done to date, but the opportunity exists.

If an organisation has such strong powers and there is equality in respect of those powers, it should be able to show to someone who runs a nursing home exactly what it will be coming to investigate so that that person is left in no doubt about the materials that they need to provide or

the witness statements and documents that they need to make available. In our case, that even includes medical records. If an organisation has those kinds of powers, they should be very specific. We are just suggesting at this stage, rather than having to come back to it at a later stage, that you should give as much legal certainty to that as possible when drafting the legislation. The standards are set: you would not have to think of them yourselves; they are already there. Is there anything that you want to add to that, Nazia, in relation to victim standing?

Dr Latif:

Ideally, the commission would have welcomed the post of Commissioner for Older People having victim standing in its own right, but we understand that that may require primary Westminster legislation. In the event that the post does not have that victim standing, the commission would be concerned if there were any policy or legislative direction that would place an onus or duty on our commission to consider cases that come its way from the Commissioner for Older People.

There are two reasons for that. First, the commission routinely welcomes referrals in any case from any organisation as a matter of course when making decisions about whether to take a case in our own name. It is not a power that we have exercised yet, but, when we do, it will be through extensive consultation with stakeholders. Secondly, we would see such a directive as compromising our independence as an accredited Paris Principles compliant national human rights institution. There would also be practical difficulties with such an arrangement, but primarily we would be opposed to any sort of directive in principle as a potential fettering of our independence.

Dr Farry:

I welcome the representatives of the Human Rights Commission. I want to return to the issue of interests versus rights. I understand the point that you are making on the limitation of the concept of interests, and that they are almost a social construction. What is meant is shaped by those who define what interests are, as opposed to a different type of standard. Is there not a sense that the concept of interests, flawed as it may well be, would be broader than dealing with matters through the issue of rights? If that is the case, to what extent are your comments about adopting a rights-based approach shaped by wider considerations on the need for some sort of bill of rights, either specifically for Northern Ireland or UK-wide? Surely, a lot of the conventions that relate to what we are talking about are currently not domesticated into UK law. At this stage, we are solely relying on the Human Rights Act and its elastic interpretation of needs.

Professor McWilliams:

I take your point. However, judicial decision-making often takes account of both hard and soft law. The UN Convention on the Rights of the Child is a perfect example. The Human Rights Act is obviously the one that most people are familiar with as it has been incorporated into our domestic legislation. We argue that the rights are set down, whether in international or domestic law. Therefore, people understand exactly what they are being referred to, what the standards are, and whether they meet them or are in breach of them.

Your point about interest is much wider. I assure you that discussion on a bill of rights was not part of any discussion that we have had in the commission or with the stakeholders, consultees or officials who came to see us. That did not form any part of our discussion. All that we are trying to do in respect of the drafting of the legislation is to be helpful both to the future commissioner, who will know that we have been down this road ourselves, and the legislators. We want to give legal certainty, where possible, if strong powers are to be given to a commissioner. It should not be left as a wider term, with other elements attached to it.

Dr Farry:

I want to be clear that, in essence, you are arguing that we should adopt a rights-based approach and rights-based language in the legislation in the context of the current UK-wide legal situation in respect of rights.

Professor McWilliams:

Yes. That still gives enormous scope, and legal certainty is attached. Every party, from the judiciary to the Executive to the stakeholders, including the Commissioner for Older People, would then be certain about what powers they are using.

The Chairperson:

That completes the questions. Thank you very much for your answers and for your earlier presentation. We will be happy to receive any additional information that you wish to pass on to us, and no doubt we will be in contact with you if any clarification is needed. Good afternoon, and thank you for your attendance.

Professor McWilliams:

You are more than welcome. Thank you.

The Chairperson:

We will now receive a briefing from Age NI on the Commissioner for Older People Bill. I am pleased to welcome Francis Hughes, Duane Farrell and Michele Smyth. Thank you very much for your attendance this afternoon. The session is being recorded by Hansard for future reference and inclusion in our considerations. You may wish to make an opening statement and then leave yourselves available for questions. We anticipate that the session will last approximately half an hour.

Mr Francis Hughes (Age Sector Platform):

Thank you very much, Mr Chairman. I am an executive member of the Age Sector Platform. I apologise that our office manager, Eddie Lynch, who was due to be here today, is unwell. Age Sector Platform has a membership base of 30 older people's organisations and networks, which represent approximately 200,000 older people across Northern Ireland. With me today are representatives of Age NI: Duane Farrell, director of policy; and Michele Smyth, project leader.

Since 2008, Age NI and Age Sector Platform have worked in partnership with a view to ensuring that the voice of older people is at the centre of the decision-making process that will ultimately inform the powers and duties that the Commissioner for Older People for Northern Ireland will have. We thank the Committee for inviting us to attend today to give oral evidence at this very important stage of the process. I will begin by offering a short overview of the activities that have informed our position to date. I will then hand over to Duane Farrell, who will outline briefly some areas about which we have concerns. We will then be happy to respond to the Committee's questions.

Throughout the process, we have liaised closely with the OFMDFM Bill team and the interim Older People's Advocate. We value greatly those opportunities for the co-operative exchange of information and ideas. We would like to add that we are in agreement with the points that were raised by the advocate at last week's Committee meeting. However, we would go further with respect to those points.

To give an insight into the process, in 2008, in the interests of establishing a strong policy

position, we commissioned research to identify potential models for a Commissioner for Older People. That research identified five criteria for success of a Commissioner for Older People. Those criteria are that the Commissioner for Older People should have a strategic and holistic role in securing, promoting and safeguarding older people's rights and interests; should be independent; should be complementary to existing bodies such as the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland; should offer value for money; and must engage older people appropriately in all aspects of his or her work.

In early 2009, that research was followed by a series of round-table discussions that continued throughout that year. Those discussions engaged stakeholders from throughout the voluntary sector and enabled us to reach an informed position and strong consensus on which our policy is based. Widespread support for our position has been demonstrated by the We Agree campaign. As of today, 1,347 individuals and 120 organisations and older people's groups have signed up to support our position. That support is growing daily.

More recently, we have drawn together a team of legal experts who have considered the amended Bill in great detail. Their deliberations have contributed to inform our written evidence. We have recently visited the office of Ruth Marks, the Older People's Commissioner for Wales, to look at the operation of that commission and to hear views on successes and shortcomings of the Welsh legislation. We believe that the Commissioner for Older People for Northern Ireland should have strong powers that can be used selectively and strategically to ensure timeliness, effectiveness and best value for money.

The Committee will be well aware that we are witnessing the onset of a massive shift in population demographics with the number of people who are aged over 60 years projected to constitute one quarter of the population by 2026. A powerful Commissioner for Older People would help to ensure that there is adequate planning for the future. We need to put in place measures to ensure that those who are able to continue to be able to contribute to society in later life are supported to do so, while older people who are vulnerable in society are granted the security of the support and protection that they need and deserve.

Mr Duane Farrell (Age NI):

I thank the Committee for this opportunity and to acknowledge MLAs' commitment to ensure the passage of the legislation during the lifetime of the Assembly. As the Committee moves towards

clause-by-clause scrutiny of the Bill, there are a number of areas to which we want to draw your attention.

As Francis mentioned, we agree with the points that were raised by the advocate. We want to draw attention to three aspects of the Bill because the effectiveness of the legislation and, thus, of the commissioner's capacity to be effective and to provide value for money hangs on them. They are: including rights as well as interests, removing or reducing unnecessary restrictions to powers, and agreeing an inclusive definition of "relevant authority".

Our legal advisers have indicated the importance of including rights and interests in the Bill. Although the Minister has indicated that interests, as they are referred to in the Bill, include rights, we have been advised that a court may interpret the legislation differently, drawing on the precedent of other legislation, and that that could lead to problems. Therefore, we have suggested a small, but effective, amendment.

As noted in the Assembly debate on 7 June, the Bill gives the commissioner powers in some areas only to reduce the effectiveness of those powers by surrounding them with restrictions. There are instances of that across complaints, investigation and legal functions. Often, the Bill relies on the existence of a remedy rather than the exercise of it. For example, as it stands, clause 8(2)(b) limits the older people's commissioner to act only if:

"the complaint does not fall within an existing statutory complaints system."

It would be preferable for the commissioner to be able to act if it is unlikely that there will be an investigation under the statutory complaints system. We believe that the intention to avoid duplication would still be addressed by rewording the clause to that effect. It makes sense that the commissioner's ability to act should not be limited merely by the existence of a statutory complaints system because its existence does not necessarily mean that the body in question would, in fact, take up the issue. Furthermore, the restrictions in clause 8(3) will limit the commissioner's capacity to take up a complaint, and clause 14 will hamper the commissioner in conducting formal investigations. Those restrictions could potentially leave older people unprotected, and Age Concern has suggested a number of amendments to those clauses in its submission to the Committee.

The Older People's Commissioner for Wales told Age Concern about the difficulties she has

encountered with restricted powers, waiting for other bodies to act and waiting for information on action. Older people have the least time of us all to wait. Age Concern understands the need to avoid duplication and has suggested ways of overcoming that in the way in which its amendments are worded and through formal memorandums of understanding. It is important that the commissioner's powers are unrestricted or that restrictions are kept to a minimum to allow the commissioner to act in a holistic and strategic manner. The commissioner must have discretion to act and must use that discretion well. Having full powers to take action will also enable the commissioner to offer individuals and bodies the option of following a conciliation or dispute resolution process, which will ensure good value for money.

A proper definition of what a "relevant authority" is and how it is covered under the Bill is fundamental to the effectiveness of the legislation. That definition should include a wide range of public, private and voluntary bodies in so far as their provision for older people is concerned, and all aspects connected with the operations that are linked to that. All functions of all public bodies should be included under all of the commissioner's powers. Examples of matters that would escape the commissioner's oversight include the services purchased under direct-payment systems, and those bodies that are included only under some powers, such as those that are listed in clause 7(6) to solely assist with complaints to relevant authorities.

Age Concern notes that some bodies listed as "relevant authorities" have been removed between drafts of the legislation and that there are other bodies that must also be considered. All functions of all private and voluntary bodies in so far as they pertain to older people should be included. The Bill seems to limit those to some providers in only part of the social care sector, and that is insufficient. Furthermore, the Bill must be future-proofed by taking account of the economic climate in which services may be delivered in the future. Age Concern intends to engage further with the legislative team in OFMDFM to arrive at an appropriate definition of what a "relevant authority" is, and would appreciate the Committee taking a continuing interest in the matter.

Age Concern also has a number of additional points to make on the Bill. First, it welcomes the introduction of the new clause to deal with alternative forms of dispute resolution, but agrees with the point made by the Older People's Advocate that the term "conciliation services" may be too limiting. Age Concern recommends that the broader term "dispute settlement services" be used, because it encompasses a range of options allowing the most appropriate and cost-effective method to

be chosen in each case. Age Concern undertook research in advance of advocating alternative dispute settlement in the Bill, and, following this session, it will be hosting a round-table discussion with a US expert to advance knowledge on the continuum of alternative dispute settlement mechanisms. Age Concern has invited members from the legislative team in the Department to that discussion, and a representative from the Assembly's Research and Library Services is attending on behalf of the Committee Clerk.

The issue of sanctions was also raised by the Older People's Advocate. That is an important area that should not be overlooked, because sanctions are an important and cost-effective way of ensuring compliance. The Northern Ireland Ombudsman has powers of sanction over persistent maladministration and the Equality Commission over persistent discrimination. The threat of a sanction could be enough to encourage remedial action without any further and potentially more costly intervention. Age Concern proposed some potential methods of sanction in its written evidence to the Committee, such as notices of compliance and, where persistent offenders are concerned, enforcement of compliance with recommendations made to the courts. As the advocate indicated last week, it is important that the commissioner's action is not frustrated by bodies failing to follow through on recommendations for improvement in a timely manner.

The advocate also raised the issue of the question of principle. Our legal advisers have indicated that that term has no legal definition and is, therefore, ambiguous. They suggested that the legislation would be clearer if that term can be replaced, wherever possible, by reference to the Commissioner for Older People's remit or aims and duties. We welcome the power to cooperate enshrined in schedule 1. Our view is that that power should be underpinned by formal memoranda of understanding between bodies.

The experience of the Welsh Older People's Commissioner suggests that informal arrangements are effective only up to a point. She has indicated a desire to develop more robust memoranda of understanding where possible. She has also identified areas in which collaborative work could be improved, such as the potential for joint investigations.

Before ending, we want to draw the Committee's attention to matters that are outside the control of the Assembly, but that nevertheless impact on older people in Northern Ireland. First, we urge the Executive to pursue victim standing status for the Commissioner for Older People through the UK Government and Westminster legislation. Victim standing is a means of getting

results for older people while ensuring that they avoid the stress and distress of legal proceedings themselves. Secondly, we are asking the Executive to explore what formal arrangements might be developed at a UK level to give the Commissioner recognised standing in relation to reserved matters such as tax and benefits, including pensions, which greatly affect older people. We have undertaken a substantial review of the Bill with our legal advisers and have suggested amendments, or not, on a clause-by-clause basis.

We commend our submission to the Committee, and ask that it be considered fully. We are happy to provide any further clarification and information as the Committee's scrutiny of the Bill proceeds, with a view to supporting the passage of this legislation in the lifetime of this Assembly in whatever way we can.

The Chairperson:

Thank you for your presentations, and for the very comprehensive submission that we received in advance.

Ms Anderson:

Thank you very much for the presentation. You acknowledge in your response that the Children's Commissioner model had extensive powers, and that, although it was a good enough starting point, you looked at four models and recommended the enhanced commissioner's model. Will you tell us a little bit more about that model?

Mr Farrell:

That goes back to the point that Francis made: we articulated five criteria at the very start of the process in 2007, and we examined a range of models from an advocate to an ombudsman, through to a commissioner. The final model was an enhanced commissioner. That process looked at the learnings from the operation of the Children's Commissioner, Equality Commission and Human Rights Commission, where issues such as restrictions to powers and access to victim standing status have become impediments to the effective employment of the powers.

The view that we took quite early on was that the best way of managing potential duplication is not necessarily by restricting the powers of the organisation of the office that is last into the field, but rather to encourage collaboration, co-operation and a set of relationships based on equality across those who deploy the powers in the best interests of people in Northern Ireland.

That is why we took the view of the enhanced commissioner model, based on the learnings from the commissions that had been in operation up to that point.

Mr Elliott:

Thank you for the presentation. I have a couple of issues. What do you consider the Bill will provide that is not already in place by some of the other Government Departments, bodies, or indeed various commissioners or ombudsmen? Could those services be provided by another mechanism within governmental organisation?

Mr Farrell:

I think that goes back to the first criterion that we articulated: a strategic and holistic overview. We recognise that the Equality Commission has powers. Where there is illegal discrimination, such as employment discrimination, the Human Rights Commission has some powers, as do ombudsmen. It is a very fragmented scene. In the Commissioner for Older People, we saw the ability to take a strategic and holistic overview and indeed to work on areas where, for example, it is still legal to discriminate against older people in the arena of goods, facilities and services. Somebody with powers to be able to take that forward, to be able to speak with politicians about that, to be able to make the case and to measure the discrimination that is —

Mr Elliott:

What I am saying is could that not be an extension of the powers of, for example, the Northern Ireland Ombudsman or the Human Rights Commission?

Mr Farrell:

The Northern Ireland Ombudsman is a case in point. He works on maladministration in respect of organisational processes. I think that the remit of the Commissioner for Older People is far broader than that — to look at, as we are proposing, rights and interests. I would go back to the fragmented nature of the scene and to the timeliness issue. The co-ordination needed to work across each of those bodies to clear lines through memoranda of understanding requires time that, very often, older people do not have.

Mr Elliott:

I have one other question. How do you answer the accusation that the model that is proposed combines advocacy, championing and education with investigatory powers, and that that

combination is inherently flawed?

Ms Michele Smyth (Age NI):

I think that, as the Older People's Advocate iterated last week, those components actually work very well together. As opposed to being in conflict, they complement one another.

Mr Elliott:

So you do not see any conflict there?

Mr Farrell:

No; I think the response required is a systems and process response within organisations. The reality is that both the Equality Commission and the Human Rights Commission combine those functions, so when the Commissioner for Older People is established, there will be a need for attention to how the separate sides of the house are linked or kept separate. However, they are not incompatible, and can support an effective commissioner's role.

Mrs D Kelly:

Thank you for your presentation; I have just a couple of points. In relation to the definition of age at 50 years and over —

The Chairperson:

You are included. *[Laughter.]*

Mrs D Kelly:

Enough of that — I have heard whispers that I should declare an interest from people who are not too far behind me. We are also hearing on the news that the working age should be lifted to 70, yet we are talking about a Commissioner for Older People to represent people aged over 50. I am sure that that is difficult to follow in some people's minds. What are your thoughts on that in relation to trying to use finite resources and target those most in need?

In your comments on the draft Bill in relation to the term "relevant authority", you said that the commissioner must respond to requests from the Executive, the Secretary of State and Assembly Committees, etc. I have concerns that there are too many relevant authorities. In other words, the commissioner could be running about, responding to requests and not really getting

into the investigative meat of the job.

Ms Smyth:

I will answer the first point. The representation of those over 50 would be in exceptional circumstances. That was something that we agreed with during the consultation. The rationale behind that is that there are groups in our society for whom a life expectancy of 50 is considered an older age. That is our interpretation of where those special circumstances will come into play. There is a bit of a stigma attached to being branded as an older person at 50, but it would be for exceptional circumstances.

Mr Farrell:

Some examples are members of the Travelling community, for whom life expectancy is far lower, so what it is to be an elderly person as a Traveller is very different. A second part of the rationale, which is particularly pertinent at the moment, is that we are in a recession, and there are large numbers of people over 50 losing their jobs. That has an impact on an individual's savings, leading them to arrive at pensionable age in poverty, with no savings to support somebody. There was a need to be able, in exceptional circumstances, to take a preventative approach.

On the second issue that you raised about relevant authorities, there is a practical point in relation to the difference between "must", "may" and "shall" in the legislation. We were concerned that "must" had the potential to mean that the commissioner could be deploying the majority of his or her resources responding to requests for information from relevant authorities and not necessarily getting at the core work. That is a very practical and pragmatic point.

Mr McElduff:

I am interested in the definitions of rights and interests. The explanatory memorandum's commentary on clause 2 states that:

"Interests is a broader term covering the wider picture. Interests includes but is broader than rights."

Are you effectively contesting that? Is that a factual statement or a matter of interpretation? What is the legal basis for your view that rights should be specified?

Mr Farrell:

We were fortunate enough to secure the services of three legal advisers who volunteered to support us in our analysis of the legislation. As we went through our analysis of the Bill, we

discussed the fact that, in the Hansard report of the Second Stage of the Bill, the Minister was quite clear in saying that interests include rights. Our legal advisers informed us that, should the commissioner be required to establish standing in a court of law, that Hansard report would not be clear enough to establish that intention at legislative drafting stage and that, in such instances, courts may refer to other, similar pieces of legislation. The example given to us was the case of the Children's Commissioner, where, very clearly, the intention was to include rights, and that was included in the legislation.

The point could be made in this case that, although it appears to be the intention to include rights, it does not appear on the face of the legislation. That might undermine that legal basis. We were very heavily influenced by our legal advisers in relation to how that would stand up in court.

Mr Spratt:

Thank you for your presentation. In reference to complaints and investigation, you mentioned that the commissioner should have "legal functions". What exactly do you mean by that?

Mr Farrell:

That was a reference to the structure of the Bill as it stands.

Mr Spratt:

What do you see the legal functions of the commissioner as being?

Mr Farrell:

The ability to support older people to take legal proceedings; the ability to act as, as is outlined in the legislation, *amicus curiae* — or friend of the court — to intervene in a legal proceeding; or to be invited by the court to make a representation on behalf of the commissioner.

Mr Spratt:

To provide legal support.

Mr Farrell:

Yes; to provide legal support to individuals.

Mr Spratt:

Have you ever thought about what that might cost?

Mr Farrell:

I will preface my answer by saying that it is our view that the commissioner is a body that should act in a strategic manner and that our preference has been that the commissioner will be most effective in working through providing advice for promoting best practice through those functions. The harder functions, such as investigations, complaints and legal proceedings, are an incentive to encourage relevant authorities to work with the commissioner in a more positive way.

Mr Spratt:

Should the commissioner have an all-singing, all-dancing legal department, with barristers?

Mr Farrell:

We have not taken a view on the commission's final structure and the numbers of staff that will be required. It is fair to say that we see the majority of the commissioner's work as not necessarily being in the legal sphere. The legal remit should be used in a strategic manner. It should take cases that test and demonstrate a point of law, rather than taking a high volume of cases. The existence of memoranda of understanding with others who operate in the field will support the identification of strategic criteria for the commissioner's legal functions.

Mr Spratt:

Chairman, I hope that you will allow me to ask one more question. I have raised the point before that it is important that any commissioner does not meddle in a criminal investigation. The right and proper practice is for the Police Service to carry out such investigations. There are big dangers with a commissioner doing that, and there are also big dangers with cost. We have seen the costs of lawyers in other places, and none of it comes cheaply. I can understand that legal advice should be sought now and again, but it worries me that you might be suggesting that an all-singing, all dancing legal department be attached to each of the commissioners. That is not what you are suggesting, is it?

Mr Farrell:

The Police Service is the first place to which an issue of criminality should be taken. The

commissioner should not undertake investigations in those circumstances.

Mr Spratt:

The commissioner might uncover something.

Mr Farrell:

At that point, the commissioner should take a back seat and refer the matter to the Police Service. The commissioner can be effective through legal work in a strategic manner, not by taking a high volume of cases and, because of that, being ineffective.

Mr Spratt:

There is always a danger in a commissioner taking on cases. In the past, ombudsmen have gone beyond their remit and caused major legal problems. I am worried about that danger, but I will not press you any further on that. I have worries on how that might be phrased and put into legislation, and there are dangers for the taxpayer. In the current economic climate, we have to be aware of that.

Mr Farrell:

We share your concerns about value for money.

The Chairperson:

That completes the questions. Thank you for your answers and for your presentation. If you wish to supply any additional information to us, we will be happy to receive it. If we need any points from your presentation to be clarified, we will be in touch. Thank you, and good afternoon.

We will now receive a briefing from the Northern Ireland Ombudsman. I welcome Dr Tom Frawley and Mrs Michaela McAleer. Thank you for your attendance. Good afternoon, Dr Frawley; you are very welcome. You are here so often that you will soon be at our staff dinners. You are here to brief us on the Commissioner for Older People Bill. The session will be recorded in the Hansard report for our considerations. You may wish to begin by making an opening statement, and then leaving yourself available for questions. We anticipate that the session will last for approximately half an hour. It may well be that I will have to leave because of business in the House, but Dr Farry, our new Deputy Chairperson, will assume the Chair if that is the case.

Dr Tom Frawley (Northern Ireland Ombudsman):

A phrase that I thought might be helpful is that perceptions are an aspect of justice. Fairness promotes confidence, and can make losing acceptable. The real focus must be that someone will say, at the end of a process, that they had a fair hearing.

Chairperson and Committee members, thank you for affording me the opportunity to provide oral evidence to the Committee as it finalises its evaluation of the draft legislation, which will inform the role of the proposed Commissioner for Older People. First, let me acknowledge the adjustments that have been made as a result of our original submission to the Committee. However, I continue to have major reservations and concerns about the range of roles and responsibilities being proposed for the Commissioner for Older People.

The documentation developed by the Bill team following the consultation process states that the investigatory powers proposed that the Commissioner for Older People will be based on an ombudsman/advocacy model. I again ask the Committee to recognise that such a proposal is based on a flawed analysis of the concept on which the role of an ombudsman is based. Indeed, I believe that it demonstrates a lack of understanding of the key criteria that must be met if a viable proposal for an ombudsman model is to be created.

Gottehrer stated in 2009 that there are four fundamental characteristics of an ombudsman: independence; impartiality and fairness; a credible review process; and confidentiality. The Commissioner for Older People, as proposed, does not meet the independence test, the impartiality and fairness test, or the credible review process test.

In relation to independence, the commissioner proposal is sponsored by a Government Department. Independence is assumed, not demonstrated. In relation to impartiality and fairness, the commissioner will be an advocate for particular individuals and groups — older people. Indeed, the document makes clear that older people must have primacy in any consideration undertaken by the commissioner. The commissioner must, therefore, weigh the interests of older people before the interests of other groups — for example, people with learning disabilities. What are the implications of such an approach in health and social care, for example, where there will always be competing needs for limited resources? Need is infinite; resources are finite.

In relation to a credible review process, the commissioner will be confined to dealing purely with a narrow jurisdiction and complaints from older people. I believe that that will lead inevitably to what I would describe as service capture. Ombudsmen, on the other hand, must be in a position to investigate anyone's grievances concerning any decision, recommendation or action, and must consider that grievance against the context of competing priorities, which will involve all individuals and groups, not just older people.

The notion of an ombudsman advocate is, therefore, I contend, self-evidently contradictory. Clearly, therefore, anyone who is the subject of an investigation by the Commissioner for Older People will always have the perception that the very title of the office biases the investigation in favour of older people.

I will now make some general comments about the evaluation of the consultation responses. There is evidence within the consultation that, had the consultees been better informed on the role and purpose of other oversight officers, including the Northern Ireland Ombudsman, they might have been more aware of the potential duplication and replication of existing powers in the role that is proposed for the Commissioner for Older People. The bodies that I allude to are ones that already exist in Northern Ireland: the Equality Commission; the Information Commissioner; the Human Rights Commission; the Consumer Council; the Regulatory and Quality Improvement Authority; the Police Ombudsman; the Pensions Ombudsman for the United Kingdom; the Parliamentary and Health Service Ombudsman, in respect of reserved matters; the Financial Services Ombudsman; the Northern Ireland Ombudsman; the Northern Ireland Commissioner for Complaints; the Local Government Staff Commission; and the Northern Ireland Patient and Client Council.

The consultation document, as I said, indicated that it had not informed those being consulted about the role of the existing bodies already available to older people to provide redress and review. It is disappointing that such information and clarification did not form part of the initial consultation to ensure that consultees were making informed statements about what was required in a new Commissioner for Older People when tested against the existing oversight landscape.

I acknowledge that the new commissioner will be advised not to act without due regard to the statutory powers and duties of other organisations; however, the legislation will not prevent him or her from doing so.

If I might offer some final comments; within the current proposal, the Commissioner for Older People can initiate arrangements to facilitate resolution of complaints, including the provision of funds to enable conciliation services. In respect of health and social care, that is a direct duplication of the current arrangements established only last year between the regional Health and Social Care Board and the trusts to facilitate mediation and alternative dispute resolution in health and social care.

The full extent of the potential overlap between regulatory and statutory bodies already in existence and dealing with issues affecting older people and the Commissioner for Older People is unknown because, as far as I am aware, no mapping work was undertaken in the pre-consultation process. Therefore, providing the commissioner with such extensive powers in the absence of such work does not appear to represent best practice, or, importantly, in our circumstances, a good use of public funds.

The responses to the consultation process recognised that, although people stated what powers the commissioner should have, few, if any, examples were given as to why such powers are necessary in the experience of older people. There is, I would suggest, a fundamental difference between the wants and the needs of individuals or sectors.

It is unclear how the objective of ensuring that public money is used efficiently can be met in circumstances where an organisation has been funded to provide a service, another organisation is also being funded to provide the same service, and so much potential overlap has been identified, in the absence of the mapping exercise that I referred to.

Finally, the principles of better regulation adopted by the UK Cabinet Office state that laws and regulations that would lead to duplication or disproportionate action by the state should not be introduced. I suggest that the potential for such duplication and overlap, as currently detailed in the proposed roles for the commissioner, has the potential to confuse and compound, in my view, the existing adverse public perception about quangos.

The Chairperson:

Thank you, Dr Frawley. I will invite questions, but I will start. You draw an important distinction in your evidence in the differences between a commissioner, an advocate and an

ombudsman. Will you highlight the differences that you see in those respective roles? Secondly, in respect of the Welsh Older People's Commissioner, how is that ombudsman role working in practical terms? What is your experience of other devolved legislatures?

Dr Frawley:

I will answer the latter part of the question first, if I may. There have been very different approaches in the two other devolved legislatures. The Scots did a lot of detailed work on a proposal to have an older person's commissioner and, in the end, decided against it and did not create the post. The Welsh, on the other hand, created an overarching strategy for older people, focusing on what older people in Wales needed. They consulted extensively on that, and then began to look at the existing system over a period of time to see how fit for purpose it was.

I suggest that it is important in Northern Ireland to map the existing landscape to see the potential for overlap and duplication, and then design a model based on that insight and understanding. The Welsh did choose to create an ombudsman, or an Older People's Commissioner, and there is now a very clear agreement between the ombudsman in Wales and the Older People's Commissioner that the commissioner will not engage in an investigation or complaint without prior debate with the ombudsman as to whether the review would be more appropriate to an ombudsman or to the commissioner. That is a fundamental part of how they proceed.

The Chairperson:

Would that approach satisfy some of your concerns?

Dr Frawley:

It would to a degree, but in Northern Ireland we have a completely different architecture. In a way, the model in Wales and England tends to have a lot of oversight arrangements, so that there is not, for example, an equality commission that specifically looks at the Welsh experience. There is no human rights commission; it has not been developed yet. Two of the major pillars that already exist in Northern Ireland do not exist there. Those two elements would require a different debate in Northern Ireland. Those who are designing the future might well say that that is an essential solution.

For example, part of the legislation states that the authority would be extended beyond people

over 65 to people aged 50 and above. However, when we look at the changing demographics of Northern Ireland, it becomes clear very quickly that over half of the population of Northern Ireland would then fall within the remit of a Commissioner for Older People. There are now debates in Wales about the issues concerning people with disabilities. Should they have a commissioner? Should people with mental-health problems have a commissioner? Should people with learning disabilities have a commissioner? The sense is that the potential now exists to fracture community society into the narrower view of older people, younger people and children, people with disabilities, people with mental health problems, etc.

Overall, a lot of thought needs to be given to designing a solution here. I do not have a problem with advocacy — none whatever. I think that it is very important that there be a voice to test and evaluate policies and to test people like me as to whether we are user friendly to older people, and so on. I have no difficulty with that; it is the investigative aspect of the post across all the other elements that presents the issue for me.

Mrs D Kelly:

Thank you for your very forthright views. Further to the Chairperson's question, what difference has having a commissioner made in Wales in relation to the well-being of the older people?

Dr Frawley:

Again, I do not want to speak on behalf of the Welsh experience because I do not have the detailed knowledge. I think that the sense is that it is early days; that is the phrase that I hear when I talk about it with my Welsh colleague. We need more ground to be covered before we can say what the real impact is. We have opportunities here to watch that Welsh experience unfold and allow it to inform how we want to proceed.

One of the interesting things is that the Scots have actually reviewed that whole landscape and collapsed a significant number of those offices into single offices, taking into account arguments about overhead costs and accountability fatigue, as it is called. A provider of healthcare, for example, could potentially have five or six oversight bodies coming in to test how their nurses and social workers are performing, and then someone like me coming in to say what the experience of the individual patient or client was. They find that, sometimes, the energy to actually deliver care is affected by the complexity and nature of the oversight. That is why the Scottish have gone in a different direction.

Mrs D Kelly:

The Scottish have a strategy for older people. I do not know if Dr Frawley would be able to help, or whether some research staff might be able to assist in looking at the strategy in relation to real, meaningful targets that have actually been reached and how much more tangible that might be for older people, as opposed to the advocate system.

Dr Frawley:

As I understand it, the Human Rights Commission has just launched a major review of nursing and long-term care in Northern Ireland. That is an area that obviously impacts completely on older people, so that will provide an insight. The Regulation and Quality Improvement Authority (RQIA) also does a lot of work in the area of care and quality of care, taking into account targets and the availability of different services, as well as the quality and content of different services. The Social Services Inspectorate and the nursing department in the Department of Health, Social Services and Public Safety equally do that work, so you are absolutely right in that a single approach is needed.

There are different approaches, and my concern is that currently proposed model will add yet another layer in the competing world of oversight, which the public is completely bemused by sometimes. They wonder to whom they should go and who is the person competent to judge their issue. That is my concern; it is about making it as affordable as we can, but also as straightforward and accessible as we can, with clarity about separate roles and functions — not duplication and overlap.

Mr Elliott:

Thank you very much for your presentation. You read out quite a long list of existing bodies. Is there anything in the proposed legislation that is not being provided or could not be provided by one of those other bodies with some additional, minor pieces of legislation?

Dr Frawley:

I think that the advocacy role would be the most difficult. That is, fundamentally, where the idea came from, because at the core of those bodies is scrutiny and investigatory resources. You might get some advocacy, for example, in the area of the Patient and Client Council, whose business it is to go in and see how well services are being delivered.

However, I read in the papers the other day — and I am sure that you are as aware of this as I am — that, although we have a Commissioner for Children and Young People, the Patient and Client Council is undertaking a major strategic review of mental-health services for young people. One of our challenges, which I know frustrates politicians, is getting the different players to talk to each other and engage with each other, and to make people aware of different initiatives. I do not think that you could take the advocacy element away, because I think that the advocate should be unencumbered with other responsibilities. Advocates should be able to go in clearly with a voice built from a constituency that briefs them and constantly updates their understanding.

It would be perfectly reasonable for a Commissioner for Older People to come to my office and ask the question, “How user friendly are you, Frawley?” It would be reasonable for them to ask how good my people are at engaging with older people, or how far older people are informed about my office. Similarly, they should be able to ask that of many public bodies. I do not have a problem with advocacy, but I perceive a focus on investigation and examination.

Some of the submissions that we have looked at suggested that some of the power and authority that people want invested in this particular commissioner is very significant, such as the place to intervene and overturn decisions. That makes governance very difficult if you have a single party coming in, so I would argue that advocacy be included. However, I think that literally every one of the bodies that I mentioned at the outset is capable of addressing investigation and inspection. Maybe we all need to look at how affordable we are as a landscape, jurisdiction or a justice system. I want it on record that I am not saying that we are absolutely beyond criticism, but the effect and value of all of those bodies should be robustly tested before designing yet another one to join the family. That is my point.

Mr Elliott:

I assume that goes back to your point about having a fundamental review of the entire process?

Dr Frawley:

I know that this is not my business; I never have been a prisoner of that reality. We are in a world where we have to think about what we can afford in the circumstances. I think that that is incumbent on us if we are going to spend and make an investment, which, in my view, if we were

to fund all of the functions that this commissioner will have, would certainly exceed £2 million or £3 million.

There will definitely be people who will say that they would prefer that money to be used for a home help or an adaptation to their house or some overnight care, especially if all that we will have will be people talking across one another at senior levels. All that I would say is that a test of the robustness of the existing system is required to identify gaps and where it is failing — that touches on Mr Elliott's point — so that we can then ask how we can address those gaps. The solution every time cannot be to create yet another commission.

Dr Farry:

I welcome our guests. I am tempted to say that there is almost a need for a commission for people who are not covered by commissioners, just to plug all the gaps.

The tenor of your evidence is very different from that of other groups that are addressing the issue, which creates a dilemma for the Committee and the Assembly in considering how to take the Bill forward. Bearing in mind that much of the balance of the legislation leans towards the investigative aspect, which is what you are most concerned about, what would you like us to do by way of response? Do you see the legislation as so fundamentally flawed that it needs to be taken back to square one? Do you think that we need to strip out a lot of the language about investigations and have a shorter Bill, or would more minor tweaking be sufficient to address your concerns?

Dr Frawley:

There is a fundamental focus in the Bill on investigation, and that is where my real difficulty lies. I suppose that I am suggesting — I might as well be forthright, as I was described a moment ago — that one needs to look very carefully at what is being put in place, and I say that mindful of the context of the current financial circumstances. I can completely understand why there would be a view that we should collapse many of the other bodies and then redesign a body around client groups, or demographics, or whatever. However, if we continue to add layer upon layer, ultimately it will become unaffordable and the resources will not be there to carry out the investigations properly.

I can say from personal experience that investigations are very expensive. It is not as though

someone can just go in and give a judgement. In order to give a judgement, one must hear the point of view of the complainant, the body that provided the service, and the experts who have views on many of the issues involved. It is simplistic to say that one can just go into an organisation and make a judgement of Solomon, because, whether or not a commissioner post is created — Dr Farry, you will know this from your own expert background — every one of those judgements is subject to judicial review. One could spend one's time in courts, where public bodies can test decisions. The commissioner would then spend more public money on a judicial review of one of his or her own decisions. I find it absolutely indefensible that two public bodies would appear in court against each other. I am just saying that the Committee should be very clear and satisfied that what it is designing is fit for purpose. I have real concerns, and I am happy to develop them.

Members, or the Chairperson at any rate, would be disappointed in me if I did not bring yet another paper here today, so I have indeed brought another paper — I am clearly not friendly to trees. The paper adds to what we said in January. All that I am asking is that we look closely at the investigative aspect of the Bill. Dr Farry, I take your point entirely that that is a core aspect of the model at the moment.

Mrs Michaela McAleer (Office of the Northern Ireland Ombudsman):

Dr Farry asked which clauses need to be removed. If we accept that there is duplication of roles, it would be the clauses that give rise to and reinforce that duplication. One good example of people not knowing what provision is currently available is a consultation response from the organisation Access to Benefits. That response talks about an elderly gentleman who goes to the Social Security Agency to apply for a benefit and is met with a number of delays. The organisation concludes by saying that there was no other body that could have investigated the matter, which is why a Commissioner for Older People is needed. However, if one looks at our annual report, which we laid before the Assembly today, you can see that we investigate those kinds of cases day and daily.

Mr Molloy:

Thank you, Dr Frawley and Michaela, for the presentation. I accept that there are issues of conflict of interest between an ombudsman and an advocate. How do you give a commissioner or an advocate the teeth to ensure that they can get an end result?

Dr Frawley:

That is the trick of all public services. I could argue against my role in a previous life, when we used to encounter each other, Mr Molloy. Those who deliver health should all be advocates for older people. Everyone who works in elderly care should be an advocate and everyone who delivers or plans a service should be an advocate. Systems can no longer afford levels upon levels of bureaucracy to ensure that the people in the delivery system are doing what they said they would do. Equally, the Assembly's scrutiny Committees are advocates; you ensure that people are delivering.

The trick is about telling the system, "This is our expectation, and if you cannot do it and say that it is not possible, we will get people who can." If it is decided that, because someone cannot do it, you will get someone else to make it happen, you are defeating the whole management system. That is where I have a problem. The advocate evaluates, pushes and shoves the system to ensure that it does what it is supposed to do and that it delivers on its responsibilities to the required level and quality. Advocates do that and ensure that those who supervise the system deliver.

The word "teeth" always worries me, because it implies that everything will be set aside for a person to have the authority to make everyone do something. Life is not like that. I found that, every time I thought that I had that authority, I was told, "Go to the next level, Frawley", and the people at the next level were seen as having the authority. I worry that we will create what we think is a solution, but that it will not be a solution. Big bureaucracy will continue to fail to deliver. It is about having people in leadership positions, whether in the Civil Service, health trusts, education boards or care settings, acting as advocates and delivering the best service that they can.

Mr Molloy:

Dr Frawley referred to his work in a previous life. When he had that role, I argued for a better Health Service, and I found that there were people in the Health Service who I thought were interested only in patients, but were not interested in patients at all. They were interested in the power that they had. How do you get the power? Mr Frawley was one of those who had the power.

Dr Frawley:

Become an ombudsman. *[Laughter.]*

Mr Molloy:

Who carries out investigations in that role, and how do we ensure that the person, who would rather see the money be put into home helps, gets their home helps?

Dr Frawley:

Every day, I investigate complaints about poor quality care, the wrong treatment regime and inadequate diagnosis. The Regulation and Quality Improvement Authority should be looking at how the whole system operates. The Patient and Client Council is there as an advocate and to support complainants. It is about mapping that environment. Daily, I get results from trusts. I keep repeating the idea that quality cannot be inspected into a system. Quality comes from people wanting to be as good as they can be, and when levels of scrutiny have to be created, they become a bureaucracy.

The teeth exist. It is not fully appreciated that no public servant whom I know is comfortable with having to come to give account to a Committee. They are not delighted at having to come here to account for a failure in the system. Real authority is invested in the Assembly. Equally, that should be so for Ministers and senior civil servants who lead Departments. It is about focusing on their clear contribution and leadership and on delivery, and ensuring that, where it does not deliver, people such as me come in to look at the failures of the system and to decide whether a complaint is fair.

My final point will be mentioned in the report that Michaela mentioned. There is an impression abroad that the public service fails every day. I do not accept that; the public service delivers some really good results every day. However, the public service also fails, and there is no basis for complacency. Therefore, all available resources cannot be invested in oversight and regulation, but, rather, should be targeted and used to ensure the optimum results for patients and clients.

Ms Anderson:

Thank you, Tom. You have provided us with a bit of a challenge this afternoon — it wouldn't be like you. You are saying that, ideally, if some aspects of the Civil Service are not doing what you

need them to, quite frankly, you will go elsewhere. If only we had the power to sack civil servants, but we do not. It is an ideal world that you are describing. However, you do not have the powers to change the system in the manner that, perhaps, some of us would like to.

That said, in 2007, the First and deputy First Ministers consulted an independent external consultative firm. Perhaps that is where we should start. I have an issue with consultancies, and it would not bother me to take a look at that. That firm looked at the potential role and responsibility of an independent commissioner and concluded, after its work — I do not know whether it mapped it out as you did — that there was strong support and a need for a commissioner. However, are you now suggesting that the Committee goes back to the list that you read out, which may or may not be inclusive, looks at the investigative powers, identifies whether there are gaps, and then designs a model that is built not on investigative powers but on advocacy?

Dr Frawley:

The first issue is the brief for Deloitte. Deloitte looked at older people. Part of the problem is that, in looking at the voice of older people and asking, “Would you like?”, “What should you have?” and “Is it necessary?”, the human response is “I want one of those”, “I want one of those” and “I want one of those”. Many people, beyond those with an organisational or policy interest in older people, responded to our consultation document. That may answer your question.

The second issue, which I say with some feeling, because it is the reason that I am here, is that the Deloitte review described the need for an office with an advocacy, promotional and educational role. I did not read in the review that a corresponding need had been established for a commissioner with a complaints-handling role. I may have missed that. However, the focus of the Deloitte review was advocacy and education, and yet, from Dr Farry’s description, the core of the legislation that we now have is inspection, complaints handling and complaints investigation.

The question is: how did we get here? It happened because, when consultation on advocacy was issued, people said that there was no point in advocacy without, as Mr Molloy said, any teeth to demand that things are done. Therefore, the coin was turned over and a new model was developed. If you went back to Deloitte with some of those questions, I do not know what its answers would be. However, the process and the review were designed around advocacy and education.

Mr Spratt:

Thank you, Tom, for that presentation, which was given in your usual forthright and independent way. It was very worthwhile.

It sends shudders down my spine to think that we may be creating another quango. You raised cost issues, legal issues and duplication issues. When creating another quango, there is always a quango king or queen. The next thing we know, there is a coach-load of hangers-on being paid to get on board too. That is at a cost to Northern Ireland in what are particularly difficult economic times. We need to wise up and be aware of what we are creating. That long list you read out — like Martina, I am not sure whether it is an exhaustive list or not — has given us serious food for thought. We have to seriously consider what you have said. I will be asking some people to take a look at the Hansard report when it is available.

One of the issues that I have been raising is the investigative powers of commissioners. I can understand the advocacy role, which is very important, and I think that we need to recognise that.

You also made a point in relation to the consultants. The consultants were asked to do what their brief stated, and they produced the report on that basis. We all need to be very aware of that. You get what you ask for, in many respects, and we all know that we should start considering the amount of consultants' advice that we take to heart too often. In relation to affordability, from a legal point of view, I see real dangers in that, and I have continually been trying to point that out. I think that you have highlighted those problems today. I probably do not have a question at the end of that.

The Chairperson:

I was just about to ask if there was one.

Mr Spratt:

I do not think that there is a question, but what I am saying, from the Committee's point of view, is that there are very serious issues that we need to consider. Perhaps the Bill's remit is too wide. Perhaps it should be a shorter Bill and that is the route that we should now be going down, because there is a danger that we will create another monster. We might, in the not-too-distant future, have to get rid of some of the monsters that we regularly see in front of this Committee. I

do not include you in that, Tom, by the way.

Ms Anderson:

Now, now, Jimmy; do not go there.

The Chairperson:

You are spared that axe.

Dr Frawley:

I almost said “absolutely” there.

Mr G Robinson:

It is not often over the years that I have agreed entirely with Tom.

Mrs D Kelly:

It is another first.

Mr G Robinson:

This time, I do agree entirely with everything that he has said. He is being very wise and cautious, and has given us a lot of food for thought. I certainly agree that he has been very forthright, open and honest about the issues. I have no hesitation in taking a lot of Tom’s recommendations on this occasion.

The Chairperson:

Thank you for your presentation, Dr Frawley and Michaela. Whatever anyone thinks of the content — and there may be some dispute — no one can doubt the powerful presentation that was made. On behalf of the Committee, I have to say that it has been one of the best in this session, on this, our final meeting before the recess. Thank you for that. You have given us food for thought. You have already indicated that you wish to submit other information, and we may seek further clarification on certain points, but thank you for your presentation.

Dr Frawley:

I will leave some papers with you; I am sure that the Committee Clerk will come back to us if any more are needed. Thank you very much.