Northern Ireland Assembly

Committee for the Office of the First Minister and deputy First Minister

OFFICIAL REPORT (Hansard)

Inquiry into Historical Institutional Abuse Bill

6 June 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Mike Nesbitt (Chairperson)
Mr Chris Lyttle (Deputy Chairperson)
Mr Trevor Clarke
Mr William Humphrey
Mr Danny Kinahan
Mr Alex Maskey
Mr Francie Molloy
Mr George Robinson

Witnesses:

Mr Jim Breen	Office of the First Minister and deputy First Minister
Mrs Cathy McMullan	Office of the First Minister and deputy First Minister
Ms Maggie Smith	Office of the First Minister and deputy First Minister

The Chairperson: This briefing, which is from Office of the First Minister and deputy First Minister (OFMDFM) officials, is on foot of last Thursday's written ministerial statement announcing the historical institutional abuse inquiry. We will be talking about the terms of reference, the chairperson and the draft Bill. Members should have received papers by e-mail as they became available. A full set in hard copy has been tabled alongside a covering note. We have three officials from the Department: Maggie Smith, Cathy McMullan and Jim Breen. Thank you for your patience. Maggie, please give us your presentation, and we will then go around the table for questions.

Ms Maggie Smith (Office of the First Minister and deputy First Minister): Thank you very much for having us here to talk to you about the Bill. We are conscious that this was not on the agenda, so we appreciate that you have slotted us in. When you get to Committee Stage, you will get to know Cathy McMullan and Jim Breen very well as we assist you.

As you know, on Thursday 31 May, the Executive agreed the Bill for introduction to the Assembly. Also on Thursday, the First Minister and deputy First Minister, by way of a statement to the Assembly, made public the terms of reference for the inquiry, the name of the chairperson of the inquiry and the names of four of the committee members.

The draft Bill is specific to the inquiry into historical institutional abuse. Before I talk to you about the Bill in particular, it might be useful to run over some of the information about the inquiry. I will then talk about how the Bill aims to facilitate the inquiry, and, lastly, if you still have time, I will say something about the timetable and the steps that are to be taken from here.

As some of you will know, the issue of historical institutional abuse has been around for a while. The background to the inquiry is reports and allegations of abuse in children's homes here and that there was a major inquiry into historical institutional abuse in the South. The purpose of the inquiry is to assess whether there were systemic failings by the state or institutions in their duties towards children for whom they provided residential care between 1945 and 1995. The incidents that the inquiry will be concerned about will have occurred between those dates.

The terms of reference of the inquiry define an "institution" as:

> *"any body, society or organisation with responsibility for the care, health or welfare of children in Northern Ireland ... which ... provided residential accommodation and took decisions about and made provision for the day to day care of children".*

In practice, that refers to the type of institutions that were really behaving in the place of parents. We are really talking about places such as orphanages, children's homes, borstals and training schools — places where children were either placed by their parents or, if there were no parents or the parents did not take that decision themselves, the children would have been removed from the care of the family. The definition therefore excludes boarding schools. By "children" we mean anybody who was under 18 at the time. The definition of a child has varied a bit over time, but, for clarity, and to link it to what we understand as a child now, we are taking the definition as being under 18.

The inquiry will be concerned with making findings about systemic failings, but Ministers have also asked the inquiry to make findings and recommendations about three other things, the first of which is about an apology to the people who have been abused. They are asking the inquiry to think about who should make an apology and what form the apology should take. The Executive are also asking the inquiry to make findings and recommendations about an appropriate memorial or tribute to those who suffered abuse. Lastly, they are asking the inquiry to make findings and recommendations about the requirement or desirability for redress to be provided by either the institutions or the Executive to meet the particular needs of victims.

As the First Minister and deputy First Minister announced on Thursday, the inquiry will be chaired by Sir Anthony Hart, who is a recently retired High Court judge. The inquiry will have two main elements. First of all, there will be what we are calling an acknowledgement forum. That will be an opportunity for people who were in the institutions during those years and who suffered abuse to recount their experiences in confidence and be listened to by inquiry panel members. As well as listening to and acknowledging what happened, the inquiry will also produce an anonymised report describing what happened, so it will draw out the essence of what the acknowledgement forum hears from the people who come forward about their experiences. Clearly, the acknowledgement forum panel members who do that work have to be extremely experienced, extremely skilled and must have the qualities that it takes to do that kind of listening over a protracted period. The people who have been appointed to that work are all extremely experienced. They are Beverley Clarke, Norah Gibbons, Dave Marshall and Tom Shaw.

The second part of the inquiry is a judicial process, which will be led personally by the chairman, who will have two other panel members with him. That will use information from various sources, particularly from the acknowledgement forum, but also from research and other sources, to build up a picture of what happened in the institutions. That will then be investigated through a legal process of inquiry. The legal process of inquiry is designed to be, as far as possible, inquisitorial. At all times during the process of the inquiry, whether it is during the acknowledgement forum or the judicial process, concern about victims, their experiences and their needs are at the heart of the thinking.

I am conscious that you have had only a brief amount of time to look at the Bill, so I thought it might be useful to take you on a bit of a walk through the Bill, so that you can see what the clauses do, the purpose of the Bill and how it all hangs together and supports the inquiry. The Bill is relatively short; it has 23 clauses, of which 17 are substantive. OFMDFM is the sponsor Department for the inquiry, so the first thing that the Bill does is give OFMDFM the power to establish the inquiry. The Bill ties itself very clearly to the inquiry. It refers to the terms of reference that were announced on May 31 and makes clear that this is an inquiry and not about making findings of criminal or civil responsibility.

The power to set up the inquiry having been given in clause 1, clause 5, indicates when the inquiry will end. Clause 5 states that the inquiry will end once it has produced its report and fulfilled its terms of reference. Clearly, in legislation, we have to be thinking all the time about what could go wrong and

about safeguards. Therefore clause 5 also contains a safeguard, which states that OFMDFM can end the inquiry before those two things are completed. However, that is only a safeguard.

The Chairperson: Maggie, would you mind taking questions as we go?

Ms Smith: I am happy to do that, if it would be helpful.

The Chairperson: Under that safeguard, the First Minister and deputy First Minister can say to the presiding officer, "Stop, it's over." Under such circumstances, it states that the First Minister and deputy First Minister must:

"lay a copy of the notice, as soon as is reasonably practicable, before the Assembly."

Why does it not say "immediately"?

Ms Smith: I think that "as soon as is reasonably practicable" means immediately, in practice. It means that it would be the next sitting day; it amounts to the same thing.

The Chairperson: OK.

Ms Smith: That is a safeguard; we do not have an example of when that might happen. It is purely a safeguard.

Mr A Maskey: A safeguard against what?

Ms Smith: By setting up the inquiry, OFMDFM is committing to support the inquiry and to provide it with public money, so there could arise circumstances in which the inquiry needs to be ended before it has provided its report and the chair has advised that the terms of reference are completed. It is highly unlikely, but it might be practical for the Ministers to decide to waive some aspect of the terms of reference, for example. However, it is highly unlikely that those circumstances will arise.

Mr Humphrey: Thank you for your presentation. The aim of the draft Bill is to make provision relating to the inquiry into institutional abuse between 1945 and 1995. Why are you stopping at 1995?

Ms Smith: We are stopping at 1995, because that was the date of the Children (Northern Ireland) Order. When that Order came in, it radically changed the way institutions were run and it built in a lot of safeguards. So, 1945 is really around the beginning of the welfare state, and 1995 was when the situation changed quite radically.

Mr Humphrey: In your view, did the safeguards eradicate the potential for abuse?

Ms Smith: They aim to.

The Chairperson: Is there a different process post-1995?

Ms Smith: I am sorry?

The Chairperson: If there was abuse in 1996, are you saying that there is a different, robust set of procedures to be followed?

Ms Smith: I cannot comment on that. We can find out more information for you about the way things operate under the Children Order, and we would be happy to come back to you with more detail.

The Chairperson: We would appreciate that.

Ms Smith: It is outwith our scope, but we would be more than happy to provide that to you.

Clauses 2 and 3 of the Bill deal with the appointment of members of the inquiry panel. Again, having appointed the members, the expectation is that the chair and the inquiry members will stay with the inquiry right the way through, but we have to build in safeguards. It is possible that, for whatever

reason, somebody will not be able to continue, so there is scope for people to resign and for OFMDFM to terminate their membership of the panel in certain circumstances. Again, that is highly unlikely, because what these circumstances boil down to are things like conduct and conflict of interest, or it could be that someone, unfortunately, is ill or something like that and is not able to continue with the inquiry.

In the event that someone needs to step down from the inquiry, the Bill gives the scope for the First Minister and the deputy First Minister to appoint somebody to replace that person. It could be that, for some reason, there is a need to increase the number of people on the inquiry panel, and there is the scope within those clauses for the First Minister and deputy First Minister to do that. In making appointments, the First Minister and deputy First Minister would consult with the chair of the inquiry, and that is about making sure that the team that is undertaking the work has all the necessary skills required.

Clause 6 deals with procedure and evidence. That is a very interesting clause, because it really sets the tone for the inquiry to a certain extent. Clause 6 (1) requires the chairman to have concern throughout the inquiry for the principle of fairness and also to have due regard to the need to avoid unnecessary expense. That refers to unnecessary expense to the public purse, but, equally, it could be unnecessary expense to a witness or to anyone else. It could be unnecessary expense to somebody whom the inquiry is asking information of. That is important in helping the chair and the Department to control the cost of the inquiry, and it also means that fairness and cost are legitimate factors to be taken into account when the chairman is making and carrying out his plans for the inquiry. Clause 6 (2) gives the chair the opportunity to take evidence under oath.

Jumping ahead slightly, but staying with the relationship between OFMDFM and the inquiry, something that is going to be very important is what OFMDFM is liable to pay for. That is covered in clauses 11 and 12. Clause 11 is called "Expenses of witnesses, etc.". It enables OFMDFM to compensate people for time lost if they are called to speak to the inquiry, to pay for their travelling expenses and to cover legal expenses. There can be further detail on that, because, under clause 11, there is the opportunity for OFMDFM to make rules about the witness costs. That would be subordinate legislation about the costs.

The Chairperson: Would it be standard procedure for OFMDFM to do that rather than the presiding member?

Ms Smith: To make the rules?

The Chairperson: Yes.

Ms Smith: Yes; in this case. There are some other places where the presiding member would make the rules. In this case, we are talking about subordinate legislation, which would be made by OFMDFM. This Committee will have the opportunity to scrutinise it. It will be subordinate legislation that will have the scrutiny of the Assembly.

Clause 12 deals with the expenses of the inquiry. It is really saying that OFMDFM can pay the legitimate expenses of running the inquiry. The very obvious things will be the costs of the panel members and the costs of the staff of the inquiry. There is an opportunity in the Bill for the presiding member or chairman to appoint to the inquiry assessors, who would help it because they have specialist knowledge. The clause is to cover those costs and the domestic expenses — the rent, the IT, the support and all those sorts of things. It also requires OFMDFM, at the end of the inquiry, to publish the sum total of the expenses that it has paid under that clause. It will all be in the public domain.

Mr G Robinson: Where will the inquiry take place?

Ms Smith: The inquiry is looking at the accommodation at the moment. The aim is to have two centres; one here in Belfast and one in Derry or Londonderry. The main work of the inquiry will be done in Belfast. There will be particular needs for the inquiry. Thinking about the acknowledgement forum, it is very important that when people come forward to talk about their experiences, they can do that in privacy and they can do that easily. Accommodation needs to be close to public transport and easy to find so that they can get in and out of the building without being in the glare of publicity or easily seen.

On the other hand, the Bill works on the assumption that the chairman will make public as much of the judicial process as possible. That will be a public inquiry, so it will have particular technical needs. In Belfast, we are looking for somewhere that is suitable for the acknowledgement forum and for the judicial part of the inquiry. Clearly, we want to reduce the travel as much as possible, so the idea is to also have a presence in the north-west to make it easier for people to go there.

Mr Kinahan: Will there be — I hope that there will be — the possibility of using other venues so that people cannot be identified by arriving at the venue?

Ms Smith: Yes. It is really about blending in. We are certainly not going to have a building with a big sign outside. It is about having somewhere that is on a thoroughfare, where people can be seen on that thoroughfare for many reasons and seen going into the building for more than one reason.

That was about the governance arrangements between the Department and the inquiry. Clearly, underneath the legislation, there will be lots of other detail that will be put in place, and we are working on that with the inquiry chair at the moment. The draft Bill makes sure that the inquiry has access to the information that it needs and also aims to protect the information that the inquiry holds. The chair of the inquiry will, when we come to the judicial part of the inquiry, invite people to come and talk to him or to give him information, in the same way that a Committee does. We hope and expect that, in most cases, people will comply with those invitations, but there will be people who will not want to comply with them, and there will be situations where people are very willing to comply but cannot, because there is some sort of confidentiality or restriction on the information, and they can only give it over to the inquiry when they have a formal court request from the inquiry. For both of those reasons, the Bill gives the chair of the inquiry the power to compel witnesses and evidence. It backs that up very strongly by making it an offence not to comply with those orders.

Clearly, it would be a bit much just to say that you can make an order to compel people and, if people do not comply, it will be an offence. There is actually a reasonableness clause built in, so, if the inquiry asks for the wrong information or asks for it within too short a time period, or something like that, which it could do in very good faith, but it is not possible for the people who are being asked, they can ask for the inquiry to have another look. If the chair thinks that their point is reasonable, he can vary or revoke the order.

Mr G Robinson: Is there a time limit on the inquiry?

Ms Smith: There is a time limit. The inquiry is expected to last three years. Those three years start from the day that the legislation is commenced, so, although the inquiry chair and four of the panel members are already working to prepare for the inquiry, the official start date is the commencement date of the legislation, which is the day after the legislation receives Royal Assent. There are two and a half years allowed for the inquiry to do its investigation and six months after that for the report to be written.

There are other offences as well. I should also say that, having obtained information, the chair can also restrict access to information. The chair will be able to issue what are called restriction notices. Those can either prevent access to a hearing of the inquiry or can prevent access to information that the inquiry holds. Depending on how those are written, the chair can write in an expiry date. Clearly, if it is about attendance at the inquiry, that will automatically expire at the end of the inquiry, but the notices about access to information held by the inquiry can actually go on after the end of the inquiry so that confidential information continues to be protected. In fact, there is a line in the Bill that allows OFMDFM, in the longer term, if things change, the power to vary or revoke a notice laid by the inquiry chair.

It will also be an offence to breach one of those restriction notices, as it will be to alter, conceal or destroy information either that the inquiry has asked for or that may be of interest to the inquiry. So, somebody who deliberately does that is committing an offence. That will not prevent redaction, though. We are conscious that some of the information that the inquiry will want to see may relate to individuals or institutions and may be in quite complicated sets of records. There may be information in such records that is not what the inquiry has asked for nor is any of its business, so the inquiry will be able to allow people to redact information that is not relevant to it.

The Bill provides for enforcement of penalties against people for such offences. The penalty for any of those offences can be a fine of level 3 on the standard scale — £1,000 — or six months imprisonment or both.

Mr A Maskey: I want to raise two points. The first is specifically on the offences. The Bill refers, in clause 13 (4), to a "relevant" document as mentioned in clause 13 (3). Does that suggest that a document is deemed relevant only if the presiding member is aware of its existence?

Ms Smith: No; it can be a relevant document that the presiding member is not aware of.

Mr A Maskey: Yes.

Ms Smith: Once the inquiry has started, that will prevent people hiding or destroying information, in the expectation that they may be asked for it.

Mr A Maskey: Why is subsection (4) there, then? To me, it reads like a proactive clause — the inquiry needs to be aware of a document's existence, if you know what I mean. I would have just stated that any document, whether the presiding member is aware or not, is "relevant", and it is an offence to destroy it. We have seen reports from the Public Accounts Committee stating that some of the Departments around here have destroyed documents in the middle of an inquiry, which, in my view, should obviously be an offence. Why does that need to be stated?

Ms Smith: It is really to spell it out. Sometimes, that is down to the way that things are expressed in legislation. I take your point completely that it is self-evident. However, it is laid out very clearly here, so I think that it is really a matter of how it is expressed in the legislation.

Mr A Maskey: So it is a standard legislative thing. I know that you can read it in different ways, and my grammar may not be perfect; I would add a couple of commas in there to make it read the way that you interpret it.

Ms Smith: Yes.

Mr A Maskey: The only other question that I have is more general. When the inquiry is in process, will there be counselling facilities or other support mechanisms in place for people who give evidence or who may have to sit through what may be quite traumatic hearings?

Ms Smith: Yes, absolutely; both for those coming forward and the inquiry staff. We are aware of how traumatic it will be for people who come forward to the acknowledgement forum or to the judicial part of the inquiry. We looked carefully at the experience in the South and that of a smaller inquiry in Scotland. In both cases we found that people were coming forward who had, perhaps, never spoken about this. Their family members did not know that they had those experiences. They did not know how to talk about them, so coming forward to the acknowledgement forum was challenging and emotional for them.

There will be people with the right skills who will be able to walk through the process with them. If they get in touch or ring up, they will get the right reception on the phone, will be met at the door and will be looked after right the way through. There will be somebody to hold their hand if they want somebody to go in with them when they recount their experiences. There will also be somebody afterwards to make sure they are OK before they leave or to signpost them if they need further help or guidance.

We are very conscious that, although the panel members doing the listening are experienced and professional, it will be stressful for staff as well to deal with people's emotions. It is also possible that people will disclose things to staff that may be difficult to deal with. So, the Department is putting in place professional counselling and support for all inquiry staff, and they can use that as necessary. They will have an early interview, support on the way through and an interview at the end.

Mr G Robinson: When is the anticipated commencement date?

Ms Smith: We are hoping that the Bill will go through the House before Christmas, but I am very conscious that that requires work by all of us in this room and is a matter for the Committee and the Committee Chair. However, we are very much at your service, and I assure you that we will do anything at all that we can to assist or support you in this process.

The Chairperson: We appreciate that. Have you more, Maggie?

Ms Smith: I think that we have more or less covered it. There are a couple of other points about immunity from suits, which means that people involved in the inquiry cannot be sued for doing their jobs. It also puts a limit on a time frame for a judicial review of a decision taken in relation to the inquiry, limiting it to two weeks from the time that the applicant knew about the decision.

The Chairperson: You have an acknowledgement forum and an inquiry panel. Will there be any overlap there?

Ms Smith: Yes. We talk about those as two elements, but it is one inquiry with those two parts, which are quite different in character. However, they are all under the chairmanship and direction of Sir Anthony Hart. Although the panel members will be appointed to work on the acknowledgement forum or the judicial part of the inquiry, that is a reflection of the different skills that are needed for those two different elements. However, Sir Anthony will be leading them as a team.

The Chairperson: Yes, I get you. I am just thinking of a different process, which was recommended by the Consultative Group on the Past for dealing with the past with regards to the Troubles. You will remember that it had various strands of activity proposed, one of which was basically looking for evidential leads. So, you would have a full investigative process ongoing. If that did not work, however, you went to the next phase, which they called information recovery, which was, perhaps, a process akin to an acknowledgement forum. However, the two were distinct, and you had to say effectively that you were finished with the investigative process first, whereas yours seem to run more in parallel rather than as alternatives.

Ms Smith: That is right, and because they are being clearly led by Sir Anthony, they are all working together and there will be cross-fertilisation. It is also important to say that the acknowledgement forum is about obtaining information. The fact that it is called an acknowledgement forum is very important, because the fact that these experiences are being acknowledged is, in itself, something that is seen as being very valuable, as is the opportunity that the people have for coming forward.

Some of our panel members have been involved in inquiries elsewhere. Tom Shaw was asked by Scottish Ministers to carry out an inquiry on homes in Scotland. He produced a very interesting report. It is also a very human report, because you actually hear the voices of the people coming through. We have no idea of who any of those people are, but, in their voices, we can hear their stories. It is quite a rounded picture; it is a picture that talks about the terrible abuse, the experiences, the sadness, the neglect and all of the other things that happened to the children. However, they also talk about the good things that they remember. It is not, therefore, a testimony about abuse; it is a wider testimony about the experiences in the homes. I am not saying that that is what our acknowledgement forum should be like, but I think that it underlines the importance of the process and of allowing the voices to be heard.

Mr Kinahan: I was concerned, when we were talking about the offences, that people might destroy information before an inquiry is held. Is there any mechanism to prevent people from doing that? Equally, we are on tape at the moment, and if you were someone who had done anything, you would be out there getting rid of every bit of evidence. Does there not need to be an offence for such activity?

Ms Smith: The offences do not apply retrospectively.

Mr Kinahan: So whatever —

Ms Smith: It comes into effect when the Act comes into effect.

Mr A Maskey: I have one point. I take Danny's point, but if someone was of that mind, I presume that they will have already got rid of the evidence, because this has been well trailed. This is not a surprise.

I want to ask something similar. Obviously, the team will start shortly, as I understand it. Is there any retrospective cover or authority in the legislation for the work of the inquiry team, when it starts, because there will be a gap between the start and when the legislation is passed. Is there any retrospective cover provided? Or, is it necessary?

Ms Smith: There are phases to this. The short answer is probably that it is not necessary. At the moment, they are doing preparatory work. This inquiry is starting from scratch. People have done things like this before, but nobody has done the same thing. The inquiry team has to work out for itself how it is going to take the inquiry forward, how it is going to work as a team and how it is going to let people know about the acknowledgement forum. All of that needs to be sorted out. Those are the sorts of things that they are thinking about at the moment. Until the autumn, at least, they will be involved in preparation. The closer we get to the start of the inquiry, the more detailed that work will be. They have a big job, at the moment, with the preparation. They do not need the legislation right away. In fact, I think one of the valuable things about introducing the legislation now is that there is still time over the summer to double-check that it is right and that all the details are right. It still gives us the opportunity to tweak it in the autumn, if we need to, subject, of course, to the Committee's input.

Mr A Maskey: So, there is no need to consider accelerated passage? I do not know whether anyone has even discussed that, but you are saying that there is no urgency.

Ms Smith: It really depends on how much time you take in your scrutiny.

The Chairperson: Our standard consideration would be 30 days. That is something that the Committee needs to have an initial discussion on when the officials are done.

Can I take you back briefly to the reasons for allowing the compelling of evidence? If I heard correctly, one reason was that there could be an individual who felt they would be unable to give evidence without being compelled to do so. I wonder why that would be and whether it might be because an individual who had been abused has some sort of arrangement with the institution responsible for the abuse, and that, without being compelled, they felt that they could come forward.

Ms Smith: The powers to compel witnesses and evidence are for the judicial part of the inquiry. It could be that the inquiry is looking for some information that is personal and that would be held in confidence by an organisation or an individual. That organisation or individual may think that it is perfectly reasonable to give this to the inquiry, but that, because the information is held in personal files, they are not comfortable about just handing over that information. They may want to make sure that the information is something that the inquiry really needs, and they may want the inquiry to issue them with an order to give them the cover to hand it over.

The Chairperson: Are you aware of any individual who has struck some sort of a deal?

Ms Smith: No. Definitely not.

The Chairperson: I appreciate that clarification. As members are content, Maggie, Cathy and Jim, thank you very much indeed. No doubt we will see you again.