



Northern Ireland
Assembly

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

OFFICIAL REPORT (Hansard)

Office of the Northern Ireland Ombudsman:
Proposed Reform Legislation

20 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 Thomas Buchanan
Mr Trevor Clarke
Mr Colum Eastwood
Mr William Humphrey
Mr Danny Kinahan
Mr Alex Maskey
Mr Francie Molloy
Mr George Robinson
Ms Caitríona Ruane

The Chairperson: We will move on to our first substantive bit of business. Last week, we agreed to review the policy decisions so far on the proposed ombudsman legislation, with a view to agreeing the policy instructions to the draftsman and producing a draft Bill for the Committee to consider.

Members will have a table that highlights the decisions that the Committee has made so far. If you are content, the most sensible thing to do is to run through them and double-check that we are content and to address outstanding issues. On the first page, there are three points. Does anybody want to raise anything or is everyone happy with those? The Committee Clerk will also outline some issues that we need to discuss. Points 1, 2 and 3 relate to general, appointment and removal of the ombudsman and duration of appointment. Are members content with the right hand column?

Members indicated assent.

The Chairperson: Point 4 on page 2 relates to the ineligibility of certain persons for appointments. It is a summary of what we agreed last week. The three time periods for disqualification are before appointment, while holding the post and after leaving office. In other words, MPs, MLAs, listed authorities, members, staff and officers of listed authorities and those disqualified from election as MLAs will be disqualified from appointment unless they resign before taking up appointment.

Ms Ruane: Where do MEPs and TDs come in, given the North/South connection? I missed last week's session, so maybe that was discussed. For example, you could have someone who has worked in bodies in —

The Chairperson: The second paragraph, which relates to disqualifications while holding office, covers any other paid employment. There is a bit of overlap between the prior and serving categories.

However, I take your point. We are specifically referencing MPs and MLAs but not other elected representatives.

Mr Molloy: You could add in "other elected office".

Ms Ruane: Does that include councillors?

Mr Humphrey: You would have to be more specific than that because councillors are paid now, but it is not a full-time position. Therefore, if you were going to use "elected office", it would have to include councillors. In relation to TDs, if someone in the Republic wanted to apply for the job and secured it, the difficulty would be that that is another jurisdiction, so you would have to tie in with whatever applies there.

The Committee Clerk: Members, staff and officers of listed authorities would include local councillors in that category. I can see the point in relation to MEPs.

The Chairperson: Shall we add MEPs?

Members indicated assent.

The Chairperson: I accept that you might want to come back on that, Caitriona. The second paragraph states that persons holding office would be disqualified from appointment to:

"any of the above positions; family health provider,"

and the key point is:

"shall not hold any other office or employment in respect of which remuneration or expenses are payable."

That would bring in the private sector as well. Would that knock out somebody who was simply a director of a company?

Mr Humphrey: A non-executive director?

The Chairperson: Would it knock out a director who does not do any work but who maybe has an investment in a company and holds some shares? Is that too restrictive?

The Committee Clerk: We could raise that with the draftsman. I do not think that it is remuneration, necessarily, but more the sense of pay.

Mr Humphrey: Is it pay, Alyn? If someone was, for example, on a board, and getting £5,000 or £10,000 a year, that is still remuneration.

The Chairperson: I think William is right. If you are getting a dividend, that is remuneration.

The Committee Clerk: It is something we could ask the draftsman to address.

The Chairperson: How are you now, Caitriona? Do you accept the two together?

Ms Ruane: In relation to what?

The Chairperson: TDs.

Ms Ruane: I just think that you would be better naming them. It would be clearer. We had the ombudsmen here from Scotland, Wales, the South and the North. We have a North/South Ministerial Council. I think we are better being clear.

Mr Humphrey: But we do not have MSPs. We do not have Assembly Members.

Ms Ruane: No, but MSPs are a bit different. MSPs are from Wales. In Wales, they have MPs —

The Chairperson: Scotland.

Ms Ruane: Sorry, Scotland. Gabh mo leithscéal. They are from Scotland, where they would be MPs and MSPs.

Mr Humphrey: I do not see how they are different. They are from a different legislature from the House of Commons, which is what we have listed here in the Assembly. The point I am making is that, if you specify TDs, you need to be absolutely in line with what the Republic says on the appointment of the ombudsman. The point that the Chair is making is that the point about remuneration covers any elected post.

Ms Ruane: I am not going to die in a ditch over it. I just think that it would be better if it was clear.

The Chairperson: I think William's point is reasonable; you would have to put in the Welsh Assembly and Scottish Parliament. Then you would get into American Congressmen and Senators.

Mr G Robinson: It opens the flood gates.

The Chairperson: It is covered under the second category. We are happy enough.

Finally, we have the third category, which is what happens after the ombudsman leaves office. The idea is to put in a period in which you could not accuse the office holder of being biased or influenced in their decisions in their latter years because they knew they were going on to their next employment. It states:

*"any office which is a listed authority,
membership of a listed authority,
employment/office holder/staff member/
Appointment to a paid office by a listed authority".*

The time period we are proposing would be the end of the financial year in which the ombudsman was to leave office plus one full financial year. So, effectively, that could be 13 to 24 months.

Mr A Maskey: It says that the:

"NIPSO leaving office may not, without the approval of the [Assembly]."

I know what that means, having been involved in the discussion, but I thought that we took the view that it was a given that they cannot take up those positions. I thought that they may appeal to the Assembly.

The Chairperson: So, you would like it drafted to say that they "may not be appointed". Then, as a bottom line: "An appeal may be submitted."

Mr A Maskey: To the employer.

Ms Ruane: Otherwise the approval becomes part of the terms and conditions debate.

The Chairperson: So, it is in exceptional circumstances.

The Committee Clerk: I probably lifted that from the Scottish legislation. It has been through whatever process they had, with draftsmen and so on. However, I can certainly make sure that the point is made.

The Chairperson: I think that would be clearer. It is not a standard process; it is an exceptional process.

Mr A Maskey: That is right. What you are really doing is providing a right to appeal for the former NIPSO.

The Chairperson: I am going to a body, which is a listed body, but one with which I have never had any dealings or ruled on, so, this should not apply. There is no probity issue.

Mr A Maskey: It is exceptional rather than routine.

The Chairperson: Next, are points 5 and 6: salary and pension, and appointment of staff expenses and the transfer of property and/or staff. The one issue that the Clerk and I discussed, which is highlighted, is:

"budget to be submitted to Assembly (or relevant Assembly Committee)".

The Comptroller and Auditor General, who is like the other half of the ombudsman, goes to the Audit Committee. Are we content?

Ms Ruane: What are the pros and cons of going to the Audit Committee? I suppose that it has experience of audits and finance. Does that give the Assembly more protection?

The Committee Clerk: Yes. It will be looking at the Assembly's finances.

Ms Ruane: What is your advice? Are we better to go to the Audit Committee?

The Chairperson: I think that you are pushing the Clerk a wee bit there, Caitriona.

The Committee Clerk: It works for the Comptroller and Auditor General (C&AG) as well.

The Chairperson: A couple of options are coming up.

The Chairperson: Points 7, 8 and 9 are on the next page. Point 7 is about bodies subject to investigation by the proposed Northern Ireland Public Services Ombudsman (NIPSO). It states that the Bill should provide for bodies subject to NIPSO jurisdiction to be listed in a schedule, with either the Office of the First Minister and deputy First Minister (OFMDFM) or the Department of Finance and Personnel (DFP) keeping that up to date. Does anybody have any strong views on that one way or the other?

Mr A Maskey: Does all of that not eventually come back to this Committee? We will be scrutinising the role of NIPSO. That is why we were saying that somebody else should do the recruitment.

The Chairperson: We are talking about this long schedule that includes education and library boards

Mr A Maskey: I understand that. I just think that it would be tidier if OFMDFM did that. If you give the responsibility to DFP, you are going to have the Finance and Personnel Committee saying that it should be looking at it, and that would confuse the issue.

The Chairperson: This is about the person who holds the list and keeps it up to date.

Mr A Maskey: Should that not be OFMDFM? Again, there is no principle for this, but I would have thought that the responsibility should be given to OFMDFM because this Committee will be dealing with this on an ongoing basis. It would make it more streamlined.

The Chairperson: It is a case of six of one, half a dozen of the other. Either OFMDFM keeps the list up to date or DFP does so on our behalf.

The Committee Clerk: I was thinking of who is best placed to know when new bodies come into existence or when other ones cease to exist. Given that it involves finances, DFP will almost certainly have to be informed when either happens and would therefore be in a position to pull together the information for the Assembly and keep the list up to date.

Ms Ruane: I think that we should bring it under the remit of this Committee. Surely we could write to all the Departments saying we want to be kept updated? This is overarching.

The Chairperson: I do not really see this as being a Committee function. It is just a list of the bodies concerned. When the Commission for Victims and Survivors was created, somebody had the responsibility of making sure that it was put on the list.

Mr Molloy: Given that this Committee will be dealing with it, the responsibility should be given to OFMDFM. If it is given to DFP, another Committee will be involved in scrutinising the role of the ombudsman. I think that it would be tidier if everything were done by one Committee.

Mr Humphrey: I think that this Committee should be the scrutiny Committee. Earlier, we talked about the appointment of staff and expenses and about the fact that the Audit Committee will come into play, which, given its role and remit, has a link to DFP. So, can we not get to a position where this Committee provides the scrutiny function and the Finance and Personnel Committee deals with the areas that you are talking about?

The Chairperson: This is not about scrutiny. It is about who compiles the up-to-date list of public bodies that will come under the purview of NIPSO. As the Clerk says, any body would have two key documents: the management statement and the financial memorandum. The financial memorandum would always involve the listed body having a relationship with DFP, or it should do in theory.

The Committee Clerk: Or it is parent Department.

The Chairperson: So, DFP is in a position to know every listed body and every change to the scheduled list of bodies. This does not impact our right to scrutinise. It just keeps us up to date. On that basis, are we content to go with DFP?

Members indicated assent.

The Chairperson: The other red line in this box is:

"Bill should provide for schools to be included within the NIPSO jurisdiction – subject to clarification of the Minister of Education's view".

If you remember, we got a letter, and it was not entirely clear whether he was suggesting that they would run appeals processes and that would be the end of the matter, or whether he was suggesting that NIPSO would not be involved until all its internal ministry processes were run. We still have not —

Mr A Maskey: That is standard anyway.

The Chairperson: Yes, if that is the case. We are simply waiting for a reply.

Point 8 is about matters subject to investigation.

Are members content?

Members indicated assent.

The Chairperson: Point 9 is on the investigation of professional/clinical judgments in the area of health and social care.

Are members content?

Members indicated assent.

The Chairperson: Point 10 is about complaints mechanisms, and Point 11 is about exhausting other remedies.

Are members content?

Members indicated assent.

The Chairperson: Point 12 sets out the time limit for complaints; point 13 is on initiating investigations; and 14 is on the purposes of investigation.

Are members content?

Members indicated assent.

The Chairperson: Points 15, 16 and 17 deal with investigation procedures, evidence, and obstruction and contempt, and point 18 is about reports on investigations.

Are members content?

Members indicated assent.

The Chairperson: Point 19 is about the application for compensation by a complainant, and point 20 is the other side of the coin — application for relief by Commissioner for Complaints.

Are members content?

Members indicated assent.

The Chairperson: Point 21 is about special reports to the Assembly. It states:

"Bill should provide for the NIPSO to lay reports before the Assembly – as currently provided for in the Ombudsman (Northern Ireland) Order 1996 - including the ability for the NIPSO to lay a special report where the Ombudsman is not satisfied with a body's response to his or her recommendations for redress.

Bill should provide that the relevant Assembly Committee may request to be briefed on any report laid or other matter."

This is the area for agreement. The Committee will wish to consider which Committee the ombudsman should report to, and there are a number of options that members might want to consider: a new public administration Committee; a public accounts and administration Committee, which would consider reports from both the Comptroller and Auditor General and the NIPSO — that is PAC would become PAAC; and the Statutory Committee with responsibility for the Department under which the listed body sits. There are at least three options.

Mr A Maskey: Are we not working on the presumption that this is the Committee that scrutinises the NIPSO?

Ms Ruane: Three is not an option.

Mr A Maskey: Why does it not just come here?

The Chairperson: It could do.

Mr A Maskey: You could set up a public accounts and administration Committee, but that is going to be another Committee in the Assembly. I do not know whether there is the stomach, or even the need, for that.

The Chairperson: Can we agree that we can knock that out now? We do not want another Committee.

Members indicated assent.

The Chairperson: Right, so that is gone.

Mr A Maskey: We could just bring it in here.

Ms Ruane: So, it is none of those options. We need a fourth one.

The Chairperson: I have no difficulty with us having that overall scrutiny of the work of the NIPSO. However, if the NIPSO is laying a report about health service providers, would it not be good governance for the NIPSO to also go to the Committee for Health, Social Services and Public Safety?

Ms Ruane: I read that wrong. I thought:

"under which the listed body sits;"

meant that it went under the Department of Finance and Personnel. The NIPSO office will be listed under DFP, but that is not what we are talking about here.

The Chairperson: No.

Ms Ruane: OK. That is my mistake.

The Chairperson: If the ombudsman were to take an investigation into a health service provider, we would want to have the right to scrutinise NIPSO on that report as we are the chief scrutiny body. Clerk, is that correct?

The Committee Clerk: Yes.

The Chairperson: However, it would also make sense for the Health Committee to be able to go into the nitty-gritty of that report. The same would apply to the Education Committee for reports on educational matters, etc.

Ms Ruane: Where is this Committee in that? I do not see the Committee for the Office of the First Minister and deputy First Minister. The document states:

"Committee will wish to consider which Committee the Ombudsman should report to" .

The Chairperson: That refers to special reports.

Mr Eastwood: We will not consider every report. Am I correct in saying that our role will be to have oversight of the ombudsman's office generally rather than of every single report that it lays?

The Chairperson: Caitríona, we will bring in the ombudsman every six to 12 months and ask how its work is going and whether a particular area or Department, such as the Department of Education or the Department of Health, is listed. That section of the document deals with specific reports into issues between complainants and listed bodies. If that report was about health or education, would it not be better if it went to the relevant Committee rather than to us?

Mr Molloy: How does the structure work at the moment? Surely if any other Committee is looking at something that this Committee has responsibility for, it will come to this Committee. Why change the rules in this instance? There is already a procedure in place that deals with the role of Committees.

The Chairperson: If the ombudsman were to lay a special report that applied to OFMDFM, this Committee would be interested in the specifics of that report. However, if that report was about health, would you not want Members who specialise in that area and who sit on the Health Committee to have the opportunity to scrutinise it?

The Committee Clerk: With the Chair's permission, this is a drafting process. The Assembly will take a view on which Committee it goes to. If it initially comes to this Committee, this Committee or the scrutiny Committee could decide whether it was an appropriate matter for another Committee to scrutinise in detail.

There is a parallel with the Public Accounts Committee. That Committee looks at reports from the C&AG before the relevant Statutory Committees get a chance to look at them. This Committee or the

oversight Committee could decide whether to look at the report or send it to the relevant Committee. That is one option.

Ms Ruane: I think that is what we should do.

Mr Molloy: That is the way that it works at the minute.

The Chairperson: Are members agreed?

Members indicated assent.

The Chairperson: Members, there are three points on the next page. Point 22 is about a Minister/member of the Executive making a statement with regard to public interest. Point 23 deals with legal privilege, and point 24 is on the duplication of investigation.

Mr A Maskey: Point 22 is a change. The previous position was that the Secretary of the State or the head of a Department gave notice to the ombudsman, but that responsibility will now be with the Assembly. I think that that responsibility should go to OFMDFM. It will be in our bailiwick. Until now, it has been the responsibility of the Secretary of State, but, as a result of the legislation, that will no longer be the case.

Mr Clarke: I take the point that you made. However, there is a tie-in, because the document refers to "NI or the UK" and to something that is:

"otherwise contrary to the public interest."

Therefore, that means that there is a tie-in to the UK as well. If you break that link, you cannot fix it.

Mr A Maskey: No area of jurisdiction under the NIPSO relates to the NIO.

Mr Eastwood: Does that relate to security issues?

Ms Ruane: No.

The Chairperson: That is an interesting point. None of the listed bodies is under the control of the Northern Ireland Office.

Mr A Maskey: The NIPSO has no role there. So, why would we have a role?

Mr Humphrey: We need clarification on that, Chairman.

The Chairperson: We need to seek clarification on that. If that is right, and the Secretary of State has no other role, why should they have this role?

Ms Ruane: You are cutting out OFMDFM. It is not even named there.

The Chairperson: It is there as one of the Departments. It says, "a head of department". It does not have the primacy role that you might prefer it to have, but it is included.

Ms Ruane: I have never heard them called "head of department" before.

The Committee Clerk: It is "Minister", effectively.

Ms Ruane: That generally refers to Departments such as Education or Health, for example.

The Chairperson: The question is: are there any circumstances under which the Secretary of State would have an input?

Mr Lyttle: The current position says that such circumstances might be in the interests of the safety or security of Northern Ireland or the UK.

Mr A Maskey: I want more clarity on what this "public interest" is about because, in the past, in our experience, that has been abused. Is it related to what is called security? Every other jurisdiction has that type of facility, and it is not all about "security". If there is a problem in the health service or the Education Department, what has that got to do with national security? There might be some issues, but I want an understanding of what they may be. There is a legal case history. I certainly will not buy in to something that gives somebody carte blanche, under the heading of national security, to block an inquiry.

The Chairperson: If we remove it, Alex, the ombudsman will say, "I want to see those papers" and will be told, "No, you cannot see those papers".

Mr A Maskey: I understand that, but some people might labour under the view that this is about what they call national security. I do not know too many examples of where a problem in the Health Department has anything at all to do with national security. So, what other reasons might there be to issue a public safety certificate? That is provided for in all the other jurisdictions on these islands, and it might be appropriate to have such a measure. However, I want a better understanding of that the problems might be, and there is a legal case history on that.

The Committee Clerk: I am not aware of any cases involving the ombudsman where that has been exercised. It is my recollection, from speaking to the ombudsman's office, that it has never had notice of that type. The power is there as a fallback so that information can be provided to the ombudsman and it can inform the decision-making process. It has not had a notice, but it could get a notice saying that it can look at this and it can inform your decision but you do not disclose it in your written decision to the parties. The ombudsman would be fairly confidential and discreet with the written decision.

Mr A Maskey: I appreciate that, and that is why I raised it earlier. Given the history of the ombudsman and the Commissioner for Complaints thus far, I do not expect there to be many, if any, problems, especially since NIPSO, in this legislation, does not have jurisdiction over any NIO-related activity. All I am saying is that I want some instances where it might be relevant.

The Chairperson: We discussed that last month, Alex.

Ms Ruane: We did, and, at the time, we raised issues. OFMDFM should be in there, because this was obviously written before the devolution of policing and justice powers. It is not just about policing or justice issues. As Alex said, it is much broader.

The Chairperson: The right-hand column is post-devolution of policing and justice powers.

Ms Ruane: I know that, but we have just taken it the way it was in the past, with the Secretary of State.

The Chairperson: Are we all happy to seek clarification on whether the Secretary of State has a role anymore?

Ms Ruane: I think we need clarification on more than whether the Secretary of State has a role. It needs to be broader. What we need to know is the pros and cons of listing OFMDFM. It is not just a simple thing about the words "Secretary of State".

Mr Eastwood: I think it is an even broader issue than that. It is about the definition of "public interest" and maybe some examples. Whoever is denying things on the basis of public interest, we would like to know what the parameters of that are.

The Chairperson: I think that that is really difficult, Colum, because there is a big public debate about the definition of public interest. Somebody has to make a judgement call and say that, in the public interest, you may see that document, but you may not disclose its contents.

Mr Eastwood: Yes, but there has to be a reason why it is the NIO rather than the Justice Minister or OFMDFM.

The Chairperson: I think that we have all agreed that we will seek clarification as to whether the Secretary of State needs to be listed. So that is one issue. Caitríona's second issue is why OFMDFM is not specified here. Yet the counterargument is that the wording includes "head of department", which would include OFMDFM and all the others.

Ms Ruane: As to your first point, I am not sure that we have all agreed that. What exact words did you use there?

The Chairperson: You were seeking clarification as to why the Secretary of State needs to be named here as having this right, because the suspicion is that he has no jurisdiction over any listed body.

Ms Ruane: Yes.

The Committee Clerk: The corollary of that is that the NIPSO would not then have the power that he or she has to require documents from listed bodies. He would not have power to require documents from the Secretary of State. I imagine that that would be the corollary of the Secretary of State not having responsibility for listed bodies.

Ms Ruane: It is not the Secretary of State that will be asking. It is the Minister.

The Chairperson: Can the Committee Clerk seek clarification of that?

Mr Humphrey: Not every power exercised in Northern Ireland is devolved to this Assembly. You have to have the Secretary of State listed here.

Mr A Maskey: If the NIPSO has no bailiwick or jurisdiction over something —

Mr Humphrey: It may be interlinked. For example, it may be something to do with the Department of Justice. That Department has no responsibility for security. Obviously, that still resides with the Secretary of State. So there may be a requirement for the Secretary of State and the Northern Ireland Office to be consulted on it. It does not take away from anything.

"The current position in Northern Ireland is that the Secretary of State or a head of department"

Alyn clarified "head of department" as being a devolved Minister. I do not think that that takes anything away from the Assembly.

Mr Molloy: I think that the listing of the Secretary of State in this belongs to the era before devolution. We now talk very clearly about the heads of Departments being the Ministers responsible. So, "head of department" is a phrase that belongs to the direct rule era.

Mr Humphrey: Then you just put "Minister".

The Chairperson: Can we say that we are agreed to take out "head of department" and put in "Minister"?

Ms Ruane: No. I think that we need clarification. That could read as the current position. What we are saying is that we may want to change that.

The Chairperson: That is what I am asking you. Do you want the word "Minister" to replace the words "head of department"?

Mr Eastwood: I would be comfortable if we did that and just sought some clarification around the Secretary of State's position in this, when it would arise and why it would arise. It may just be simple enough, but it is there because, as William said, there are some reserved matters.

Mr Kinahan: Just to go back to what was said about reserved matters, we should have more clarity on what the relevant reserved matters are, and then we can look at the problems that come with that.

Ms Ruane: We are agreed to get clarification. Can we have that second paragraph written in red, because we have not agreed to it yet?

The Chairperson: You want the sentence:

"The Committee considered legal advice"

to be in red?

Ms Ruane: Or maybe something at the end of it, to the effect that we will return to this and take a decision based on the new information. We need a red column there.

The Chairperson: So, we have to return to point 22.

Let us move on to point 23, which is about legal privilege.

"The current position ...is that legal privilege cannot prevent the Ombudsman having access to papers."

That approach could be affected by the decision to extend the County Court enforcement mechanism to all bodies, because public bodies within the Commissioner for Complaints' jurisdiction are currently entitled to claim privilege in respect of their legal advice and do not have to disclose it. If we extend the enforcement mechanism, it may mean that all public bodies within NIPSO jurisdiction would have the same legal entitlement not to declare their legal advice. OK?

Members indicated assent.

The Chairperson: Point 24 deals with duplication of investigation.

Members indicated assent.

The Chairperson: Point 25 deals with disclosure of information, information sharing and co-operation. Are you all content?

Members indicated assent.

The Chairperson: Point 26 deals with the financial accountability of the ombudsman.

Members indicated assent.

The Chairperson: Finally, point 27 deals with the public procurement role of the ombudsman, and point 28 deals with the requirement to provide facilities.

Members indicated assent.

Mr Clarke: Can we go back to point 23? I am just curious. I apologise for being late, and maybe you have covered the section about the County Court. From my reading of that, are we not tying our hands by extending the enforcement mechanism to the other bodies coming under that jurisdiction not to declare their legal advice? We are tying the ombudsman's hands. Some of the legal advice is useful for his investigation, but, if we apply that rule, my reading of it is that he is not entitled to see that. It could actually make it more difficult for him to come to a determination about how a Department arrived at a decision.

The Chairperson: My understanding is that we did discuss that, and one of the decisions that we made was to accept that we were putting it all into a more legalistic and adversarial framework.

Mr A Maskey: Potentially, but the evidence that we received was that it is actually rarely used. We had a good discussion about it, and part of our conclusion was that there has been no negative impact on any of the investigations that have been carried out so far. That is the evidence that we were given.

Mr Clarke: Yes, to take it to the next stage, but, if you apply that opportunity — which is what I thought we were agreeing — that means that, from the outset, as part of the investigation, some of the Departments could withhold their legal advice in the knowledge that there is a possibility that someone could take a case. So, we are locked in.

Mr A Maskey: I think the problem that people were concerned about was that they would move it into full litigation. All I am saying is that the evidence that we were given was that that has not been the case. In practice, it has not happened that way at all. It has not forced people into court. It has not posed any problems for the Commissioner for Complaints. I thought that we were told that most people are actually very co-operative with the ombudsman's office and the Commissioner for Complaints, and that it rarely goes to court. Remember, we were worried that there would be a lot of money involved, but that has proved not to be the case.

Mr Clarke: Were we going to include the County Court part, which we do not have at the moment?

Mr A Maskey: As I understand it, at the moment the Commissioner for Complaints has a certain level of power and the current ombudsperson does not. When merging both offices, we were going to maximise them all.

Mr Clarke: That is my concern.

Mr A Maskey: But there have not been any negative results of all of that.

Mr Clarke: The difficulty of doing that is that, if we stay where we are, they will never foresee circumstances in which they would have to use it. We are now giving them the power to use that mechanism because we are ramping that up, in my understanding. If we do that, that enables them to withhold legal advice, which they would not have had to do before, because there was no opportunity for them to be taken to the County Court. Now, by applying the opportunity and giving them that bit more power, we are creating the possibility that some information on legal advice can be withheld from the ombudsman.

The Chairperson: We had the two. When he sits as the Commissioner for Complaints and you are going in as a public body, defending a complaint against you, you know that, at the end of it, the commissioner can rule against you and tell the complainant to pop off down to the County Court with his documents and get themselves a few quid for compensation. When he is sitting as ombudsman, that does not happen. We had to make a decision on whether we knocked out that function of the commissioner so that there was no reference to the County Courts or whether we brought it in for the NIPSO and for everyone or whether we broadened it to include health service providers. Everyone now has this recourse.

Mr Clarke: Yes, but giving that recourse gives the bodies the opportunity to withhold some of the information. It is clearly saying that.

The Chairperson: We discussed that this would potentially make public bodies and listed authorities more cautious.

Mr Clarke: I see it the opposite way around. My reading of that is that you are giving public bodies the opportunity to withhold legal advice that, initially, they could have divulged.

The Chairperson: You would be more cautious if you thought that you would end up in court.

Mr Clarke: I would not describe it as that type of caution. It would be more secretive in that they can now withhold information that they currently give to the ombudsman and which he could have used. In terms of the ombudsman making a judgement based on the information that the bodies initially would have got, there is now a possibility that they cannot even see this information to use it.

Mr A Maskey: They cannot withhold information, because that is obstructing —

Mr Clarke: Not information, but legal advice.

Mr A Maskey: That is only their legal advice. Any one of us can get legal advice tomorrow, and we do not have to tell the other person what the legal advice was. I have to make a decision on the legal advice that I get. It is not about allowing an organisation or a listed body to withhold information, because that is provided for in legislation. They cannot do that, and, if they are obstructing, they are guilty. We are all very clear about that. If we were to merge the two offices and remove that right, we would be weakening the potential for claimants to have redress against a Department that has fallen foul of them. Bear in mind that most of the complaints are dealt with, and there is an amicable enough resolution to them. This is only providing for the worst-case scenarios where there is continuing and almost serious abuse. In some recent cases, people are going through the mill, for example, families claiming negligence against hospitals. Not one head rolled anywhere.

Mr Clarke: There are also opportunities for public bodies that have gone against legal advice. If they have gone against legal advice and you do not know what the legal advice was, how can you judge that the public body was wrong?

Ms Ruane: Trevor, the document states:

"The current position under the Ombudsman Order is that legal privilege cannot prevent the Ombudsman having access to papers."

The extension of that is:

"Bill should make similar provision in relation to all bodies within the NIPSO's jurisdiction."

Mr Clarke: Reading on, it states:

"this approach may well be affected"

The Chairperson: We are going to change that.

Ms Ruane: The part that you read out is in red.

Mr Clarke: Yes, because we are changing it. That is why it is in red.

The Chairperson: We are proposing to change that position, Cairtriona.

Mr Clarke: We have heard of councils going against legal advice. Now we are saying that we do not know whether a public authority has gone against the advice that it has been given, so you have weakened the hand of the ombudsman in how he comes to his decision.

Mr A Maskey: Some people have gone against their own legal opinion and advice and paid the price for that when they went to court.

Mr Clarke: They are protected under privilege for their legal advice, so you will not know whether or not they have gone against their advice.

Mr Humphrey: I sat on Belfast City Council when the director of legal services came in and gave legal advice, and, sometimes, we were none the wiser. Advice that you get from one lawyer will be vastly different from advice that you will get from another.

The Chairperson: Give me the name of your lawyer so that I can avoid them.

Mr Humphrey: I remember, in your time at the council, when Ciaran came in to give legal advice, no one had any idea what advice had been given.

The Chairperson: Trevor, we are talking about a situation where the ombudsman is undertaking an investigation and asks the listed body whether it had taken legal advice, and, on being told, "yes", asking what that advice was, and the body says that it is not prepared to tell the ombudsman. That does not prevent the ombudsman going on to do what he or she thinks is right.

Mr Clarke: Actually, it does, if the body were to go against the advice that it was given. If it were given legal advice to a point but was not prepared to tell the ombudsman whether the legal advice supported one direction or another —

The Chairperson: Surely, it only comes into play if you go to the next stage, where you go to the County Court. Then, the legal advice will become pretty clear.

Mr A Maskey: Which is an absolute rarity; such a provision exists for the Commissioner for Complaints, but it happens very rarely. That is the evidence that we have been —

The Chairperson: It has stopped, yes.

Mr A Maskey: I just think that it would be bad of us to produce legislation that weakens a person's rights.

Mr Clarke: The tone of caution in that is interesting. I do not know whether that was done by the Clerk or is based on the legal advice that we got, but there is caution there about what could happen if we do it.

The Chairperson: To begin with, I felt that that would take it down a more adversarial legal route. However, the ombudsman made it clear that it would happen once in blue moon.

Mr Clarke: Yes, but you are comparing apples and oranges. Previously, they were entitled to know whether or not legal advice had been sought and now they are not. So, you are not comparing like with like.

The Chairperson: But he was not when he was acting as the ombudsman.

The Committee Clerk: Acting as the ombudsman, he is entitled to see legal advice at present; acting as the Commissioner for Complaints, at present, the ombudsman regards himself as not being entitled to see legal advice, so those complaints are being investigated without the right to see legal advice. They may ask for it; the public sector body may share it voluntarily, but it is not required to do so.

The Chairperson: So, we are seeking further clarification of point 22. Do you want to reserve your position on that, Trevor?

Mr Clarke: Nobody else seems to be that frustrated about it. When a problem arises in the future, I will dig back into the Hansard report and say, "I told you so". That will do me.

Mr Kinahan: Chair, it may sound daft, but should we not take legal advice?

The Chairperson: We will, yes.

The Committee Clerk: The parliamentary draftsman will look at the legislation's fairness and compliance with human rights. The draftsman will have to decide whether, in the round, the ombudsman's investigation and the right to go to County Court amount to the determination of a civil right that will, in effect, end with a County Court judgement against you. In such circumstances, the question is what safeguards should there be in place for a public body to defend itself where a civil right is being determined. We can ask the draftsman to look at balancing those issues in the Bill.

Mr Molloy: If I understand Trevor's point correctly, it is likely that more cases will finish up in County Court. Settlements will not be reached and the ombudsman's role will be weakened because bodies will know that they can always go to the County Court; whereas, up to now, the ombudsman's office has been able to get a settlement more easily without going to court. In fact, the whole idea of the ombudsman was to avoid courts, to get complaints dealt with and decisions taken at a lower level. By bringing in the changes, you are, near enough, driving it into court.

The Chairperson: I take on board the argument 100%, Francie, but I think that we are changing our previous position.

Mr Molloy: We do that regularly, so that is not a problem. *[Laughter.]*

Ms Ruane: We asked the ombudsman that specific question. I cannot remember his exact words, but he said that, to help his position, we need to retain the threat or the fact that it could go to County Court.

The Chairperson: Help focus people?

Ms Ruane: Yes; and help make them want to reach agreement.

The Chairperson: So where are we? Do we have consensus?

Mr Molloy: Seek an opinion.

The Committee Clerk: Ask the draftsman to specifically address the balancing of those rights and the powers of the ombudsman?

Mr Molloy: He will have the answer on different issues, even some that we have not raised.

The Chairperson: So, there will be two legal washes — after the draftsman's it will go to the Speaker's Office for further legal consideration.

The Committee Clerk: It will then come back here for members to satisfy themselves about the draft Bill.

The Chairperson: OK; so, we seek clarification of points 22 and 23. Are you happy that we do that in the hope that it does not slow us down too much? Shall we send it? Clerk, will you liaise with the Bill Office to get started on the rest of it, with the proviso that 22 and 23 could change, or is that not practical?

The Committee Clerk: It is probably not practical. It is more expensive to go back and forward to the draftsman. It is probably better to arrive at a conclusion here, but we can certainly take preparatory steps in getting things moved forward.

The Chairperson: That will knock us out for two weeks, because next week we will probably not be in a position to debate the issues. We will certainly not be in a position to take a vote, if one is required.

Ms Ruane: Why is that? Were we not trying to set another meeting for Thursday?

The Chairperson: There are difficulties. Alex has a Social Development Committee to Chair, and I made the commitment that, if we were to meet next week, we would not vote.

Ms Ruane: I have a Policing Board meeting as well.

The Committee Clerk: In relation to point 23, we could ask about the privilege attaching to legal advice at the draftsman's stage and get them to comment on it, rather than seeking advice on it now.

The Chairperson: That just leaves paragraph 22.

The Committee Clerk: I wonder would the ombudsman's office be able to tell us in practice what interaction there is with the Secretary of State.

The Chairperson: I think we will need more than that. We need to know the circumstances, if any, when there is interaction. It will take as long as it takes. Thank you, members.