



Northern Ireland
Assembly

Committee for the Environment

OFFICIAL REPORT (Hansard)

Local Government Bill — Draft Code of
Conduct for Councillors: Northern Ireland
Ombudsman

16 January 2014

NORTHERN IRELAND ASSEMBLY

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Local Government Bill — Draft Code of Conduct for Councillors:
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Members present for all or part of the proceedings:

Ms Anna Lo (Chairperson)
Mr Cathal Boylan
Mr Colum Eastwood
Mr Tom Elliott
Mr Alban Maginness
Mr Ian McCrea
Mr Barry McElduff
Mr Ian Milne
Lord Morrow
Mr Peter Weir

Witnesses:

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

The Chairperson: I welcome Dr Tom Frawley, Marie Anderson and Gillian Coey. You are very welcome. We have received a lot of written submissions on, obviously, the code of conduct, complaints and all that, so, we look forward to your briefing, Dr Frawley.

Dr Tom Frawley (Northern Ireland Ombudsman): Thank you, Chairperson and Committee members. With your permission, I will make some opening remarks to set the scene from my perspective.

I begin by thanking the Committee for the opportunity to give evidence this morning on the proposed role of the Commissioner for Complaints in relation to the local government ethical standards regime that is to be established under Part 9 of the Bill. I very much welcome the introduction of a mandatory code of conduct for councillors, which I consider to be an important part of the reform of local government in Northern Ireland. I am conscious that with the inception of the new councils we are embarking on a new era in which councillors will have an increasingly important role, particularly in planning and community planning matters.

These developments make it even more important that we ensure that the code, the first mandatory code for councillors in Northern Ireland, is effective and secures the confidence and trust of the public in ethical standards in local government. However, there is also a need to maintain the balance between ensuring that the public interest is met and creating a regime that is fair to the individuals whose conduct is the subject of a complaint.

I am aware that, during the Committee's scrutiny of the Bill, a number of issues have been raised on the proposal that the commissioner will be involved in ethical standards. It is my understanding that those include the procedures by which complaints of alleged breaches of the code will be investigated and adjudicated on; whether the scope of the code and my related jurisdiction should be wider than that currently proposed in the Bill; the need for an appeal mechanism; a means by which complaints of a more minor nature might be handled; and how unfounded allegations will be dealt with.

The written paper I have submitted to the Committee gives an overview, from my perspective, of my proposed role in ethical standards regarding investigation and adjudication procedures. It also provides some clarity in relation to the scope of the code as currently drafted. Before moving to respond to the Committee's questions on these and any other matters, I will highlight the provision in the Bill for the extension of some provisions of the Commissioner for Complaints (Northern Ireland) Order 1996 to apply to the investigation of local government ethical standards complaints. I consider it essential that the principles already established in the existing areas of my jurisdiction are built on in the ethical standards regime and that the model that has operated successfully in the Commissioner for Complaints jurisdiction since 1969 is not compromised. I am happy to take questions from the Committee.

The Chairperson: You mentioned a number of issues arising from the written submissions. A frequent one concerns the lack of an appeal mechanism. As I said earlier, we have just received a tabled paper from the Northern Ireland Local Government Association (NILGA). I will allow members a couple of minutes to quickly read that paper. I would like you to respond to the issue of the lack of an appeal mechanism; so, if you do not mind, we will take a couple of minutes for members to read the paper.

It lists practices in other jurisdictions, such as Scotland, as well as reasons for appeal. It states that in Scotland an appeal can go to a sheriff principal, which, in Northern Ireland, would perhaps be the County Court.

Dr Frawley: Yes.

The Chairperson: It says that, in Wales, they have the Public Services Ombudsman, which is equivalent to you.

Dr Frawley: Correct.

The Chairperson: However, there is also an adjudication panel, which is an independent body. The paper states:

"The Panel's role is to form tribunals to consider whether elected members or co-opted members of county, county borough and community councils, police, fire and national park authorities in Wales have breached their authority's statutory code of conduct. The Panel will also hear appeals by members."

So, the paper is stating that we do not have that here.

Dr Frawley: Chairman, it may be helpful, from that preliminary commentary that you offered me, that we look at those alternative jurisdictions and how they deal with the matter, because it may be helpful for the Committee to understand what is different in Scotland and Wales and what are we proposing to do. Having opened up the discussion in that way, we could then possibly explore the model here that we will speak to, and then you can make your own judgement on that.

I have looked to my deputy Marie Anderson, particularly as a qualified and practising lawyer, to look at these issues, because there are obviously legal issues fundamentally involved, and to look at the comparative models across these islands in terms of the so-called devolved territories. If you will allow her to speak on the subject we can then join in as you find helpful.

Ms Marie Anderson (Northern Ireland Ombudsman's Office): Will it be helpful if I deal with the comparison with the other jurisdictions before I deal with Appeal v JR?

The Chairperson: Yes, please.

Ms M Anderson: In the other jurisdictions, the model is completely different from that proposed by Part 9 of the Local Government Bill. In Scotland and in Wales, in particular, the role of the standards commissioner or ombudsman is simply to investigate. There is then an appeal mechanism from that decision.

I will take the position in Wales because it is probably closest to our own. The Public Services Ombudsman for Wales investigates complaints of maladministration in public bodies and complaints about the standards and behaviour of local authority councillors and members. The Welsh ombudsman simply investigates. I have not seen the NILGA paper, but the Adjudication Panel for Wales that you mentioned adjudicates; so, the model is different.

The model proposed for Northern Ireland is for the Commissioner for Complaints for Northern Ireland to investigate complaints and adjudicate on sanctions; so, it is a different model. I had the benefit of visiting Wales, seeing how they investigate, and meeting Peter Davies, the president of the Adjudication Panel for Wales. They impose the sanctions. In Northern Ireland, the Commissioner for Complaints is investigator and adjudicator; so, it is a different model.

In effect, we have tied the roles of the Public Services Ombudsman for Wales and the Adjudication Panel for Wales into one office. There are a number of reasons for that. One of the significant reasons is the saving of costs, because the model, as previously proposed and which would have had an appellate tier, standards committees and councils, would have cost in excess of £850,000. In effect, the Commissioner for Complaints is combining the role of investigator and adjudicator for something in excess of £300,000 per annum; so, there is a cost saving.

Nevertheless, it may be helpful if I take you to the issue of what would be an appropriate method of challenging decisions by the Commissioner for Complaints on investigation and adjudication. It is important for the councillors who are the subject of a complaint to understand that the process will be fair, transparent and provide opportunities for representation.

I think back to what the Commissioner for Complaints said in his opening remarks. It is important to remember that the function of investigation and adjudication of local government standards will sit within the jurisdiction of our Commissioner for Complaints. Currently, his decisions are amenable to challenge only by way of judicial review. We have sought the opinion of senior counsel on this matter and have been advised that this arrangement reflects the constitutional position of the commissioner, who sits parallel to other aspects of the justice system. It is important to maintain that consistency with the Commissioner for Complaints jurisdiction, and it would be inappropriate to have an appeal on a Commissioner for Complaints decision either on maladministration or on an issue regarding breach of the code of conduct. That is quite a significant point.

From looking at some of the debates, I am aware that there has been a concern about fairness in the process and that judicial review merely looks at the process of decision-making and, for instance, is not an appropriate method to open up challenge to the decision of the commissioner on sanction. I reassure the Committee that this is not the case. Judicial review has been described as:

“the principal legal procedure by which public power is defined, invoked and restrained”,

and it includes an examination of process and the legality, fairness and proportionality of a decision. It is also important to note that, if judicial review were available, as proposed, to challenge a commissioner's decision, there is an important element to judicial review that may not be there in an appeal, namely the fact that the first stage is a leave application to a High Court judge to look at the merits of the decision to see if there is prima facie evidence. That is helpful not only to provide parties with an opportunity to look again at a decision and perhaps seek to resolve it but because it means that unmeritorious challenges, either from a complainant or a councillor, could not be granted leave and would go no further. That might result in a significant saving in legal costs to the public purse overall.

Dr Frawley: I thank Marie for that very helpful perspective. The other thing that comes into play, Chairman, is that you have the authority of a High Court judge making the judgement on whether the commissioner has acted fairly or not.

The irony of the circumstance is that, even if you have an appeal mechanism, when the individuals are not happy with the appeal, it will go to judicial review, because that is what people do. If people are not willing to accept the outcome of an appeal, they will just go to judicial review. There are two other dimensions to it. The appeal issue, by its nature, is extremely expensive, because all parties will want

legal representation. I do not want to say this because you know it better than I do, but everyone will look to the public purse to support that legal representation. In designing the legislation, you will be asked to indemnify councillors, who will therefore have open access to public money for their challenge. My office is funded by public money, and, indeed, the complainant might well argue that equality of arms demands that they, too, have access to public money and all that for an appeal process. I make the point that the word "appeal" is left there.

Marie can describe the process, Chairman, so bear with us. You may already have questions that you want to ask, but this will give you a sense of how the decision-making process will work, in our view, and you will get the sense that the different levels of engagement and opportunity afforded to an individual to speak in their defence or challenge an allegation made against them are quite significant in the process that we propose. That, in turn, will allow you to make a judgement about how far the individual is able to articulate their own position and challenge the allegation made against them.

Ms M Anderson: Would you find it helpful if I explain that, Chair?

The Chairperson: Yes.

Ms M Anderson: The caveat is that this is still work in progress, and we are working on the procedures for investigation and adjudication in the office. The procedures will be tested by getting the opinion of senior counsel, who is a judicial review practitioner, to ensure that there is fairness and that the rules of natural justice are met as well as any obligations under the European Convention on Human Rights (ECHR). Under a service level agreement (SLA) with the Northern Ireland Human Rights Commission (NIHRC), we can obtain advice about our process and its meeting human rights and data protection obligations. We intend to take that step. So, our procedures will be human rights-proofed and proofed on fairness, transparency and openness.

The first, and quite significant, fact is that the Bill provides that only a complaint in writing can be accepted by the commissioner. That is quite important. The commissioner will not be accepting anonymous complaints. The individual must put their complaint in writing. As part of our consideration of what the process might look like, the Bill contains a discretion on the part of the commissioner on how to investigate or proceed in an investigation. We think that an important part of the process will be the admissibility stage, in which we will consider whether a complaint has been properly brought to the commissioner and whether the matter is within jurisdiction; in other words, that you are not complaining about an individual in their role as an MLA or otherwise. Consideration will be given to whether the complaint is of a minor nature or whether it should proceed to investigation.

If a decision is made to proceed to investigation, the councillor will be informed at that time of the full details of the complaint and of any evidence provided by the complainant to support the complaint. The councillor will be informed of the commissioner's decision in relation to an investigation. Of course, once an investigation starts, the complainant will have to be interviewed, perhaps, as will the councillor. The councillor will be given the ability to have someone in support in relation to any interviews with the commissioner or his staff; so, there will be an opportunity to make representations during the investigation stage. It is important to point out that, because of the way the Bill is framed, there is a middle procedure that needs to be undertaken. Quite rightly, the Bill provides for circumstances in which there is no evidence of a breach, and, in circumstances where there is no evidence of any breach of the code, no further action will be taken by the commissioner. So, there is a provision that relates to the findings that the commissioner can make, and one of them is that there is no evidence of a breach. It is important for an individual who has been accused to know that there is a rigorous process to test the evidence.

The next stage of the investigation may well involve looking at documents or taking statements from eyewitnesses about a particular incident, and there will be procedures and processes around that. It is important to note that in adjudication, which is the next stage, the commissioner will make the decision on the sanction to be imposed. That is a commissioner's decision. Internally, we have established a directorate of investigations so that those who lead on the investigation will sign off on the investigation report. There will be, if you like, a Chinese wall between the investigator and the commissioner who makes the decision on sanction. So, there will be a careful dichotomy or difference between the investigation and the decisions on sanction. At the stage where the commissioner is considering whether to impose sanction, which can be censure, suspension or disqualification, the councillor will be given an opportunity to bring representations either on their own behalf or through legal representatives on the issues raised in the investigation and on the sanction. So, we have a three-stage process, in effect: admissibility, investigation and adjudication.

The Chairperson: How transparent is the whole process? Will you publish details of the investigation and will you let the public know about a case whether admissible or not admissible?

Dr Frawley: One of the merits of using the model of the Commissioner for Complaints is that we do everything in private. That is very important to us. The confidentiality dimension is hugely important. Clearly, as highlighted in your discussions, there is the risk that an individual, while complaining, will also go to the local media and say that they have made a complaint to the Commissioner for Standards. The representatives in this room understand how this works better than I do. In such circumstances, a very clear judgement would have to be made that, in the event of an allegation being put into the public space, the vindication would also have to be put into the public space. It would not be a private answer that states, "Well, I find no case to answer." If it is in the public arena, the commissioner would be compelled to go into that public arena and say that the allegation had no basis whatsoever.

Secondly, it is important to be very clear to everyone affected by this code that, if people make malicious complaints and they are found to be malicious and judged to be so by the commissioner, then they in turn are breaching the code and are liable to an investigation. The commissioner would then make a judgement on whether the behaviour — the way the person dealt with the issue — was, in itself, a breach of the code.

Confidentiality is important throughout this matter, but clearly that will be guided and informed by whether the individual pursuing a complaint has behaved properly in that circumstance. As I have tried to suggest, Chair, there are other interventions that may be appropriate if their behaviour is inappropriate.

The Chairperson: That is a good balance in many ways. It will safeguard against people bringing frivolous complaints.

Ms M Anderson: Without prejudging any matter, one of the benefits of adding this function to the commissioner for complaints' legislation, as it exists, is that the commissioner has the benefit of the obstruction and contempt provisions in that order. That would allow him, if he thought that any person was contemptuous of his process, which might well include going into the public domain with an unfounded and uninvestigated allegation about an individual and the damage to the reputation of that individual, to certify to the High Court a matter of contempt. It is not a decision that he would take lightly, but you can see that already there is protection there for individuals who may be the subject of unfounded or malicious allegations. That is an important protection.

Again, it feeds back into our desire, which is to, as far as possible, not only provide the protections of the 1996 legislation, under which we currently operate, to the individuals, but ensure that the commissioner's constitutional position under that legislation is protected.

Mr Eastwood: You will be well aware of how this thing is used up here. It becomes a political football. We had a lot of complaints, last summer in particular, and I am sure that, coming up to the next election, there will be a few more. The vast majority do not go anywhere. You have a lot of protections in there about confidentiality, but it should be the rule that you should not be allowed, if you are the complainant, to put the matter into the public domain, whether it is malicious or not. The only thing that should ever be put into the public domain is whether someone is found guilty of something. In the political arena, it is used as part of a political campaign against an individual. We have seen it far too often up here. We are grappling with this issue in the Standards and Privileges Committee and it is not that easy. You need to make as much provision as possible to protect the person being complained against. That would be a good thing. It is good that people can be found guilty of making malicious complaints, but I do not think that anyone should be allowed to put anything in the public domain until the results are investigated.

Ms M Anderson: Chair, may I answer that point? We have sought legal advice on our work under the investigation of complaints of maladministration where complainants, or even public bodies, have taken a draft report and have gone into the public domain with it. We have been told that it is contempt. There are existing provisions and they apply equally to the complainant and the councillor. We have sought advice on that matter in the other aspect of our work.

Dr Frawley: I will just add to that. We would wish the spirit to be one of confidentiality and privacy. We believe that people are entitled to that, but you are the public representatives and there is a

dimension to the whole issue — these are your words, not mine — of transparency and openness. There is a tension between transparency and openness and absolute confidentiality. Therefore, let me be clear: the issue is that, once the matter was published, the judgement would have to lie with the commissioner on the nature of the finding and whether that finding demanded to be in the public space because of its significance or the implication of it. That is a judgement call for the commissioner. There are issues that would go into the public arena. The pitch of Mr Eastwood's point, however, is that someone might just use the complaint itself as a vehicle for gaining traction and visibility, and, once you have that traction and visibility, the outcome does not matter at all. That is his point, and I take it entirely.

The Chairperson: Mud sticks?

Dr Frawley: Absolutely. However, I think that the other side of that allows me to have a cheap shot at politicians. So much of that is dependent on you, if I may say so.

I am happy. I do not wish to present myself as the referee in the middle, but if the players accept the spirit of the process, it is much easier to referee the match. I merely make the point that it is a very difficult arena. There are real issues about openness and transparency, and you would advocate those very strongly for Departments, public bodies and others, so we have to find that balance.

Ms M Anderson: I think that it is not to be naive either. Mr Eastwood's point is properly made. The experience in Wales, we are told, is that, at election time, complaints to its ombudsman more than double.

The Chairperson: We will be seeing that in the coming months and years.

Mr Boylan: Thank you very much for your presentation. I will not comment on what you said about politicians just now. However, I wish to comment on a couple of key issues. I welcome Mr Eastwood's point. People should get a fair hearing, and it should be confidential. Once the issue goes into the public domain, the perception is that you do not get a fair hearing.

I want to pick up on the important point about the admissibility criteria. Have they been set yet, or have you any ideas about them?

Ms M Anderson: As you know, the admissibility criteria have not been set yet. However, we have been able to scope out those complaints that we think that we will not accept for investigation under the code. Those are cases in which the individual has not put the complaint in writing but has merely telephoned the office. They will include circumstances in which the complaint is anonymous or there is no evidence to support it. This is not merely about raising an allegation. What we intend to do is to have, on our website and available on paper, a complaint form that states, "Please outline in detail the nature of the allegation and provide supporting evidence or documentation to support it". It is not simply the case that we will accept the complaint, immediately admit it and then commence an investigation. We will be looking at the evidence and assessing it. Perhaps "admissibility" is not the right word, as "assessment" may be a better one to describe the initial part of the process. That is important. Obviously, all our procedures will be put in the public domain. I know that departmental officials are here today, and I think that the intention is that, when the code and our procedures are finalised and we begin to work on the guidance, there will be some stakeholder events at which we will communicate in detail, to the councillor community and others, just what our procedures are.

Mr Boylan: The reason that I ask the question is because, in the past, there have been issues about the recording of minutes and evidence. We do not want to go down that route. We need to cut that out from the start. We need a proper base, criteria and investigation.

Dr Frawley: We feel that very clearly, Mr Boylan. That is very much our focus.

It is very hard to finalise the admissibility criteria until the code is finalised and accepted, because that will hugely inform the key criteria that we wish to have for the admissibility phase of the process. Therefore, there is a lot of work to be done. We are very conscious of that, and it is very helpful to get the perspective of the Committee on its concerns and priorities at this moment.

Mr Boylan: Following on from the Bill itself, clause 67 concerns expenditure of the commissioner. Can you touch on that a wee bit?

Dr Frawley: The referee now becomes a sort of player on the pitch. The one thing that I want to say, if I may, is that our office is very clear that we have to provide value for money. Our core business is in investigating complaints. I want to put it on the record — this is an opportunity to do so, and I thank Mr Boylan for it — that we will not compromise our core business of investigating complaints by in some way cross-subsidising the role of our code of conduct. We will be very honest about what we think the cost will be.

Marie has given you two ballpark numbers: the projected cost of the original proposals, which was in excess of £900,000; and what we are now talking about, which is a sum in the region of £300,000. Marie has been working on the cost of that for me and on the skills, resources and competencies that we believe we would need to deliver the mechanics and spirit of the process that we have described. I will ask her to speak to those core costs. That, I hope, will give you a sense of what we are talking about.

Ms M Anderson: Earlier, we mentioned the establishment of a directorate of standards, which will be led, in Civil Service terms, by a grade 7 director. There will be two deputy principal officers, a staff officer and administrative support. When it is fully operational — it is obviously not fully operational at the moment, as the regime has not started and the code is not yet in play — and we start to receive complaints, we think that the fully functioning cost will probably be in the region of £375,000.

I go back to Mr Boylan's point: we are not happy with clause 67 as it stands. I do not think that it is the intention, but it certainly looks as though there is a kind of "polluter pay" principle and that councils will be charged by the commissioner for the number of complaints that they receive. It will then be up to the commissioner to recover that amount as a debt. We do not think that that is appropriate, and we think that that, again, would undermine our role as the Commissioner for Complaints. As the Committee may know, we investigate complaints of maladministration by councils under the maladministration function. That is funded through the Estimates process and is essential to our independence. We think that a member of the public who reads clause 67 may think that we are being paid by the council commissioner to investigate complaints, and there could be some perception of a lack of independence.

We have had discussions with officials, and it is proposed that the local government grant will be top-sliced in some way to fund this activity by the commissioner. I do not think that it is appropriate for the commissioner to start sending out bills and collecting debts.

Dr Frawley: I would be totally opposed to it. I do not think that it is a model that makes any sense. As Marie said, it would compromise our independence.

There is another issue that we should not underestimate, which is very real and imminent. It is certainly an issue in Wales, Scotland, England and, indeed, the Republic of Ireland. It is the issue of legal costs. You can say that there will be upfront costs of £390,000, but if you get into judicial reviews or representation in which people have been indemnified, those costs will escalate very rapidly. I do not want to burden you too much, but judicial reviews can be very expensive processes and no one can predict what they will be like. Once you indemnify people, they will immediately take up the option. They will not feel that the costs are coming out of the public purse and not seek that support or cover. When you make a judgement to indemnify people, as you will when you prepare the legislation and decide on it, you will be signing a blank cheque as far as what lies ahead of us is concerned. That is your judgement, not mine. I am just highlighting the risk.

Secondly, there is a real issue with equality, and, as my human rights conscience, Marie reminds me of that. Equality of arms demands that, if you fund and indemnify a councillor, you should also fund and indemnify the person who makes the complaint. If not, all the councillor would have to do is take a judicial review, and the whole thing would fall. Therefore, there are big issues in that for you on which I am not in a position to give you a direction, but I think that I have made my position clear as you make those calls and offer advice to the Assembly as it proceeds with the legislation.

Ms M Anderson: The concern is that, given the pressures on the legal aid budget — it is overspent — if a councillor is going to be indemnified in order to challenge the commissioner's decision, will a complainant have the benefit of legal aid, from the public purse, also to challenge the commissioner's decision not to investigate or impose sanctions where he or she is unhappy with the outcome of an investigation? That is where the equality of arms issue comes in.

The Chairperson: You are certainly bringing up a lot of issues.

Mr Boylan: I had to ask the question.

I have one final point. From what you have said, I take it that the role as it relates to maladministration and sanctions is similar to the ombudsman's role. What are your views on councillors sitting on outside bodies? For example, if an issue came up about a decision that was made about neighbourhood renewal, they would feel that they were fulfilling their role as part of a council, but there might be independent members on the body.

Dr Frawley: There are two things to say. First, in the original review of my office that was done by Deloitte in 2004 when there was the proposal to have the conduct issue placed in it, the idea was that the role of the Assembly Commissioner for Standards and the role of a local government Commissioner for Standards would be located in the office, thus saving significant money. However, the Assembly decided that it wanted its own commissioner, and that was perfectly reasonable.

The other part of the recommendation was that all public appointees to public bodies should be the subject of a code so that the code would apply equally to people who are, say, non-executive directors of trusts or board members appointed by Ministers to education boards currently or other bodies. I know that that would have brought in inequality that is of concern to some councillors. Again, in the way in which the design is developed — local government is taking its place now through the reform process — that issue has not been addressed. Therefore, although councillors will be going on to other bodies and representing their councils on those other bodies, they will be subject to the code in that role, but the other people on the bodies will not be subject to the code. Equally, if the bodies that councillors are nominated or appointed to by the council do not have a code, the code for local councillors will apply in that circumstance.

The Chairperson: Would that be for the other members appointed to those bodies, not just councillors?

Dr Frawley: Absolutely.

Lord Morrow: Thank you to those who have spoken. I am glad that I am not a councillor anymore. Having spent 40 years as one, I think that I have just escaped.

I would like to hear your comments on a number of issues. It strikes me that what lies ahead of us is a lawyer's paradise, because lawyers are going to have real good times if the worst is achieved. When a complaint is made about a councillor — I know that no complaint will be accepted over the telephone or as a result of someone speaking to you in town; rather it will have to be done in writing — will the councillor or the person to whom the complaint is made be informed immediately in writing of the nature of the complaint?

Dr Frawley: Yes, that is the intention. Go ahead, Marie: you answer.

Ms M Anderson: Yes. I mentioned complaints that are not for investigation and not in jurisdiction, but the Bill as drafted puts a requirement — a duty — on the commissioner to provide the person who is the subject of the investigation with an opportunity to comment on any allegation.

Lord Morrow: Therefore, the nature of the complaint will be put to the person in writing.

Ms M Anderson: Yes, I think that that is the intention.

Lord Morrow: And the name of the person who complained will be given.

Ms M Anderson: Yes. I think that that is important. It is important that those who are accused know their accuser.

Lord Morrow: Yes, that is fair enough.

Ms M Anderson: I think that that is an important for fairness.

Lord Morrow: That is fine.

Mr I McCrea: On the back of that, will the person who is making the complaint be made aware that that will happen at the earliest point?

Dr Frawley: Absolutely. We take transparency and openness seriously. It will be on our website. Anyone who makes a complaint will know from the website, or from the guidance on how to make a complaint, that we will be telling the person complained about immediately after we receive the complaint, provided that it is properly made. I think that that person is entitled to know.

Lord Morrow: Chair, may I develop this a wee bit more? Take, for instance, a councillor who is on the receiving end of a complaint. It breaks into the public arena, and it is kicked around, and, subsequently, the councillor loses his seat. When the complaint is being adjudicated on, will it be taken into account that all the malicious conduct cost that individual his seat?

Mr Eastwood: It is too late then.

Lord Morrow: Yes. What protection is in the Bill for the public representative to be immune from that, or to be protected from that? If he cannot be protected, what compensation is due to him? Will he be awarded his seat one day because he was maliciously treated in the media?

Dr Frawley: I need clarification from Lord Morrow. Does he mean if the adjudication vindicates the councillor?

Lord Morrow: Yes.

Dr Frawley: The councillor has acted absolutely properly and without fault, yes? The problem that one would have, or could see, in that circumstance is that one could assume that it was at the election, through the ballot box, that the individual lost his seat. The problem would be in demonstrating that it was because of the event or allegation that he lost his seat. I accept entirely that people who have the insights that you have could say, "He was an absolutely front-runner for that particular seat and could only have lost it because of this". However, it would be very hard to make that judgement definitively, because the argument could be that the electorate decided. The electorate is the ultimate decision-maker.

Ms M Anderson: I wonder whether it is something that could be the subject of defamation proceedings. If the malicious complaint had defamed the councillor, and it was proven that the comments or allegations were untrue, I think that it would still be open to a councillor, as it would be to any person in a public position, to take defamation proceedings. That may result in compensation. It will not get him to the point of getting his seat back, but you did mention compensation.

Mr Eastwood: How do you prove that the complaint was malicious and not just mistaken?

Dr Frawley: As I said to an individual earlier in these exchanges, that is a judgement that the Commissioner for Standards should make. I said that if someone made a malicious complaint, and it was judged to be so, the commissioner could judge whether that was a breach of the standards rules and would investigate whether the complaint was malicious. I think that the malicious nature of complaints is something that the commissioner and his or her staff should always be very vigilant about.

Mr Eastwood: Would it not be easier to ensure that everything is confidential until there is a result?

Ms M Anderson: Everything is.

Mr Eastwood: You talked about the website.

Dr Frawley: I talked about the website purely and simply to give advice to people about how they should —

Mr Eastwood: Did you not say that the complainant and the person being complained about —

Dr Frawley: No, I am not talking about the website. The website is purely to give advice to people on what is required of them in making a complaint so that they know up front the detail required and the criteria that have to be met.

Ms M Anderson: Following that, there will be leaflets and guidance on making a complaint available to the public. It will be clear to them, right from the beginning, that every investigation will be conducted in private and that there is a duty of confidentiality on them, as well as on the councillor and other witnesses involved in the process. My colleague Gillian and I have been discussing the importance of putting as much information at the front of the process when the individual who makes a complaint knows that this is a confidential process and that he or she must abide by that confidentiality.

Dr Frawley: I give the assurance also, Chairman, in supporting Marie's point, that we live in a transformed world compared with 10 years ago, with the Internet, tweeting and all the stuff that goes on, and it is impossible to track these things. We also have a media that is voracious for such issues, because it is what sells papers or gets news. Therefore, clearly there is an issue. If the matter goes into the public arena through any of those channels, there is a commitment on the part of the commissioner that the vindication for that individual will be in the public arena and then a judgement made as to who broke the principle of confidentiality. It is very difficult, as I have just suggested, to find out who did that, but, as I said to Mr Boylan earlier, my view was that the spirit of this is about the people on the pitch, and the onus is on the people on the pitch. It would be impossible and unreasonable to put the whole onus for this on a Commissioner for Standards or a Commissioner for Complaints and say it is that person's business to manage and control the whole thing. Equally, councillors might wish to use the peer pressure of needing to have a standard that they commit to and that they will deliver on.

Lord Morrow: The problem with the players on the pitch is this: they sometimes also want to referee. We then discover that not only do they want to referee but all the good referees are sitting in the stand, and the one who is doing his best out there knows nothing about it.

I seldom go to football matches, but occasionally I do, and I have discovered that the guy who is running about with the black outfit on him knows nothing about the game, but all the people around me have all the answers to everything that happens. Therefore, all the good referees are not there, unfortunately, and that might become a syndrome within which you will have to operate.

On malicious complaints that do not take us anywhere, what is the penalty for the person who makes a malicious complaint?

Dr Frawley: If individuals are covered by the standards legislation — that is, if they are an elected member — there is an issue about how you can enforce some sanction on them. If they are a member of the public, there is immediately a different problem. Marie made the point that there are defamation proceedings and other recourses open to people. That is something that we have to consider, but, at the end of the day, the infamous public accusation and private apology is always there. It is a real problem for us in this area, and it affects all aspects of public life.

Lord Morrow: What about the time factor in all of this? The period between the date of a complaint being lodged to the date that the findings are made known can be long. I suspect that it can go into years. Hopefully, it will not, but —

Dr Frawley: If you accept the model that we are proposing, it should not. One cannot guarantee the time frame, but there should be an absolute principle that because someone's reputation, standing or character is being questioned, there is an absolute urgency about vindication and closure. I see that as a principle.

Lord Morrow: How do you deal with uncooperative Departments that are saying, "By the way, there is a complaint here. It is not top of our agenda, so we will just let that sit for a couple of months or until we have the staff to respond to it".

Ms M Anderson: We have discussed that. Our intention is that when we write to a Department or body and ask for information we will give it a timescale. If it does not comply within the timescale, we will send a warning letter referring to the protections that I mentioned earlier under article 14 of the Commissioner for Complaints Order. We may consider bringing proceedings for obstruction, because

the article-14 provision allows the commissioner to certify for obstruction or contempt. I would say that the continued failure to prove information is obstruction.

Lord Morrow: That, in turn, will delay the process further.

Ms M Anderson: It may delay the process, but our experience to date involving maladministration complaints is that the letter of warning works. We have never had to certify to the high court for an obstruction from a reluctant provider of information.

Dr Frawley: That is an important assurance to give the Committee. Compliance from public bodies and Departments on our core work is 100%. It is not always as timely as it should be, but let me assure the Committee that, if it is an issue about someone's reputation or character, deadlines are deadlines and are not negotiable.

Lord Morrow: Finally, I know that you have flagged up judicial reviews, but they are costly exercises. They are also sometimes off-putting to the individual who perhaps feels very aggrieved about whether they can draw off the public purse. I know that it is easy cutting whangs off another man's leather. It does not cost you anything, so you can perhaps be careless, for want of a better word. You do not have to be as particular if you are not paying for it. I think that you, Mr Frawley, said that you were very conscious that there has to be probity and accountability, because, after all, it is the public purse that we are dealing with. I was glad to hear you say that.

Dr Frawley: Thank you.

Mr Boylan: Talking about being on the pitch, I would not like to be the one getting the red card. The issue for us was the admissibility criteria and also, now that you mention the website, clearly defining the grounds for a complaint. I have noticed in the Committee on Standards and Privileges that we are starting to learn a bit more about how that process works.

Ms M Anderson: It is our intention to do significant work on our website, publishing details of how to make a complaint and, if you are a councillor subject to a complaint, how we will deal with you. That is part of the overall cost that we have bid for.

Dr Frawley: Timescales are important. It is important that, once everything has been finalised — it must be in a time frame ahead of the election — I will commit to going out into the local geographies, particularly to prospective councillors and to those who are elected afterwards, to emphasise the issues and the values that we have aired today. No one will be able to put their hand up and say, "I did not know. No one told me. I misunderstood".

The other thing that I hope, and it is important for leadership from the Assembly, is that a clear expectation will be articulated that there will be induction programmes for councillors before, or as, each council is convened, that an hour or an hour and a half of attendance at a meeting on standards will be vital, and that people will commit to it so that we can continue to hammer home the concepts of transparency, openness and confidentiality and build up a culture of ethics as an integral part of what we do. Being ethically driven and informed is absolutely central to good politics.

The Chairperson: It is so important that you have that as a corporate culture and that everyone has to abide by the code of conduct.

Mr I McCrea: Do you not feel that training on standards should be compulsory for any new councillor in the new super-councils, if that is what people still want to call them? On many occasions I have witnessed council staff trying to organise training for councillors to benefit the council and the councillors themselves for possible things that come through in the future. It should be compulsory.

Dr Frawley: Far be it from me to say that. I look forward to the new Mid-Ulster Council and its compulsory attendance at the induction programme.

Mr I McCrea: I am happy to propose it.

Dr Frawley: Indeed. I give you an absolute commitment that I will happily attend such events. I will be there, and I think that individual councils should demonstrate their commitment by saying that it is

compulsory and not voluntary. I also argue, as another important little piece of the jigsaw, that we might develop, either through individual councils or through the office of the Commissioner for Standards, a form that says that the councillor has been inducted and understands and accepts the requirements of the standards arrangements that exist in the council. That would be signed and dated by the councillor so that there would be no doubt about where we all are with how we will commit. I am happy to facilitate those mechanics. It is not in my gift but in that of the legislature or individual councils to make it compulsory .

The Chairperson: It would be a written contract between a council and its councillors.

Dr Frawley: Absolutely.

The Chairperson: It could be done. I am sure that they sign many documents when they become councillors.

Mr Eastwood: Apologies for coming back to it again, but I have just thought of this. What do you think of a moratorium on complaints for a period before an election? People could still complain after an election and before that particular time, but it might avoid a flood of complaints around an election. Some of those complaints might not be made after an election.

Dr Frawley: The only problem, if I may say so, is that Northern Ireland is a bit of a hothouse for elections. Elections tend to start immediately after the previous one has finished, so you would have a real difficulty in deciding when such a period would begin. Secondly, you might argue that some complaints are so powerfully in the public interest that it would be wrong not to investigate them, so you would be making a qualitative judgement. It would be a very helpful thing. The only moratorium that you will ever get is the discipline of people themselves. Of course, the very reason that someone makes a complaint in a pre-election atmosphere is to affect either another candidate or their own candidature.

Ms M Anderson: Chair, it might be helpful if I explain one of the things on developing the procedures. The commissioner has a time limit for which he will accept complaints on maladministration. It must be on a decision or action that has happened within the past 12 months. They should not be old complaints or gripes that have been around for a long time. I think that we will adopt a 12-month period when we look more carefully at the admissibility criteria so that the complaint has to be on something that happened in the past 12 months.

The Chairperson: Twelve months is quite a long time. I think that complaints to the Equality Commission have to be within three months sometimes.

Dr Frawley: Absolutely, Chairman.

Ms M Anderson: That is all couched at the discretion of the commissioner.

Dr Frawley: We see a time limit, so we would have to make a judgement about what an appropriate time limit should be. The issue is about when someone becomes aware of something. There is a fundamental issue if someone is aware of something and, 12 months later, decides, "I think that I will deal with that now". That does not say much about the urgency or the significance of the issue for them, and it is, in some ways, manipulative to introduce it. There is a clear judgement on what the timescale should be, and we will look at that.

The Chairperson: Alban, you have been very patient.

Mr A Maginness: I think that most of the questions have been exhausted. However, I remind Mr Frawley and his colleagues that the Northern Ireland Local Government Association (NILGA), at the meeting of 7 January, which, unfortunately, I was unable to attend, again raised the issue of an appeals mechanism. So although you may be able to persuade the Committee or other colleagues, you may have a job persuading NILGA . To recapitulate on your argument, you are saying that the office of the ombudsman has a certain legal authority and that it would be inappropriate in those circumstances to have a separate appeals mechanism other than judicial review.

I am not sure whether councillors would be fully convinced by that argument. I find it persuasive, but councillors as a body may not be so persuaded.

Dr Frawley: I thank Mr Maginness for saying that he accepts the argument. Part of people's experience is the word "appeal". It is the formulation of an arrangement by which there is a forum where I come to articulate my view and the people who have a different view articulate theirs and there is a panel making a judgement about it and so on. That is not different from representation to the ombudsman, where both parties argue their case or make their representation.

As Marie said, at the adjudication point, people who wish to have legal representation to make their case forcefully, powerfully and, you may argue, professionally will be facilitated in doing so. There is no real difference between the two things other than the word "appeal".

If you like, the panel does adjudicate. The appeal panel adjudicates on the sides of the argument that they have heard, so the word that we are using is "adjudicate". It is not a formal appeal, but to us it is the alternative model; it has served us well, and we are very anxious, as Marie said, to protect the integrity of our process. That is vital to us because that is the core that we must protect.

Mr A Maginness: Who makes up the panel?

Dr Frawley: There is no panel; it is just the commissioner, the individual.

Ms M Anderson: Mr Maginness, there is already a model in local government for investigation and adjudication by a single decision-maker. That is in relation to the functions of the local government auditor when she investigates whether there has been wilful misconduct on the part of a councillor. She also adjudicates on the question of whether a surcharge will be imposed. That decision and those functions are not subject to appeal; they are subject to judicial review, so the model already exists.

Mr A Maginness: NILGA raised the point on 7 January in relation to councillors who are on outside bodies. They argue that there is an inherent unfairness that a councillor should be subject to a code of conduct whereas individuals who perform similar tasks and functions are not. That does raise an issue.

Dr Frawley: I agree completely. Some people may know that I worked in the health service for 30 years. People appointed to public bodies should have a code of conduct to which they are accountable, and I do not see why it should be different from the code for councillors. You would then have equivalence, and everyone would be in the same circumstances when accounting for their decisions and performance, and if they operate outside the rules of the standards, they are made amenable.

It is not for me, but it is in the gift of this legislature. Northern Ireland could break new and important ground by saying, "We have expectations of people who operate in the public sphere because we have shown what we expect of councillors. We equally want those who are on public bodies to be just as accountable and susceptible to investigation and complaint." I have no problem with that whatever.

I respect NILGA; it does great work on behalf of the whole community of councillors. Of course, it has a perspective, and I totally respect it. I have offered you mine this morning, Chair.

Mr Elliott: Thank you for your presentation. It was very interesting, as always.

Marie, you mentioned the local government auditor. I am not sure that that is the best one to hold up as a good process. I do not know whether you were doing that or not; I am just making that comment.

Ms M Anderson: I am aware of a judicial review in which its decision was overturned because there was insufficient evidence.

Mr Elliott: So am I.

Ms M Anderson: I know; I am aware of it. *[Laughter.]*

Dr Frawley: I do not know whether Mr Elliott is declaring an interest. *[Laughter.]*

Mr Elliott: Chair, my second issue is that, in regards to one of your last points, Mr Frawley, about the competence of this legislation having a basis for other people who sit on outside bodies or organisations, I do not know whether it is within the competence of this legislation —

Dr Frawley: No.

Mr Elliott: Certainly it is within the competence of the Assembly to do something about it.

Dr Frawley: That is correct.

Mr Elliott: I think that your point is well made.

My first question is quite a simple one. I know that you would have to implement the legislation here, but do you agree with the principles of the legislation?

Dr Frawley: Yes, I am content with them.

Mr Elliott: All right.

My other question is around the fact that the complaint must be made in writing. When I was on another Committee, we had long discussions about how a complaint could be made to the ombudsman by text or by phone call. Are you content that it can be made only in writing? I foresee, looking at it from the other side, an argument from people who work in departments in the Civil Service saying, "Well, people can complain about us and decisions that we have made by a simple text or phone call, whereas a complaint about a councillor must be made in writing."

Dr Frawley: I will have to clarify that, Chair. A complaint has to be more than a text. People could say, "Here is a complaint", and there may be two words. There will be people who will say that they want to make a complaint and here is what it is. However, there are people, and the Committee is aware of this more than I am, who would have difficulty in writing a complaint, not for any reason other than perhaps misfortune or literacy challenges that they have been unable to overcome. In that circumstance, one would assist. We will help them to put what they want to say on a page, but they would have to come to us and say who they are and where they live. They will have to know that their complaint will be shared with the person they are complaining about. I would not want it to be a case where, unless you can write me a letter and get a stamp and an envelope and send it to me, it will not be a properly made complaint. We would assist in getting it formalised if the circumstances warranted it, but we would need to make that judgement. We would not obstruct people from making a complaint.

Mr Elliott: The issue that I am making is that, to the ombudsman, it is much easier to make a complaint in a written format than it would be in this case. The only point that I am making is that there is a difference.

Dr Frawley: Yes, there is.

Mr Weir: Chair, possibly one difference is that, while it might be an individual civil servant who is taking a particular decision, largely speaking, with the ombudsman, it is likely to be a complaint against a government body and so the repercussion could be for that body. Here, on the other hand, if you are talking about a complaint, it will ultimately be against an individual councillor.

Mr Elliott: I knew that you would come up with a Civil Service answer, Peter. You always do.
[Laughter.]

Mr Weir: Tom, I would be a civil servant, but I could not take the pay rise. *[Laughter.]*

Dr Frawley: I do not want to get caught in the crossfire, Chair. The referee wants to get off the pitch.
[Laughter.]

The Chairperson: Let us move on, Peter.

Mr Elliott: That is fine, Chair.

Mr Milne: You are saying that the code should be in place by May and that it will apply to those elected to the new councils. What about those who are not standing for the new councils and who will still be councillors for that year? Will you be fit to adjudicate on people in that position? Has that been taken into account?

Dr Frawley: That has not been advised to me, but my understanding is that it relates to the new councillors and not to the present councils.

Mr Milne: Fair enough.

The Chairperson: It will start from May 2014 with the shadow councils.

Dr Frawley: It will operate under the shadow period.

Mr Weir: To clarify, if there is a complaint against someone, what capacity does it relate to? Presumably, during that period, it is likely that quite a lot of people will experience a degree of overlap. So, presumably, it relates to their performance of duties in the new council.

Dr Frawley: Absolutely.

The Chairperson: The induction has to be done quickly — almost immediately — as well, as you say.

Mr Boylan: Have you expressed your views on clause 67 in your paper?

Ms M Anderson: Yes.

The Chairperson: Thank you very much. It was a very informative exchange of information and a very robust discussion.

Dr Frawley: Thank you very much, Chairman and members.