Northern Ireland Assembly

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

OFFICIAL REPORT (Hansard)

Northern Ireland Ombudsman's Office: Reform Proposals

23 May 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 Alex Maskey
Mr George Robinson
Ms Caitríona Ruane

Witnesses:

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

The Chairperson: We are joined by Tom Frawley and Marie Anderson, the ombudsman and deputy ombudsman respectively. You are both very welcome. Tom, we have been looking at this issue, and there are three options. First, you could keep the County Court option for where it currently applies. Secondly, you could drop it, or, thirdly, you could include it for all cases under the new Northern Ireland Public Services Ombudsman (NIPSO) office. Can you give us your pitch or your thoughts, as it were?

Dr Tom Frawley (Northern Ireland Ombudsman's Office): Thank you. I prepared a brief note that might give you background and context, which will hopefully help you make your own judgement about which of those options might apply. Just to make it more complicated, there is possibly a fourth option, which I will come to.

You noted the three options. One is to extend the enforcement provisions of article 16 of the Commissioner for Complaints (Northern Ireland) Order 1996 to the bodies that are in the Assembly Ombudsman's jurisdiction. In other words, it currently does not exist for those bodies. As you suggest, the second option is to remove the enforcement provision for the bodies that are currently in the Commissioner for Complaints's jurisdiction. The third option is to retain the enforcement provision for bodies that are in the Commissioner for Complaints's jurisdiction but to not go any further than that.

As I suggested, there is one possible further opportunity, which relates to a proposal to extend the County Court mechanism to all bodies in the Commissioner for Complaints's jurisdiction. The reason that I make that point is that, currently, for example — members may not appreciate this — the general

health service providers, that is, trusts and independent contractors, are not covered by the mechanism, even though they are in that jurisdiction. So, the mechanism does not cover all the bodies that are in that jurisdiction. I will speak to that a little bit more extensively later.

To assist the Committee in its deliberation, I remind members of the historical origins of the system, because I think that it is unique in these islands to have a recourse that allows complainants to go to the County Court. Therefore, I think that it might also be helpful to understand where it comes from. The rationale for the inclusion of that enforcement can be traced to section 7 of the original commissioner legislation. The notes on clauses for the relevant provision, which would have been prepared by civil servants in informing those who would apply the legislation, indicate that the purpose of the provision was to encompass acts of maladministration by public authorities that involved political and religious bias. To put that in its context, it was 1969 and there was a very significant issue around discrimination in the allocation of housing and in employment. There was a particular focus on local authorities where those issues were concerned. The recourse, therefore, was that the ombudsman made a recommendation, but if the local authority refused to implement it, the complainant had the right to go to the County Court to say, "I have a finding from the ombudsman; they are not implementing it, so please look at it.".

The original creation of the office of Commissioner for Complaints was, therefore, directed mainly at the actions of local councils. Today, however, the number of bodies in my jurisdiction as Commissioner for Complaints is much expanded and includes, for example, the Housing Executive, housing associations and a number of arm's-length justice bodies, as well as regulatory bodies such as the Equality Commission, the Northern Ireland Children's Commissioner and the Regulation and Quality Improvement Authority (RQIA). The 1969 Act predated the fair employment legislation that has come on stream since, which is another recourse that is now available to people in Northern Ireland. Indeed, it importantly predated the expansion of protection against discrimination that exists today. We also have to remember that there has been a whole expansion of protections beyond what was intended at this moment in time, so you might want to look at the total landscape now.

In my own experience as Commissioner for Complaints since 2000, I am aware of no reported cases heard in the County Court where the complainants have invoked the procedure under article 16 of the Commissioner for Complaints (Northern Ireland) Order 1996 to seek damages for loss of opportunity where I found injustice arising from maladministration. Indeed, the last significant case brought pursuant of the County Court enforcement mechanism was that, which some members may remember, that was brought against members of Craigavon Borough Council who refused to enter into a lease with a GAA club in 1980. The case was initially heard in the County Court, and the Court of Appeal gave its judgement in 1986. That judgement was in favour of the complainant and was a very significant finding in terms of the fine that was levied. The councillors were made personally accountable for the payment of that fine, and they were also excluded from public office for 10 years. It was a very heavy response from the Court of Appeal in the light of the council's refusal to implement the ombudsman's decision.

My office has been unable, therefore, to obtain any further data from the Court Service on the number of applications that were brought under that procedure that did not precede the 1980 hearing. A possible reason for that enforcement mechanism not being invoked, in my view — I cannot assume what was in the minds of complainants — is the degree of compliance. In other words, I have had practically 100% compliance with every recommendation that I have made. I suppose the experience of Craigavon has led many to say that that is not somewhere that they want to go and that they want to stay with the outcome that was offered in the ombudsman's recommendation. For your information, I have attached an appendix to the paper, which provides you with more details on my findings across more recent years.

As you will note, in the period 2009-2012, there has been almost 100% compliance with the recommendations in my jurisdiction as commissioner. I made the point earlier that I am excluding general health service practitioners' complaints from my general picture of the recommendations, as there is currently a High Court challenge from a general practice to my ability to make a recommendation for financial redress. I pointed out that they are excluded from the original legislation. I do not want to make any comment on that, Chairman, and I advise the Committee on that accordingly, because that judgement is still in process and a decision has not yet emanated from the court. Further, I draw the Committee's attention to the fact that general health service providers are not covered by the County Court mechanism. In other words, if a trust refused to implement my recommendation, the complainant would not have recourse to the court. You will note from the statistical analysis provided that, in my jurisdiction in health under the Commissioner for Complaints legislation, in only four cases where I have recommended a financial payment has this not been

complied with. Those are all cases involving general practitioners. Clearly, I cannot make a final judgement until I know what the High Court is going to say about the original one.

In my role as Assembly Ombudsman, I am pleased to advise the Committee that there has, to date, never been an incidence of non-compliance with my recommendations in this jurisdiction over Northern Ireland Departments and their agencies. They have all been complied with. The Committee will note that, in her consultation response to the original consultation document issued by the Committee, former Northern Ireland Ombudsman Mrs Jill McIvor refers to one instance where the Child Support Agency (CSA) had not initially accepted her recommendations. However, the threat from Mrs McIvor of a special report to Parliament — that would now be the Assembly — ensured that the matter was satisfactorily settled.

Moving on to the recommendations of the Welsh and Scottish ombudsmen, as far as I am aware, there has been full compliance by all public bodies in those jurisdictions of the ombudsmen's recommendations. There are, however, a number of instances where the recommendations of the Parliamentary Ombudsman, which is the ombudsman based at Westminster, have not been met by Departments. On those occasions, the ombudsman used her special report power under section 10(3) of the Parliamentary Commissioner Act 1967 to achieve compliance. The most notable of those, which the Committee may well be aware of, was the Equitable Life report, in which she found 10 instances of maladministration by the Department of Trade and Industry (DTI), the Government Actuary's Department (GAD) and the Financial Services Authority (FSA) and recommended the introduction of a compensation scheme for those who had suffered. You may remember that that involved huge compensation; ultimately, we were talking about £5 billion for people who had been misled on pension arrangements. In all those special report cases, the Departments eventually complied. Therefore, if there were an issue of non-compliance, it is my view that the appropriate forum to deal with it would be a Committee of the Northern Ireland Assembly using the procedure for a special report, which currently exists in the Commissioner for Complaints and Assembly Ombudsman legislation. I note that it is anticipated that the special report power would be provided for under current proposals in the proposed Ombudsman Bill.

I made the point to the Committee previously that the office of the ombudsman, in the new model, is an office of this legislature. The purpose of this legislature is to scrutinise the performance and work of Departments. Therefore, if a Department or official refuses to comply with a recommendation of the ombudsman, the place to take that non-compliance is back into the legislature to the relevant Committee. When faced with non-compliance, it is obviously for the Committee to call the official or body before it to seek an explanation about why such a position is being adopted. However, I caution against the potential for the Committee's becoming another level of appeal for the individual. That would defeat the purpose. That is something that would work against special reports, because it would require a fairly unanimous Committee to be working, or political advantage might be taken from those sorts of issues, which is a judgement that only you can make as you decide whether that County Court mechanism should be extended. That is the downside of it that I want to acknowledge.

The classic public service ombudsman relies on political pressure to achieve compliance with his non-binding recommendations. I remind the Committee again that I make recommendations; I do not make conditions on courts as an enforcement mechanism. In merging the two legislative models of Assembly Ombudsman and Commissioner for Complaints, this should be at the forefront of the Committee's consideration, so there should be a merging of the fundamental role of the ombudsman and the Assembly and its Committees to ensure that the recommendation of the ombudsman and officer of the Assembly are met.

I have drawn the comparison previously in this forum that, on one level, the Comptroller and Auditor General (C&AG) gives the Assembly assurance that money is being spent properly and appropriately and that probity is being applied. The ombudsman is the other side of that, which is that they want to know the experience of individual citizens of those services. Are they doing the sort of things that government say they that are doing? Are they achieving the outcomes? It is about the specifics of the debate that you were having a moment ago about what a service being "provided" means to a single mother or to an elderly man living alone. However, to use common parlance, is it doing what it says on the tin? That is where the individual has the right to come to my office and say that they are not getting the service that they are entitled to or that they have not been given the eligibility that they are entitled to, and I investigate to see whether that is the case.

Therefore, to put it in context, as you suggest, there are two directions of travel. One is to take the County Court mechanism, which, you might argue, in some way assumes non-compliance, and to apply it across the whole landscape. I think that that is what you will need to do if you decide to bring

the two offices together. Alternatively, we could leave it behind us as something that was clearly very relevant in 1969. However, with the new arena and framework of protections that are now in place, we have to ask whether it is still relevant, and, instead, whether we could bring the non-compliance, if it should arise — we should not assume that it should arise, but, if it can happen, it will happen — to a Committee. However, there is a risk of politicising that recommendation. On balance, those are the comments that we have prepared for you today.

Mr A Maskey: Thank you for coming here today to help us out on some of these issues. I am pleased to hear that there has been a high record of success in compliance. If the claimant had recourse to the courts, I would be satisfied that it would not require a large amount of money. If the level of compliance has been so successful, that tells you that it would not open the floodgates of going to court. There was a fear among members that, if we went down that route, we would open up the floodgates, meaning that the whole thing would become litigious and would involve more lawyers and therefore an awful lot of money. So, I am satisfied that if you were to go down the route of applying that access to the County Court, it would not open up the floodgates.

By the same token, I am not aware of the level of recommendations that have been made over the years. I do not know whether they were modest or very strong. Therefore, it could be relatively easy for somebody to accept a rap on the knuckles or to say that they will do better, but it might not make a lot of difference. I am not suggesting that that has been your record; far from it. I am simply saying that I have to satisfy myself on that.

I accept entirely that there have been a number of changes over the years, but you continually get higher rates of compliance because new measures have been introduced over the years. I firmly believe that we should maximise the degree to which people have redress. I know that you are making the point that you might want to revert the thing back into the Assembly for final redress once you have gone through the ombudsman. I have to say that that would frustrate me. By the time you have to go to the ombudsman, you have aged considerably and been greatly frustrated.

Dr Frawley: Thank you for that endorsement. *[Laughter.]*

Mr A Maskey: That is by the time that they get to your office, not even by the time that your office would have to deal with it. Someone would have to have got there via an Assembly Member and all the rest. I am working on the basis that, by the time a complaint goes to you and your office, it has already exhausted all the avenues, including local representation and going to the Department or wherever you go to. If someone has not got a result, which is why they end up on your doorstep, why the heck would they want to bring it back to the same people again? I have to say that I am against that.

My instincts would tell me that I want to be able to go to point zero. If someone has gone through you and got a result and then there is non-compliance, I want knuckles rapped. There was a withering Public Accounts Committee (PAC) report this morning, and I was delighted to hear it actually. However, will a head roll? Probably not, but clearly a head should roll. I want some mechanism that ultimately deals with all these things maturely and rationally. Hopefully, once someone goes to the Ombudsman's Office, you will make a determination and resolve the case. According to the figures, most of these issues are resolved satisfactorily, which is a good thing. However, in the hopefully very small minority of cases that are not resolved amicably and properly, the buck should stop somewhere, and that has to be the court. I would not want to bring someone back to travail around another Assembly Committee.

Dr Frawley: I do not want to draw the ire of the judiciary or the Justice Committee, but I think that there are certain delays in getting into the justice system as well. I do not think that the immediacy that Mr Maskey might seek is necessarily possible within the court alternative, but I take his point. Having travelled the journey through a complaints process in the public service, I accept entirely that it can become like a marathon and is torturous for many people. For some to then find themselves in the position of the recommendation not being complied with is very unacceptable. It is a judgement call for the Committee. I can live with either.

I am sure that the Committee Clerk will advise you of this, but we did not consult on the extension of this to the ombudsman's jurisdiction when the original document went out. Far be it from me to say, but I am sure that permanent secretaries and Departments would have expected to have been able to articulate a view on it if you decided to go that way. If you want to look at this option, you may also

want to reconsider whether we need to speak to any other parties that could argue that they were not consulted about that solution originally.

The Chairperson: I think that we have discussed this at Committee before. Take somebody who has an issue with planning. After the whole process, it comes to you, and you review it and say that there has been maladministration. The planners might say sorry, but the edifice is still out the back window blocking the sun. There is no compensation or recourse.

Dr Frawley: I want to say two things. I think that this is a bigger issue than the Office of the Ombudsman, primarily because of the argument that third party appeals are the answer to the real objector issue. That is one that politicians have different views on, whereas I have a very narrow jurisdiction. I am looking at the administrative process that informs the planning decision, which is a very narrow jurisdiction.

In some instances, when I find failure in respect of the particular circumstance of an individual case, I make a consolatory payment to the person affected. However, you are absolutely right in saying that the expectation of a complainant when that happens is to say, "Knock the building down. That structure is a blight on my life that impacts on my daily quality of life and my family." That is understandable because it is not something that they can walk away from; it is with them forever. I accept entirely that there is a gap between what I offer them and what people expect to happen. Those are intractable issues that I cannot really resolve.

Ms Ruane: I want to ask about schools. I should also say that I noted your comment about the Craigavon case, which you say went on for six years between 1980 and 1986.

Dr Frawley: Yes, that was to get it to the Court of Appeal.

Ms Ruane: The way we deal with that is not to not have that remedy, but it is speedy justice. That is what we are looking at in other levels in order to ensure speedy justice. We have new PPSs. The Assembly has to make sure that that improves.

I want to talk to you about schools. As an Assembly Member, I find the number of letters I get about bullying in schools very frustrating. Parents know the impact of bullying. We all have to take bullying extremely seriously. In some cases, I found that schools were brilliant at dealing with it; in others, I found that schools were dreadful. There was no consistency of approach across the board, yet damage is being done to children's lives. I have seen parents who were in tears, and every Assembly Member has probably had a similar experience. I think that, as a society, we need to mature in relation to how we deal with the bullying of children. If that means taking hard decisions, I think that we need to take them. Schools need to know that there are certain things that they have to do, such as implementing anti-bullying strategies. It is grand having the lovely little thing up on the wall saying that this is an anti-bullying school. I just wanted your view on that.

I also note that you speculate a little bit on school transport. Again, that is another area where there are big issues, particularly when it comes to special needs children.

Dr Frawley: I will explain to the Committee, and some of the older members may remember, that one of the great Thatcher reforms — so described by those who supported Thatcher — was the local management of schools initiative, the purpose of which was to give boards of governors a lot more autonomy to manage decisions around the local situation. As a result of that, the management of schools was taken out of the jurisdiction of the ombudsman completely. Therefore, our jurisdiction in schools specifically is very narrow. It relates only to the appointment, say, of a principal where the local education and library board is involved or, in the other sectors, where the Council for Catholic Maintained Schools (CCMS) or the council for integrated schools is involved. It is quite narrow, and, therefore, this opportunity to bring it back into our jurisdiction is something that I would welcome. I think that it offers the potential for the consistency you talk about. For example, if you marry it to another part of the extension of the role of the ombudsman such as that around own initiative investigations, which is also proposed, you could look at an issue such as bullying and the management of and response to it in the round. You could look at how the different sectors or geographies deal with the same issue and why — in the very effective way in which you articulated — there is good practice out there that works extremely well and yet there is an absence of any practice in other places. We could look at how to get best practice across all schools. I would welcome that very much.

The second part, transport, is actually a bit of the jurisdiction that is currently with us. School transport is provided by education and library boards. It is becoming increasingly complex. It is very difficult, primarily because you have a collision of pressure, particularly on local schools in rural communities, with children travelling further and further. Parents get a sense that somewhere is not the right location for their child, and suddenly the transport becomes nearly oppressive in that they have to travel on two or three buses to get to school and back. That is particularly true, as you highlighted, for children with learning disabilities. They can spend hours on buses and have less time in the centre of the school than they have on the bus coming and going while people are left off and so on. So, there are real issues there, and I would not, in any way, have the solution to those problems. However, there is a need for a more systematic examination of those failures, so perceived when they arise. Again, that part of the jurisdiction would be assisted.

I have a final point about schools, and then Marie might want to add something. The Committee may want to look at the way in which the different funding streams operate. Some schools are fully funded by the state; others are not fully funded by the state. We have had the debate before with the Committee about following the public pound. The legitimacy of the ombudsman's role is where there is public funding involved. Obviously, if there is a private school, you could question the legitimacy. However, in this situation, we commend the Welsh solution. When the Public Services Ombudsman for Wales gave evidence to you, he indicated that you do not want to be involved. I think that Mr Maskey made the point at the time about small community groups being given £100 or £200 by government, which entitled this office to then use a sledgehammer to crack a nut. In circumstances where over 50% of the running costs of a particular body or activity is sourced from public funds, then the writ of the ombudsman applies and people have the right to the protection of the ombudsman. That is just a little nuance on the schools that you might want to look at because, as you know, there is different status across different schools.

Chairman, with your permission, I will ask Marie to add to that.

Ms Marie Anderson (Northern Ireland Ombudsman's Office): In respect of consistency, I will highlight a point that is in the briefing paper. The ombudsman's jurisdiction currently has the Department of Education, the Education and Training Inspectorate, the education and library boards, the Council for the Curriculum, Examinations and Assessment (CCEA) and CCMS, but then a huge chunk around the local management of schools is not there. Consistency from the departmental source right through to the delivery is an essential part of the issue — not only consistency among schools and boards of governors in how they apply policy. This is an opportunity to track and to have scrutiny right across the board with regard to education. That is my first point.

Secondly, picking up on what Caitríona said about special educational needs, one aspect of our legislation has probably not been brought to the fore previously. Currently, under the ombudsman legislation on both sides of the house — Assembly Ombudsman and Commissioner for Complaints — if an individual has a right of appeal to a tribunal, which is described as any determining body, and, having exercised that right of review, the individual still feels that he or she has sustained an injustice that remains unremedied, that individual can come back to the ombudsman. If he considers that there is reasonable ground for complaint, he can still look at it. There are a wide range of tribunals within education, dealing with expulsion, admissions and special educational needs. However, if you are a parent and you go there, it stops there. Under the proposals in the new legislation, if you retain the last resort aspect of the remedy that we currently hold, parents and children who remain dissatisfied with the outcome of an appeal tribunal can come back to the ombudsman, and I am thinking specifically of special educational needs. That may not have been drawn to the Committee's attention before, and I think that it is important that we draw that out.

We have looked at other jurisdictions, and I go back to your special educational needs point. The Local Government Ombudsman in England has a jurisdiction in relation to schools and the local management of schools. Even though there is a tribunal, it retains some scrutiny over special educational needs assessments, where, if you do not go to the assessment, you do not get. That is the aspect of having made an assessment, it is wrong, and you appeal it. The precursor to that is, if you do not assess, we do not have to make a decision in relation to resources. As regards its schools jurisdiction, that is an aspect of the Local Government Ombudsman that we know is an area of complaint and is fertile for investigation and scrutiny. I just wanted to draw out some of those examples.

The other area is bullying and harassment, which can be so painful for parents and children, and the consistent application of policies across the piece. The Local Government Ombudsman has told us that it also gets complaints about that and investigates them. I make that point to reassure you, in that

the new proposals will give the ombudsman more comprehensive scrutiny across the education sector and individuals more rights of redress and remedy.

The Chairperson: We wrote to the Minister about that residual referral back to the ombudsman the week before last. We are seeking clarification on that.

Ms Marie Anderson: You are across that issue. Thank you for that, Chair.

Mr Eastwood: Thank you both for coming. It is very good to hear that there is such a high level of compliance — 100%, I think. If people were more comfortable having the County Court mechanism in the legislation as a last resort, do you see any downside to that other than that it might not be necessary?

Dr Frawley: I have a fundamental difficulty with two public bodies being in a court spending public money and contesting against each other. I have a real worry about that. I think that it is hard to defend in any environment, particularly when we are not able to provide fundamental services. The sums of money that are expended are just not defensible. That is the downside that I see. If it is not a circumstance that arises that often, maybe the costs will not be accrued. However, once you go into a courtroom, the costs escalate beyond all recognition. In a 1980s Craigavon sort of circumstance, in which you move to a Court of Appeal after a County Court, the costs are even more significant. There is a cost implication that one would want to be very careful about.

Compliance is like anything. I will tempt the Chairman's prejudices and use the sporting metaphor. If one guy on a football pitch challenges the referee and the referee does not deal with it very well, suddenly everyone on the pitch will challenge the referee. I sense that all that you would need are two or three examples of people saying, "I will not facilitate that." Therefore, it might be important to have that recourse in that moment.

As you can see, I am a bit schizophrenic about it. On one level, it gives me comfort to know that I can say, "You can either face me or the County Court, and you might find me more amenable." The person might not want to go through the County Court, so just having that option in the armoury may be helpful. However, I do not underestimate the problems that might arise. I am not saying that we should not lead the way, but we would be the only jurisdiction in the UK that has the County Court as the back-up position. However, it may well have merit.

Mr Clarke: I will follow on from that point. I have not really thought in depth about this County Court aspect, but you made a valid point about two public authorities. Can you envisage the opportunity for an individual to take a public authority to court as opposed to it being two public authorities fighting it out?

Dr Frawley: You are right: it would be the individuals. Ironically, the individuals are least well resourced to do it, whereas the big public bodies are very well resourced to do it. There is an issue there. I assume that, the expectation within the model that would develop would be that, once I had made a finding in favour of an individual, I would support that complainant in going to the County Court. It would be completely iniquitous to have an individual who did not have the means to do anything about it. I would look completely gutless if I made a finding in their favour and then sat on my hands when they said, "I wanted to go to the County Court, but they will not do anything about your recommendation," and responded by saying, "I am afraid that I am in no position to help you. You have the consolation of my wonderful report, but there is nothing that I can do about it."

Mr Clarke: That is where you have two public authorities, and I understand your example. However, suppose someone were coming armed with your report but you did not have the mechanism to go to court on their behalf. Surely the very fact that they have a supportive document should mean something. To be honest, I like the big stick approach to this issue. I would hope that the fear of knowing that I had a good report from the ombudsman that suggested that there had been maladministration or whatever in the Department would be enough for it to settle the case, regardless of whether or not I have the means to take them to court. If you remove that opportunity, you have nothing to beat the Department with.

Ms Marie Anderson: There is an excellent article on the County Court enforcement mechanism by Ciaran White, who is a law lecturer at the University of Ulster. There was a rash of cases in the late 1980s and early 1990s. The experience was that, once the County Court mechanism was initiated,

the case was settled. I suppose that the Court of Appeal avenue in 1986 was a one-off. However, if you have the ombudsman's report, that takes you a long way.

Dr Frawley: That is fair, and it is fair to say that, in the Craigavon case, the judge used the ombudsman's report as his basic position to say that he found the position of the council intolerable. The council felt that it could resist and refused to comply with his direction, and that is when the case went to the Court of Appeal and escalated into a huge thing. As a result, it stands as a monument to most public bodies, who do not want to go near a County Court. That confirms the commentary that we have had from members, which is that it just sits there in the background and does not get invoked. It should not have to be invoked, but if it needs to be invoked, then it is there as the backstop for individuals, and it is a protection for the individuals.

The Chairperson: We have had that point previously. I think that students' unions made the point that they would like the ombudsman brought in. Knowing that it was there would change the dynamic. Tom, you used the expression, "You can go to the County Court or you can deal with me". If we extended the power across everything for NIPSO, does that change the dynamic of how it operates? Would it be judicial from the very start?

Dr Frawley: The ombudsman's writ would still run. You cannot go until the ombudsman's investigation is finished. What you go with is the finding of the ombudsman that says that that organisation must do a, b or c, or make a consolatory payment of whatever the sum is, and they refuse to do that. That is what goes to the court. The complainant says, "I have a finding from the ombudsman, supported by a report in favour of me, and body A is refusing to do anything about it". That is the fundamental of the court. He is looking at the case that I have made. Technically, I suppose, he could find that Frawley's case is not very well made and find in favour of the body. I suppose that that is always the option in courts. However, that is not the impression, and I hope that they are robust enough to take whatever challenge comes. That is the whole point.

Ms Marie Anderson: In terms of whether you deal with the ombudsman, the question of unenforceability or non-compliance does come back to the ombudsman because it is in his gift or at his discretion whether or not to bring a special report to the Assembly. The ombudsman's decision is whether he goes to the Assembly with the case and does a separate report that we call a special report. That special report is a report on the failure of the body concerned to meet the recommendations.

The Chairperson: If you brought a special report to this Committee, what would our broad options be?

Dr Frawley: There are two things that I would say. First, I would not underestimate, and I am sure that you do not, the authority of these Committees and their effect on officials. Some people will disagree, but I think that most public officials find it an incredibly uncomfortable and challenging environment. Secondly, to be defending a decision where you have refused to accept a rational argument for a particular outcome is not a position where an accounting officer should be. Part of the commentary you get, especially from PAC reports, is this: "when is somebody going to do something about these things?" If an official arrives here having refused to implement a particular recommendation, the vulnerability of that official is hugely increased as regards career, public perception, etc. You know the coverage that some of those issues get. That is my view.

The other side of that is that the permanent secretary is the accounting officer, so, in a way, he is the authority. Again, you have to recognise that a political dynamic may apply in some of these situations because a Minister could have a particular view, but it will be very much the permanent secretary who is involved. However, there is that other complication once you bring it into a Committee forum. I am not unaware of the potential complexity of that either.

Ms Marie Anderson: I think that it is a bit like the County Court, in that the threat of a special report may be enough. Many bodies would not want to be the first to come before a Committee like this with a special report from the ombudsman. Jill McIvor used a powerful example in her response to the consultation document. She explains:

> *"I had difficulties with the Department responsible for the Child Support Agency, now abolished, which insisted that it could not decide on a certain matter until it was known 'what London would do'."*

She describes her experience:

> *"This was unacceptable. I had found in favour of two mothers each trying to bring up a child with no financial support from the absent fathers. I brought this to the attention of the Head of the Civil Service and said I intended to make a special report ... The matter was satisfactorily settled."*

So that is the power of the special report. Sometimes, the threat is enough.

The Chairperson: If I come as an individual to the Commissioner for Complaints, knowing that the endgame may be in court, do I start from the very beginning with legal advice and representation, which I would not necessarily do with the ombudsman? Are there two separate processes?

Dr Frawley: No; they are linked, Chairman. The process will start with the ombudsman. The ombudsman will follow the process to the conclusion, arrive at a series of findings and, based on that, make a series of recommendations. Those recommendations may involve, as I say, changing systems, apologising, making payments in lieu of being unable to put the person back in the position they were in originally. It is only at that point that the body concerned could turn round and say, "I am not implementing those" or "I am only implementing part of those". At that point, if you retain the County Court, once they refuse to do it — obviously, I would continue to be involved — and the point was reached where I was satisfied that they were not going to do it, then the complainant would have the right to take my report and say, "The ombudsman has given me this report; he has reached these conclusions and made these recommendations; and x or y Department is refusing to do anything about it". Then, the judgement would be made by the County Court as to what action he/she would take in that circumstance.

Mr A Maskey: Just a final point. Thanks, Tom and Marie. I think that the high level of compliance that you have outlined is good news. By the time somebody gets to your office, they have gone through a fairly difficult route. I have nominated people in the past, as I am sure that everybody else has done — or near enough — and you do not often get people coming back to you saying that they went through that and it got them nowhere. There seems to be a reasonable satisfaction rate, and I am sure that you are pleased to hear that. That is the good news.

The kind of threat that agencies should face if they do not comply with your report is that they could be for the high jump — the High Court. Or, they could be reported to the Assembly. Ultimately, they do not want to go there. That is proved by the fact that very few people have had to force it to go there. The Craigavon thing was a landmark because there has been no example like that since, and that is a good thing. People basically think, "Hold on a wee second; wind your neck in; you cannot go that far; you are going to go for the chop; so forget about it". So that has modified people's behaviour.

I think that the mechanism needs to be retained. In fact, I would argue that, if it goes through the ombudsman and he makes a recommendation, on the rare occasion that the agency or Department does not respond appropriately, the claimant has the right to go back. It is not to go back just to have the case heard again; it is really to chastise the offending agency. I think that we should then be dealing with a report from the ombudsman. Why does somebody from a public agency or Department force it all the way to the ombudsman and end up in court? It is obviously an extremely rare occurrence. I think that the Assembly would have a right to ask, "Where is that person? What did you do?" And to say, "Sorry, you do not belong here". That is the route that I would go down.

I am encouraged by the level of compliance and the very few complaints that people make. I cannot think of anyone who has said that they went to the ombudsman and got nowhere. In my view, most people want a simple remedy, and most of the remedies are relatively simple. I am happy enough with what I have heard today. The ultimate backstop is being able to go to court — Trevor used the phrase "the big stick". If somebody knows that this can go all the way, they are more likely to respond positively.

Ms Ruane: Especially Departments.

The Chairperson: Sorry, Tom, to be thick about this. If it is the Commissioner for Complaints, and I am not the individual but the public body, do I not come in armed with all the solicitors, barristers and legal advice in the world?

Dr Frawley: To be fair, I have to say that they do not, at this point. We have a very co-operative environment. Most public and civil servants today want to avoid legalising the issues. They know that, when they are dealing with me, there is a very open opportunity to clarify their positions. I invest great energy — some complainants would say too much energy — offering them the opportunity to look at drafts and to test for factual accuracy. I always do that; I think that that is very important. I will offer them an informal hearing, particularly if I am going to make a finding against them, so that they can come and say to me, "I think that you got that wrong," "You did not understand this," or whatever, and I will listen to that. Ultimately, I will make a judgement. At that point, I have found — again, Mr Maskey puts it well — a very high level of compliance. They accept it. I am not saying that they are delighted. I am not saying that they are pleased.

I say this as a final comment: we have noted that the Departments in England are now required, as part of their final accounts, to include a statement about how many complaints about their Department have gone to the Parliamentary Ombudsman, the outcome of those complaints and the action taken as result of those complaints. It takes you into a world where this is no longer something that happens under cover of darkness or privately. You now have to stand up and be accountable, not just for the financial performance of your system but for how you are performing administratively, managerially and in relation to the users of your service.

Ms Marie Anderson: Recently, Tom and I had an excellent quote from the Lord Chief Justice. An individual at the beginning of the process has to decide whether to go to court and have a legal remedy, which means that the lawyers get involved, or to go to the ombudsman. There is a choice. There is a statutory bar in the ombudsman's legislation that bars him from looking at cases where a legal remedy is available unless it is not reasonable to expect a complainant, perhaps because of resources or the stress of court, to go to court. There is a complementarity between the roles of the courts and the ombudsman that the Lord Chief Justice has recognised on more than one occasion. He says that we are like the emergency services. People ask for the fire service, an ambulance or the police. In terms of remedy, it is whether you go to court, to the ombudsman or to a tribunal. There is a divergence at the beginning of our process. If you have a legal case, you have a legal route. If it is reasonable to go to the ombudsman, you go to the ombudsman.

Dr Frawley: In all my cases, particularly in health, one of the first questions I will ask is this: "Have you taken legal advice and do you intend to pursue this?" If someone says yes, I will then say, "I can offer you no help or support". Secondly, in a belt-and-braces approach, there is no way in which someone can have my report and then take it to a court. It is completely excluded. They have chosen a route: it is not the adversarial courtroom; it is the inquisitorial ombudsman. That is the model. It sits well with Mr Maskey's point.

Increasingly, because of their involvement and the insights that they develop from layman's reports — some of the language may be a bit labyrinthine and not as accessible as it should be, but, increasingly, we are making it accessible — in areas such as health, people can get a much better sense of what happened to their mother or their daughter or why an elderly person in a nursing home was not being cared for properly or whatever it may be. It is an appropriate recourse for many people who do not want tens of thousands of pounds. They just want to understand what happened and what went wrong, because otherwise no one listens to them or tells them what went wrong. The model works well in that one-to-one engagement with people, as distinct from the inevitably impersonal — understandably so — courtroom where people feel that the system has taken over and they have very little influence over either the direction of travel or the conclusion.

The Chairperson: Tom and Marie, thank you both very much indeed. It has been very useful. As you say, we have a judgement call to make. We thought that it was between three options. You have made it clear that there is a fourth. It is better to find that out now, obviously, than later on.

Dr Frawley: Thank you, Chairman. Thank you for your patience with us.