Northern Ireland Assembly

Ad Hoc Committee on the Northern Ireland Public Service Ombudsperson Bill

OFFICIAL REPORT (Hansard)

Public Services Ombudsperson Bill: Northern Ireland Ombudsman's Office

19 May 2015

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Pat Sheehan (Deputy Chairperson)
Mr Cathal Boylan
Mr Leslie Cree
Mr Colum Eastwood
Mr David Hilditch
Mr Trevor Lunn
Mr Alban Maginness
Ms Maeve McLaughlin
Mr Gary Middleton
Mr Jim Wells

Witnesses:

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

In attendance:

Mrs Michaela McAleer	Northern Ireland Ombudsman's Office

The Deputy Chairperson (Mr Sheehan): I welcome Dr Frawley, Ms Anderson and Ms McAleer. You are all very welcome, and the Floor is yours.

Dr Tom Frawley (Northern Ireland Ombudsman's Office): If I may have the Committee's indulgence, I will make some opening comments setting the context for a journey that I embarked on in 2004. I am pleased to be coming to a conclusion, as the legislation is hopefully adopted over the next number of months. I thank you for the opportunity to speak to you today about the provisions and what I consider to be the main implications for the office of the ombudsman. I also want to acknowledge all the work undertaken by the OFMDFM Committee, its Chair, membership and staff, and, in particular, the members of the Bill team, who I believe have developed a very comprehensive piece of legislation with the potential to create the most modern ombudsman's office in these islands.

It is important to remember that the role of the ombudsman is to address complaints of maladministration. The word is Swedish in origin and, indeed, the first ombudsman's office was established in Sweden in 1809. The purpose of an ombudsman is to investigate impartially complaints about the actions of public administration. The classical ombudsman does not make binding recommendations for improvements in public administration, but relies on parliamentary accountability to ensure compliance. I should also explain that classical ombudsmen report on their functions to the

legislature and rely on the legislature's interest in oversight of their offices to ensure that public administration is held to account, which, again, members will recognise is completely consistent with the scrutiny function of Committees of this Assembly.

An ombudsman is not a court; his powers are inquisitorial, not adversarial. While investigations are conducted in private to ensure the free exchange of information between the body under scrutiny and the ombudsman's office, it is significant that his work and that of his office is highlighted publicly through reporting to the legislature or an assembly.

The UK ombudsmen do not currently have own-initiative powers, and this in my view is an oversight which, I am pleased to note, will be addressed by the Public Services Ombudsperson (NIPSO) Bill. The Northern Ireland Assembly's innovation and initiative is now being replicated in Wales, and it is also proposed for the development of a public services ombudsman for England. It is important to highlight that in this, as in other matters, Northern Ireland is leading. I believe that this is a significant innovation in relation to the legislation underpinning my office and will enable citizens to obtain redress where they have sustained injustice as a result of maladministration on the part of public services in Northern Ireland.

In addition, the Bill provides for an extended remit covering additional bodies, such as colleges of further education, universities, schools, the Northern Ireland Audit Office and, indeed, the Assembly Commission. The additional powers provided to the NIPSO by the Bill include universal access to legal advice, held by bodies in jurisdiction, where this is relevant to the issue raised in a complaint.

The NIPSO will also have significant power to commence an investigation on his or her own initiative. This is an important part of an ombudsman's recourse to address issues of systemic maladministration. It also, I suggest, is a hugely important power and authority for those whom I would call the voiceless, or people who are not in a position to make a complaint. I am very struck by the limited number of complaints we receive, for example, from people with learning disabilities, in residential or nursing homes or in long-term psychiatric care. It may be that they do not have any complaints, but how do we ensure that their voices are heard? An own-initiative authority gives the recourse to allow that voice to be heard if necessary.

Unlike other ombudsmen, the NIPSO will have a range of enforcement mechanisms, including two court actions to ensure compliance with recommendations. The County Court mechanism and access to the High Court through the intervention of the Attorney General are unique to the NIPSO.

A key element of the classical ombudsman is his links with the legislature or assembly. The Bill will provide for the appointment of the NIPSO by a two-thirds majority of the Assembly. The NIPSO will report to the Audit Committee of the Assembly on his performance, both in respect of activity and management of resources, and this will be an important accountability mechanism providing public confidence in the effectiveness of the office. The NIPSO will continue to be funded by the Assembly. These closer links with the Assembly are welcomed, and, in particular, the fact that the NIPSO will be made an officer of the Assembly.

Chair, I am happy to take any questions relating to issues of concern to the Committee at this, the beginning of its scrutiny of the draft legislation. I would like to present you with a paper from my office that provides greater detail on the history, background and implications of the NIPSO Bill, which I will give to you at the end of the meeting.

The Deputy Chairperson (Mr Sheehan): Thank you very much. Do you wish to make any comments, Marie, or would you prefer that I throw it open for questions?

Ms Marie Anderson (Northern Ireland Ombudsman's Office): No, I am happy for —

Mr Sheehan: OK. It is open to members.

Mr Boylan: Thank you very much for the presentation. It is good to see you back. I just wanted to pick up on a couple of points. I liked your idea about voices being heard and being a vehicle for people to make their complaints. Can you expand a bit on how people can access the new office? That is one point. Mr Allister raised three or four points in the Chamber as part of the debate, which, unfortunately, I could not make. I would like you to expand in your answer on some of the points that Mr Allister raised in relation to some matters. Can you also expand on the criteria for the

memorandum of understanding with the Secretary of State under clause 41? How do you see that developing?

Dr Frawley: Thank you. I will look at access first. For example, while it might not be perceived as a block to access under the current arrangements, securing sponsorship from an MLA for complaints around the Assembly ombudsman's role certainly did inhibit people on occasion. They could not submit a complaint about a Government Department without sponsorship. This arrangement was inherited from the Westminster model, which has always required an MP to sponsor a complaint to the parliamentary ombudsman. It had been altered, for example, in both Scotland and Wales, where it was decided to abolish sponsorship. We now in this legislation are proposing to take the same course, meaning that people can write directly to us, when before they would have required a sponsor. That is one aspect of it.

Secondly, I think we are also creating a greater facility for people to access us through new technologies, recognising that for many young people that is their first recourse in these circumstances. They no longer want to commit pen to paper and so on. We will support them once they have contacted us. We also have a website which we continue to upgrade and develop to make it as accessible as we can. Moreover, we continue to undertake major outreach initiatives to renew our engagement with bodies that are very familiar with us, because it is important that we keep them up to date on developments and changes, but also stakeholders that go beyond the public services to individual citizens in advocacy groups and others that are very familiar with our office. So we have a major communications challenge ahead of us, but I think that we are already well down that route with our established office. It is about developing that and renewing it and not assuming that people know how to reach us.

Also, as you probably know, in most of the bigger organisations like hospital trusts, they will always refer people to us. In other words, at the end of the complaints process, they will say, "If you are not satisfied with the outcome that you have received from the trust, you are entitled to take this matter to the ombudsman." That has now become a standard signpost arrangement that applies to all public bodies so that, in a sense, both the bodies in jurisdiction and citizens are increasingly being encouraged to get in touch with us and speak to us. Indeed, the number of inquiries that we receive also demonstrates, as they increase in number, that we can also signpost people to more appropriate authorities if we are not the right destination for them in particular circumstances.

There is a duty on the body concerned in the new legislation to inform the aggrieved person about the existence of the ombudsman, as I have said. We are trying to cover all the bases, but we will never do that successfully. When people have issues they, quite often, can be quite distressed and disturbed, and they need to be facilitated and supported in pursuing complaints. That is part of our commitment to them: to help them to be guided through the processes. Access is not something that I think we have resolved, but it is something that we will continue to work at.

You asked about the issues raised by Mr Allister during the debate. He talked first about clause 18 of the NIPSO Bill, which he indicated provides only for complaints by students of maladministration about university administrative decisions. He raised the issue that staff were not included in the model that was proposed for NIPSO. You will note from the documentation that, in fact, the OFMDFM Committee has decided that it is no longer defensible that only people in the public service have access to the ombudsman in relation to employment issues — that they are now through agencies like the Equality Commission, industrial tribunals and so on. There is a wide range of recourse open to people. Therefore, it would not be consistent to abolish the employment jurisdiction in the public service and, at the same time, to be bringing university employment issues into the jurisdiction of the ombudsman. We are putting the employment issues of public servants and civil servants on the same footing as everybody else now across Northern Ireland.

The other issues were clauses 34 and 35, which relate to publishing reports in the public interest. That is a critical issue for us. I have always argued that we are doing very important work — I would say that, wouldn't I? — and a lot of it is not even public, in the sense that the public are not aware of it, whereas my colleagues in Wales and Scotland can publish reports where they have made a particular finding that they think is in the public interest. The current legislation does not allow me to do that. That is why the option now to publish, in certain circumstances, matters that I think will be of importance to the public will be something that we will use very carefully and discreetly.

There is an argument that Mr Allister put that all reports that we do should be in the public arena. I suggest that that is something that we should do over time. We probably need some time to build up our capacity and expertise, and, without wanting to overstate it, there are also resources involved in

making everything public all at once. So, over time, we could progress that transparency and openness aspect. Clearly, there will always be issues in the nature of the work that we do that will be confidential and have to be treated as confidential where the privacy and well-being of people are concerned, but, in the main, we are also advocates of the sort of transparency that Mr Allister suggested, but we think that is something that we would like to progress over time rather than to attempt to do it from the outset, because we do not have the resources, skills or expertise that we will need to build that capacity. I would have no difficulty in looking at that over a time frame of one to five years so that, by year four or five, say, we would then be in a position where everything would be in an open space. Again, technology will also help us with that.

We already produce an annual report which is sent to each Member of the Assembly — that is a statutory requirement — but clearly, right from day one, we would start producing reports if they were in the public interest. I can think of issues that we have been doing around care of elderly people in nursing homes that we see as having merit. Something that gets to be assumed is that the service fails every time we investigate; that is not so. There is some very good practice out there that I think would be very reassuring for the public. We would like to say that the public service gets it right and that what we are looking at is hugely important but is not the totality of what is done in the public service, because the reality is that most people have a positive experience. What we are looking at is where that experience is not what it should have been and trying to understand how that happened.

I have often emphasised to public servants and to leaders of public bodies that my office can be a shield for you. It can give you the vindication that you are entitled to if people are making unreasonable complaints. However, if they are making reasonable complaints, you have to be accountable and acknowledge where things have gone wrong and, importantly, make commitments to improve things when they go wrong. It is that balance of argument that we think will come, and we would, therefore, be content to make a commitment to move forward on transparency over time.

Mr Allister then raised the issue that there was no enforcement mechanism for an ombudsman's recommendations and that a body can simply ignore them. All I can say is that that is not our experience. We have had total compliance from public bodies. There have been issues that I would acknowledge where they have sought meetings with me to say that maybe the emphasis that I have taken does not do justice to the detailed response they gave, and we will look at that, but, in the main, we have had total compliance with our recommendations.

There then is a different issue, I suppose. Part of the reality of the closer working relationship with the Assembly will also create a new dynamic in these relationships, because it will be very clear to the bodies in jurisdiction that the opportunity will exist now for me to go directly to Committees in the Assembly and indicate where matters have not been addressed or where recommendations are not being complied with. That completes the loop, if you like. It is very important for Committees in fulfilling their scrutiny responsibilities. They will see areas in detail where things have gone wrong but also where recommendations are being proposed.

The other recourse that is open to us and to the individuals concerned is the County Court mechanism. The problem with the County Court mechanism is that it is expensive. When you say to somebody, "Well, of course, you could take my report to the County Court", they have to find the resources to do that. If they do not have the resources, then you go to another issue, which is that the public purse funds that. We all know the difficulties that already exist in the whole arena of legal aid and so on, but the County Court mechanism is a fallback position that is available for people and something that I think will develop, but, in the main, the moral suasion, as it is called, of the ombudsman authority secures the sort of commitment and support of the public service to implement our recommendations.

I can honestly say that, in the 15 years that I have been the ombudsman — it is a long time now — we have had three or four cases where there have been issues where public bodies have said, "No, we do not accept this recommendation. We want to challenge this recommendation." We have found a very high level of compliance and a mutual respect in terms of how they go about their task and an acknowledgement and credibility of the office that allows them to be heard, which is important.

The final issue is that of clause 41 and the proposal for a memorandum of understanding between the Secretary of State and the NIPSO. That is an issue that has existed across all ombudsman's offices. It is a protection that is seen as necessary in terms of national security and other issues. I have not had any requirement in all the time I have been in post to invoke such an arrangement, because the work that I do is outside the whole arena of national security. As with anything, I am sure you could contemplate a circumstance, but I have not had one to deal with, so it has not been an issue for me.

That is consistent with what is happening in Scotland and Wales, with the parliamentary ombudsman and so on, that there is this memorandum of understanding. That is quite a sensible and proportionate solution to a problem that one should not have to legislate for. Good judgement and sense allows you to proceed with a memorandum of understanding.

Mr Sheehan: Happy enough, Cathal?

Mr Boylan: Thank you, Chair.

Mr Lunn: It is good to see you again. Is there a clear definition, either in the legislation as it stands or in the new proposal, of "maladministration"?

Dr Frawley: Well, no. I suppose that this is one of those great historic and classical Westminster issues. Some people will say that one of the great parliamentary speeches ever made was the famous one by the Labour MP Richard Crossman, who introduced the legislation in the first place. He skilfully did a litany of things that were maladministration, but he concluded in his final comment that maladministration is whatever the ombudsman says it is. He decided that, rather than have some sort of limiting criteria that would end up being the subject of great challenge and court judgements and so on, he would open it up as much as he could. He would talk about things like unreasonable delay, lack of candour, processes not being properly and completely implemented, the failure to hear people's points of view and the absence of appeal processes. He covered a litany of things without ever defining it.

My colleague in the Republic of Ireland, Kevin Murphy, who was Emily O'Reilly's predecessor, said that he saw it simply as "fairness". Let us not use a word that people find it hard to make any sense of. Would the ordinary man consider it fair? When you break this down, that is what it comes down to ultimately: fairness. What is fair in the circumstance? It can be quite complex, but it has not been defined.

Mr Lunn: It is almost refreshing in this day and age that we have not spent two years agonising over a definition, so I am not disagreeing with you. Has your office been challenged on the meaning of the word? In other words, has some local authority had to say to you, "We don't agree that this comes within any definition of maladministration, whether we did something wrong or not"?

Dr Frawley: Marie is getting very agitated beside me, so I will let her speak.

Ms M Anderson: Frequently, when we send a draft report to a body and use the word "maladministration", we will engage with that body on whether they think there has been maladministration. While there is no statutory definition of maladministration, in 2007-08 the Parliamentary and Health Service Ombudsman at Westminster consulted on and developed, with the assistance of other ombudsmen, what are known as "the principles of good administration". Those are six basic principles that are required of bodies in public administration, and they are getting it right, being customer-focused, being open and transparent, being proportionate and seeking continuous improvement. I suppose it is difficult, when you have staff investigating cases, to give them no definition, so a principle-based framework is what we and other ombudsmen use.

Mr Lunn: I suppose that "getting it right" would be the bone of contention.

Ms M Anderson: That would be important.

Mr Lunn: What about the universities in particular and, I suppose, schools? The National Union of Students, for instance, is quite exercised about this and would like it to go further. Clearly, it will not go into the area of academic judgement, which is why I am wondering where maladministration begins and ends in the university situation. I can understand students being aggrieved about a report or mark resulting in failure and wanting to complain to somebody, but, clearly, it should not be to you. If the complaint was that the university had appointed a lecturer who was incompetent and the whole class had suffered through that, is that maladministration?

Dr Frawley: In the clinical context, the incompetence of doctors is an issue, but I think that, in universities, the question of what is incompetent brings you back into the academic arena. Is it bad teaching or is the man not qualified to do what he is doing? Clearly, part of our assessment in receiving complaints is to try, in a sense, to circumscribe the judgement that we make. We will stay

away from academic judgement, which is not for us to make. We tend to see the National Union of Students more in the area of disciplinary processes that impact students, such as the arrangements for exclusion and suspension. Those sorts of issues, for which the universities have their own internal arrangements but no external scrutiny of their judgements, tend to come into the remit of the ombudsman. That is the issue that the National Union of Students wanted to be brought to our attention or brought under the remit of the ombudsman.

Mr Lunn: You mentioned incompetence. As little as I know about these things, I would have thought that incompetence could be the result of maladministration. If a health trust were to instruct a nurse to carry out a procedure that she was not qualified to carry out, that would be maladministration, surely. If a university were to appoint a lecturer on the same basis, it would almost lead us to the same conclusion, but you say that that is an academic judgement.

Dr Frawley: You are making a different judgement. You used the word "incompetence", and that is the word that I would use. If someone were to be asked to do something that they are not qualified to do, that would come into the area of the judgement made by the university in relation to the individual and what systems were there to ensure that quality was assured and that the teaching and so on was of a sufficient standard etc. So, you move into a different arena.

The point that I was trying to make was that, as you assess whether this is a complaint that you wish to accept, those are the judgements that you make. If a complaint veered into academic outcomes, that, for us, would be a different issue. Quite often, part of complainants' frustration at the length of time that it takes for us to undertake complaints is focused on the particular issue of whether we should accept the complaint. That is the sort of fine judgement that we make at that point.

Ms M Anderson: I go back to Tom's point that incompetence on the part of a university lecturer or teacher would have to be something for the university to deal with through its performance processes. For individuals to be able to bring a complaint, under current legislation and under the NIPSO Bill, they must demonstrate that they have sustained injustice in some way in consequence of maladministration. There must have been some detrimental effect on an individual as a result of failures, mainly maladministration. By mainly, I mean that it is about the decision-making and administrative processes as opposed to judgement and discretion.

Ms Maeve McLaughlin: Thank you, both, and I am sorry that I was slightly late. Hopefully, Tom, when we move to the fairness issue, we do it for all people as opposed to one section of society. That is an important point to make. On the financial side of this, the report shows a 46% increase in complaints about health and social care. Given the added remit, which is a positive for reporting and procedures, are you convinced or assured that the additional resources required are there?

Dr Frawley: Do not ever ask a bureaucrat whether he has enough money because he will always say that he needs more. There is a whole new arena of work. To be fair, we have been given resources by DOE for our work on standards in local government and secured additional money from the Department of Justice for the Judicial Appointments Ombudsman function. When it comes to the broader areas of responsibility in the core business — the ombudsman and the NIPSO Bill — you will see from the documentation that we are taking on that whole process in a very managed way. We are not taking on all of that jurisdiction in one moment; we are doing it over a period of three or four years. Clearly, we cannot presume that there will be resources for us throughout, but we will bid for money as we move through that time frame, recognising that new, significant responsibilities will come our way through the extension to the jurisdiction.

I have never been one to assume that we cannot be more efficient or able to do at least as much with less, and that includes when I worked in the health service. We are doing that, and I am very proud of our achievement. We need to be careful, as you rightly identified, about taking on new responsibilities that have an adverse impact on what we already do. That is the judgement that we will make. It will be helpful to us to have the Assembly's Audit Committee to come to because it will look at our workload, whether our current performance is sufficient and whether we need to be doing more with the same resources. If we make the right argument and the case is proven, we might get more resources. There is a dialogue to have. We are happy to start in the current circumstance, take the commencement dates for implementation as laid out in our project initiation document (PID) and look to the Audit Committee and, through it, to the Assembly itself. If there is an argument and a case for more resources, we will make it forcibly. If we are successful, and I realise how competitive that is, we will, hopefully, be heard.

This is happening in Scotland as I speak. I am on the audit committee for the Scottish Public Services Ombudsman (SPSO). Officials there are saying to the Scottish Parliament that, because they just do not have enough money, their time frames will be extended — they cannot do the work that is coming at them as a result of their extended jurisdiction. Clearly, that will be a dialogue, but I will be very open with the public about that. If we do not have the resources, we will get extended time frames. We will do everything that we can to avoid that, but I hope that, by sequencing it, by keeping the debate open and by making our case, we will get some additional resource. As I said, we are already getting additional resources for significant parts of this new jurisdiction.

Ms M Anderson: May I offer some clarification, Chairperson? The Chairperson of the OFMDFM Committee is on record in Hansard as saying that the loss of the employment jurisdiction will mean a saving of approximately £130,000 because it represents about 12% to 15% of our current caseload. A very detailed and comprehensive explanatory and financial memorandum to the NIPSO Bill explains where the future costs might arise. The ombudsman has explained how those costs will be staged over time. The total additional resource that we are seeking is in the region of £350,000. However, over time, we will be able to look at how many cases we get from universities and colleges, and, in particular, schools. If necessary — if we find that our figures are getting out of hand and we do not have the resources — we will make bids through the budgetary process and through our relationship with the Audit Committee and DFP Supply. The point that the ombudsman is making is that we will manage this over time.

Reflecting on the experience in other jurisdictions, in 2012, the Irish ombudsman took on the universities remit, but only now is he beginning to get approximately 50 complaints a year. At the beginning of any new jurisdiction, take-up is slow. At least, that is the trend, but we will keep it under review and keep dialogue open.

Ms Maeve McLaughlin: The point is that your remit is extended, giving you additional powers, but with that comes accountability. It also opens up access in a way that creates its own dynamic. My sense is that you have more progressive legislation, but can you do everything that it says on the tin?

Dr Frawley: I would not say definitively that we can. I have belief, and I am an optimist. The health service has come under incredible scrutiny and been stretched by the level of activity that it is now engaged in. We have to assume that the delivery side will improve. Therefore, we should not simply assume that the number of complaints will get higher and higher. There should be an expectation that things will get better and that the number of complaints will drop. We should not assume — "Woe is us" — that it will get worse and worse.

One of the dialogues on the new model that I look forward to involves going before Committees, telling them the number of complaints and allowing them to target their efforts on where they want to focus. That in itself will create a dynamic for self-improvement. Indeed, I have already seen that dynamic. Last year, probably our busiest, we had 972 cases, and we are down to 830 this year, which is an improvement. Unfortunately, that is against an increasing trend, and, obviously, when you bring in new jurisdictions, the potential for numbers to increase is very real indeed.

It is an open dialogue. We cannot say, "We will do this when you give us the money." We will take it on. Then, from a position of insight and knowledge, we will be able to say to the Audit Committee that x amount would make a difference or that we are managing. We should not be taking money if we do not need it. We will look for it only when we must have it to prevent the qualitative side of our work going downhill. We have to employ, for example, clinical advisers on the health side, which is becoming more and more complex. That is expensive, as you can imagine. We now have some cases for which we need six different specialists to advise us because there are six aspects of the person's care that we need to understand. We need to understand which aspects worked and which did not. We have to make the best use of the resources that we have. We have restructured our office and put a lot more of our more experienced people and leaders at the front end of the process as distinct from the investigation end. We decided that, if we are going to investigate, we need to be sure that our choices are robust, rather than just accepting everything that comes our way.

Ms Maeve McLaughlin: You are saying that the NIPSO will be resourced with skilled professional staff to cover that extended remit.

Dr Frawley: The legislation gives me the opportunity to seek professional or expert advice from whomever I consider would assist me in understanding a case. Clearly, we will need some, although not a huge amount, expert advice in the new jurisdictions. We have had extensions in the past, into

local government, for example, which did not necessitate a huge amount of expert advice because the issues were really administrative judgements and processes. Sometimes it goes beyond that into areas that require us to take clinical or technical engineering advice. One of the new jurisdictions, which we have not spoken to this morning, is procurement. Up to now, procurement by Departments was outside our remit. I am sure that most of you know from your postbags that SMEs in Northern Ireland can be quite critical of procurement in government and local government. This is a new arena for us. Do we have all the knowledge internally to enable us to do justice to that? Probably not. That will take some time. However, we will acquire it or find a way to source it. We can make those judgements only when the work is under way, and that is how we will proceed.

Ms M Anderson: I will address something that is in the papers before you. To ensure that, as far as possible, we deliver what it says on the tin, an implementation committee has been set up internally to deal with implementing the changes that NIPSO will bring. The implementation committee is chaired by me, and each of the directors and senior management team has a specific remit. There are work streams on changes in processes, changes in communications, changes on our website and changes in governance and accountability.

Your point about skills is very important. Part of getting ready for NIPSO has been a huge internal training programme for our staff called Refresh and Refocus. The leader of that training programme, Mrs McAleer, is here with us today. Part of that has been to remind people what is maladministration, to look at our processes and at what can be streamlined, to remind staff about good records management and to speak to issues. We brought Gordon Anthony from the Queen's Law School along to talk about the sort of public law challenges that we may face and the importance of remembering that, in our role, we always have the judge looking over our shoulder in terms of potential judicial review challenges. In support of the NIPSO legislation, the office is undertaking a change programme. I meet my senior management team every second Tuesday, when, importantly, I look for progress on issues of communication, training, skills and changes in process. If the Committee would find it helpful, I will be happy to come and speak to that in more detail at any time in the future.

Mr A Maginness: I apologise for coming late to the meeting. I had other business on the Floor of the Assembly. If I am going over areas that have already been covered, I apologise. Thank you for your contribution today, particularly the written submission, which is very helpful. I want to clarify something, just to tidy it up in my mind. Under the Ombudsman (Northern Ireland) Order 1996, in dealing with complaints about Northern Ireland Departments and their agencies, there is provision for access to legal advice obtained by the Department or the body. Under this Bill, we extend that power. Is that right? Into what areas are we extending that?

Ms M Anderson: Currently, under the Commissioner for Complaints jurisdiction are health, housing, local government and education bodies, such as the Council for Catholic Maintained Schools (CCMS), the Council for the Curriculum, Examinations and Assessment (CCEA) and education and library boards. The Bill equalises the territory across all bodies and jurisdictions so that there is access to legal advice across the piece.

Mr A Maginness: Has access to the legal advice encountered any difficulty in practice?

Ms M Anderson: No. In practice, Mr Maginness, Departments freely provide the legal advice. They do so on the understanding that our investigations are conducted in private and that we maintain the confidentiality of that legal advice. In fact, there is case law that supports the view that providing legal advice to an ombudsman does not waive privilege — the privilege of the legal advice is not lost.

Mr A Maginness: So, the privilege remains.

Ms M Anderson: The privilege remains.

Mr A Maginness: You have access to it, but —

Ms M Anderson: Yes. As you know, the fundamental concept of legal professional privilege is based on confidential communications. That is maintained because of the confidentiality of our processes. I am happy to share with you the relevant case law, if you would find that helpful.

On our Commissioner for Complaints jurisdiction, while we cannot compel access to legal advice, we do, on occasions, ask for it. When we have done so, to inform our judgements or because we think that it is relevant, bodies, although they cannot be compelled, have, for the most part, provided it. They were free to give it to us because they were aware of the confidentiality of our processes. I can think of perhaps only one occasion where the body said that it would not share the actual legal advice but would summarise the advice so that we could see what it was relying on to defend a complaint of maladministration. In practice, that has been happening anyway.

Mr A Maginness: I have just one other point in relation to the County Court enforcement mechanism. I just want to clarify that position. When a complainant goes to County Court enforcement to speak, the evidence on which the complainant relies is the evidence that has been gathered by the ombudsman's office. Is that correct? Is that taken as read?

Ms M Anderson: No. The evidence on which the claimant relies in the County Court is actually the ombudsman's report. It is one of the only occasions on which the ombudsman report can be disclosed. There are limited disclosure provisions, as you know. However, when an individual goes to the County Court and proceedings are issued against the body, the ombudsman is asked for a certificate of authenticity that includes a copy of his report, and the facts therein are taken as evidence by the County Court.

Mr A Maginness: And the onus would be on the public body to disprove the conclusions of the ombudsman's office.

Ms M Anderson: Yes.

Dr Frawley: That is right.

Mr A Maginness: And that will remain part and parcel of the position here under the new Bill.

Dr Frawley: It will extend it.

Ms M Anderson: Yes. The County Court mechanism currently exists for only those bodies that fall under Commissioner for Complaints legislation. The proposed Bill will extend it across the piece.

Mr A Maginness: Again, it is a sort of tidying-up exercise.

Ms M Anderson: It is. When you merge the two pieces of legislation, it is about finding commonality between them. The County Court mechanism is unique, and I think that —

Mr A Maginness: Unique to Northern Ireland.

Ms M Anderson: Unique to Northern Ireland.

Dr Frawley: To be fair, some academics will say that recourse to the County Court diminishes the ombudsman in some way because the moral suasion of the ombudsman should be sufficient without requiring a court. It is interesting that we went to our original encounters with OFMDFM with the view that we did not really need the County Court. The members of the Committee were not persuaded that we did not really need the County Court mechanism, so we left being told not only that you continue to need it for the Commissioner for Complaints but you will have to have it for the Assembly Ombudsman legislation. In a sense, they felt it was important that behind the moral suasion was this option for people who were not having compliance as far as recommendations were concerned.

Mr A Maginness: I do not want to put you on the spot, but how many times has that option been used?

Ms M Anderson: I actually have a paper that was produced by Ciarán White, who is a lecturer in law at the University of Ulster, that I can share with the Committee. In the 1990s, the option was used quite frequently; I think in excess of 20 times. However, it was used in employment cases. More recently, I am aware of perhaps three cases in the office where there are claims pending through the County Court as a result of the ombudsman finding injustice in consequence of maladministration. So, there are three that I cannot speak of because there is litigation in process.

Mr A Maginness: So it is fairly infrequent.

Ms M Anderson: It is infrequent.

Mr A Maginness: I have one final point, Chair, if you will indulge me. Would the motion that is proposed in relation to the ombudsman's office be unique in the UK, although the Republic has that power?

Dr Frawley: Absolutely. It is commonplace in Europe and has been used in the Republic of Ireland with great impact. You might remember the case around personal moneys belonging to elderly people in nursing home care. The health boards across the South were discovered to be using that money to support the care of elderly people as distinct from giving it to them to buy a packet of cigarettes, a newspaper or whatever. The ombudsman found that they were involved in a systemic process. It was totally outside the rules. I think that, when it was finished, the sums of money exceeded €1 billion in back claims to people who had been deprived of that money. It can be very significant. I am not saying that it will always be on that scale, but without that initiative, it would have been impossible to identify that because elderly people just accepted that the money went for their care.

Mr A Maginness: I pay tribute to the work you have done for 15 years.

Mr Wells: Generally, I find that the work of the ombudsman is fine apart from one glaring issue, which is planning. As with most other complaints through the process, the aggrieved person gets a letter of apology, some money to compensate, and moves on with his life. The planners make some grotesque errors of judgement. The building is built, the constituent comes to me or another MLA and makes a complaint and it goes through the system. The constituent then gets a letter of apology from the Planning Service, which I am sure warms the cockles of his heart greatly, and he gets £500. Meanwhile, out his back window, there is still the carbuncle that has been permitted. Can you see why there is a concern amongst some folk that this legislation has not gone far enough in that there is not really genuine compensation for people in that position?

Dr Frawley: The County Court mechanism now offers them a recourse in terms of unlimited damages, should they choose that direction. We have been critical of the Planning Service in the past, and you will be aware of that, Mr Wells. But, we have seen a significant — and I want to acknowledge it — improvement in its processes, and the incidences and instances of findings against it has reduced. You might say, "Not before time", in terms of the work you did yourself.

This is an area that will get into a very difficult arena given that, as you know, local government will now have a significant say in these matters as well. In those circumstances, with the County Court and with local government now directly involved, some of that issue, which has clearly been a concern, can be addressed, and I think that the County Court mechanism in particular could well mean that the sums of involved will be significantly higher than £500.

Mr Wells: The fundamental difference between you and your colleague in the Irish Republic is that there is the right of third-party appeals there. If a person is faced with an applicant who has vast resources — a big developer — and permission has been given but it is quite obvious that a mistake has been made, there are two options. Option one is to complain to you and, four years later, get the little letter and the £500. Option two is to risk financial oblivion and go to judicial review. Similarly, the County Court option presupposes that "Mr Small" or "Mr Average" has the money to do that. It is highly unlikely that he will get legal aid.

What about having the power to revoke planning approval? That really would give the ombudsman teeth and would also mean that the Planning Service would be extremely careful in the future, particularly in a situation where — I have dealt with you many times, Mr Frawley, and with your many successful predecessors on this — the developer goes ahead and builds. That is quite common. Planners will often give approval for something that they never would have entertained, because the attitude is, "It is there already. What do you expect us to do about it?" I have one case in south Down where a guy got permission for a three-storey block of flats, and he built four storeys. He just thought that he would build four. The objector is incensed, but it is there and there is no question but that it will get approval. No doubt, in many years' time, the objector will get a letter from you and £500. What real, genuine justice is that for those people?

Dr Frawley: You have spoken on this issue before. It is a very difficult one. If you are saying that the ombudsman should have the authority to revoke planning, that would be very challenging.

Mr Wells: A very strong sanction would send a very clear message that this will not be tolerated.

Dr Frawley: There are a number of issues around the judgement involved in that and the nature of that judgement, which would need very careful consideration. I have no doubt that, on the other side of it, applicants would argue that they need protections as well. As you say, most of them are well-resourced and can probably pursue such protection, unlike objectors who do not have that sort of financial support. I suppose that some way of equalising this is important.

I have always argued that third-party objections should have been allowed. That was the hugely fair way to proceed so that people would be heard. The real issue that I often sense is the inability to be heard and that people see the whole thing being weighted against them. It would open up a whole new dimension to this legislation were we to seek to include in it the type of authority you are describing.

Mr Wells: You could have a situation where "Mr Small" could be put on an equal footing and have his rights protected. That would be dreadful. Surely, at least in the situation where the developer has gone ahead and built something, you should have the power to revoke the approval.

Dr Frawley: Well, again, I make recommendations; I do not make judgements. I could recommend that it be revoked.

Mr Wells: Have you ever done so?

Dr Frawley: No.

Mr Wells: Can you understand why many small groups of residents feel very aggrieved at the David and Goliath situation they find themselves in?

Dr Frawley: Again, I see that in many instances, but, in a way, I have also seen numbers of instances where we have, hopefully, secured outcomes for people that are fair to them and have addressed their issues.

Mr Wells: I have been in this business for 33 years, and you are the eighth ombudsperson — there were a few ladies as well — in that time. I have never met a group of residents or an individual objector who felt that £500 and a nice warm letter from you undid the incredible damage to their life caused by someone who went ahead and built.

Dr Frawley: I could give you similar cases in health that have not addressed the sense of hurt and grievance that people have had. I would not, in any way, claim that the judgements I make have brought resolution to people. We have tried to address problems in an open and honest way and we have looked at processes and made recommendations about processes. We have made proposals around improvements and so on. I am not saying that they have transformed the circumstance; there are always issues on which people will feel that we could and should have done more. This moves us into an area where we have not really been involved, in the sense of this legislation, looking at it. Maybe if you had been involved earlier, Mr Wells, it would have been possible to build that into the legislation.

Mr Wells: There is still time to give you real teeth.

Dr Frawley: I hope that you are not suggesting that I do not have real teeth. *[Laughter.]*

Mr Wells: In planning, you do not.

Dr Frawley: Again, we can look at the new local government arrangements that are there and so on.

Ms M Anderson: On that point, no ombudsman has the powers you are suggesting. Primarily, the ombudsman process is to allow the body to resolve the issue in the first instance and then, if there is an issue, for the person to go to the ombudsman. The sort of intervention you are suggesting requires

early intervention when someone is building. That is probably a matter that is better placed in the courts.

I appreciate your point that for small and medium-sized businesses, challenging by way of judicial review is, perhaps, no option at all because of the expense. However, the County Court mechanism has been extended under the NIPSO Bill in relation to the actions of Departments and, obviously, local government now has planning as part of its functions. One aspect of the County Court mechanism we have not explored is the injunctive relief that is there. In addition to damages, if:

> *"it appears to the court that justice could only be done to the person aggrieved by directing the body concerned to take, or refrain from taking, any particular action, the court may, if satisfied ... make an order".*

So, actually, the teeth are there in the County Court mechanism. The extent to which that applies is a matter for the court's discretion.

Mr Wells: Who pays for that?

Ms M Anderson: I am not sure whether an individual such as a small business or an individual householder would get legal aid and assistance.

Mr Wells: I will tell you from experience of judicial reviews that it is almost impossible to get legal aid now.

Mr A Maginness: Could I come in on the terrible subject of legal aid? There may be a decision in favour of the complainant by the ombudsman, who comes to the conclusion that something should happen, only the public body does not comply, and the complainant goes to the County Court. Are there circumstances where the complainant is permitted to say, "I am not satisfied with what the ombudsman has recommended and I am therefore going to the County Court"? Can a person do that?

Dr Frawley: In that case, their recourse is to judicial review of the ombudsman's decision.

Ms M Anderson: If an ombudsman decided that the remedy for an injustice was simply an apology, then the County Court mechanism is such that the court will look at what is required in damages and may indeed go beyond what the ombudsman recommended in financial redress.

Mr A Maginness: Damages are at large.

Ms M Anderson: Damages are at large, and they are unlimited, even though this is a County Court application. The County Court, as you know, Mr Maginness, has limited jurisdiction in damages, but for these purposes the judge has no limit on his jurisdiction.

Mr A Maginness: Then, there is the vexed matter of legal aid, which Mr Wells and I are very familiar with from the Justice Committee. The person's eligibility is entirely dependent on their financial situation. Is that the criterion that is used?

Ms M Anderson: Legal aid, as I understand it, currently has two tests: one is merits-based and the other is financial. I think that the merits test would succeed on the basis that the ombudsman found maladministration and then found injustice as a consequence of that maladministration. Indeed, without speaking about confidential matters, I am aware of one case at present where we are in correspondence with the Legal Services Agency Northern Ireland — it is no longer the Northern Ireland Legal Services Commission. We are in correspondence with them, and they are seeking access to our report, because the individual is seeking legal aid. It does, then, become a question of a financial assessment.

Mr A Maginness: Would it be helpful in such circumstances if the ombudsman's office could recommend, rather than order, that legal aid be given? I know that legal assistance could not come from the ombudsman's office.

Dr Frawley: My 15 years are nearly up, hopefully. That puts another responsibility on the ombudsman. If you have made a recommendation about a particular circumstance or sanction or whatever, and the person does not think it is enough, and then they ask you to give them the benefit of your advocacy to help meet the merit test, that puts the ombudsman in a very difficult position. It gets very complex.

Mr A Maginness: I understand that, Dr Frawley, but Mr Wells raises a very important point. It is all very well saying that people have the opportunity to go to the County Court, but if they cannot afford to go to the County Court, you might as well say that they have the opportunity to go to the moon. It is not a realistic proposition.

Ms M Anderson: A couple of points occur to me. First, obviously, this comes down to the availability of legal aid. Secondly, there are pro bono units in the solicitor's profession and in the barrister's profession for those who do not have the financial wherewithal to take legal proceedings. There is also a pro bono unit in the Law Centre dealing with tribunal work. That is an option.

May I talk about one experience again, subject to confidentiality? Proceedings were issued in one case, and the body settled for a substantial sum of money, having issued County Court proceedings on foot of an ombudsman's report. There are the initial questions, "Am I going to go to court?" or "Am I going to get support to take legal proceedings?". There is always the possibility that these cases will be settled.

Mr A Maginness: Could there be a provision, or would you view favourably a provision, that meant that, in the event of the County Court not changing the basic recommendation of the ombudsman and not changing the level of damages, as it were, then no order of cost would be made against the complainant? Is that going too far? Would that give them license to complain willy-nilly?

Ms M Anderson: I think that this is ultimately a matter for the court. We would be binding judicial discretion in relation to costs. The debate around just what the County Court mechanism means and can mean in the future is worthwhile.

Mr Wells: Surely, Mr Frawley, the objective of your office is to put the complainant back in exactly the position they would have been in had the maladministration not occurred.

Dr Frawley: Yes, that is the fundamental purpose of the office. Again, we can discuss this: it is in your gift to give the ombudsman's office the authorities you think it needs. Clearly, there is a strong feeling on Mr Wells' part that this is not a fair circumstance and requires attention. The legislation, as he suggests, affords that opportunity. How you design the solution becomes a different issue, but it is quite a complex area. Again, I do not know how the Committee wishes to proceed with it.

The Deputy Chairperson (Mr Sheehan): No one else has indicated that they wish to ask a question. In the course of its work, the Committee may want to invite you back at some stage. However, that is for another day. Thank you for your contribution today. I will let you get on your way. Thanks very much.

Dr Frawley: Thank you, Chairman. With your permission, I have a set of papers, some of which have already been sent to the secretariat, but, there is a document there that might be helpful to the Committee. It was produced on the 40-year anniversary of the creation of the ombudsman's office, and it gives a series of reflections on decisions that were taken, which may well have relevance to the current day. We would like to leave that paper with you as you proceed to reach your conclusions. Hopefully, you will find it helpful. There is another paper that details areas and developments of some of the responses we have given to you this morning. We will leave those for you, and you may well wish to circulate them to other Members as we proceed.

Thank you for the time you have taken. I continue to appreciate the effort made by the Assembly to move the legislation to a conclusion.

The Deputy Chairperson (Mr Sheehan): Thank you.