



Research Paper 56/09

30 April 2009

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

The paper has been prepared to assist the Assembly and Executive Review Committee consider the role of the Attorney General for Northern Ireland. At present one person, the Attorney General, holds two posts: Attorney General for England & Wales and Attorney General for Northern Ireland. Provision for a new Attorney General for Northern Ireland (Attorney General NI) after the devolution of justice functions is contained in the Part 2 of the Justice (Northern Ireland) Act 2002. This paper details the background to the creation of the post and sets out the provisions contained in the 2002 Act. The position of the Attorney General for Northern Ireland mirrors (albeit with some important differences) that of the Lord Advocate in Scotland. The paper, therefore, contains information prepared by the Scottish Government Legal Directorate on the role and functions of the Lord Advocate and the Solicitor General for Scotland (the Scottish Law Officers).

Research Papers are compiled for the benefit of Members of The Assembly and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public.

SUMMARY

At present one person, the Attorney General, holds two posts: Attorney General for England & Wales and Attorney General for Northern Ireland. Provisions contained in Part 2 of the Justice (Northern Ireland) Act 2002 mean that after the devolution of justice functions the Attorney General for England and Wales shall no longer be Attorney General for Northern Ireland and that the First Minister and deputy First Minister must appoint a person to be Attorney General for Northern Ireland. In a letter to the Assembly and Executive Review Committee, dated 18 November 2008, the FM and dFM stated that they were minded that John Larkin QC be invited to become Attorney General for Northern Ireland.

The creation of the new post, which has its origins in the Criminal Justice Review, has provided an opportunity to address the tensions which have resulted from the current situation in which the Attorney General for England and Wales is a politician and a member of the Government, but one who also acts as an independent legal adviser and guardian of the public interest. Debate about the Attorney General's role has focussed on two areas:

- tension between the various functions of the Attorney General - being a Minister and a member of the Government, and being an independent guardian of the public interest and performing superintendence functions (e.g. on decisions relating to sensitive prosecutions);
- tension between being a party politician and a member of the Government, and the giving of independent and impartial legal advice

In this context, it is worth noting that under the provisions of the Justice (Northern Ireland) Act 2002:

- the Attorney general is disqualified from being a member of the House of Commons, the Northern Ireland Assembly or a local authority in Northern Ireland;
- the Attorney General is also required to exercise his functions independently; and
- whilst a duty is placed on the First Minister and deputy First Minister to appoint a person to be Attorney General for Northern Ireland, after consulting the Advocate General for Northern Ireland, the First Minister and deputy First Minister can only remove or suspend the Attorney General from office on the recommendation of a tribunal. The members of the tribunal will be judges in England, Wales or Scotland. The tribunal will be convened by the First Minister and deputy First Minister and its members will be appointed by the Lord Chancellor

As regards appointment and removal, it is worth noting the significant role that the Scottish Parliament has in the appointment and removal of the Lord Advocate. The Scotland Act 1998 states that:

It is for the First Minister to recommend to Her Majesty the appointment or removal of a person as Lord Advocate or Solicitor General for Scotland; but he shall not do so without the agreement of the Parliament.

The Lord Advocate and the Solicitor General for Scotland may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.

Further comparison with the functions of the Lord Advocate in Scotland may provide a useful framework for consideration of the remit of the new 'Attorney General for Northern Ireland'.

Legal Advice to Executive

The Scotland Act 1998 provides that the Lord Advocate and the Solicitor General for Scotland are members of the Scottish Executive. There is no concept of a Scottish "Cabinet" in the Scotland Act and the Ministers who are members of it are matters for the First Minister. Since May 2007 the position has been that the Lord Advocate will not be a member of the Cabinet and will not normally attend meetings; she will however continue to receive all papers. In addition, the Lord Advocate retains the right to address the Cabinet and she will attend where discussion of a particular matter requires her to do so.

The Scottish Ministerial Code sets out rules and guidance in relation to the roles of the Scottish Law Officers and excepts from collective responsibility the Lord Advocate's functions as head of the systems of prosecution and investigation of deaths. As Law Officers, both the Lord Advocate and the Solicitor General for Scotland have the ultimate responsibility for advising the Scottish Ministers on all matters relating to the law of Scotland and the Code sets out guidance as to the circumstances in which the Law Officers should be consulted.

The Attorney General is not a member of the Executive Committee, which consists of the First Minister, the deputy First Minister and the Northern Ireland Ministers. The Northern Ireland Executive Ministerial Code makes no reference to the Attorney General.

Relation to Prosecution Service

In Scotland, the Lord Advocate's dual role as legal adviser to government and head of the prosecution service has been perceived to contain tensions. In Northern Ireland, however, the Justice NI Act 2002 provides for a prosecuting service for Northern Ireland known as the Public Prosecution Service for Northern Ireland which is to be headed by the Director of Public Prosecutions for Northern Ireland. On devolution a number of functions of the Attorney General will transfer to the Director of Public Prosecutions and the Attorney General for Northern Ireland will no longer have superintendence functions in relation to prosecutions. The Director must exercise functions independently of any other person. However, he/she must consult the Attorney General for Northern Ireland and the Advocate General for Northern Ireland (a) before issuing or making alterations to a code of practice for prosecutors¹, and (b) before preparing his annual report. The Attorney General for Northern Ireland must arrange for each annual report of the Director to be published. He may though exclude a part of an annual report from the copy to be published if, in

¹ Amongst other things, the code must give guidance on general principles to be applied— (a) in determining, in any case, whether criminal proceedings should be instituted or, where criminal proceedings have been instituted, whether they should be discontinued, and (b) in determining, in any case, what charges should be preferred.

his opinion, the publication of the part (a) would be against the public interest, or (b) might jeopardise the safety of any person.

Section 25 of the Justice (Northern Ireland) Act 2002 provides that the Attorney General for Northern Ireland may participate in the proceedings of the Assembly. The Explanatory Note which accompanies the Act states that *'The effect of this section is to make the Attorney General accountable before the Northern Ireland Assembly for the operation of the Prosecution Service'*. The note adds that *'the Attorney General will be allowed to answer questions and make statements pursuant to standing orders, but without the right to vote'*. He will also have the right to refuse to answer questions or produce documents on public interest grounds or where that might prejudice criminal proceedings. The Attorney General will also be required to declare any interests in the register maintained by the Assembly before taking part in any relevant proceedings of the Assembly.

Executive legal services and legislative draughtspersons

As Lord Advocate, Eilish Angiolini, has Ministerial responsibility for Scottish Government Legal Directorate (SGLD), which provides legal advice to the directorates of the Scottish Government and for the Office of the Scottish Parliamentary Counsel ("OSPC"), which drafts Bills for the Government's legislative programme. Responsibilities of the Advocate General for Northern Ireland in relation to government legal services and the Office of Legislative Council are unclear.

Legislative competence

A major focus of SGLD's advisory and legislation work is in ensuring that Ministers act always within the powers conferred on them by the devolution settlement and that Government Bills presented to the Scottish Parliament are within the legislative competence of the Parliament. This aspect of the office's work invariably involves consideration of human rights issues. Before a bill can be introduced in the Scottish Parliament, the Minister responsible must state that it is in his or her view within the legislative competence of the Parliament. This view is reached on the advice of the Law Officers.

Section 10(1) of the Northern Ireland Act 1998 provides that the Assembly's standing orders shall ensure that a Bill is not introduced in the Assembly if the Presiding Officer decides that any provision of it would not be within the legislative competence of the Assembly. It has been noted, however, that, unlike its Scottish equivalent, this provision does not impose a duty on the Presiding Officer to decide in every case whether a Bill is within that legislative competence

The Northern Ireland Human Rights Commission has s69(4) has a statutory duty to advise the Assembly whether a Bill is compatible with human rights (a) as soon as reasonably practicable after receipt of a request for advice; and (b) on such other occasions as the Commission thinks appropriate

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INTRODUCTION

The Attorney General and the Solicitor General (the Law Officers of the Crown, together with the Advocate General for Scotland), are the UK Government's chief legal advisers, advising on domestic and international law. They also have public interest roles, for example in relation to criminal cases and contempt of court proceedings. In England and Wales, they superintend the work of the Crown Prosecution Service and the Serious Fraud Office and in Northern Ireland they superintend the functions of the Director of Public Prosecutions.

At present one person, the Attorney General, holds two posts: Attorney General for England & Wales and Attorney General for Northern Ireland. Under devolution a new Attorney General for Northern Ireland (Attorney General NI) will be created. Provision for this is contained in Part 2 of the Justice (Northern Ireland) Act 2002.

This paper provides information on the background to the proposal for a 'local' Attorney General for Northern Ireland and sets out the extent to which the role of this post has been defined in legislation.

As the position of Attorney General for Northern Ireland broadly mirrors that of the Lord Advocate in Scotland (albeit with important differences) the second part of the paper provides detail on that position.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

The current position is that one person, the Attorney General, holds two posts: Attorney General for England & Wales and Attorney General for Northern Ireland. Under devolution a new Attorney General for Northern Ireland (Attorney General NI) will be created. The Justice (Northern Ireland) Act 2002² provides the legislative authority for the role of Attorney-General following the devolution of policing and justice powers to Northern Ireland.

The role of the Attorney General for Northern Ireland has been considered within a number of key consultations and pieces of legislation:

- The Criminal Justice Review 2000;
- Ad-hoc Committee on Justice (Northern Ireland) Bill
- Justice (Northern Ireland) Act 2002;
- NIO Discussion Document – 'Devolving Policing & Justice in NI'; and
- The Assembly and Executive Review Committee.

The remainder of this section of the paper will deal with each of the above and the information which they have provided in relation to the role and functions of the Attorney General for Northern Ireland.

² The Justice (Northern Ireland) Act 2002:
http://www.opsi.gov.uk/acts/acts2002/ukpga_20020026_en_1

The Criminal Justice Review 2000³

The Review of the Criminal Justice System in Northern Ireland was published by the Northern Ireland Office in March 2000. The review addressed 10 key areas of the Criminal Justice System and made recommendations as to how they could be reformed. The Review addressed the area of the Attorney General for Northern Ireland and the role and functions that he/she would have upon the devolution of policing and justice powers to Northern Ireland.

The origins of a 'local' Attorney general can be in found in the Criminal Justice Review, which stated that:

'We recommend that consideration be given to establishing a locally sponsored post of Attorney General who, inter alia, would have oversight of the prosecution service. We see the Attorney General as a non-political figure drawn from the ranks of senior lawyers and appointed by the First Minister and deputy First minister. We would suggest a fixed term appointment, with security of tenure, say for five years, which would not be affected by the timing of Assembly terms.'¹

The review went on to state that *'...the appointment process should be transparent, enabling people to declare themselves as candidates. We would see such a position as carrying significant status, equivalent to that of a High Court judge, and attracting candidates of the highest possible calibre'*.

Addressing the issue of political accountability that would arise given the appointment of a 'non-political figure' the Review recommended that:⁴

...the formulation in section 27 of the Scotland Act 1998 be adopted in that, although not a member of the Assembly, the Attorney should be enabled by Standing Orders to participate in Assembly business, for example through answering questions or making statements, but without voting rights.

An Attorney General appointed along the lines envisaged above would, the Review suggested, be less "political" than almost all counterparts in other common law jurisdictions, where the post holder is a member of the Government or at the very least an appointee of the governing party. Whilst it was argued that this would, in itself, help insulate the prosecution process from political pressure, the Review went on to state that.

...in the particular circumstances of Northern Ireland, this independence should be further strengthened, by ensuring that the relationship between the Attorney General and the head of the prosecution service, while containing elements of oversight, is consultative and not supervisory. In other words, there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters. The impression is that in some other common law jurisdictions the relationship between Attorney and prosecutor works well in practice and that the independence of the prosecutor in decision making is respected; but ultimately, if there were disagreement between the Attorney and the prosecutor on an

³ Review of the Criminal Justice system in Northern Ireland:
http://www.nio.gov.uk/review_of_the_criminal_justice_system_in_northern_ireland.pdf

⁴ The Review 4.161

individual case, then in law the Attorney's will would probably prevail. The Criminal Justice Review states that they do not believe that such an arrangement would be suitable in the Northern Ireland context.

Stating that they had been attracted to aspects of the model in the Republic of Ireland the Review stated:

We recommend that legislation should: confirm the independence of the prosecutor; make it an offence for anyone without a legitimate interest in a case to seek to influence the prosecutor not to pursue it; but make provision for statutory consultation between the head of the prosecution service and the Attorney General, at the request of either.

Whilst The Review concluded that the Attorney General should be answerable to the Assembly for the work of the prosecution service in general terms it went on to say:

We recommend that it be made clear on the face of legislation, as in section 27 of the Scotland Act 1998¹, that the Attorney could decline to answer questions on individual cases where to do so might prejudice criminal proceedings or would be contrary to the public interest.

"It may be that the prosecutor and Attorney General would conclude that in no circumstances should they be expected to answer such questions. Nevertheless we do not think that this should be ruled out for all time, as will be apparent from our views on the giving of reasons for decisions:"

We recommend that the head of the prosecution service should be accountable to the appropriate Assembly Committee for financial and administrative matters relating to the running of service. In this event it would be important that Standing Orders made clear the limitations on questioning which might impinge on individual cases

The Assembly Ad-hoc Committee on Justice (Northern Ireland) Bill⁵

In January 2002, the Northern Ireland Assembly Ad-hoc Committee on Justice (Northern Ireland) Act published a report on the draft Justice (Northern Ireland) Bill and the Criminal Justice Review Implementation plan in 2001. They considered the role and functions of the Attorney General under the Bill and completed recommendations:

The Committee considered the role and functions of an Attorney General where the affect the proceedings of the Assembly and acknowledged that provision must be made for his/her participation in the proceedings of the Assembly. The Committee determined that a clear set of procedures, in respect of the following areas of business, will need to be resolved: – questions, statements, voting, quorum; and register of interests. The Committee agreed that the Committee on Procedures might be the most appropriate Committee to resolve these issues.⁶

⁵ http://www.niassembly.gov.uk/adhocs/flags/reports/adhoc1-01_reform.htm

⁶ Section 63 of the Ad-hoc Committee report on Justice (Northern Ireland) Bill 2001: http://www.niassembly.gov.uk/adhocs/flags/reports/adhoc1-01_reform.htm

Recommendation 7: That the Committee on Procedures examine and make recommendations to the Assembly on the extent to which the Attorney General may participate in the proceedings of the Assembly having due regard to best practice in other jurisdictions.

The Committee also determined that consideration needed to be given to the additional functions, proposed in the Review, which may be given to the Attorney General. Those functions⁷ were:

- Senior legal adviser to the Northern Ireland Executive;
- Responsibility for legislative draftsmen;
- The Executive's link with the Law Commission; and
- Responsibility for human rights-proofing legislation.

Recommendation 8: That, post devolution, the appropriate steps are taken to define the future role and extent of the Attorney General's responsibilities.

The Committee noted⁸ that the First Minister and deputy First Minister had the power to convene a tribunal to remove the Attorney General from office. The Committee agreed that this unilateral power would not reflect the primacy that the Assembly will have, following the devolution of justice matters, and that the draft Bill should be amended to provide scope for the Assembly to have an input in this area. The Committee agreed that the power to convene a tribunal to consider removing the Attorney General from office should be given to the Assembly.

Recommendation 12: That clause 21(3) of the draft Bill be amended to provide authority for the Assembly to convene a tribunal following a resolution of the Assembly that is passed with the support of a number of members of the Assembly which equals or exceeds two thirds of the total number of seats in the Assembly.

The Justice (Northern Ireland) Act 2002⁹

Part 2 of the Justice (Northern Ireland) Act 2002 contains provisions regarding law officers and the Public Prosecution Service. Commenting on the provisions, the then Secretary of State for Northern Ireland, Dr John Reid, stated that:

'Part 2 covers Law Officers and the new Public Prosecution Service. It provides for the appointment of a local Attorney-

⁷ Section 64 of the Ad-hoc Committee report on Justice (Northern Ireland) Bill 2001:

⁸ Section 71 of the Ad-hoc Committee report on Justice (Northern Ireland) Bill 2001:

⁹ http://www.opsi.gov.uk/acts/acts2002/ukpga_20020026_en_1

General for Northern Ireland and the creation of a Westminster-based Advocate-General for Northern Ireland. Both posts are to be commenced on or after the devolution of justice functions to the Northern Ireland Assembly. The Attorney-General for Northern Ireland will become a figure responsible to the Northern Ireland Assembly and will carry out many of the existing functions of the post and some new ones, but not all the functions of the current Attorney-General fall within the devolved field. That is why we will create the new post of Advocate-General for Northern Ireland, mirroring arrangements in Scotland. The Advocate-General will be responsible to Parliament for those of the Attorney-General's current functions that are within the reserved and excepted fields in Northern Ireland.¹⁰

Paragraph 43¹¹ of the Explanatory Note which accompanies the Justice (Northern Ireland) 2002, states that part 2 of the act:

implements the recommendations in Chapter 4 of the Review, establishing a Public Prosecution Service for Northern Ireland and providing for the appointment of the Attorney General for Northern Ireland after the devolution of justice functions. After devolution, the Attorney General for England and Wales will hold the new post of Advocate General for Northern Ireland. This Westminster figure will be responsible for matters relating to prosecutions that are not within the competence of the devolved administration, for example matters relating to national security and international relations.

The Explanatory Note goes on to explain the various provisions relating to the Attorney General and related matters within the Justice (Northern Ireland) Act 2002 in the following terms:

Section 22: Attorney General¹²

44. It is planned to commence the provisions in sections 22 to 28 and sections 41 to 43 on the devolution of justice functions to the Northern Ireland Assembly. *Subsection (1)* of section 22 will remove the linkage, established by section 10 of the Northern Ireland Constitution Act 1973, between the Attorney General for England and Wales and the Attorney General for Northern Ireland.

45. *Subsection (2)* of this section gives the First Minister and deputy First Minister the duty to appoint a person to be Attorney General for Northern Ireland, after consulting the Advocate General for Northern Ireland (see *paragraph 13* of Schedule 7). *Subsections (3) and (4)* make it clear how the new, local Attorney General for Northern Ireland is to be funded and that he may appoint new staff. *Subsection (5)* requires the Attorney General to exercise his functions independently. *Subsection (6)* sets out the legal qualifications for the post. These are equivalent to those of a judge of the High Court in Northern Ireland (see section 18). Under *subsection (7)* the First Minister and deputy First Minister may make

¹⁰ Orders of the Day, Justice (Northern Ireland) Bill, 21st January 2001: <http://www.parliament.the-stationery-office.com/pa/cm200102/cmhansrd/vo020121/debtext/20121-13.htm>

¹¹ Paragraph 43 of the explanatory note; Justice (Northern Ireland) Act 2002: <http://www.opsi.gov.uk/ACTS/acts2002/en/02en26-a.htm>

arrangements to fill the post of Attorney General temporarily during a vacancy. Before doing so they must consult the Advocate General for Northern Ireland (see *paragraph 12* of Schedule 7).

Section 23: Terms of appointment of Attorney General¹³

46. *Subsection (2)* of this section provides that the local Attorney General cannot be appointed for a period of longer than five years at a time. It would be possible for the First Minister and deputy First Minister to reappoint an individual to the post of Attorney General for Northern Ireland after such a period of five years has come to an end.

47. The effect of *subsections (6) to (8)* is to disqualify the holder of the post of Attorney General for Northern Ireland from being a member of the House of Commons, the Northern Ireland Assembly or a local authority in Northern Ireland.

48. *Subsection (9)* makes the local Attorney General subject to the provisions of the Freedom of Information Act 2000. This is equivalent to the position of the Attorney General in England and Wales.

Section 24: Removal of Attorney General¹⁴

49. *Subsection (1)* provides that the First Minister and deputy First Minister can only remove or suspend the Attorney General for Northern Ireland from office on the recommendation of a tribunal. The members of the tribunal will be judges in England, Wales or Scotland (*subsection (4)*). The tribunal will be convened by the First Minister and deputy First Minister and its members will be appointed by the Lord Chancellor.

Section 25: Participation by Attorney General in Assembly proceedings¹⁵

50. The effect of this section is to make the Attorney General accountable before the Northern Ireland Assembly for the operation of the Prosecution Service. He will be allowed to answer questions and make statements pursuant to standing orders, but without the right to vote. *Subsection (3)* will give him the right to refuse to answer questions or produce documents on public interest grounds or where that might prejudice criminal proceedings. *Subsection (4)* makes the Attorney subject to the provisions of section 43 of the Northern Ireland Act 1998 (members' interests), under which he will be required to declare any interests in the register maintained by the Assembly before taking part in any relevant proceedings of the Assembly.

Section 26: Annual report by Attorney General¹⁶

¹² Explanatory note, Justice (Northern Ireland) Act 2002:
<http://www.opsi.gov.uk/ACTS/acts2002/en/02en26-a.htm>

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

51. This section sets out arrangements whereby the Attorney General for Northern Ireland is required to write an annual report for each financial year on how he has exercised his functions. This report will be laid before the Northern Ireland Assembly by the First Minister and deputy First Minister, who will also arrange for it to be published.

Northern Ireland Office Discussion Document- 'Devolving Policing and Justice in Northern Ireland.'¹⁷

In February 2006, the Northern Ireland Office published the discussion paper 'Devolving Policing and Justice in Northern Ireland'. The paper contained a detailed analysis by the Northern Ireland Office into the all the powers that will be devolved to the Northern Ireland Assembly regarding policing and justice. Under chapter seven, the paper discusses the role of the new Prosecution Service upon devolution and the role of the Attorney General in relation to this:

The Public Prosecution Service

7.1 The single most significant element of reform proposed by the Criminal Justice Review 2000 was the transformation of the existing Department of Public Prosecutions (DPPNI) into a new Public Prosecution Service for Northern Ireland (PPSNI). The PPSNI was formally established on 13 June 2005 using provisions set out in the Justice (Northern Ireland) Act 2002 and the Justice (Northern Ireland) Act 2004.

7.2 The PPSNI when fully rolled out will be responsible for all prosecutions Previously conducted by the DPPNI and those previously brought by the police. It will operate regionally, establishing local offices in Belfast, Londonderry, Ballymena, Omagh, Newry and Lisburn. In order to be able to take on this role fully, the new Service is being greatly increased in size. Full roll-out of the new PPSNI is planned for 2007.

7.3 The head of the PPSNI is the Director of Public Prosecutions for Northern Ireland. The PPSNI is an independent prosecuting authority subject, currently, to the superintendence and direction of the Attorney General, and is accountable to the Attorney for the performance of his functions. The Attorney is in turn answerable to Parliament for the PPSNI. The Attorney is not engaged in the day to day running of the Service but may be consulted in respect of certain prosecutorial decisions. Even when consulted, the prosecutorial decision rests with the Director unless it requires the consent of the Attorney or the Attorney exercises his power to direct. The power of direction has not been used since the early 1970s.

7.4 As well as looking at existing arrangements, the Criminal Justice Review was tasked specifically to look at how prosecutions, and the Attorney General's other functions in relation to Northern Ireland, should operate once they were devolved. Flowing from the Review recommendations, the Justice (Northern Ireland) Act 2002 sets out the arrangements for a post-devolution environment.

7.5 The current position is that one person, the Attorney General, holds two posts:

¹⁶ Ibid
¹⁷

http://www.nio.gov.uk/devolving_police_and_justice_in_northern_ireland_a_discussion_paper.pdf

Attorney General for England & Wales and Attorney General for Northern Ireland. Under devolution a new Attorney General for Northern Ireland (Attorney General NI) will be created. The Attorney General for Northern Ireland will be appointed by the First Minister and deputy First Minister, after consulting the Advocate General for Northern Ireland (see below).

7.6 Following devolution and the end of Ministerial responsibility for the prosecution service, the Director's relationship with the Attorney General for Northern Ireland will be one of consultation. The Attorney General NI will have no power of direction or superintendence over the PPSNI, whether in individual cases or on matters of policy. This underpins the independence which was a key recommendation of the Criminal Justice Review.

7.7 The Attorney General NI will be responsible for appointing the Director and Deputy Director of Public Prosecutions. He will also require the Director to prepare an annual report on how he has exercised his functions, and will arrange for that report to be published and to be laid before the Assembly. The Director will not be required to answer to the Assembly except in relation to finance and administration and will consult the Attorney General NI where appropriate.

7.8 The independence and impartiality of the prosecution system are fundamental principles of the UK justice system. The Government will put forward a Concordat setting out the core principles of the independence and impartiality of the Public Prosecution Service in Northern Ireland.

The Assembly and Executive Review Committee

Throughout the inquiry into the devolution of policing and justice, the Assembly and Executive Review Committee heard evidence from a range of different sources within the Criminal Justice system. The Assembly and Executive Review Committee heard evidence, on 22nd January 2008, from the Head of the Northern Ireland Civil Service and his officials. When questioned on the role and functions of the Attorney General, an official stated that:¹⁸

A number of details about the functions of the Attorney General for Northern Ireland are contained in statute. They are set out primarily in the Justice (Northern Ireland) Act 2002, and they relate mostly to the relationship with the Director of Public Prosecutions (DPP). They outline the changes to the current relationship of superintendence that the Attorney General based in London has over the Director of Public Prosecutions, and the new, slightly more arm's-length relationship that will exist with an Attorney General for Northern Ireland.

The legislation also gives the power of appointment of the DPP and the deputy DPP to the Attorney General. It refers to a number of functional aspects of the relationship, including consultation on the code for prosecutors, consultation with DPP on matters for which the Attorney General will be accountable to the Assembly, and consultations on responsibilities relating to the annual report of the DPP.

¹⁸ Assembly and Executive Review Committee, Official Report, 22 January 2008: <http://www.niassembly.gov.uk/assem-exec/2007mandate/moe/080122.htm>

Other statutory functions are set out in legislation: the Northern Ireland Act 1998 contains provisions relating to devolution matters and cases relating to the boundaries of devolution, involving the Judicial Committee of the Privy Council; the Justice (Northern Ireland) Act 2004 contains a responsibility to issue guidance for criminal justice organisations on human rights standards; and the Justice (Northern Ireland) Act 2002 contains a requirement that the Attorney General will be consulted by the Chief Inspector of Criminal Justice on his programme of inspections.

On relating those functions to comparable legislation on the appointment of the Lord Advocate in Scotland under the Scotland Act 1998, one will find that much has been left unsaid about the role of the Assembly and in contrast to the Scottish Parliament. There are, therefore, aspects that are not stated clearly.

A raft of functions relating to the Attorney General's non-statutory role in defending the public interest in matters relating to civil law will pass across, because they are carried out currently by the Attorney General for England and Wales. In Northern Ireland, such roles will be carried out by the new Attorney General. However, that is not set in statute though custom and precedent have established that the Attorney General has a role with regard to vexatious litigants on contempt of court proceedings and the appointment of amici curiae in courts, and will continue to have that.

The Attorney General might also be given a range of functions by extrapolation from the work that is done by the Attorney Generals in London and Dublin and the Lord Advocate in Scotland — providing legal advice to the Executive, for instance. However, that is not laid down in statute, so it would be for the First Minister and deputy First Minister to decide.

The Justice (Northern Ireland) Act 2002 contains provisions relating to the appointment by First Minister and the deputy First Minister, but it does not contain anything about the appointment process. The Criminal Justice Review 2000 first raised the possibility of Northern Ireland having an Attorney General separate from England and Wales, and the review stated that it should be a non-political appointment. There were also references to the non-political nature of the appointment in the debates in Parliament on the Justice (Northern Ireland) Act 2002. There is, therefore, that collateral for the view that the appointment of the Attorney General should be non-political. However, it is up to the First Minister and the deputy First Minister to consider further details on the appointment and laid terms.

The Justice (Northern Ireland) Act 2002 also contains provisions relating to the required qualifications of any Attorney General; for example, being a member of the Bar of Northern Ireland or a Northern Ireland solicitor for 10 years. Therefore, there is some statutory provision for what the Attorney General will do and what his or her qualifications will be. It has been said that an MLA can become the

*Attorney General. That would not be permitted, and that is stated in the Justice (Northern Ireland) Act 2002.*¹⁹

THE SCOTTISH LAW OFFICERS

This section provides information on the appointment and function of the Scottish Lord Advocate and the Solicitor General for Scotland (the Scottish Law Officers). The material is contained in a paper prepared by the The Scottish Government Legal Directorate (SGLD) on the Role and Functions of the Lord Advocate.

The Scotland Act 1998 ('the 1998 Act') and the Scottish Ministerial code provide the remit for the role of Lord Advocate in Scotland. The Lord Advocate has four roles:

- **head of the systems of prosecution and investigations of deaths**
- **principal legal adviser to the Scottish Government;**
- **representing the Scottish Government in civil proceedings;**
- **Representing the public interest in a range of statutory and common law civil functions**

In relation to criminal prosecutions and investigation of deaths the Law Officers have always acted independently of other Ministers and, indeed, of any other person. That duty is now expressly set out in s.48(5) of the Scotland Act 1998:

48 (5) *Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person.*²⁰

The Solicitor General is the Lord Advocate's deputy. He may discharge any of the Lord Advocate's functions where the office of Lord Advocate is vacant, the Lord Advocate is unable to act owing to absence or illness, or the Lord Advocate authorises the Solicitor General to act in any particular case (Law Officers Act 1944, s2).

The Scotland Act makes important special provision for the role of the Lord Advocate. Her decisions as head of the systems of criminal prosecution and investigation of deaths are to continue to be taken independently of any other person. It is outside the legislative competence of the Parliament to remove the Lord Advocate from her position as head of the systems of criminal prosecution and investigation of deaths (SA s.29(2)(e)):

Further, like the other UK Law Officers, the Lord Advocate is given a particular role in relation to ensuring that legislation passed by the Scottish Parliament is within the legislative competence of the Parliament, and has particular powers under the Scotland Act in relation to the resolution of legal questions about the devolved powers of Ministers and the Parliament.

Appointment

¹⁹ Evidence from Mr Tony Canavan, Assembly and Executive Review Committee, Official Report, 22 January 2008: <http://www.niassembly.gov.uk/assem-exec/2007mandate/moe/080122.htm>

²⁰ The Scotland Act 1998: http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980046_en_1

The Law Officers are appointed by the Queen on the recommendation of the First Minister, with the agreement of the Parliament, s. 48 (1) of the Scotland Act 1998 ('SA Act'):

48 (1) *It is for the First Minister to recommend to Her Majesty the appointment or removal of a person as Lord Advocate or Solicitor General for Scotland; but he shall not do so without the agreement of the Parliament.*

Unlike other Ministers, however, they cannot be removed from office by the First Minister without the approval of the Parliament (SA s. 48(1)). They are members of the Scottish Government (SA s.44(1)(c)):

44 (1) *There shall be a Scottish Executive, whose member shall*
(c) the Lord Advocate and the Solicitor General for Scotland.

As such they may exercise any of the functions of the Scottish Ministers; acts of Ministers bind them and vice versa (SA s.52(3) and (4)):

52 (3) *Statutory functions of the Scottish Ministers shall be exercisable by any member of the Scottish Executive.*

(4) Any act or omission of, or in relation to, any member of the Scottish Executive shall be treated as an act or omission of, or in relation to, each of them; and any property acquired, or liability incurred, by any member of the Scottish Executive shall be treated accordingly.

This does not apply to the retained functions of the Lord Advocate - in effect her functions in relation to prosecution and investigation of deaths, and any other functions conferred upon the Lord Advocate by name (SA s.52(5)(b) and (6)). (Nor does it apply to functions conferred on the First Minister alone.)

There is no concept of a Scottish "Cabinet" in the Scotland Act. The fact of a Cabinet, and the Ministers who are members of it, are matters for the First Minister. Since 23 May 2007 the position has been that the Lord Advocate will not be a member of the Cabinet and will not normally attend meetings; she will however continue to receive all papers. As the First Minister explained in his statement to the Parliament on 24 May 2007, the Lord Advocate retains the right to address the Cabinet and she will attend where discussion of a particular matter requires her to do so.

If a Law Officer is not an MSP s/he is empowered to participate in the proceedings of the Parliament but may not vote (SA s.27):

27 (1) *If the Lord Advocate or the Solicitor General for Scotland is not a member of the Parliament—*

(a) he may participate in the proceedings of the Parliament to the extent permitted by standing orders, but may not vote, and

(b) standing orders may in other respects provide that they are to apply to him as if he were such a member.

S/he can therefore be questioned by MSPs about the exercise of his or her functions,

²¹ Code of Conduct for Scottish Ministers 2008:

<http://www.scotland.gov.uk/Publications/2008/06/18120242/0/>

²² The Scotland Act 1998: http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980046_en_1

²³ Schedule 6(4)(1) of the Scotland Act 1998:

http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980046_en_1

although s/he may not be required to answer questions or produce documents relating to the operation of the system of criminal prosecution in any particular case if s/he considers that it might prejudice criminal proceedings or would otherwise be contrary to the public interest (SA s.27(3)):

27 (3) *The Lord Advocate or the Solicitor General for Scotland may, in any proceedings of the Parliament, decline to answer any question or produce any document relating to the operation of the system of criminal prosecution in any particular case if he considers that answering the question or producing the document—*

(a) might prejudice criminal proceedings in that case, or

(b) would otherwise be contrary to the public interest.

Under the Parliament's Standing Orders, written questions about the operation of the systems of criminal prosecution and investigation of deaths are answerable only by the Law Officers, as are oral questions on those matters in all but exceptional circumstances, which are documented in Standing Order of the Scottish Parliament: Rules 13.5.1, 13.7.1 and 13.8.3.

A Law Officer may resign at any time and must do so if the Parliament resolves that the Government no longer enjoys the confidence of the Parliament (SA s.48(2)):

48 (2) *The Lord Advocate and the Solicitor General for Scotland may at any time resign and shall do so if the Parliament resolves that the Scottish Executive no longer enjoys the confidence of the Parliament.*

Statutory provisions ensure that there is no interruption in the conduct of prosecutions where there is a change of incumbent (Criminal Procedure (Sc) Act 1995 s.287; SA s.48(3)).

As noted above, the Lord Advocate's position as head of the prosecution system and member of the Scottish Government, and her role in relation to devolution issues and the competence of legislation, are enshrined in the Scotland Act. Neither the Scottish Government nor the Parliament can change that - it would require legislation at Westminster.

The Scottish Ministerial Code

The Scottish Ministerial Code (June 2008)²¹ sets out rules and guidance in relation to the roles of the Scottish Law Officers.

The Code specifically sets out that in criminal proceedings the Law Officers act wholly independently of the Government (para 2.32). Paragraph 2.7 excepts from collective responsibility the Lord Advocate's functions as head of the systems of prosecution and investigation of deaths.

As Law Officers, both the Lord Advocate and the Solicitor General for Scotland have the ultimate responsibility for advising the Scottish Ministers on all matters relating to the law of Scotland. As the senior Law Officer to the Scottish Government the Lord Advocate provides legal advice on the full range of the Government's responsibilities, policies and legislation, including advice on the legal implications of any Government proposals. However, they cannot and do not advise on every legal issue which may arise. The primary source of legal advice for the Scottish Government is the Scottish Government Legal Directorate (SGLD).

The Code sets out guidance as to the circumstances in which the Law Officers should be consulted. The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations. The process of obtaining an opinion of the Law Officers, if advice is expressly sought, will normally be a request on a reference from SGLD. Submissions to Cabinet Secretaries and Ministers are often copied to the Law Officers for information or awareness. Sometimes the Law Officers will comment on such submissions but often they will simply note them. Either way, the Law Officers are not to be taken as offering a legal view on the contents of such a submission.

It will normally be appropriate to consult the Law Officers in cases where:

- (a) the legal consequences of action by the Government might have important repercussions in the foreign, European Union or domestic fields;
- (b) a legal adviser in the Scottish Government has doubts about the legality or constitutional propriety of proposed legislation or executive action, particularly where it concerns any devolution issue within the meaning of paragraph 1 of Schedule 6 to the Scotland Act 1998;
- (c) ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations which are likely to come before the Cabinet or any other collective Ministerial meeting; or
- (d) there is a particular legal difficulty that may raise political aspects of policy.

The Code also refers to the role of Law Officers in relation to civil proceedings. In particular it sets out a distinction to be drawn between proceedings in which the Law Officers are involved in a representative capacity on behalf of the Government, and action undertaken by them on behalf of the general community to enforce the law as an end in itself.

Paragraph 2.30 states that the fact that legal advice has been given to the Scottish Government (by the Law Officers or anyone else), and the content of any such advice, is not revealed outwith the Scottish Government without the Law Officers' prior consent.

Paragraph 2.31 requires Ministers to consult the Lord Advocate before they engage in civil proceedings in a personal capacity.

Paragraph 5.15 provides that the Lord Advocate must be consulted, or take the lead, where it is proposed to appoint a judge or legal officer to a Royal Commission or Committee of Inquiry.

Civil Functions of the Scottish Law Officers

The Lord Advocate is the principal legal adviser to the Scottish Government. Apart from the fact that she has specific responsibilities in relation to the legislative competence of Scottish legislation, she also advises on general legal issues and has general responsibility for the provision of legal advice to the Scottish Government. She has Ministerial responsibility for SGLD, which (as above) provides legal advice to the directorates of the Scottish Government on a daily basis, and for the Office of the Scottish Parliamentary Counsel ("OSPC"), which drafts Bills for the Government's legislative programme.

Legislation

The Lord Advocate is a member of the Cabinet Sub-Committee on Legislation and contributes in that and other ways to the planning, management and delivery of the Scottish Government's legislative programme. She oversees the drafting of Government Bills by Scottish parliamentary counsel in OSPC. She maintains an interest in the development of the devolved Scottish statute book, including matters such as the accessibility of legislation.

Before a Bill can be introduced in the Parliament by the Government, the Minister responsible must state that it is in his or her view within the legislative competence of the Parliament (SA s.31(1)):

31 (1) *A member of the Scottish Executive in charge of a Bill shall, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament²²*

This view is reached on the advice of the Law Officers. This is the only case in which the convention against revealing the Law Officers' involvement in legal advice is routinely departed from. (The Presiding Officer is also required to take a view, which may be that some or all of the provisions of a Bill are outwith competence - s.31 (2)):

31 (2) *The Presiding Officer shall, on or before the introduction of a Bill in the Parliament, decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision*

The Lord Advocate also has the power to refer a Bill to the Judicial Committee of the Privy Council within the four week period after it is passed by the Parliament, for a decision whether the Bill or any of its provisions are outwith legislative competence (SA s.33):

33 (1) *The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Judicial Committee for decision.*

(2) *Subject to subsection (3), he may make a reference in relation to a Bill at any time during—*

(a) *the period of four weeks beginning with the passing of the Bill, and*

(b) *any period of four weeks beginning with any subsequent approval of the Bill in accordance with standing orders made by virtue of section 36(5).*

(3) *He shall not make a reference in relation to a Bill if he has notified the Presiding Officer that he does not intend to make a reference in relation to the Bill, unless the Bill has been approved as mentioned in subsection (2)(b) since the notification.*

Litigation

Most civil litigation involving the Scottish Ministers is conducted on behalf of Ministers by Scottish Government Legal Directorate (although in some areas, such as reparation actions, outside firms are used). SGLD remains responsible to the Lord Advocate for the conduct of all such litigation. Counsel are instructed by SGLD for all litigation in the Court of Session.

The selection of counsel is a matter for the Lord Advocate. She approves a list of

junior counsel known as Standing Junior Counsel who may be instructed by SGLD in litigation involving the Scottish Government. In cases where that is considered appropriate senior counsel will also be instructed. The approval of the Lord Advocate is sought in relation to the appointment of senior counsel for a particular piece of litigation. On occasion one of the Law Officers will appear in court in person to represent the Scottish Ministers.

In conducting civil litigation SGLD proceeds on the instructions of individual Directorates subject to the overall supervision of the Law Officers. Any decisions as to the handling of a civil case are at the end of the day for the Scottish Ministers collectively: if a Law Officer is appearing for the Scottish Ministers in a civil case then, like any other counsel, s/he acts on instructions from them.

By statute, a party raising an action against the Scottish Government may do so against the Lord Advocate as representing it; and an action by the Scottish Ministers may run in the name of the Lord Advocate (Crown Suits (Scotland) Act 1857 s.1).

The Scotland Act makes provision for the determination of devolution issues which arise in litigation anywhere in the UK must be intimated to the Lord Advocate (as well as to the Advocate General). The Lord Advocate (or the Advocate General) may also initiate proceedings for determination of a devolution issue (SA Schedule 6, paragraph 4(1)):

4 (1) *Proceedings for the determination of a devolution issue may be instituted by the Advocate General or the Lord Advocate.*²³

The Lord Advocate also has a specific statutory or common law role in relation to a number of types of action. Commonly these will include matters such as actions for declarator of death or actions for proving the tenor of a will. The Lord Advocate's role in actions for declarator of nullity of marriage or of divorce has recently been abolished, but actions for declarator of marriage by cohabitation with habit and repute continue to be served on her. It is very unusual for the Lord Advocate to enter appearance in such cases, although it may happen for example where an action for declarator of death has implications for any criminal investigation. (Sometimes actions are served on or intimated to the Lord Advocate when they clearly should not be: in particular under section 11 of the Children (Scotland) Act 1995 - the court rules providing for this were revoked in 2000.) It is for the Lord Advocate to ask the Court of Session to declare a person a "vexatious litigant" so that actions raised by that person are subject to special controls by the court. She has specific duties under the Extradition Act 2003.

The Lord Advocate also has a general "public interest" role in litigation. For example, she is entitled to intervene in litigation in the public interest where a proprietary interest of the Crown or the interest of a public trust is involved. Courts will sometimes require matters to be intimated to the Lord Advocate because they consider that there may be an element of public interest or public importance. It is unusual for the Lord Advocate to become involved in such cases, although the *Law Hospital* case (involving withdrawal of nutrition from a patient who was in a persistent vegetative state) is one example. The courts have also recognised the Lord Advocate as the appropriate respondent where the competence of an Act of the Scottish Parliament is challenged "as befits his role as a Scottish Law Officer acting in the public interest" - *Adams v Advocate General* 2003 SC 171.

The Lord Advocate also has a role in relation to the reorganisation of public (non-charitable) trusts under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Again these are fairly unusual.

The Lord Advocate is also responsible for the appointment of an *amicus curiae* in a case where the Court of Session has requested it. The arrangements are set out in a Memorandum of Understanding with the Lord President dated 23 July 1999.

Other appointments

The Law Officers have a range of other functions. For example, they are *ex officio* Commissioners of Northern Lighthouses. They are both members of the Bible Board. The Lord Advocate is a member of the Board of Trustees of the National Library of Scotland, and one of the Commissioners for the Keeping of the Regalia of Scotland. She provides advice to the Privy Council in relation to certain charters. The Solicitor General has certain ceremonial duties in relation to the General Assembly of the Church of Scotland.

April 2009