



Northern Ireland
Assembly

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Speaking rights of Attorneys General/Law Officers in legislatures

1 Background

At its meeting on 22 January 2013, the Committee on Procedures requested research on precedent and process used in other legislatures where the Attorney General/Law Officer is required to speak in plenary in respect of guidance s/he has issued.

This request relates to Section 8 of the Justice (Northern Ireland) Act 2004 which requires the Attorney General for Northern Ireland (AGNI) to issue guidance to a range of criminal justice organisations on the exercise of their functions in a manner consistent with international human rights standards¹. There is a potential scenario whereby a Member could table a motion against the guidance and there is currently no mechanism for the Attorney General to speak to it in such circumstances.

Section 8(3) of the 2004 Act states:

(3) Any guidance issued or revised under this section

¹ Section 8 of the Justice (Northern Ireland) Act 2004 as amended

(a) shall be published in such manner as the Attorney General for Northern Ireland thinks appropriate;

(b) shall be laid before [the Northern Ireland Assembly]; and

(c) shall not come into operation until the Attorney General for Northern Ireland by order so provides².

The accompanying explanatory note provides more information on this provision:

Subsection (3) requires the guidance to be published, to be laid before (the Assembly) and to be brought into operation by an order made by the Attorney General, subject to the negative resolution procedure, when it is issued, and each time it is revised. The organisations to which the guidance will apply are listed at subsection (4). Subsection (5) gives the Attorney General for Northern Ireland the power to amend this list by order subject to the draft affirmative procedure³.

In evidence to the Committee for Justice on 5 July 2012 Attorney General John Larkin further explained the process: “This guidance will have to be laid before the Assembly, and it will be subject to negative resolution. It will then come into effect the day after it is made”⁴.

To date, the Attorney General has produced draft guidance for Forensic Science Northern Ireland, the State Pathologist’s Department and draft guidance on Human Rights Standards relevant to the Protection of the Right to Life⁵, but this cannot come into effect until it is laid before, and approved, by the Assembly.

What is the origin of Section 8?

The Review of Criminal Justice 2000 envisaged wide-ranging reforms across the criminal justice system. The Justice (Northern Ireland) Act 2002 implemented the recommendations from that Review. Subsequently, the British/Irish Joint Declaration of 2003 promised that: “Further significant change will be introduced in the context of a second Criminal Justice Bill which will bring forward the creation of a Judicial Appointments Commission and make further provision to promote a human rights culture in the criminal justice system in Northern Ireland”⁶. The 2004 Act was the vehicle for these further changes and included the provision for guidance to be issued by the Attorney General.

The research was unable to find a parallel with Section 8 of the 2004 Act in another legislature. This is perhaps not surprising, given the political context within which the Northern Ireland legislation was drafted. Nevertheless, there are examples where the

² As above

³ Explanatory Note for the Justice (Northern Ireland) Act 2004

⁴ Official Report, Committee for Justice, 5 July 2012

⁵ http://www.attorneygeneralni.gov.uk/index/latest-news/human_rights_day_2012.htm

⁶ www.irishtimes.com/newspaper/special/2003/blueprint/blueprint.pdf

Attorney General or other law officer contributes to debates in plenary and these are explored further below.

2 Participation of relevant law officers in plenary in other legislatures

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 to the extent permitted by its Standing Orders, but may not vote. This is also true of the Lord Advocate in the Scottish Parliament and Counsel General in the National Assembly for Wales. In the other common-law countries examined for this paper, the Attorneys General in Canada, Australia and New Zealand all participate in proceedings of their respective legislatures, either through a requirement to answer parliamentary questions, contribute to debates, or both. The Attorney General in the Republic of Ireland is prohibited by Article 30(4) of the Constitution from being a member of the Government, although the modern practice is for the Attorney General to attend all Cabinet meetings. There is no provision in Standing Orders for the Attorney General to participate in proceedings and the Taoiseach answers parliamentary questions relating to the role and functions of the Attorney General.

Scottish Parliament and National Assembly for Wales

Previous papers have outlined the process whereby the Lord Advocate (Scottish Parliament) and Counsel General (National Assembly for Wales) can participate in proceedings of those institutions. It should be noted that Section 44 of the Scotland Act 1998 states that the Law officers are members of the Executive⁷:

44 The Scottish Executive

- (1) There shall be a [Scottish Government], whose members shall be—
 - (a) the First Minister,
 - (b) such Ministers as the First Minister may appoint under section 47, and
 - (c) the Lord Advocate and the Solicitor General for Scotland.

- (2) The members of the [Scottish Government] are referred to collectively as the Scottish Ministers⁸.

Similar provision exists in the Government of Wales Act 2006:

45 Welsh Assembly Government

- (1) There is to be a Welsh Assembly Government, or Llywodraeth Cynulliad Cymru, whose members are—

⁷ Since the 2007, it has been usual practice for the Lord Advocate not to attend Cabinet meetings, to strengthen their independence.

⁸ Scotland Act 1998 (as amended)

- (a) the First Minister or Prif Weinidog (see sections 46 and 47),
- (b) the Welsh Ministers, or Gweinidogion Cymru, appointed under section 48,
- (c) the Counsel General to the Welsh Assembly Government or Cwnsler Cyffredinol i Lywodraeth Cynulliad Cymru (see section 49) (referred to in this Act as “the Counsel General”), and
- (d) the Deputy Welsh Ministers or Dirprwy Weinidogion Cymru (see section 50).

(2) In this Act and in any other enactment or instrument the First Minister and the Welsh Ministers appointed under section 48 are referred to collectively as the Welsh Ministers⁹.

There is no similar provision in the Northern Ireland Act 1998 or subsequent legislation to include the Attorney General as a member of the Executive.

Section 27 of the Scotland Act 1998 provides for the participation in Scottish Parliament proceedings by the Lord Advocate and Solicitor General, but they cannot vote if they are not a Member of Parliament. It allows them to participate to the extent provided for in Standing Orders:

Figure 1: Section 27 of the Scotland Act 1998

27 Participation of the Scottish Law Officers¹⁰
<p>(1) If the Lord Advocate or the Solicitor General for Scotland is not a member of the Parliament—</p> <p>(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.</p> <p>(2) Subsection (1) is without prejudice to section 39.</p> <p>(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—</p> <p>(a) might prejudice criminal proceedings in that case, or (b) would otherwise be contrary to the public interest.</p>

The following table replicates those Standing Orders relevant to the participation of Law Officers in proceedings of the Scottish Parliament.

Figure 2: Standing Orders relevant to the participation of the Law officers in proceedings of the Scottish Parliament

Rule 4.5 Participation of the Scottish Law Officers in proceedings¹¹
1. This Rule applies where the Lord Advocate or Solicitor General for Scotland (“the Scottish Law Officer”) is not

⁹ Government of Wales Act 2006

¹⁰ Scotland Act 1998

¹¹ Standing Orders of the Scottish Parliament

<p>a member of the Parliament.</p> <p>2. The Scottish Law Officer may (subject always to the provision in section 27(1)(a) preventing him or her from voting) participate in any of the proceedings of the Parliament as fully as any member but he or she may not be appointed as a member of the Parliamentary corporation or the Parliamentary Bureau.</p> <p>3. These Rules shall apply to the Scottish Law Officer, when he or she is participating in any proceedings of the Parliament, as if he or she were a member of the Parliament.</p> <p>4. Paragraphs 2 and 3 are without prejudice to section 27(2) (application of rules regarding members' interests) and section 27(3) (questions and documents relating to operation of system of criminal prosecution).</p>
<p>Rule 13.5 Written questions</p> <p>1. A written question concerning a matter for which the First Minister is alone responsible may be answered only by the First Minister. A written question concerning the operation of the systems of criminal prosecution and investigation of deaths in Scotland may be answered only by the Lord Advocate or the Solicitor General for Scotland. Other written questions may be answered by any member of the Scottish Executive or by a junior Scottish Minister.</p>
<p>Rule 13.7 Oral Questions in the Chamber</p> <p>1. An oral question concerning a matter for which the First Minister is alone responsible shall normally be answered by the First Minister but may exceptionally be answered by any other member of the Scottish Executive. An oral question concerning the operation of the systems of criminal prosecution and investigation of deaths in Scotland shall normally be answered by the Lord Advocate or the Solicitor General for Scotland but may exceptionally be answered by another member of the Scottish Executive. Other oral questions may be answered by any member of the Scottish Executive or a junior Scottish Minister. An oral question selected for answer at First Minister's Question Time shall normally be answered by the First Minister but may, if the First Minister is unable to attend First Minister's Question Time or any part of it, be answered by another member of the Scottish Executive.</p>
<p>Rule 13.8 Emergency Questions</p> <p>3. An emergency question concerning a matter for which the First Minister is alone responsible shall normally be answered by the First Minister but may exceptionally be answered by any other member of the Scottish Executive. An emergency question concerning the operation of the systems of criminal prosecution and investigation of deaths in Scotland shall normally be answered by the Lord Advocate or the Solicitor General for Scotland but may exceptionally be answered by another member of the Scottish Executive. Other emergency questions may be answered by any member of the Scottish Executive or a junior Scottish Minister</p>
<p>Rule 15.3 Access to the chamber</p> <p>4. During a meeting of the Parliament, only a member, or the Lord Advocate or Solicitor General for Scotland (if not a member), may sit in any seat in the chamber which is reserved for members.</p>

Rule 4.5 permits extensive participation in Parliamentary proceedings (with regard to the prohibition on voting) for the Law Officers. The Lord Advocate and Solicitor General engage in debate in much the same way as any other Member. The following are some examples of their participation in debates including brief extracts:

Table 1: Extracts from contributions of Law officers in proceedings of the Scottish Parliament

<p>Criminal Procedure (Amendment) (Scotland) Bill: Stage 3 (November 2002)</p>	<p>The Solicitor General for Scotland (Mrs Elish Angiolini): I am grateful to members and I have listened with interest to the mature and consensual debate on an issue that is vital to confidence in the criminal justice system in Scotland. This short and simple bill is necessary to correct a procedural flaw based on the explicit nature of interlocutor made by a judge in the context of a summary court, albeit that the intention of the judge and other practitioners in those courts over 21 years was that the trial diet should be</p>
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	discharged and that that was a common understanding.
Subordinate Legislation (November 1999)	<p>The Lord Advocate (Lord Hardie): I am grateful to Mike Russell for his confidence in me and in my ability to speak for as long as is necessary.</p> <p>On the management of business, the Minister for Parliament is here and it is a matter for the Parliamentary Bureau. It must be difficult to judge particular issues, but the minister will speak for himself on that matter.</p> <p>I welcome the support from every member who has spoken in the debate. It is a tribute to the judiciary in Scotland that all members from all parties have supported the need to give effect to the order. It is also a tribute to the judiciary in Scotland that we have had the request for the services of Lord Cullen in relation to Paddington. I accept the point made by Lord James Douglas- Hamilton and Ms Cunningham, that Lockerbie and the Lockerbie trial have put the judicial and criminal justice system on show throughout the world. I hope that at the end of the day everyone throughout the world will pay tribute to that system, which I am sure it will deserve.</p>

Standing Orders of the National Assembly for Wales also provide for participation of the Counsel General in Assembly proceedings:

Figure 3: Selected standing Orders of the National Assembly for Wales relating to the Counsel General

<p>Participation in proceedings</p> <p>5.3 Subject to the provisions of the (2006) Act, the Counsel General may do anything under these Standing Orders which may be done by a Welsh Minister</p> <p>5.4 If the Counsel General is not a Member, the Standing Orders apply to the Counsel General as they apply to Members and the Counsel General may participate in Assembly proceedings but may not vote</p>
<p>Oral questions</p> <p>7.46 Members may table oral questions to the First Minister, to each Welsh Minister or to the Counsel General, about any matters relating to his or her responsibilities</p>
<p>Written questions</p> <p>9.1 Members may table questions for written answer by:</p> <p>(i) the First Minister, a Welsh Minister or the Counsel General, on any matter relating to his or her responsibilities</p>

The following is an extract from Questions to the Counsel General:

Table 2: Extract from contribution made by Counsel General in proceedings of National Assembly for Wales

<p>16 November 2011</p> <p>Mick Antoniw: "Will the Counsel General make a statement outlining his duties and responsibilities?"</p>	<p>Theodore Huckle: I am a creature of statute, under section 49 of the Government of Wales Act 2006. I am legal adviser to the Welsh Government, but also have certain independent statutory functions. I may take the lead for the Welsh Government on particular matters, as appropriate and if asked, and also meet with other Law Officers, the judiciary, members of the legal profession and others involved in the administration of justice.</p>
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	<p>Mick Antoniw: I will try to ask this as diplomatically as possible. There are concerns over precisely what your functions are and how we hold you, as a member of Government, to account and scrutinise the work of Government. Will you agree to a more substantive and detailed explanation for Members of the Assembly, outlining precisely the sorts of things that you do and the areas where you think we can scrutinise and hold you to account, so that it is clear in our minds at least. You will be aware that there have been questions that have been felt not to have been answered satisfactorily, or which could not be tabled, because there appears to be this uncertainty about precisely what your function is and how that interlinks with our obligation to hold you to account and to scrutinise your work as part of the Government.</p> <p>Theodore Huckle: I am grateful for your question. In principle, I have no difficulty with this idea, and I assure Members that steps are in hand to clarify the position for the benefit of all. Perhaps I should say that, with regard to accountability, I am always keen to qualify that expression, because I will not be accountable in any sense in the same way that Ministers are, but I am accountable under the ministerial code to the Assembly in respect of the functions directly conferred upon me. I understand that to be what I call the 'independent hat' functions, under section 62, to make representations, section 67, to act in the courts, section 112, to refer Assembly Bills to the Supreme Court if there is a question as to competence, and possibly also section 149 and Schedule 9, dealing in the courts with devolution issues...</p>
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In January 2012 the Counsel General sent a letter to the Presiding Officer outlining new guidance issued by the Welsh Government on negative and affirmative procedures in relation to subordinate legislation. The guidelines set out the criteria that the Welsh Government applies in determining the procedure to be adhered to in relation to such subordinate legislation. However, no evidence could be found by the research of the Counsel General having to speak to any motion tabled in such circumstances, and this was confirmed by officials at the Assembly¹².

Examples from other Commonwealth countries

In Canada, New Zealand and Australia the Attorneys General are also members of the respective Governments and contribute to parliamentary proceedings on a regular basis. Their roles could be said to be more overtly political than their counterparts in the UK and Ireland:

¹² The letter and guidelines can be found here:

<http://www.senedd.assemblywales.org/documents/g625/Public%20reports%20pack%20Monday%2006-Feb-2012%2014.30%20Constitutional%20and%20Legislative%20Affairs%20Committee.pdf?T=10>

- Canada:** The AG is a Member of the House of Commons and is also the Minister of Justice. The two titles reflect two very different roles - As Minister of Justice he is responsible for more than 47 statutes and areas of federal law, such as human rights, family and youth law, administrative law, Aboriginal justice, general public law and private international law. The Minister introduces policies and programs that not only change the law but are intended to influence the way the law is applied, how the legal system functions and how individuals interact with the system, such as victims' policy or support services in family law. The Department enacts reform and provides advice on all reforms related to criminal law. As Attorney General he advises federal departments and agencies on behalf of the Crown, and represents the Crown whenever legal actions are taken against a federal body. The Attorney General also oversees the prosecution of violations of federal law in all the provinces, as well as the prosecution of all federal offences, including Criminal Code violations, in the territories.
- New Zealand:** The Attorney-General is the principal legal adviser (the "senior law officer") to the government. The Attorney-General is a Minister and almost always a member of Cabinet. In Cabinet and Cabinet committee meetings, the Attorney-General gives legal advice and encourages ministerial colleagues to seek appropriate legal advice in the course of government decision making. The Attorney-General should be consulted on policy papers that raise significant legal issues. The Attorney-General has particular responsibility for maintaining the rule of law. The Attorney-General has a responsibility to notify Cabinet of any proposals or government actions that do not comply with existing law and to propose action to remedy such matters. The New Zealand Bill of Rights Act 1990 requires the Attorney-General to report to the House of Representatives if a bill appears to be inconsistent with this Act. The Attorney-General may take into account public policy considerations when exercising the law officer functions. By convention, however, the Attorney-General is not influenced by party political considerations, and should avoid appearing to be so influenced. Consequently, when acting in the law officer capacity, the Attorney-General is not subject to collective responsibility. The Attorney-General may seek the views of other Ministers, and they may volunteer their views. The Attorney-General, as a Minister, whether inside or outside Cabinet, shares collective responsibility for the decisions of Cabinet that do not relate to the law officer role.

The New Zealand House of Commons and Australia House of Representatives provide useful examples where the Attorney General speaks to Government legislation, including the obvious partisan debating style:

Table 3: Extracts from debates involving Attorneys General in the New Zealand Parliament and Australia House of Representatives

Australia House of Representatives	Ms ROXON (Gellibrand—Attorney-General and Minister for Emergency Management) (16:43): It is normal in the summing up speech to thank
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	<p>those who have contributed to the debate. I think that is a little difficult after the member for Mayo's contributions because they were, I have to say, a bit half-hearted in what is a serious piece of legislation. I certainly do not criticise the opposition's wanting to reserve its position following the Senate's committee process, because that is a normal step that can be taken for legislation. But I think to be rambling, quite frankly, about Customs cuts really does show—and I know that you are acting for the member for Stirling while he is on paternity leave—a lack of understanding that intelligence based screening is actually delivering better outcomes for identifying, through customs, prohibited goods being brought into Australia. Obviously that is also not especially relevant to the bill.</p> <p>But I am pleased that, in the middle of all of that, the member for Mayo made it clear that the substantive changes to the bill primarily modernise and tighten criminal legislation. It is important that we make sure we can quickly respond to the changing types of drugs being brought into the community. It is important that we deal with new offences, such as identify crime, which are becoming much more prevalent. That is what this bill seeks to do¹³.</p>
<p>New Zealand House of Representatives</p>	<p>Hon CHRISTOPHER FINLAYSON (Attorney-General): This is a very important issue of black-letter law, and I am excited by this legislation. But it would be quite remiss of me, on this red-letter day for the Labour Party, not to express my sympathy to that party for its ongoing problems. I am especially sorry for my good friend Trevor Mallard, who has today lost his special buddy at pump class at Bodyworks on Thorndon Quay, Chris Carter.</p> <p>Grant Robertson: You'll still be there for him, though, won't you?</p> <p>Hon CHRISTOPHER FINLAYSON: I will not be there for him, because—</p> <p>Grant Robertson: No, you will still be there for him.</p> <p>Hon CHRISTOPHER FINLAYSON: No, I say to Mr Robertson, I will not be there, because while Trevor does pump classes, I am upstairs lifting the real tin. But I digress, and we have important issues to concentrate on this afternoon.</p> <p>Grant Robertson: A challenge, does the Minister have?</p> <p>Hon CHRISTOPHER FINLAYSON: I will challenge him any day. I doubt whether he could lift what I lift.</p> <p>Paul Quinn: Too busy sunning himself.</p> <p>Hon CHRISTOPHER FINLAYSON: Oh, he is too busy sunning himself, which is why he looks like an orange.</p> <p>The Law Commission proposed that the Parliamentary Counsel Office should be given enhanced powers of editing when producing reprints of statutes, and this recommendation is implemented in full¹⁴.</p>

¹³ Australia House of Representatives Hansard, 30 October 2012

¹⁴ New Zealand Parliament Hansard, 29 July 2010

The Attorney General for Northern Ireland appears to operate in an unusual context compared to other Attorneys General/Law officers examined for this paper. The most obvious reason for this is that in the examples cited it is usual for the Attorney General to be a member of a political party and/or a member of Government (with the exception of the Republic of Ireland). However, the AGNI is disqualified from membership of the House of Commons and Northern Ireland Assembly. Furthermore, to date there is no provision in Standing Orders for the AGNI to participate in Assembly proceedings as provided for in the 2002 Act.

The research was unable to find an exact parallel in respect of the guidance issued by the Attorney General under Section 8 of the Justice (Northern Ireland) Act 2004, whereby it would be desirable to allow the Attorney General to speak to the guidance where a motion has been tabled under the negative resolution procedure.

However, 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 to the extent permitted by its Standing Orders, but may not vote. Similar legislation exists in relation to the Law Officers in the Scottish Parliament and National Assembly for Wales, and the Standing Orders of these legislatures give the Law Officers wide parameters within which to participate in proceedings.

Finally, in the jurisdictions examined, the requirement for Attorneys General/Law Officers to be present in the Chamber relates directly to the discharge of their functions. They have clear roles that encompass answering questions on behalf of Government and/or fulfilling their duties as a Minister. This reflects their duties as members of the legislature and/or Ministers within the Government.