



**Northern Ireland
Assembly**

**ASSEMBLY AND EXECUTIVE
REVIEW COMMITTEE**

**OFFICIAL REPORT
(Hansard)**

**Devolution of Policing and Justice
Matters**

23 February 2010

NORTHERN IRELAND ASSEMBLY

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REVIEW COMMITTEE**

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Members present for all or part of the proceedings:

Mr Jimmy Spratt (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Alex Attwood
Mr Nigel Dodds
Mr Simon Hamilton
Mr Alex Maskey
Mr Alan McFarland
Mr Declan O'Loan
Mr Ian Paisley Jnr

The Chairperson (Mr Spratt):

We move to the devolution of policing and justice, and the category 2 list of issues. I declare that I am a member of the Northern Ireland Policing Board.

Mr A Maskey:

I am a member of the Policing Board.

Mr Attwood:

I am a member of the Policing Board.

Mr O'Loan:

I am a member of Ballymena District Policing Partnership (DPP).

Mr Paisley Jnr:

I am a member of the Policing Board.

The Chairperson:

We will move straight into the category 2 list of issues. During the Committee's meeting of 18 February 2010, agreement and conclusion was reached on several of those issues. Therefore, the Committee will consider only the issues that are yet to be resolved.

One of the issues to be resolved by the Committee pre-devolution that may require further consultation is issue A, which deals with the role of the attorney general. During the meeting of 18 February 2010, Committee members agreed to ask the First Minister and the deputy First Minister to publish the paper by John Larkin QC, and their response to it. Following on from earlier Committee discussions, do members wish to discuss issue A further, in light of the letter tabled by the First Minister and deputy First Minister.

Mr Paisley Jnr:

We note that the report and the response to the report are to be published in the Assembly Library in the next couple of weeks. There is nothing else that we can say until we see those documents.

Mr Hamilton:

I think that we only can note that.

The Chairperson:

The Committee Clerk or I could request that a copy of the documents be sent to members of the Committee at the same time that they are placed in the Library. That is my understanding of the suggestion that was made earlier. Do members have any comments on that?

Mr Attwood:

There is a very small window for the Committee to consider that issue between the documents being placed in the Library and the proposed date for the devolution of policing and justice. There will have been a period of approximately six months between John Larkin writing his report and the Committee receiving a copy of it, and I can only imagine why there was such a delay in the Office of the First and deputy First Minister sharing it more broadly.

However, the critical issue in respect of the attorney general is the interface between the Assembly and the Public Prosecution Service (PPS). How will that work and be managed? What will Assembly Members be able to do? That is going to be one of the critical relationships. Such a relationship and the conduct that will be involved is something that no Member of the Assembly will have had any experience of. Nor will we have had any experience of the conduct that will be involved in respect of cross-border prosecutions. Matters can be difficult even in the relationship between Members and the Chief Constable and the PSNI.

It is unfortunate that the Committee has not had more of an opportunity to consider what the document means. However, there will be a window between the second week in March and the middle of April when the Committee can determine whether there any matters on which it can make suggestions to OFMDFM.

Mr Paisley Jnr:

I have no difficulty with that. We all want to see what is contained in Mr Larkin's report and would like the opportunity to say that we have at least scrutinised and tested it, and seen the response. I do not imagine that the delay is all one-sided.

Mr Attwood:

It is three-sided.

Mr Paisley Jnr:

I think that it is two-sided. I have no problem with the Committee having an opportunity to consider and examine that report once it has been placed in the Assembly Library. I do not know whether we will require another Committee report, but we should at least have a chance to see Mr Larkin's report.

The Chairperson:

The Committee on Procedures probably need a steer from this Committee about whether the attorney general should have speaking rights in the Assembly. We must deal with that issue. However, as someone suggested earlier, once the devolution of policing and justice has taken place, the matter may have to become the property of the future justice Committee pretty quickly.

Mr Attwood:

But not before the middle of April.

The Chairperson:

No. I appreciate that.

Mr Attwood:

Regardless of what may arise constitutionally thereafter, the Committee should have some locus on what will happen until then. I am not sure whether we will cover this issue today, but I do think that the attorney general should have speaking rights in the Assembly, and we should have the capacity to question him, just as we do in the case of Ministers.

Mr Paisley Jnr:

Do you envisage those speaking rights being through a Committee or on the Floor of the House?

Mr Attwood:

I would go for the maximum model and give the attorney general speaking rights on the Floor of the House. However, I am unsure what the precedent is for that.

Mr Paisley Jnr:

That would not necessarily provide the opportunity for maximum scrutiny; rather, it would just provide a sounding board.

Mr Attwood:

I meant that the attorney general should be given speaking rights on the Floor of the Assembly, and that a Committee would be empowered to require his attendance to make enquiries about appropriate matters. Therefore, the maximum model would involve the attorney general having a responsibility to a Committee and on the Floor of the House.

The Chairperson:

Committee members will remember that, during our visit to the Scottish Parliament, the deputy head of the Procurator Fiscal Service gave a presentation that outlined that they do have speaking rights in the Scottish Parliament and can make statements, but that they cannot be questioned on individual cases. It would be entirely wrong for the attorney general to be obligated to answer

questions or make statements only on policy issues, and so on.

Mr Paisley Jnr:

In this House, the attorney general would potentially answer for the Director of the Public Prosecution Service. There is an issue about that relationship and about whether the voice says what the body wants. Such a relationship would require some sort of test.

The Chairperson:

That is the very point.

Mr A Maskey:

It is new territory, and people will want to have opportunities to ask questions. As Peter Robinson and Martin McGuinness told the Committee last week, the attorney general will also probably want such opportunities. That is all subject to the issue of independence. Even if there are tensions further down the road about some of these matters, they will not be insurmountable. We should make sure that the attorney general has speaking rights. It is about ensuring a level of scrutiny and accountability, within the confines of guaranteeing people's independence.

The Chairperson:

We have had a helpful discussion on this matter.

Mr McFarland:

I thought that these matters had been set out in some form of advice from the NIO. I understood that the attorney general would be able to take questions, but would not be able to vote. Was that not laid down somewhere already?

The Committee Clerk:

There is legislative cover for the attorney general to report, but it is no more specific than that. The advice does not specify that such reports should be made orally or in writing; or to the Assembly in plenary or to a Committee. The Committee on Procedures would develop Standing Orders for the purposes of the conduct of business on the Floor of the Assembly. I understand that that Committee would expect to take a lead from the Assembly and Executive Review Committee on what those Standing Orders might reflect. My understanding is that the entire purpose of the Committee asking to have sight of John Larkin's paper, and the response of the

First Minister and deputy First Minister, was to see the extent to which those matters were covered, and, if they were covered, whether this Committee would endorse those approaches, add to them, or suggest alternatives.

The Chairperson:

We have had a wide discussion on that matter, and a number of points have been raised. We need to see that paper when it is placed in the Assembly Library. If there is time for a Committee meeting before that paper goes before the Assembly, we will have it, with the agreement of members.

Can we note the comments that have been made, and agree that they will be reflected in our report?

Members indicated assent.

The Chairperson:

Does the Committee agree that we have dealt with issue A?

Members indicated assent.

The Chairperson:

We move to the next matter that remains outstanding: issue C, which relates to the Serious Organised Crime Agency (SOCA) and the security services. The Committee agreed that there was no consensus on that issue. However, members may wish to consider, in light of the NIO's letter of 19 February, whether there are any further matters for discussion, or whether we continue to maintain that there is no consensus.

Mr A Maskey:

There is nothing new to say, Chairman. There is no consensus.

The Chairperson:

There was a suggestion that we simply note the protocol.

Mr A Maskey:

Are we dealing with the protocol overall?

The Chairperson:

Issue C asks:

“What should be the relationship between SOCA and the Security Services and the Minister/Department/Assembly?”

Issue N in the original category 1 list of issues asks:

“What needs to be done to ensure that attention is given to having appropriate measures in place to address issues such as the role of the security services?”

That came from the category 1 list of issues and became part of issue C in the category 2 list. That is the history of the matter, and that is what the Committee is being asked to address. We now have the protocol before us, and there has been some discussion about that inside and outside this room in the past few days.

Mr A Maskey:

Without getting into a long argument, there are matters that my party does not accept. That is why I said that we are happy to note the various concordats and protocols, with the big caveat that my party may or may not take issue with a number of matters. We will do that through party spokespersons and through Martin McGuinness’s office as deputy First Minister. We take the view that we are dealing with some issues that are set in law, whereas protocols and concordats are not. We have been given assurances from the Secretary of State and from the First Minister and deputy First Minister that those matters will be kept under review. There are issues that we wish to deal with.

I made it clear last week that we do not subscribe to the same notion of national security interests as the British Government or as other people in this room. Therefore, there would not be consensus on that issue. We do not accept the status of organisations such as SOCA. We believe that the work of those organisations should be incorporated into police work here. However, we are dealing with the legislative and legal framework as we move forward. The protocols, concordats, and so on, are subject to review. They are not the law. Alex Attwood said earlier that these provisions will come in by default. That may be the case, but they are not the law. They are subject to change and negotiation, some of which might even be going on as we speak.

Obviously, the SDLP is making arguments, we are making arguments, and I presume that others are making similar or other types of arguments. However, we note that the protocols are

there, but we do not afford them any particular status. They do not go beyond the legislative framework within which we are taking transfer of powers forward.

Mr Attwood:

First, the national security protocol is in a category apart from other protocols, because elements of the other protocols would be devolved, whereas national security is not a devolved matter. I am not going to go over the history of all of that, but we can look at the national security protocol differently from the other protocols, because it is a matter that remains in the hands of the British Government. Therefore, the likelihood of it being kept under review, or being changed significantly after review, despite what it says in the protocol, is much less likely, given that the matter is a responsibility retained by London, and, unfortunately, we do not have much control over it.

Secondly, there are a lot of errors in the protocols, but there are two fundamental errors in particular. Paragraph 8(i) of the national security protocol states that all justice and policing agencies in Northern Ireland are accountable for all matters to the minister of justice. I am recalling that from memory, but I think that that is verbatim. However, that is simply not the law. The British Government making that statement reverses a lot of the past 10 years, which have been good years in respect of policing progress and of politicians and the community taking responsibility for policing matters. I find it bizarre that they could include a statement like that, which is utterly without foundation.

Thirdly, an issue came up last week about the presumption to communicate, but there is not a presumption to disclose when it comes to national security matters. Moreover, the presumption to communicate will be determined exclusively by the British Government as to what and how they share. In my view, and we have made this clear to the Secretary of State, that is not a sensible principle on which to start the relationship following devolution. As it states in paragraph 5 of the national security protocol, it is strictly the responsibility of the British Government to decide what is shared and how it is shared. There should be more principles laid down than just that one because, as I said to the Committee last week, there could be a high-profile collapse of a criminal prosecution due to some public interest matter or frenzy around some SOCA activity, or the PSNI doing something gravely wrong when they are under the direction of MI5 in respect of national security or an anti-terror operation, and those are going to be the rubbing points. Those rubbing points could arise very quickly, because, unfortunately, we

live in a situation where that sort of development could arise.

It is our view that a set of principles can be worked up to try to map out how that sort of business would be handled. We are on the same page as Sinn Féin in that we did not agree that the national security function should be taken from the Chief Constable, and thought that there were good, objective local arguments as to why that should be retained by the Chief Constable. However, that matter has moved on. In moving on, we need get the principles right in respect of what information is shared, how it is shared, when it is shared, in what sense it is shared, and what could then happen in respect of the Minister of justice letting people more widely know that information, not just on the political side but on the public side, because there will be a heightened awareness.

I can imagine what Ian is going to say. However, although noting the usual exchanges, the point is, as I understand it, that a lot of time was taken up at Hillsborough with what the Minister of justice would or would not share with the Executive. Those are very difficult issues to manage, and I do not agree fully with what is in the Hillsborough agreement. We submitted a paper to the British Government outlining in more clarity what could happen, what information should and should not be shared, and how that might be shared. At Hillsborough, people were occupied by that issue, and there was some development around what the Minister of justice would or would not share with the Executive. Therefore, it seems to me that it would have been useful for the Committee to spend some time trying to work out principles, similar to what happened at Hillsborough, that mitigate the risks that we are trying to identify around what should be shared, when it should be shared, and with whom. That could have happened if we had received the document earlier than last week. We have advised the British Government in writing that we reject that, and we will meet them next week.

The Chairperson:

We received the national security protocol only last week.

Mr McCartney:

The minutes of last week's meeting state that we could not reach consensus on the issue, and that we agreed to report to the Assembly accordingly. We all know our positions.

The Chairperson:

I have allowed everybody to have their say.

Mr Paisley Jnr:

It is refreshing that today there is recognition of the factual and legal position that national security is “national” security, and not a regional issue. Although there is a regional interest, as there is for any other region in the UK, national security remains a national issue in fact and in law. Refreshingly, even Alex Attwood recognises that that is unlikely to change. This is probably the first time that we have got to the crux of the matter: we can talk about it as much as we want, but national security is exactly that. Therefore, for that reason, there is a limited role that we can play. It is important that that be noted.

It is worth noting that we have to make do with the protocols, and, although people may have other aspirations, which they are entitled to, the factual and legal position is as set out. Therefore, we are noting a legal position, even though some may have aspirations to change that. I do not believe that anyone on this side of the table shares those aspirations, because, patently, the protocol makes good sense and it is logical that national security is not regionalised.

Paragraph 8(i) of the protocol on national security outlines a theoretical position, which could be interpreted as saying that, ultimately, all relevant powers are devolved from Westminster and from the sovereign Parliament. There may be issues that could be tidied up, but, essentially, we are noting a position. Some members have indicated that they would like a different position. However, it does no violence to anyone’s position to note it. I welcome the fact that, for the first time in a long time, there is at least consensus around the table to note that and to move on.

The Chairperson:

To clarify, paragraph 8(i), which, having first been raised by Mr Attwood, has come up on a number of occasions, reads:

“Northern Ireland policing and justice agencies are accountable to the Minister of Justice on all devolved policing and justice matters”. That was just slightly different to what you said.

Mr Attwood:

Yes, but there was no effective difference.

Mr Paisley Jnr:

There could be; it depends where the emphasis is placed. There is a difference between all devolved matters and all matters.

Mr Attwood:

I am talking only about devolved matters.

The Chairperson:

I am simply clarifying the position so that everyone is aware of it.

Mr McFarland:

I recall the first Policing Board, which Alex and I sat on back in 2001. Alex was always greatly exercised about national security. I want to reiterate that national security is an excepted matter. It is not and will not be devolved. The handling arrangements are an excepted matter. It does not matter how much Alex twiddles around with it or wishes otherwise, that is the way it is. Sooner or later, he will have to live with it.

Mr A Maskey:

We are now moving to conclude this particular debate, which we spoke about only last week. On behalf of Sinn Féin, I made it clear to the Secretary of State that there needs to be a presumption of disclosure on all such matters. As we said in the past, national security, as defined by the British Government and people around this table, pollutes a lot of matters. At the end of the day, we are talking about what this Committee should include in its report. I put our points on the record for the Hansard report last week. We are not going to reach consensus on this issue. It is as simple as that. Therefore, I do not want to sit for another half an hour talking about an issue that I know we are not going to reach agreement on.

The Chairperson:

The Committee agreed at the previous meeting that there was no consensus on this issue. From what I have heard today, there is still no consensus. Do members agree that there is no consensus?

Members indicated assent.

The Chairperson:

We will move on to issue D, which is about North/South policing and justice arrangements. I remind members that they agreed to consider this issue at today's meeting following further clarification from the Secretary of State. Is there any consensus on the requirement for a justice sector of the North/South Ministerial Council? Furthermore, are members content with the seven agreements, that is, the relevant agreements?

Mr Paisley Jnr:

It is similar to the situation with the previous issue in that we all have our stated ideological positions on this issue. Therefore, there will be no consensus, but we should agree to note that.

Mr McFarland:

At the previous meeting, my colleague Danny Kennedy asked the Secretary of State about this matter. Safeguards exist for any other North/South contacts in that a unionist Minister and a nationalist Minister have to be present and must agree. The proposal on co-operation on criminal justice matters seems to allow a Minister for justice here to meet his counterpart and for entire secretariats to meet without any such safeguards. I think that, in the first case, the Ministers would meet at least once a year and that the others would meet at least twice a year. Those could develop into weekly meetings, which technically would become a North/South ministerial link without any of the previous protections that were designed for North/South relationships. Although one is not against any issue of co-operation, there is a danger that the outcome of the document, as it is written, would expand into what would effectively be another North/South body by any other name.

Mr Attwood:

Previously, there was agreement that the part of the North/South justice agreement that fell to Dublin and Belfast would remain in place after the devolution of policing and justice powers. No one had any issue with that. Some technical issues must be addressed, but there was no difference in principle on that matter. We do not have a responsibility to North/South policing arrangements, because they are between the PSNI and the guards. I trust that we are not going to invade their operational responsibilities. I previously proposed the creation of a justice sector of the North/South Ministerial Council, but there was no consensus for that among Committee members. Therefore, I am not inclined to propose it again.

Mr Hamilton:

It was rejected.

Mr Attwood:

The Committee has covered all the issues on that matter as fully as possible.

I am unsure what the Chairperson meant when he said “seven agreements”.

The Committee Clerk:

Those are the seven agreements including protocols, memoranda of understanding and concordats, which the Secretary of State said would “underpin” the devolution of policing and justice. Some of those seven agreements relate to matters of co-operation between Northern Ireland and the Republic of Ireland, such as those on sex offenders and policing and justice. Therefore, it was the relevant documents that were referred to.

The Chairperson:

Those are all normally areas of co-operation. You were right to say that the Committee did agree the other document. It did, though, need to be tweaked to allow for devolution and the new set up here. However, it is just the old document with an add-on.

Mr McFarland:

The policing co-operation document started off as a national agreement between London and Dublin.

Mr Attwood:

No; that was an agreement between the PSNI and the gardaí.

Mr McFarland:

The document that I am referring to was signed off by John Reid and John O’Donoghue. It deals with policing co-operation between the Irish and UK Governments. Will that agreement fall, or will it be translated into a new agreement?

It is interesting because it refers to “respective Governments”, and if policing is devolved here and we are to become responsible for policing and what the Chief Constable does, it would

presumably become the responsibility of the Minister for justice and the Irish Government.

The Chairperson:

That is where the change has come. Perhaps the Committee Clerk would elaborate on that issue.

The Committee Clerk:

The matter was discussed with the Secretary of State when he appeared before the Committee on 18 February. He acknowledged that, because it was an agreement between two Governments, there would need to be a formal agreement to change the document that was co-signed in 2002. A process will be required for that. The Secretary of State also acknowledged that the Committee had drawn attention to the need to identify the relevant responsibilities of a justice Minister and the Policing Board.

Mr McFarland:

Will that document be superseded by a new one that will eventually be signed by the new justice Minister?

The Committee Clerk:

That is my understanding.

The Chairperson:

That issue was also raised with some of the officials who appeared before the Committee.

Mr A Maskey:

Obviously, Sinn Féin wants maximum matters transferred. However, the current situation is about providing for the transfer of powers and ensuring that everything is in place that needs be at the point of transfer. Sinn Féin is satisfied that it is a key issue.

The Chairperson:

Would members find it helpful if the Committee Clerk grouped issues C and D in the Committee's report, and that the report records the fact that, as a result of the Committee's scrutiny of those documents, revisions will be made to some of them?

Mr Attwood:

Which documents? Are you talking about the protocols?

The Chairperson:

Yes. Some of the issues that have been raised and have been recorded in the Hansard report would be brought together for the report.

Mr McFarland:

It could be drafted that revisions “may be made”, because they will not necessarily be made.

The Chairperson:

Yes. It would pick up the points that Committee members have made, but issues C and D would be grouped for the purposes of the Committee’s report.

Mr McFarland:

Issue C and issue D are about entirely different issues.

The Chairperson:

If the Committee agrees to group those issues, we can go through them during Thursday’s closed session on the report. That is when we can make any changes. Members may feel the need to separate them again, but for ease of drafting —

Mr Attwood:

They do not seem to fit naturally. Issue C and issue D are different.

Mr Hamilton:

Keep them separate.

The Chairperson:

OK. We are happy to draft them as two issues. It was only a suggestion from the Committee Clerk. I do not know whether it would have made the Committee Clerk’s life easier. At any rate, he was trying to be helpful, but the result is, “No, thank you, and sorry.”

We will move to issue E. Most of the financial issues have been agreed. Members may,

though, wish to consider, in light of the letter from the Secretary of State, any further issues. If members have no points to raise from the earlier discussion about the £22 million for the part-time Reserve, I ask whether members are content to agree that issue E is complete and that the report should recommend that the policing and justice budget should be ring-fenced for 2010-11 as was discussed at our previous meeting.

Members indicated assent.

The Chairperson:

The final issue is the Public Prosecution Service. Members agreed that — *[Interruption.]* I am sorry; there is a private meeting going on. Please make your remarks through the Chair. Members agreed that there was no consensus on issue G. Are members agreed that the Committee Clerk should draft a recommendation asking for an assurance that there should be proper scrutiny of the prosecution policy of the PPS, but not its decisions, and of the justice Department's spending and administrative matters?

Mr Attwood:

Yes. I would like to see the wording of that.

The Chairperson:

That will be made available to you.

Mr Attwood:

Given that we do not have a consensus about what the funding relationship should be, what will be the default position?

Mr McFarland:

It will be the responsibility of the Department of Finance and Personnel (DFP). It is written down in the NIO briefing note at the beginning of the documents that we were given. Do you want me to read it out, Chairperson?

The Chairperson:

That comment is in the document, and I am sure that everyone has read it.

Mr McFarland:

It says that it is the responsibility of DFP.

The Chairperson:

Yes, but it is subject to any comments that this Committee might make.

Mr Attwood:

Presumably, all the money goes to DFP, and in the absence of somewhere else to go, it stays with DFP.

Mr McFarland:

Yes, but non-ministerial departments are based on an entirely different system, as I understand it.

The Chairperson:

We were at the point at which there was no consensus. Everyone had their own views, and I do not think that we need to rehearse them. I assume that those views have not changed.

Mr Hamilton:

They have been well aired.

Mr McFarland:

I want to make a quick point. There is a throwaway reference to a website, which is to do with the protocol between the attorney general and the prosecuting Departments. The website contains a fascinating document, which is extant in GB, about how PPS policy is handled. Presumably, we will have one of those —

The Chairperson:

That document was given out last week.

Mr McFarland:

OK.

The Chairperson:

Issue I deals with the Police Ombudsman. Members agreed to consider the issue in light of the

further clarification from the Secretary of State on the agreements, concordats, protocols and memoranda of understanding. At the Committee meeting on 9 February 2010, members agreed to consult their parties on issue I and to revisit it at today's meeting. Is this matter best left to the joint Office of the First Minister and deputy First Minister, or should the justice Minister provide the relevant advice? Should all three Ministers have a role? The protocol on national security, which was recently supplied to the Committee, details the position as follows:

"The Minister of Justice is responsible for the process of appointing the Police Ombudsman ("PONI") and for sponsoring his/her office (although the appointment is made formally by HM The Queen on the recommendation of the First Minister and deputy First Minister). In relation to all devolved matters PONI reports to the Minister of Justice. In relation to reserved or national security matters, PONI reports to the Secretary of State and the Secretary of State may issue guidance to PONI on matters relating to national security."

At last week's meeting, Mr Attwood said that he wanted to consider that matter further. Do members have any concerns with that issue? If so, will you enlighten us as to those concerns?

Mr Attwood:

I cannot recall what Patten said about that. I will stick with whatever Patten said. *[Laughter.]*

Mr McCartney:

That is a shock.

Mr Attwood:

Patten probably said that OFMDFM should have the advisory role. Am I right?

Mr McCartney:

Yes.

Mr Attwood:

How do you know that?

Mr McCartney:

You said it one day in the Chamber.

Mr Paisley Jnr:

That does not make it true. *[Laughter.]*

The Chairperson:

Perhaps you are all jolly because we are coming to the end of the report. However, I have a wee bit more work to do to get us to the end. That is the exact wording of the national security document. Are members content?

Mr A Maskey:

That is only a reference to a protocol.

The Chairperson:

Do members agree?

Members indicated assent.

The Chairperson:

We now move into closed session, and I ask members of the public to leave.

Mr Paisley Jnr:

Before we move to closed session and while the session is still being recorded by Hansard, I have issues with issue A, which is about the attorney general. I am interested in the issue of reporting and how that takes place, as was discussed earlier. It would be useful to get clarification on where the office will be based, the number of staff that will be located in it, who will appoint those staff and the budgetary requirements for the office.

The Chairperson:

All those issues will be in the report.

Mr Attwood:

The answer to the final question is £1.6 million a year and a £500,000 set-up cost.

The Chairperson:

We now move into closed session.