



Northern Ireland  
Assembly

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## **COMMITTEE FOR JUSTICE**

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# **OFFICIAL REPORT (Hansard)**

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### **Public Prosecution Service: Draft Consultation on Governance and Accountability**

17 November 2011

**NORTHERN IRELAND ASSEMBLY**

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**Members present for all or part of the proceedings:**

Mr Paul Givan (Chairperson)  
Mr Raymond McCartney (Deputy Chairperson)  
Mr Sydney Anderson  
Mr Seán Lynch  
Mr Alban Maginness  
Mr Peter Weir

**Witnesses:**

Mr Gareth Johnston ) Department of Justice  
Mr David Lennox )

**The Chairperson:**

I welcome Gareth Johnston and David Lennox from the criminal justice policy and legislation division of the Department of Justice (DOJ). The session will be reported by Hansard. I will hand over to Gareth, and then members will have some questions.

**Mr Gareth Johnston (Department of Justice):**

Chairman, the Committee will be aware, not least from references when we were discussing the Department's legislative plans, that we have been looking at arrangements for the governance and accountability of the Public Prosecution Service (PPS), particularly the role of the Attorney General in relation to the PPS. The Assembly and Executive Review Committee recommended

that the issue be considered by the Committee for Justice.

I should be clear at the outset about responsibilities. The PPS is independent, and since devolution it has been a non-ministerial department in its own right. The Department of Justice is not responsible for it, although, of course, we work very closely with it on a range of issues affecting the justice system. However, after discussion with the First Minister and the deputy First Minister, it was felt that DOJ should lead on the consultation, given the Justice Minister's wider interest in the general effectiveness of the justice system.

The draft consultation paper, which the Committee has seen, looks at the history of arrangements for accountability for prosecutions. For now, however, I will focus on the current position and what got us to it. The criminal justice review in 2000 looked at a wide range of international models of how prosecution services were governed and held to account and at the roles of Attorneys General across the world. Its conclusions emphasised the independence of prosecutorial decisions. The review felt that that position best suited the situation in Northern Ireland. Therefore, it recommended that there should be no power for the Attorney General to direct the prosecutor in individual cases or on wider policies. Instead, it recommended that there should be a consultative relationship between the prosecutor and the Attorney General and that such a relationship should be underpinned in statute. However, the criminal justice review envisaged that the Attorney General should be answerable to the Assembly for the work of the PPS in general terms, subject to Assembly Standing Orders.

Many of the arrangements recommended in the review found their way into the Justice (Northern Ireland) Act 2002. That is set out on pages 8 and 9 of the draft consultation paper. However, there is an important issue about what the Justice Act says and does not say about answerability. It says that the Attorney General may decline to answer certain questions, but there is no specific power in the Act for the Attorney General to answer in the Assembly. That point has been discussed at the Committee on Procedures, and there is a reference in the paper to the Hansard report of that Committee meeting. The net effect is that there is no one to answer questions about the PPS on the Floor of the Assembly.

I should mention, although it is in the paper, that the arrangements in the Justice (Northern Ireland) Act 2002 are underpinned by a concordat on the independence of the PPS, which was signed by Her Majesty's Government and by the Executive on devolution. If we were to change

the legislation, concomitant changes would be likely to be needed to that concordat. That would have to be raised with Her Majesty's Government.

I do not want the Committee to have the impression that there are no arrangements for accountability for the PPS. Indeed, the paper lists them. There is clear accountability on finance and administration matters, and, in the concordat, there is a commitment from the PPS that, on other issues that are not to do with finance and administration, it will be as helpful as it can to the Assembly subject to the overriding requirements of the interests of justice. There is, of course, the unified inspectorate, the Criminal Justice Inspection, which includes the PPS in its remit, and there are other arrangements such as the giving of reasons and the PPS's consultation of policies. Recently, it consulted very widely on policies around, for example, the prosecution of rape and the prosecution of road traffic offences. There is a code for prosecutors, which is published and subject to approvals. There are the annual reports of the PPS, and there is provision for those in the legislation. Of course, there is the mere fact that much of what the PPS does is done in open court and in public. However, there are still the broader questions of what is the right overall balance between independence and accountability. Those are dealt with in the paper, and there is the specific issue of answerability in the Assembly.

To help inform public consideration of these issues, the paper includes sections on human rights, the nature of independence and on comparators from elsewhere. On human rights, the paper sets out the relevant international instruments, but those do not really point to any particular model of oversight. Various models are used across the world. On independence, the paper makes the point that the human rights material supports the idea that there should be limits on any questioning. It is difficult if questioning, be it in an Assembly or elsewhere, starts to look like a retrial of the facts of a case without the procedural safeguards that are there for a criminal trial or, indeed, if it starts to assail the reputation of a suspect without those procedural safeguards. The Justice Act recognised some of those issues when it said that an Attorney General should not have to answer where answering might prejudice proceedings or be against the public interest, and I suggest that whatever model we adopt for the future, those remain important safeguards. It also looks at other models, including those in England and Wales, where a protocol has been adopted by the Attorney General. Baroness Scotland and Mr Grieve have said voluntarily that they will not use their power of direction other than in national security issues.

So, having looked at all the background and the various models elsewhere, the paper comes to

four options. Option 1 is that we keep the current arrangements, namely the consultative relationship between the PPS and the Attorney General. It notes that that can be a challenging arrangement and that it reflects a similar position in Ireland. However, under that option, there would be just one adjustment. Before devolution, references of cases that were thought to be unduly lenient in the sentence were considered by the Attorney General for reference to the Court of Appeal. The responsibility for that moved, on devolution, to the Director of Public Prosecutions (DPP). The DPP has certainly been using that power, and, since devolution, five cases have been referred. However, we propose that even under option 1, it would move back to the Attorney General. We feel that a greater separation of that power would be useful. So, option 1 is essentially the maintenance of the statutory consultative relationship.

Option 2 puts a general responsibility on the DPP. The DPP would become responsible to the Attorney General for the performance of his or her functions. That would be accompanied by an explicit power for the Attorney to answer in the Assembly, and a concomitant duty on the DPP to keep the Attorney General informed so that that answerability could happen. The Committee will notice that that does not include a power of direction for the Attorney General. Nevertheless, the accountability under option 2 would be wide-ranging. As well as specific prosecutorial matters, it would cover efficiency, effectiveness and the contribution to wider priorities for the justice system, including speeding up justice and dealing with victims. Therefore, option 1 is the consultative relationship. Option 2 is a general responsibility on the DPP to be answerable to the Attorney for the performance of his functions.

Option 3 includes option 2 — general accountability — but also provides a backstop power for the Attorney General to commence or stop a prosecution. Clearly, in such cases, there would be discussion between the PPS and the Attorney General. No doubt, both would seek to reach agreement. Ultimately, a decision on prosecution under option 3 would be for the DPP to take. However, the Attorney General could launch a prosecution. Obviously, that would be in exceptional circumstances, and the paper notes the pros and cons of that option to help members consider it.

Option 4 is the full superintendence of the DPP by the Attorney General. That would include a power of direction, which would mean that the Attorney General would, in effect, have the final say in whether a prosecution did or did not happen. In some ways, that takes us back to the pre-devolution situation, when there was a power of direction, although it was never used. That

having been said, it certainly informed the nature of the relationship between the DPP and the Attorney General. Under option 4, the paper looks at how that power of direction may be framed and the provisions that might be put around it.

Finally, the covering paper notes that the Assembly and Executive Review Committee and the Committee on Procedures have previously had an interest in these issues, and it may be that this Committee would want to communicate with them.

There will be various views on which of the four options represents the best balance between independence and accountability. Today, we are happy to start to take any that the Committee wants to express. However, the consultation paper presents the four options without, at this stage, trying to settle on one. We want to hear views and be informed by the consultation. Subject to the Committee's views, the Executive will be invited to approve the consultation, which will be launched publicly. Of course, we will report back to the Committee on the results and that will be an opportunity for the Committee to express further views. Any necessary legislative changes could be taken into the Department of Justice's legislative programme for next year.

**The Chairperson:**

Thank you very much. I do not have any questions other than saying that the current arrangement is not satisfactory and that you have a document to consult on. I am happy for the draft to be consulted on; so I have no other issues to raise.

**Mr A Maginness:**

I have a few questions. You say that there some limitations on the PPS as it presently stands, one example of which involves money and budgets. They are committed to being helpful, which I do not really understand, but I am reflecting what you said. Then there is the Criminal Justice Inspection, which has the PPS as part of its remit. I am not sure if there were any other matters. It seems to me that that is fairly light on effective accountability. What we have at the moment is a DPP and a PPS which is really accountable to no one. Is that a fair summary? How would you respond to that?

**Mr Johnston:**

Those are, perhaps, not the terms in which I would put it. *[Laughter.]*

**Mr A Maginness:**

You are such a diplomat.

**Mr Johnston:**

I would express it in a different way. The emphasis of the criminal justice review was very much on the manifest independence of the PPS and of prosecutorial decisions. The reasoning was that the review wanted to promote confidence in prosecutions. At that stage, in 2000, given the background then and all that was happening, the review felt that that was best done by the manifest independence of the PPS. Whether the same considerations still obtain in 2011 is the central question that the paper publishes.

**Mr A Maginness:**

I understand that reasoning and fully sympathise with it. The DPP must be completely independent in the exercise of the function of whether or not to prosecute. I do not see any serious problem with that. However, there is an issue of accountability, and I am not certain that there is any real accountability — certainly not to any political body. The question in all this is whether the PPS is accountable in some way to the Attorney General. That is the way I read it. Is that a fair assessment of the situation?

**Mr Johnston:**

Yes. The paper focuses on the relationship between the PPS and the Attorney General, what that accountability should be, and then, in turn, how the Attorney General answers to the Assembly for issues relating to the PPS.

**Mr A Maginness:**

Can I just take the latter point? The Committee on Procedures has a role to play in this, but I would have thought that the Attorney General must be able, at some stage, to address the Assembly and answer questions in the Assembly or at an Assembly Committee. I think that that should be a given — I am sorry; I do not mean that in any disrespectful sense, Chairperson.

**The Chairperson:**

No offence taken.

**Mr A Maginness:**

I would have thought that we would accept that as a common position, unless there is any great opposition to that. I would have thought that that was necessary in any event.

I have a further point to make, which is about referral of cases to the Court of Appeal. I would have thought that the Attorney General should make those referrals. The PPS is, in effect, almost acting as a judge in its own cause. To some extent, it would have been involved, perhaps in a very limited sense, in the decision-making of the court. The PPS has the function of deciding whether a case should go to the Court of Appeal, but it may well not be in its interests for a case to go down that route if it has its fingerprints on the case. It is better to have that one step removed from the PPS.

**Mr Johnston:**

I will go back to one specific point that Mr Maginness raised about the concordat on the independence of the PPS. In saying “being helpful”, I was probably using shorthand. It relates to the provision of information to the Assembly and to Committees. The PPS has made a commitment that if it can make information available that does not compromise the interests of justice it will do so.

**Mr A Maginness:**

The PPS is really only making a concession in that instance. It is not an obligation.

**Mr Johnston:**

Arguably, it is not an obligation in the legislation, but it features prominently in the concordat.

**Mr A Maginness:**

Finally, I would have thought that the only serious issue is the power of direction, and whether or not the Attorney General could direct in a case. Should that function be given to the Attorney General in addition to the DPP?

**Mr Johnston:**

In many ways, it boils down to who makes the final decision. Does the DPP make the final decision, albeit with a general accountability to the Attorney General so that he can be answerable to the Assembly, or does the Attorney General make the final decision, as is the case when you

have a power of direction?

**Mr McCartney:**

Is there a time line for this?

**Mr Johnston:**

Subject to the Committee's views, I hope to get it to the Executive, if possible, on 8 December so that we can get it published.

**The Chairperson:**

OK, we clearly do not have an issue with your paper, so you can crack on. Thank you very much for coming to the Committee.