Northern Ireland Assembly

Committee for Justice

# OFFICIAL REPORT (Hansard)

## Scope and Nature of Judicial Independence/Forensic Science Northern Ireland: Briefing by the Attorney General

5 July 2012

# NORTHERN IRELAND ASSEMBLY

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Scope and Nature of Judicial Independence/Forensic Science Northern Ireland: Briefing by the Attorney General

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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 Stewart Dickson
Mr Tom Elliott
Mr Seán Lynch
Mr Patsy McGlone
Mr Peter Weir
Mr Jim Wells

**Witnesses:**

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|---|---|
| Mr John Larkin | Attorney General for Northern Ireland |
| Ms Mairead Bunting | Office of the Attorney General for Northern Ireland |

**The Chairperson:** The Attorney General is attending the meeting to discuss the points he made in his letter of 23 April regarding the prosecution against the former Northern Ireland Secretary of State Peter Hain and Biteback Publishing for criticisms of judges or judicial decisions, what constitutes contempt of court, and the view he expressed that fair criticism of judges and judicial decisions is not only a right but may be, on occasions, a duty. We will then move on to discuss the draft guidance for Forensic Science Northern Ireland on the exercise of its functions in a manner consistent with international human rights standards.

I formally welcome the Attorney General for Northern Ireland, John Larkin QC, and Mairead Bunting, senior principal legal officer. The session will be reported by Hansard and a transcript will be published in due course. I will hand over to you, Attorney General, and I am sure that members will have some questions after that. We will deal first with the

contempt issue and any questions on that and then move on to the forensic science issue.

**Mr John Larkin (Attorney General for Northern Ireland):** I am very grateful, Chairman. As always, it is a pleasure to be here to attempt to assist the Committee in its deliberations. I regard engagement with the Committee as a particularly important part of my work. I am conscious that you have a particularly packed programme this afternoon, not merely with us but with a number of people who are lined up to appear afterwards. Therefore, I thought that I would not make any opening remarks on the first issue, as you have my letter of 23 April. Instead, I invite the questions so that I can engage as soon as possible with the issues that interest the Committee.

**The Chairperson:** OK, that is fine. I have a few questions to kick off with. There was the initial publication and the Lord Chief Justice's reaction to that in the statement that he made. Subsequently, you decided to proceed with a contempt of court action around scandalising the judge. Was there contact between the judiciary and your office to initiate your office's work in taking this case against Peter Hain, or was it a decision that you took solely and without anyone else speaking to you about it and seeking to encourage you or otherwise?

**Mr Larkin:** The decision is entirely mine. It is true to say that I was written to by Lord Justice Girvan, who drew my attention formally to the nature of Mr Hain's remarks.

**The Chairperson:** Can you go into the nature of that?

**Mr Larkin:** Using the comparator of a complainant in a criminal case is a highly imperfect analogy, but let us stick with that for now. Lord Justice Girvan, very properly, formally drew my attention to the matter and asked me to consider it. There is no question, as it were, of him making any strong plea for any particularly course of action. Constitutionally, it is not a matter for him but a matter for me. He, very properly, drew the matter to our attention for us to consider it.

**The Chairperson:** Is that normal? Would it not have been the Lord Chief Justice's office that would have —

**Mr Larkin:** No. If you cast your mind back to an issue that arose during an environmental judicial review either last year or the year before, you will recall that remarks had been drawn to a judge's attention during the course of a hearing. That judge wrote to me formally to draw my

attention to it and to invite me to consider what action, if any, I thought appropriate. On that occasion, no action was taken.

**The Chairperson:** I think that it was the same judge.

**Mr Larkin:** It was.

**The Chairperson:** Was it pointed out in that letter that the avenue through which you could take a case was a law about scandalising the court? Most commentators have said that it is archaic and obsolete, and it is subject to debate in the House of Lords?

**Mr Larkin:** In general terms, I was invited to consider it within the rubric of that. I have to correct you Chairman, or at least invite you to clarify whether you have done a straw poll of the commentators. In Australia and New Zealand, where people are not normally thought of as being particularly thin skinned, this species of contempt is alive and well. There is debate about whether it should be, but no one has suggested that it is not there.

**The Chairperson:** Subsequently, proceedings commenced and were then withdrawn. I think the official status is that they are kept on the books.

**Mr Larkin:** The proper way to put it is that the court was invited to make no order, and the court made no order. It would not have been proper to have invited the court to make an order in the absence of a finding, but no order reflects the fact that no finding was, in the event, necessary.

**The Chairperson:** What struck me was the commentary from Biteback Publishing once that decision had been taken. It said that you took the decision not to proceed but that you had all of the information at the very commencement that in no way was Peter Hain calling into question the integrity of Lord Justice Girvan. At least from the media interviews that I have seem, it seems to make very clear that its position from day one never altered until you said that you had what you needed to proceed.

**Mr Larkin:** That is a little perplexing, as far as I am concerned. There are two things. The response to the statement by the Lord Chief Justice, to which you referred, was not at all of a conciliatory nature and not at all of a nature designed to reassure. If you look at the correspondence that is exhibited, and to affidavits lodged in court, you will also see that there is nothing remotely akin to the letter that arrived in May of this year. It is

helpful to get that other perspective on things. If you look at the analysis of the transaction in the House of Lords debates earlier this week, you will see that there was no suggestion that it was a letter that simply repeated the obvious or repeated what had been said earlier. That is certainly not the case. Let me put it very bluntly. If the response and the material contained in the letter of May had been uttered in reply to the statement of the Lord Chief Justice, there would have been no proceedings.

**The Chairperson:** Let me clarify something. To me, there are two issues. There is the individual who felt that what was said about him was inappropriate, and there is the broader confidence in the administration of justice. You obviously took the case because of the broader context, and not because an individual judge felt somehow that they were personally aggrieved.

At the time, Sammy Wilson said that there was a fear that an individual was able to use the state against Peter Hain. Would it be open to a judge to take a libel case, or can a judge challenge what is said about them only by going through your office? If I am critical of a judge and say something inappropriate about him or her, is it the case that they cannot take an individual libel case but would come to you to ask: "Has Paul Givan scandalised the court? If so, should he, therefore, be prosecuted as being in contempt?"

**Mr Larkin:** There are two important issues to clear up. First, and I probably cannot repeat this sufficiently often, criticising judges is, in itself, not at all improper. There is nothing at all improper about temperate, well-informed criticism. Indeed, if you want to see a ready source of temperate, sometimes hard-hitting, criticism of judges, you can go to the UK Supreme Court website and look at the speeches by the UK Supreme Court Justices. There, you will often see very hard-hitting analyses of individual judicial decisions. What you do not find, of course, is any improper imputation on motivation. So, let us park that. The second issue is that contempt of court, in particular this species of contempt of court, is not at all about protecting the sensibilities, far less the reputation, of individual judges. As you said, Chairman, it is precisely about upholding public confidence in the administration of justice.

The reputational interests of a judge can be protected at his or her election through an action for defamation, but that does not look after the public interest. A judge could decide that, because they have been outrageously defamed as a result of something said in the media about one of their judgements, they will go to court and privately settle the matter for a huge sum of money, but will do so in terms endorsed. The

public never get to hear what the terms of settlement are. The public may, perhaps, at best, forget about the issue, which may very often happen. However, if there has been damage to public confidence, that has not and cannot be repaired by a private action that may be settled, for example, in terms endorsed.

**The Chairperson:** That is why I do not understand why the Lord Chief Justice did not write to you. Surely, he, of all people, would be concerned about confidence in the administration of justice, as opposed to Lord Justice Girvan, who felt that confidence in the administration of justice could be at risk. With all due respect, one would have thought that the Lord Chief Justice, rather than someone who is beneath him, should have had the concern to initiate the correspondence with you.

**Mr Larkin:** It is important to bear in mind that one aspect of judicial independence that is perhaps not sufficiently emphasised is that, not only are judges independent of the legislature and executive, they are independent from one another. So, although the Lord Chief Justice does, as you say, have certain managerial functions, each judge has important calls to make. They cannot be influenced, steered or leaned on by other judges. That is a matter of choice.

The other point that might be made is that the Lord Chief Justice will have assumed, rightly as it happens, that I will have read his statement and be aware of the response to it.

**The Chairperson:** There is another aspect around this that I wanted to raise, but it eludes me for the time being.

**Mr Larkin:** I am sure that it will come back to you, Chairman. *[Laughter.]*

**Mr Elliott:** Thanks very much for that information.

I have two points. First, to the Attorney General, in your response to the letter from the Chair of the Committee, you say, in point one, that, in bringing forward proceedings:

> *"is firstly to inquire whether there is sufficient evidence of contempt so as to afford a reasonable prospect of success and secondly to evaluate, if there is sufficient evidence, whether proceedings are in the public interest."*

Will you outline a wee bit more around that? Obviously, you are very much viewed as the legal advice in the Northern Ireland Government.

There is a perception that you should actually realise whether there is enough evidence to take it that far.

**Mr Larkin:** First, you will know, Mr Elliott, that I am — by section 22(5) of the 2002 Act — statutorily independent. So, my act is my own and is not the act of any individual Minister or the Executive collectively.

The letter reflects the standard test for prosecution, which is a two-stage one. There is the evidential test, which asks whether there is sufficient evidence that is likely to secure a reasonable prospect of a conviction. The second test is whether is the proceedings are in the public interest. The evidence was there: the evidential test was met and remained. The point that was critical in the case in the public interest test was the letter from Mr Hain, which clarified his position. After receiving the letter, I took the view that continuing proceedings was no longer required in the public interest.

**Mr Elliott:** Your indication is that you had sufficient evidence to pursue the case if necessary.

**Mr Larkin:** Yes.

**Mr Elliott:** That leads me to my second point. Are you indicating that, in layman's terms, there was a climb down by Mr Hain?

**Mr Larkin:** I do not see what happened in those terms, and it would be churlish to seek to cast what happened as such. Again, one sees a helpful analysis in the House of Lords debate, where there was a hint from one of the Lords that Mr Hain, presumably on legal advice, wrote the letter which put him on the right side of the line.

**Mr Elliott:** Were there any winners or losers in this case?

**Mr Larkin:** The winner is the administration of justice, which had public confidence in its probity and integrity protected.

**Mr Elliott:** Do you feel that freedom of speech or freedom of view was a winner?

**Mr Larkin:** Freedom of view does not come into it, because, being a matter of opinion, it does not necessarily lend itself to external expression. Freedom of speech is, as you know, protected by article 10 of the European Convention on Human Rights, which expressly provides

for, among the exceptions, that designed to uphold the independence and authority of the judiciary. So, the proceedings were entirely consummate with the framework of article 10 protection.

Again, I refer to the very interesting speeches that you will see on the Supreme Court website. There, it is absolutely clear that there was no reticence on the part of senior judges to, with integrity, probity and often a good deal of fairly robust comment, critique the work of other judges. That is not simply a right that is reserved to the judiciary; it is open to every citizen. To summarise, freedom of speech was in no way impaired by the application or affected by its conclusion.

**Mr Elliott:** Could the layperson conclude that they should be extremely cautious about being critical in the future?

**Mr Larkin:** I would have thought not. If people are speaking reasonably, even if they are speaking a little bit intemperately on occasion, there is no question of an off-the-cuff remark or word spoken in haste ever leading to proceedings such as those that we are discussing. It is important to remember the context of the case. The words were not spoken in a stump speech somewhere in Wales; they were included in the text of a book written for money and written, not in the heat of the moment, but after some due reflection.

**Mr Dickson:** I thank the Attorney General for coming to speak to us today. You have very helpfully explained the legal context within which you took your actions. Going back to what Mr Elliott referred to as the layman's perspective, even though there may very well have been a legal right or imperative on you to take the action that you took, did you do a commonsense risk assessment of the damage or benefit to your reputation, or indeed the reputational damage to others, before arriving at the decision to proceed?

**Mr Larkin:** That is a very good question, if I may say so. I have to look at issues quite coldly and dispassionately. Happily, under the 2002 Act, the Attorney General is not a party politician. A party politician, or a Minister who is trying to sell policy, has to be hugely concerned about those kinds of issues. In many ways, I have to be somewhat insulated. If I take the view that a particular course of action is required in the public interest, I must take it, even if I think it will be an unpopular step. Even if it is one that will attract a good deal of opprobrium, I must nonetheless take that step. That is why, for example, judges have particular independence. It is no accident, that under our new regime, post-2002, the Attorney General is also independent. Any law officer worth his or

her salt will often have to take decisions which may be understood or not, and which may be popular or unpopular. The important aspect is the judgement in conscience that a particular course of action is required. If the reflection leads to that conclusion, popularity does not enter into it.

**Mr Dickson:** So therefore the public can be assured that the action that you took was not to assist or help your legal colleagues and friends through some old boys' network?

**Mr Larkin:** Heavens above, no. Certainly not.

**The Chairperson:** Mr Dickson makes comments with regard to reputational damage, benefit or otherwise. I am sure that you have read what has been said very recently in the House of Lords about it. It appears to me that in London, they are certainly looking here and that the action that was taken has damaged the reputation. Lord Pannick said:

> *"This bizarre episode has damaged the reputation of the legal system in Northern Ireland."*

Lord Bew said that it has had a "chilling effect" on freedom of speech and the former Northern Ireland Lord Chief Justice Lord Carswell said that judges have to be able to take these things. He said:

> *"they have to shrug their shoulders and get on with it."*

**Mr Larkin:** Let us take those in reverse order. It was interesting to read Lord Carswell's remarks. He referred to himself as being scandalised. I am not sure that Lord Carswell was ever scandalised. No doubt, people said things about him that he may have found unpleasant. However, I do not think that any of those things would have led to a crisis of confidence in the administration of justice. Memory is, of course, a fickle instrument at times, but I cannot recall a single occasion when Lord Carswell was criticised by a Minister or former Minister, and that is what we had here. So, with the greatest of respect to Lord Carswell, his comparison with what happened to Lord Justice Girvan is, it strikes me, singularly inapt.

Lord Bew talked about a "chilling effect". I cannot say that I see much evidence of that. People are still able to speak, pretty robustly at times, about judicial decisions, and quite right too, as I keep on emphasising. As for Lord Pannick, that is the assessment from his perspective in the House of Lords. I simply have to say that it is not mine.

**The Chairperson:** I think that there has been a chilling effect, certainly among colleagues that I speak to. Here we had a former Secretary of State against whom the Attorney General was prepared to take an action, and a very senior member of the judiciary who has, in writing, complained about what was said. If he is prepared to take on a former Secretary of State, then I had better but only say great and wonderful things about our judiciary.

**Mr Larkin:** Chairman, you disappoint me immeasurably. I would have thought that you were made of sterner stuff.

**The Chairperson:** Just to clarify, I said "among my colleagues".

**Mr Larkin:** That, at least, is a partial reassurance.

Let us be very clear about this. The identity of the publisher — in the technical sense, the writer — is neither here nor there, save in this sense: the words of a member of the Privy Council and former Secretary of State, which are damaging of a judge until they are clarified, are globally different from the kind of words that are written on a sandwich board and with which a disappointed litigant marches up and down outside a County Court to complain about the bad judgement that he has got. That is why I urge you to look at the some of the speeches by the Supreme Court of the UK. You will see quite hard-hitting analysis of judicial decisions. When it comes to the Strasbourg court, you will see that there have been a number of criticisms of Strasbourg decisions, from time to time. It seems that citizens, Members of Parliament and Members of this House are free to express their mind about those important decisions, and so they should.

Let me take the recent famous case of Italian prisoner voting rights. That is a big constitutional question. It strikes me that if Members of this House or other parliamentary bodies are not expressing views about that rhetorically, who will do so? It strikes me that they must express their views about that. I see the value, at least in part, of this exchange. If reassurance is needed that free, fair and robust criticism of the judiciary is something that every citizen has as his or her birth right, I can give it.

**Mr McCartney:** Thank you for your presentation. Being very mindful of the contempt law, as I am, I will take care not to scandalise any judges. I am sure that some of them could be scandalised.

**Mr Weir:** No more time in clinky, Raymond.

**Mr McCartney:** I have a couple of questions. Does the letter of clarification from Peter Hain put him within point 3 in your letter?

**Mr Larkin:** I prefer to say that it takes the sting out of what he said. Those of you who are interested in this whole business could do very well to read the report commissioned by the then Attorney General, Mr Peter Scott QC. It analysed what had happened in terms of the conduct of the litigation. You saw that courts were being misled on not one but two occasions, for example. It was a deeply unedifying story in some respects. Therefore that is a useful prism through which to look at what Mr Hain says in his book.

In fairness to Mr Hain, he also makes a point about judicial review. He says that judicial reviews very often became a substitute for politics in Northern Ireland. I can see how that remark would come to be made. Those are legitimate points. It does not say that Mr Hain cannot say, "I lost in the first instance very heavily, but, in the Court of Appeal, I lost only on fairly narrow ground". Again, that is a perfectly proper point for him to make.

**Mr McCartney:** I know that an early day motion was tabled in the British Parliament. Was there any contact between that Parliament and your office in relation to the early day motion?

**Mr Larkin:** Not formally, although I had the pleasure of speaking to, and writing to, the sponsor of the early day motion, in which I set out my perspective. One of the points I made to him, and I make it again here, is that if one rolls out the phrase "guardian of the constitution" in the contemporary period, people tend to think that it refers to the judiciary. It does not. The author of the phrase, William Blackstone, used it to refer to Members of Parliament in the 18th century. In many ways, I think that issues of constitutional propriety, human rights and the rule of law are too important to be left to judges. I think that parliamentarians have to assert themselves increasingly as guardians of the constitution. That was the contact, and I was glad to have it.

**Mr McCartney:** Peter Hain had a particular role in the appointment of judges, and he was a former British Secretary of State. If it had been an ordinary person who had written that and said the same thing in an autobiography, would it have been of the same concern?

**Mr Larkin:** No. I used the analogy earlier of the sandwich-board man walking up and down, ranting and raving about a bad decision. Plainly, the standing of the writer or speaker is a significant factor.

**Mr McCartney:** Stewart Dickson made the point about enhancing reputations. Do you know whether this has increased the sales of Mr Hain's book?

**Mr Larkin:** I suppose that I should not express regret or pleasure. However, my educated guess would be that it probably did.

**Mr Weir:** Mr Larkin, I wonder in defending the guardians of the constitution — and you seem to have placed us in that bracket — whether it is unfair criticism that triggers such actions. I do not know whether you will prosecute Stephen Nolan in the morning for what he has said over the past number of years. That might be —

**Mr Larkin:** Do not tempt me. *[Laughter.]*

**Mr Weir:** I want to make a few points and get your views. I am not sure whether we are left with a very satisfactory situation. Leaving aside the concern raised about any chilling effect in politicians and the different interpretations that legal commentators have produced; if we take it to the level of what might be described as the ordinary man in the street, or the public, who are meant to be protected, the grounds for the prosecution were that confidence in the administration of justice had been undermined. Do you seriously believe that there is a single member of the public whose view on the administration of justice was, in any way, altered or damaged by Mr Hain's comments, or that their confidence in the judicial system was restored by the settlement?

**Mr Larkin:** Let us take that in pieces. The first is the act of the sandwich-board man, and no one takes him seriously.

**Mr Weir:** Some people may take the sandwich-board man more seriously than Peter Hain. It depends on their perspective.

**Mr Larkin:** That may be your perspective Mr Weir; I will not comment on that. In the abstract, it would be foolish to suppose that the status of a Privy Councillor and a former Secretary of State would not lend an authority to the words that the sandwich-board man would not have.

**Mr Weir:** With respect, Mr Larkin, where is the dividing line? You could take the two ends of the spectrum — and you seemed to have done that — with the Privy Councillor Peter Hain and the sandwich-board man. Where is the dividing line between someone who is regarded as significant enough to have an impact on public confidence and someone who is regarded as insignificant? Is it between MLAs and councillors, or councillors and members of the public? Where is the dividing line? I think that one of the concerns about the position in which we have been left is that it seems that the waters have been left more muddied than clear.

**Mr Larkin:** With respect, Mr Weir, I do not think that they have been. First, it is not a question of the issue being triggered by a particular rank. The status may be, in fact —

**Mr Weir:** With respect, Mr Larkin, you have given us indications previously that it has a very significant impact.

**Mr Larkin:** Yes, but it is not triggered by rank. A global view is taken of the nature of what has been said and the medium through which it was said. Moving away from the example of the sandwich-board man, it is impossible to imagine intemperate words in a public house, for example, having any significant impact on public confidence.

To take you back and to take this out of the immediate context, the classic collective biography of the Irish judiciary is F E Ball's 'The Judges in Ireland, 1221-1921', which takes the position, I think, up to 1922. For the latter part of the 19th century and the early part of the 20th century, he gives the religious and political allegiances of the judges. Why did he do that? He did it because it mattered. To say that someone was a Roman Catholic and a unionist or a liberal was material information. Historically, we have had huge divisions on this island. Issues of public governance are often hugely contentious, and when an important figure and a previously important figure in government attacks a judge and not merely a judgement, that is capable of having a very significant effect on the perception of some people.

**Mr Weir:** Where is the evidence that this has had any impact whatsoever on the perception of any member of the public?

**Mr Larkin:** Fortunately, or unfortunately, Mr Weir, I am not going to try the case now, particularly since it has resolved.

**Mr Weir:** With respect, clearly, in taking the case, you felt that there was at least a prima facie case to believe that there was an undermining of public confidence. What is the basis upon which you believed that there was any impact on public confidence? I doubt whether you would be able to find anybody on the street who would say that it had any impact on them whatsoever.

**Mr Larkin:** The test is not the straw poll of going out into the street. The test is the judgement on the likely impact of the words.

**Mr Weir:** What is your definition of what constitutes fair and unfair criticism? You seem to have drawn a distinction.

**Mr Larkin:** That is a useful question. In many ways, even if criticism is unfair, that, in itself, will not be sufficient to bring it into this territory. For example, one could say; "Oh, that is a silly judgement." On analysis, that might be a very unfair thing to say. It might be a very thoughtful judgement but one that you simply do not like. The mere fact that unfair criticism is uttered is very far from taking us into the territory of contempt of court.

**Mr Weir:** Mr Larkin, do you accept that we are left with a much more muddied field as a result of this? I suspect that the answer will be no. However, take your evidence today that a remark can be a little bit intemperate. Presumably, if it is a bit too intemperate, then it would constitute unfair criticism. It can be a little bit unfair provided that it does not go too far. It potentially needs to be given by someone who could have a significant impact. It could be hard-hitting but still considered unfair. Where does that leave public figures with respect to their attitude to what they say about any judge or judicial decision? Anybody looking in from outside would not have a clue whether something that they were going to say counted, on your definition, as being potential contempt or simply robust, fair criticism?

**Mr Larkin:** As I have indicated to you, it does not have to be fair criticism. The test is whether the words are capable of damaging public confidence in the administration of justice. The words can be foolish, fair or unfair, but, if they do not give rise to a significant risk to public confidence in the administration of justice, no conceivable risk to the speaker arises.

One of the problems is that law can take us so far. Law cannot take us the whole distance. I would like to encourage a culture in which there was high quality debate and informed criticism about judicial decision-

making. The mere fact that criticism may not be particularly well-informed is neither here or there. It strikes me that, particularly in this Committee and Assembly, there should be a culture of informed evaluation of judicial decision-making. I see no reason why that cannot happen.

**Mr Weir:** I doubt if anyone would disagree with you that it should be informed. However, in informing the attitude of a public representative or anything that they say, we seem to be left in a void. From what you have said, it is very difficult for anyone to make a comment and know with a high level of certainty whether it falls on one side of the line or the other. I have to say that I think that the line has become more and more blurred the more that you have said. That suggests to me that the law itself is one that has fallen into contempt.

**Mr Larkin:** As you know, this is a common-law offence, and the definition moulds and adjusts with time. If the Assembly decides to look at this and legislate afresh, that would be entirely appropriate.

**Mr Weir:** Given the mess that we have got ourselves into, would you, as Attorney General, support that course of action, and do you feel that it would be a worthy to look at this again and potentially take legislative action?

**Mr Larkin:** The problem with long questions is that you throw a bit in at the end and expect me to comment. I do not think that we are in a mess at all. I actually think that this is very straightforward. Rather than keeping the matter abstract, you might want to test it with concrete propositions. I adverted earlier to an environmental judicial review and the references to the approach to judicial review in previous cases by the then Environment Minister. Did I consider that those were in contempt of court? No, I did not. The Minister is a man very properly given to forthright speech. He did not commit any contempt of court. It would assist me, at this meeting, to look at concrete instances which you think —

**Mr Weir:** What is the position of the law at present as a result of this? I would not expect you to say anything else, but do you think that it is a commonly held view that it is in a bit of a mess?

**Mr Larkin:** I am not sure that the issue arouses a great deal of passion, so I am not sure —

**Mr Weir:** I have no doubt — which is one of the key points — that Mr Hain's original wording and that of the settlement did not make a jot of difference in undermining confidence in the administration of justice. That is one reason why this case should not have been taken in the first place, but I suspect that we may not be of a common mind on that.

**Mr Larkin:** No, but let me hastily say that, if you were not a Member of the Assembly, and, as a member of the Bar you had been appointed Attorney — obviously you could not combine both roles at present — it would have been open to you to take quite a different course. One of the things that we have to bear in mind is that there is a spectrum of positions in which a range of views are legitimate. I can see the force in the opposite case. I do not ask people to share my view of my decision, but I recognise the range of views that are possible on an issue such as this.

The one point that I would make — and I would go some distance with what you are saying — is that this is a common-law offence and, therefore, there is always an issue, particularly with the older common-law offences, that, if they are going to be used, they really ought to be refreshed and put on a proper statutory basis. That gives the opportunity to adjust, narrow or refine —

**Mr Weir:** On that possible single note of agreement, Chairperson, I will leave it there.

**Mr McGlone:** I come to this as someone who does not have a legal background, Mr Larkin. It is an interesting case, because reputations are involved. Those who are interested in it are talking about archaic law and about two people who are well able and resourced to fight their own battles, yet one of them looks to, and gets, the support of the public purse to do so. We are guardians of the constitution, but we are also guardians of the public purse. I have heard some of the arguments. What weight was given to the argument that, in making the decision to support a judge in doing this, that person could not have engaged his or her — well, there are no hers, that is another thing —

**Mr Larkin:** There are.

**Mr McGlone:** Oh, are there?

**Mr Larkin:** In the County Court.

**Mr McGlone:** I meant at the higher level. What weight was given to the potential cost had the case gone ahead?

**Mr Larkin:** It is an important issue, but one has to be very careful, because we can end up in a certain territory. Let us, if we may, take it out of the present setting and look at the issue of a standard prosecution by the PPS. If the PPS had made a decision that prosecution is in the public interest, for example, for theft, and the evidential and public interest tests are met, and on the first appearance in the Magistrate's Court or whatever place on election, the accused opts for jury trial, that, as you well know, very clearly increases the expense of the proceedings. However, the decision has been made that the proceedings are evidentially sound and that they are in the public interest. It would not be appropriate for the PPS, I think, to then ditch an otherwise important case because the defence had tactically moved to more expensive terrain.

The response might be two-fold, and it would then be over to the legislature to consider strongly whether the right of election should continue to exist. Indeed, I know that the costs of legal proceedings, in general, continues to exercise the Committee. Where the judgement is made that the evidence is there and that the proceedings are justified in the public interest, issues of pure cost can play only a very small part in that decision.

**Mr McGlone:** I am not talking about a significant issue of going to a jury trial or whatever; I, as an ordinary non-legal person, am talking about archaic legislation that has not been very much used but has been picked out in defence of probably a very well-paid judge, who could be used to fighting his own battles.

**Mr Larkin:** I have to correct you, Mr McGlone: it is not done in defence of the judge. The issue —

**Mr McGlone:** Sorry; I am relating to you what the public perception is, which is, for those who are —

**Mr Larkin:** It is important, then — and I hope that occasions such as this will serve to do it — to emphasise that this is not about protecting individual judicial reputation. As you rightly say, a judge can look after that himself or herself. This is about protecting public confidence in the administration of justice.

Take the matter outwith the realm of the legal entirely. Say you have a surgical department of a moderately sized hospital, and a local journalist writes something entirely unfounded and hugely damaging about the head of surgery. The head of surgery, of course, is entitled to bring his or her action for damages, but let us say that the head of surgery is going somewhere else anyway and is changing jobs. Say that he comes to a private arrangement, as he is entitled to do, with the person who has defamed him. Say that that is settled, the terms are endorsed in counsels' briefs, and are confidential, so the public do not hear about them . The head of surgery's reputation, as far as he is concerned, has been assuaged by the award of damages and by the settlement, but what about the public? What about the people who ill-advisedly decide not to undergo important surgery because of the damage to the reputation of the surgical department? There is no protection for such as condition at present outwith defamation, but there is protection as far as respect for the administration of justice is concerned, and it is through the application to commit for scandalise and contempt.

**Mr McGlone:** I have one wee question. I do not know whether you are in a position to answer this: who pointed out that law? Did you discover it, or did the judge point it out to you?

**Mr Larkin:** Oh no. I am not flattering myself unduly, Mr McGlone —

**Mr McGlone:** Were you aware of it?

**Mr Larkin:** Of course, I am aware of the law.

**Mr McGlone:** Sorry; I am trying to just crystallise this for my own mind. In his correspondence with you, did the judge say, "Mr Larkin, it is this piece of law here."

**Mr Larkin:** He drew attention to the nature of scandalising contempt, but — and I hope that this does not come across as unduly arrogant — it is an area of the law with which I was reasonably familiar.

**Mr McGlone:** I am not disputing in any way your knowledge; I just wanted to know whether he signposted you.

**Mr Larkin:** Bear in mind, of course, that the issue had been flagged up by the Lord Chief Justice in his statement.

**The Chairperson:** Were you also familiar with how often anyone had prosecuted a case of it?

**Mr Larkin:** Yes, I was. There is no shadow of a doubt that it is not resorted to frequently. That is absolutely right as far as reflects these islands. If you look at Australia or New Zealand, you will see that scandalising contempt seems to be in rude good health. It is resorted to fairly frequently in that part of the world.

**The Chairperson:** As regards contempt and slander and all of that, people can be very precious about what others say about them. The difference here is whether the judiciary has, as a vehicle, the Attorney General's office to do its bidding. Patsy has just left, but he highlighted a public perspective that somebody was pretty annoyed about what was said about them and asked the Attorney General to prosecute. The public may ask why their taxes are being used in a case in which a judge feels offended by what was said about him. I hear what you say about the global picture of the administration of justice, but that is not what Joe Bloggs may see it as. I need to be careful, because I cannot speak for everyone here, but certainly at Westminster it was perceived as an attempt to muzzle the politicians.

**Mr Larkin:** First, there is no question of doing the bidding of the judiciary. It is important to distinguish between the individual interest of that judge, or even several judges, and public confidence in the administration of justice. After all, judicial independence is not for judges. It is for us so that we have confidence, when we take our cases to court, that the judge is not being swayed by external factors.

It is also worth bearing in mind that, even outwith the context of the judiciary, we often make special provision. The law of non-fatal offences against the person applies and protects all citizens. However, in the case of police officers, we have particular offences, as you will know, of assaulting a constable in the due execution of his duty and of obstructing police. We have those offences, not because we take the view that police are special human beings. Very many of them are, as it happens. We do it because they are on the front line of protecting the rule of law, and we have to have special protection for the rule of law. The issue of public confidence in the administration of justice manifests itself across a range of areas. The kind of offences that exist to protect police officers and others serving on the front line in the administration of justice is one aspect; the species of contempt known as "scandalising the court" — a regrettably old-fashioned term — is another.

**The Chairperson:** OK. The final question on this comes from Mr Wells and then we will move on to Forensic Science Northern Ireland.

**Mr Wells:** I have a very brief question, and it is the question that I always ask. How much did all this cost?

**Mr Larkin:** I am sorry that Mr McGlone has left the meeting. When he spoke of £300,000, I was wishing that I could be back in private practice. I rather quaked in my boots —

**Mr Wells:** A cheap case, in that case? Only £300,000?

**Mr Larkin:** I fear that I am going to hear again about Mr Wells's bad career choices, when he opted to study geography rather than law —

**Mr Wells:** An appalling career choice.

**Mr Larkin:** Well, the total costs were £8,100 plus VAT.

**Mr Wells:** What went wrong? That is terribly low. *[Laughter.]*

**Mr Elliott:** I hope that you are not encouraging him.

**Mr Wells:** A QC does not get out of bed for £8,000 pounds.

**The Chairperson:** Some would describe that as Yellow Pack justice.

**Mr Larkin:** You would not expect me to rise to that particular bait, Chairman. One has to be sober about this. Two counsel were engaged at Departmental Solicitor's Office (DSO) civil panel rates for their particular standing, and they gave, I have to say, absolutely excellent value for money.

**Mr Wells:** At that price? *[Laughter.]* I have had a QC ask me for a grand to sign a letter, so I cannot understand how that figure was arrived at.

**Mr Larkin:** The compliment may be due, at least in part, to DSO and the Department of Finance and Personnel (DFP). They have set out a series of rates. Those fees did not include brief fees, but purely an hourly rate. Of course, much turns on the hourly rate. You have commercial counsel in London charging enormous sums per hour, but

these were fair rates. There was a great deal of very diligent work done, and I agree that it was excellent value for money.

**Mr Wells:** I will just have to cancel my press release, then. *[Laughter.]*

**The Chairperson:** Finally, what if this had never been raised in public? When the book was published, I do not recall anyone highlighting page 90-something only for the judiciary. Therefore, if it had not been raised in public by the judiciary at the time, would you have read through Peter Hain's book, and, on coming to that page, there having been no public comment, which only came about because of the judiciary, would you have decided that you had to prosecute?

**Mr Larkin:** Chair, you are not, yet, a member of either branch of the legal profession, but you already know the first rule of cross-examination: do not ask a question that you do not know the answer to. You are absolutely right. The technical correction is that 'The Irish News' trailed that aspect of the story, so it probably would have seeped out that way. If you are asking whether I would I have dashed to my bookseller to secure a copy of Peter Hain's book, the answer is no.

**The Chairperson:** It may have been trailed, but it was elevated to a much broader media circulation because of the judiciary's comment about it.

**Mr Larkin:** It is easy to say that, had it not appeared in 'The Irish News' —

**The Chairperson:** I certainly would not have used some of the language that was in it, but, the judiciary raised it publicly, giving it credibility, public credence and circulation that it did not deserve. The fact that the judiciary raised it, and a member of the judiciary then wrote to you to complain about the damage that was done to his reputation, makes one ask whether the judiciary is shooting itself in the foot. On this occasion, it may have cost the taxpayer only £8,000, but I am sure that it cost Peter Hain expenses that he has had to settle for a case that ultimately never went to court. The whole thing seems to be a bit of a sorry mess.

**Mr Larkin:** It is worth repeating that, if there had been a reasonable response to the statement by the Lord Chief Justice, proceedings would not have been taken and would not have been necessary. If Peter Hain had said in response to the Lord Chief Justice that which he said to me in his letter in May, the proceedings would not have been at all called for.

**The Chairperson:** OK. Hopefully, we are clear. We will still need to tease out the issue of what is fair criticism and where the balance lies. As a Committee, we talked about issues to do with that piece of work before the case ever happened, and we are still not clear.

Devolution of justice is a recent thing. The Lord Chief Justice described us as a point of equilibrium between this place and the judiciary, and we are not there yet as far as the boundaries are concerned.

**Mr Larkin:** As you will know, the House of Commons has an absolute protection. The Assembly has protection over defamation but not over contempt of court. For my part, I do not see why the Assembly does not have that protection, because it would be the responsibility of the Speaker and Chairs of Committees to ensure that that protection were not abused, as is exercised in the House of Commons. I see no reason why that protection should not be extended. On the more general issue of continuing to tease out the issues, it strikes me that, when people — to use football parlance — play the ball and not the man, they will not get into trouble.

**The Chairperson:** That is a fair point. Thank you for that, members. Let us move on to the issue of Forensic Science Northern Ireland (FSNI). Can you outline where that issue is going?

**Mr Larkin:** I am very grateful to be able to speak about that, and I hope that you all have the text of the draft guidance in its present form.

As you know, Chairman, I had the pleasure of speaking to you and the Deputy Chair some time ago, when we talked generally about what I saw as the role of the section 8 guidance. It strikes me that it is designed to make life easier for competent professionals, It also strikes me that, when competent professionals in their particular disciplines are acting to the highest standards of those particular disciplines, they are complying, in all reasonable likelihood, with the relevant human rights standards. The project has been ongoing since the obligation was created in 2004. Initially, it belonged to the Attorney General for England and Wales, who, as you know, was also ex officio Attorney General for Northern Ireland. Across the water, the initial thinking had been that one great big piece of comprehensive guidance covering everything would be produced.

I have taken the view that that is not the best way to proceed. It strikes me that the best way to proceed is to break the global section 8 duty into its component parts. Obviously, section 8 guidance is not a once-for-all

text that is carved in stone and preserved for eternity. Rather, it is designed to be flexible and to respond to the needs of the relevant practitioners and the public, and to be responsive to those. Although the international human rights standards cannot be adjusted, at least not by me, how and to what extent text replicates their obligations can be, and there is a good deal of flexibility about that.

Furthermore, I want to ensure that there is a built-in process of review so that if, for example, formally after a year it seems that there are problems, those problems can be taken on board. Indeed, an invitation is contained in the guidance to Forensic Science, and if it discovers something that concerns it, even after a short time, that can be drawn to my attention and, where appropriate, be addressed.

The guidance is before you. One of the reasons that we have chosen Forensic Science is that it is a reasonably compact organisation. It is also not an organisation that tends to be in the front line. In court, the police and the Public Prosecution Service (PPS) can usually look after their reputations, but Forensic Science representatives are very seldom in court unless they are in to answer questions on various things. This guidance will enable them to have some reassurance and safeguards so that they have the confidence of knowing that if they follow it, they are enormously protected.

**The Chairperson:** To give the document effect, what is the process? This will be binding as a legal document, is that right?

**Mr Larkin:** It is not binding in the sense that it must be slavishly followed. The guidance must be taken into account by Forensic Science. For example, if one takes a key issue such as DNA profiles, the Criminal Justice Bill permits retention, but it does not require it. The guidance provides something else for the relevant holder — in this case, the FSNI — to consider, because there are relevant international human rights standard in that field.

**The Chairperson:** Having produced this after engaging with us, the final document that you produce does not need to go through this place?

**Mr Larkin:** It does. 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.

**The Chairperson:** Will this Committee be the vehicle to take that through?

**Mr Larkin:** Yes.

**The Chairperson:** That leads us to the other quandary of who will speak to it if it ends up being debated in the Assembly.

**Mr Larkin:** The Committee on Procedures has parked the issue of Standing Orders that deal with my participation in the Assembly until the great PPS superintendence debate is resolved. This is a concrete instance of where that might not be the entire picture. Obviously, I am blithely optimistic that the guidance will commend itself to the Committee. If it commends itself to the Committee, I imagine that it will be successful when it is laid before the Assembly.

**The Chairperson:** Forensic Service is probably, dare I say it, the easiest body in the criminal justice system to do that for. What is your time frame? What is next? When will you be doing the police?

**Mr Larkin:** I would welcome hearing from the Committee as soon as it feels that it has a handle on this. I hope that the Committee comes back positively, and as soon as that happens, I will lay it before the Assembly as soon as I can.

**The Chairperson:** OK.

**Mr Larkin:** Thank you also for the question about the others. You are right about the nature of Forensic Science. The State Pathologist is next. We will then turn to the Prison Service. The Prison Service is, of course, a much larger organisation. I am sharing my very preliminary thoughts, and I hope that the Committee finds them of assistance. My initial thinking was not to cover Prison Service in its entirety but simply to deal with one aspect, such as custody standards, particularly since the Prison Service is going through a good deal of change. One thing that strikes me as a constant for some time is that there will be prisoners.

**The Chairperson:** Are you hoping to provide guidance for the Police Service on this?

**Mr Larkin:** You raise another important issue. I have consulted the Advocate General, as I am statutorily obliged to do, about amending section 8 to include the police. If you look at section 8, you will see that the police, perhaps paradoxically, are not included among the list of organisations but that the Chief Constable takes account of guidance

addressed to others where he is producing regulatory documents for the police. Again, it strikes me that the police individually would be assisted by guidance addressed to them, and I have an order, in draft form, designed to have that effect. Obviously, I want to discuss that with the Committee, too.

**The Chairperson:** OK. Members have no more questions at this stage. We will get a good look at the paper and formally correspond with you in September. If we need you again, I am sure that you will be willing, as always, to meet us.

**Mr Larkin:** Yes.

**The Chairperson:** I thank you very much for your time today.

**Mr Larkin:** Thank you, Chairman. I wish the Committee a peaceful and restorative break.

**The Chairperson:** Likewise.