



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

**Tommy English Murder Trial: Ministerial
Briefing**

1 March 2012

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 Stewart Dickson
Mr Colum Eastwood
Mr Seán Lynch
Mr Alban Maginness
Mr Basil McCrea
Mr Peter Weir

Witnesses:

Mr David Ford	Minister of Justice
Mr David Lavery	Department of Justice
Mr Peter May	Department of Justice

The Chairperson: Minister Ford, I welcome you, Peter May, director of safer communities, and David Lavery, director of access to justice, to the Committee. The session will be recorded by Hansard, and the report will be published on the Committee webpage. Minister, I invite you to address the meeting.

Mr Ford (Minister of Justice): Thank you very much, Chairman. You already introduced Peter and David, so I do not need to do so. Chair, you wrote to me at the end of last week after the Committee discussed the case of the Crown versus Haddock and Others, which had just concluded. The Committee asked me to make a statement to the Assembly on the outcome and cost of the trial. An application for a question for urgent oral answer on Monday was not accepted by the Speaker, although I had indicated a willingness to answer it. However, I wrote to the Committee that day about the use of accomplice evidence, under the Serious Organised Crime and Police Act 2005 (SOCPA), and said that I would make myself available to attend a Committee meeting. I therefore thank you for the opportunity to discuss the issue today.

At the outset, I want to say that we should not forget that the murder of Thomas English on 31 October 2000 was brutal; he was gunned down in his home in front of his wife, Doreen, and his children. The police are continuing their investigations, and I again urge anyone with any information that could be of assistance to contact the police. There has been considerable comment about the prosecution of a number of people in the case and the opinion was expressed that it should not have been brought.

Members will appreciate that I need to be careful about getting into too much detail, as sentencing is awaited in one case. In many respects, the responsibilities fall to others. In my letter, I set out the role of the various justice agencies and the independence that properly protects their decisions. I shall say more about that later.

First, I wish to make some general remarks about trials of this kind. I recognise that there is little enthusiasm for a process by which criminals receive lower sentences than they otherwise deserve because they have informed on or given evidence against those who participated in the same or linked crimes. However, it is not a new-fangled notion; the practice dates from at least the seventeenth century. It gives the opportunity to bring evidence that the courts would not otherwise hear about major criminals who, in many cases, would escape being called to account for their crimes.

In 2007, in the case of Blackburn, quoted by Mr Justice Gillen in the present case, the Court of Appeal in England and Wales spoke of the arrangement as:

"a price worth paying to achieve the overwhelming and recurring public interest that major criminals, in particular, should be caught and prosecuted to conviction".

Arrangements for accomplice evidence existed in common law for several centuries; however, in 2005, they were codified into the Serious Organised Crime and Police Act. There were three reasons for that Act: first, it provided a more structured and transparent system; secondly, it introduced procedures for written agreements on the basis that defendants will likely be more prepared to co-operate when they had the binding assurance that the prosecution would apply to the judge for a reduced sentence in return for co-operation; thirdly, and importantly, the Act also allowed for a sentence to be referred to the court where promised co-operation was not forthcoming. Mr Justice Gillen stated in his judgment that that should not be seen as, and was not intended to be, a criticism of the regime on the use of accomplice evidence under SOCPA.

It is also relevant for members to be aware that the legislation has been used successfully by the police and prosecution in Northern Ireland in the case of the Crown versus Brown in relation to the murders of David McIlwaine and Andrew Robb. That case involved evidence given by a witness assisting under SOCPA and led to a conviction for murder that was upheld at appeal. The judge also welcomed another statutory innovation of recent years: the exceptions to the rule of double jeopardy in the Criminal Justice Act 2003, which, in some circumstances, where there is new and compelling evidence and where it is in the interests of justice, allow an individual to be tried a second time for a serious offence. I am always willing to review criminal law, and I will listen carefully to any representations made to me in that regard. However, I hope that the Committee will understand why, in the light of what the judge said, I see no immediate need to change the underpinning legislation.

Let me say something about the decisions that need to be made in this type of case: they are not and should not be decisions for me. Decisions about operational issues of investigation and prosecution have to be taken independently of political interference. I can, however, make some general remarks. The first is about the work of the police and the Public Prosecution Service (PPS). Needless to say, the police have been working on the case in detail for some considerable time. The PPS and the judge himself remarked on the comprehensive debriefing exercise carried out by the police in the case. I understand that there were some 330 interviews with the Stewart brothers. It was on the basis of that extensive assessment that the prosecution determined that the test for prosecution was met and that it was proper to place the case before the court. Those were not easy decisions, not least because they involved predicting how human beings would behave. I should emphasise that at the end of the prosecution case, the court rejected an application brought by the defence to stop the trial. The judge's conclusion, in effect, was that it was conceivable that he could convict the accused. That was after the cross-examination of the principal witnesses. Moreover, the case was not based solely on the brothers' evidence; there was other evidence, such as that of Mrs English, and she, of course, remains a victim for whom the truth still needs to be sought. However, the judge must apply a high standard to the evidence heard in any case in determining whether it proves the case beyond a reasonable doubt.

I come to the matter of accountability. I recognise that where there has been a difficult case such as the present one, the Committee may be frustrated that there is no one person who can sit here and account for all the aspects. It is not that the justice system is unaccountable — I set out the relevant lines of accountability in my letter this week. The Chief Constable, although having operational independence in making decisions, is accountable to the Policing Board for the delivery of the functions of the Police Service, and his accounting officer is accountable for the use of resources, through my permanent secretary, to the Public Accounts Committee. Again, the PPS is independent, and members will know that it is not within my responsibilities where the legislation allows for it to answer questions in Assembly proceedings on matters relating to the finance and administration of the service. A concordat contains a commitment to provide other relevant information to assist the Assembly where that does not interfere with its quasi-judicial role or legal duties. I understand that part of the Committee's concerns related to the extent to which the actions of those agencies that exercise varying types of operational independence should be subject to political scrutiny and challenge. I believe that political comment on matters of widespread public interest is both inevitable and appropriate; however, that brings with it the responsibility not to appear to undermine the independence of decision-making.

Beyond that, there are some wider observations that I want to offer that should inform any comments that we may choose to make. I believe that it is common ground among us all that the cost of a case should not be a determining factor in the taking of decisions about whether to proceed. I also suggest that although individual cases may give rise to important policy considerations that apply more widely than the individual case, focusing on a single case to draw much wider lessons for the criminal justice system is often problematic. Although I accept that there is public concern when high-profile cases fail, none of us should want to live in a society in which all cases prosecuted lead to conviction. That would mean either that the judicial process was not impartial or that such a risk-averse approach was being adopted by the PPS that some people would never be tried when sufficient evidence did exist for that purpose.

We also need to accept that it is not for us politicians to second-guess decisions about investigation and prosecution. What we can, and should, expect is that such cases lead to a thorough review of how decisions were reached and the lessons for the future. Both the PPS and the police are committed to doing that. That will inform how such cases should be approached in future. A particular aspect that has been raised publicly is the question of whether the Stewart brothers' circumstances will be examined. Those operating under SOCPA must enter into a written agreement. In this case, the PPS has announced that it is considering whether the men knowingly failed to give assistance and is considering the position in light of the judgement. That is how it should be. It is a matter that the PPS is best placed to decide. It is right, however, that we know that a review is being undertaken, a fact that the PPS acknowledged by releasing the information.

Members also asked about the cost of the case. I have asked for that to be estimated and for the information to be provided to the Committee. I understand the legitimate interest in knowing that. I have some information at this stage, but the information on the areas where larger costs were incurred will take further work, given the wide range of people involved. It needs to be looked at in context, however. Last year, with the assistance of the Committee, I made new legal aid rules for Crown Court cases that will reduce the total annual legal aid costs for such cases by 50% — a saving of some £18.3 million per annum. Further savings in legal aid are planned.

As I emphasised in the letter, I know from the Police Service that the investigation will continue. That trial was one part of a much wider investigation into crimes committed by the UVF in north Belfast. I do not underestimate the difficulty of the decisions faced by all the agencies in that case, but it is right to review the experience of it. That is happening now across all the relevant agencies.

The Chairperson: Thank you very much for that outline. I am sure that members will have some points that they want to put to you. I will lead off and we will continue from that point. You can understand where the public perspective can come from on two high-profile cases of late. One was the Colin Duffy case in relation to Massereene, where there was no conviction, and this case, with the Public Prosecution Service, which the public will see as a failing. Confidence in the PPS has been rocked; that is undeniable. People are looking for answers. Although I welcome Barra McGrory commenting on that today, people do look for a response. I appreciate that you are not responsible for prosecution

decisions, but there does seem to be a gap in people coming forward and explaining themselves to the public. Is that an area that you feel that you can address in a better fashion than has been the case, or are there other measures that can be taken so that the public will get a response from those agencies much more quickly?

Mr Ford: I appreciate the point, although I will correct you ever so slightly on the precise details of the two high-profile cases that you mentioned. In the case of the Massereene murders, there was a conviction, though not of the higher-profile defendant; in this case there was a conviction, and sentencing is awaited for one individual. That raises issues and suggests that it was not simply clear-cut. I understand why the Committee is seeking explanations. We have to look at the fact that the consultation is under way on the accountability of the PPS. The consultation paper, which the Committee saw and which is now out for consultation, was agreed between the Attorney General, the First Minister, the deputy First Minister and me. That is one area that needs to be looked at. You will doubtless ask the Attorney General for his views on that shortly.

Moreover, we do not have the procedures. Although the legislation allows the PPS to engage directly with the Assembly, there has, as far as I know, been no formal determination on which Assembly Committee might take on that responsibility. That is something that the Committee might wish to discuss with others. It is part of assisting the openness and transparency that the director said this morning he is committed to.

The Chairperson: You highlighted in your letter that the Assembly can hold the PPS to account only on financial and administrative matters.

Mr Ford: I was trying to emphasise both the potential role of the Attorney General in governance issues and the potential for answering to the Assembly alongside what might be a Committee role on the other matters that you highlighted.

The Chairperson: You commented on the legislation, and the judge said that he has no difficulty with the legislation. As Minister, do you feel that there is a need to review the legislation? That is where there will be a fault line. Some will say that it is flawed and that a case should never be taken on the basis of this legislation; others will agree with the legislation in principle but question the process that was followed in this case. Is there a need to strengthen the legislation so that the public can have absolute confidence that this principle will be carried out and support the legislation?

Mr Ford: I would not wish to claim that I have read the entire judgement; it is extremely lengthy. However, I have read the section at the end that deals with the wider issues and refers, in particular, to the operation of SOCPA. My reading of it is that the judge believes that the legislation is adequate and meets the needs of this society. The issues that he raised are around the credibility of the two witnesses. As I understand it, that judge also presided over the Brown case in which the SOCPA legislation was applied. He found it a suitable vehicle to ensure that accomplice evidence put away a murderer for a long time; that judgement was upheld on appeal. Therefore, it appears that the judge who knows most about these cases is satisfied with the legislation. Given the points that I made about the checks and balances in SOCPA as opposed to the previous common-law position, which created difficulties for this society 30 or 40 years ago, it seems to me that the legislation is adequate at the moment. However, as ever, I remain open to persuasion otherwise.

The Chairperson: Were you not surprised when you found out that 330 interviews had taken place yet the prosecution still went ahead? Hindsight is a wonderful thing, of course. However, given what the judge said about the credibility of the two witnesses, are you not surprised? I am drawing you into an area on which you will probably say that you cannot comment.

Mr Ford: You are coming very close to encouraging me to go where I should not go. The only comment that I will make is that how an individual deals with police interviews in one set of circumstances may be very different from how that individual stands up to cross-questioning by defence barristers in a courtroom.

Mr Dickson: Thank you for responding to us in this way, Minister. You rightly pointed out that there will inevitably be public and political interest in cases of this nature. Do you agree with me that the

independence of the judiciary is not only your responsibility but the responsibility of all of us in this place, that it is vital that that principle be enunciated in this place at all times, and that we have a duty to inform the public about that independent role?

Mr Ford: Stewart is absolutely right: the independence of the judiciary has to be the responsibility of us all. There are particular responsibilities on me as Minister. David Lavery may be able to quote the legislation that I believe places similar obligations on all those concerned with the administration of justice, which I suspect may include members of the Committee in the devolved context.

Mr David Lavery (Department of Justice): The Justice Act places an extensive duty on all public authorities to uphold the continuing independence of the judiciary. The Justice (Northern Ireland) Act 2002 also emphasises the prosecutorial independence of the Director of Public Prosecutions. I suppose that this issue brings into stark relief the question of where independence in individual decision ends and accountability for performance begins. That will always be a difficult line to draw.

The Chairperson: Minister, have you heard anyone criticise the judge? I ask because I got the impression when I read the letter that it was put out there as a veiled threat: "Do not ask questions about this case". That may be a wrong perception, but I am not aware of any politician criticising what the judge decided in this case. In fact, any politician whom I have heard speak on it has agreed with the judge's decision. The questions have been about the Public Prosecution Service and how the case was investigated, but not the judiciary.

Mr Ford: No, but the obligation to respect independence extends beyond the judiciary. I felt that there was one comment, made at an early stage, that invited me as Minister to pass comment on the actions of the PPS, which is why a comment was released from the Department that I approved. It was perhaps not phrased as elegantly as it might have been, but I believe that I have particular responsibilities not to interfere in any way, given that I might be assumed to have more powers of direction over independent agencies than I have or ought to have.

Mr McCartney: Does independence mean that you are beyond criticism?

Mr Ford: Do you mean me personally?

Mr McCartney: No. This concept that the judiciary is independent is left hanging. Does criticising the judiciary make us guilty of questioning its independence?

Mr Ford: Individuals have a right to state their opinion on how things have been carried out, but one needs to be very careful as to how that is expressed. It can come easily from any of us, and particularly from me as Minister, which is why I made the comment that I did, that it looks as though I am seeking to second-guess or direct a judge, the director or the Chief Constable.

Mr McCartney: I will come back to my question. It is a question that we talked about last week. I made the point then that there have been many, many miscarriages of justice. In one of them someone said "The judge is wrong", and they were accused of questioning the independence of the judiciary; but it was proven that they were right to do it.

Mr Ford: Which is where the difference lies between an individual saying that and a Minister calling independent decisions into question.

Mr McCartney: Last week, your Department warned us off.

Mr Ford: As I just said, and I will say it differently, the comment that was passed was made in response to a direct statement that David Ford, as Minister, should take actions that are not appropriate. It was not an attempt to warn off other people; it was a statement —

Mr McCartney: It was framed in the plural.

Mr Ford: In that case —

Mr McCartney: Do you accept that that statement should not have been made?

Mr Ford: No; I believe that the statement was correct. It was perhaps not phrased as elegantly as it might have been, given that the particular issue was the responsibility of the Minister. However, I believe that this Committee and its members also fall under something of the same obligation.

Mr McCartney: Therefore if I believe that a judicial decision is wrong, I should not raise my voice in concern.

Mr Ford: You have a right to raise your voice in concern; the issue is exactly how that is expressed. It is possible to express concern while respecting the role of the judge who took the decision.

Mr McCartney: I cannot understand what that means. If I think that a judge has called something wrong, what you say is that I should not question the integrity of the judge.

Mr Ford: You have actually —

Mr McCartney: Look at it in the context of all the miscarriages of justice: if someone had not said that the judge was wrong, all those miscarriages of justice would have continued.

Mr Ford: You have just complicated it further by referring to questioning the integrity of the judge. You can question the decision of the judge, but you have now made it more complex by questioning his integrity.

Mr McCartney: In the case of the Birmingham Six, you would question the integrity of the judge.

Mr Ford: I am happy to say that the Birmingham Six were not my responsibility; but I take it that you are making a general point.

Mr McCartney: The principle is that the Lord Chief Justice warned people of the "appalling vista" of what would happen if they challenged the judiciary; but the people who challenged it turned out to be right.

Mr Ford: Yes, but there are also proper ways in which to challenge those decisions, through appeal procedures and so on.

Mr McCartney: You say that you think something is wrong, and people might say that you are challenging the independence of the Public Prosecution Service, the police and — in this particular instance — the judge. It was proved beyond all reasonable doubt that all three of them were in cahoots. That is established fact.

Mr Ford: Yes, but that is not the issue that we are discussing today. What may have happened in a case 40 years ago —

Mr McCartney: With respect, we are discussing that today because this is an issue of public confidence. If you are saying to this Committee that what happened last week, as a result of that court case, enhances public confidence in the judicial system, you are living in the wrong place. Last week, confidence was undermined because the process is flawed. It has been used in the past and has been seen to be flawed. Now we are being asked not to raise our voices in concern in case we are questioning the independence of the judiciary. I am not questioning the integrity of the judge or anyone else involved, but I am questioning the legislation. I believe that it is flawed and I will raise my voice to say that it is flawed.

Mr Ford: And I am saying that, while I accept your concerns, based on the unhappy experiences of this society 30 or 40 years ago, I believe that the provisions that now exist under SOCPA, which ensure that we have a much more open and transparent process, mean that people know what happened to the Stewart brothers, that they were in court and that they received their sentences for their part in offences, and that those sentences were stated to be reduced by a certain amount because they were

given the status of assisting offenders. As I understand it, that is not what happened 30 years ago. That is where I see the current process as being very different from the concerns of the past.

Mr McCartney: One of the tests was that they were truthful and honest.

Mr Ford: That is why the director has said that a senior officer is now investigating the issue to make a reference back.

Mr McCartney: This is where I want to make a specific point. What is the difference between "I told a lie" and "I knowingly told a lie"?

The Chairperson: You would find it hard to prove.

Mr McCartney: That is where we are at with this: "I told a lie" or "I knowingly told a lie".

Mr Ford: I am sorry; we are now engaging in a process of second-guessing the work of the director to consider a reference back.

Mr McCartney: No, no. I am not second-guessing anyone. I am telling you what those people were found to be by the trial judge. Those people were found to be liars. They were people who embellished. If you take it from the process that they could find themselves in court only if they were willing to assist, there is an inducement to assist. The process of inducement, in my opinion, leads people to be liars and embellishers, and that turned out to be fact.

Mr Ford: You are drawing that inference from this case. I am saying that, in the Brown case involving the two dreadful murders in Tandragee, we saw an entirely different scenario.

Mr McCartney: There were issues around that case as well, which were well ventilated, that, perhaps, an informer was being protected.

Mr Ford: Well, in the context of the evidence that was given by —

Mr McCartney: Do not paint the Brown case as flawless. There was public concern raised about the McIlwaine case as well. There is a fear in this case and in some of the other cases that the state is protecting informers as a backdrop to some of these trials. You have a situation in which one part of the state is doing one thing and another part of the state is doing another, and informers are being protected.

Someone is sitting as a defendant who the PSNI and others know is a member of the UVF and is an informant, and yet he is being acquitted. People are asking what that is all about. Are we to go back to the system as it once was? Are we going to repeat that? In my opinion, the answer should be no.

Mr Ford: In the case of the Stewart brothers, who had the status of assisting offenders, it is not that they were acquitted. They were convicted. They had their sentences reduced.

Mr McCartney: I am talking about people who are defendants in this case, who, it is publicly accepted, are paid agents of the state. People are asking questions.

Mr Ford: You are introducing an entirely different issue.

Mr McCartney: If they are paid agents of the state and members of the UVF, why do their handlers not go into the box and say that they are members of the UVF, leading to them being duly convicted?

Mr Ford: You are now introducing an entirely different issue to the use of assisting offenders.

Mr McCartney: I am saying that it is all enmeshed, and that is why there is no public confidence in what happened. This is supergrass trials mark II. That is the way that people see it. People are saying that, if that continues, it will undermine the judicial process. That is what the public are saying, in my opinion; not the general public, because there are obviously different views, but there are people

saying that these events are the continuation of a flawed system and that we will find ourselves back in the same position in which we found ourselves before, when we had to have a review of the criminal justice system. That is where we are heading with this.

The Chairperson: I want to pick up on one of those points; if it is in the legislation, will you review it? Those two individuals were found by the judge to have been consistent liars throughout their debrief interviews and in court. However, it is required that it needs to be proven that they knowingly lied. If they are found to have lied, they have lied. Can you consider looking at the issue in the legislation of having "knowingly" lied? That, to me, is another minefield; how are you going to prove that?

Mr Ford: The first issue there lies with the director, which is to review the case. He has said that he is doing that at the moment. He may draw inferences from that review that legislative change is appropriate and it would then be for me, with the assistance of this Committee, to consider appropriate legislative change, but I think we need to allow him to conduct his review as to whether he sees any need for that legislation to be changed before we come to any conclusions here.

The Chairperson: I think the public will be outraged that these two guys got a reduced sentence for being consistent liars.

Mr Ford: They were given a reduced sentence because they were giving evidence. They have subsequently been demonstrated in court to have been liars, and the issue is being considered for referral back to decide whether that reduction in sentence was appropriate. The legislation makes it quite clear that, if they do not comply with their side of the bargain, they can be returned to court to have their sentences increased.

The Chairperson: I think we need to get more clarity around the issue of independence. I feel that there is a gagging attempt being made on members of the Committee to stop them asking questions. The statement was put out in response to what my deputy leader, Nigel Dodds, had said, and it was clearly targeted at him to keep him quiet, and we —

Mr Ford: No. I am sorry; it was not targeted at him to keep him quiet. It was a response to what was perceived to be his asking me to go beyond my remit. The fact that I wrote a detailed letter to you, I indicated a willingness to answer an urgent question, and am sitting here this afternoon is surely an indication that I am prepared to engage with the Committee.

The Chairperson: An element of your letter advises that it is not just the Minister who is responsible; that there is a wider responsibility on people. We need to have clarity on that so that people can have confidence in what they can ask questions about and what they cannot. I have no Executive authority; you do. You are the Minister. I appreciate your position within the law on these issues, but I think it is different for Committee members, ordinary MLAs and Members of Parliament. I think a little advice from the Department on that may be helpful.

The Chairperson: If it would be helpful, we would do our best to provide the Committee with advice, although the Committee might wish to ask for its own legal advice.

The Chairperson: I think we are, but it would be interesting to see what the Department's specific advice on it is.

Mr Lynch: My colleague touched on the case that you mentioned in your opening address, David; the McIlwaine/Robb case. You are aware that the families were very critical of legislation in that case.

Mr Ford: I am not aware of the detail of the comments that they made.

Mr Lynch: The families were very critical because they felt the legislation was used to allow those involved in the murder to be concealed, as Raymond said. That was their big question. What do you have to say about that?

Mr Ford: You have raised the same question that Raymond raised. The specific legislation we are talking about, the SOCPA provisions for assisting offenders who have received a reduced sentence, is

not the same as anything that would relate to the allegations that Raymond made of the potential or possibility that some individuals might not be charged at all.

Mr Lynch: This particular family who were bereaved thought that this legislation concealed those who were involved in the murder; that it was used as a tool to conceal that.

Mr Ford: I do not see how the openness and transparency that exists within SOCPA could be seen that way. I accept that there may be concerns about the identities of some people being concealed anyway, but I do not see how that is relevant to the operation of these provisions under SOCPA.

Mr Peter May (Department of Justice): I will read a sentence from the judgement passed in the case of R v Brown, which does not answer all of the issues that you raise, but answers one of them:

"The reality of the matter is that unlike all of the super grass authorities explored in this case in argument, this man volunteered to come forward to the police in 2005 at a time when there was no evidence against him, when the police did not have him under suspicion, when 5 years had passed since the murder and the police trail had gone cold."

That comment was made by the Judge in passing judgement on this case in 2009. That was just the point I wanted to draw out.

Mr Lynch: I have one final comment. I find it hard to understand why there was no suspicion of these two characters when they were known in UVF circles.

Mr Ford: Sorry?

Mr Lynch: You said, Peter, that there were no suspicions previously of these two characters.

Mr May: I was quoting the judge, when he said that police did not have him under suspicion.

Mr A Maginness: I thank the Minister for coming. It is important that he attended and made a statement to the Committee. It is important that the Committee has an opportunity to discuss this openly, although there are parameters beyond which we cannot go.

It is clear that there is dissatisfaction with what one would term supergrass evidence at large. In essence, supergrass evidence is that of an accomplice against fellow criminals. There are all sorts of reasons why that might be done. However, I suppose that the Act makes more transparent what is happening, and it allows the judge and the court to judge and make a balanced judgement in relation to the weight of the evidence being given in court. That is the real difference between pre-2005 and now.

To bring about any prosecution, three elements are necessary for the PPS. There must be an evidentiary basis; a reasonable prospect of conviction; and the prosecution must be in the public interest. On the public interest test, I put to you the proposition that a series of criminal acts were committed by the UVF in north Belfast. Of that, there is no contradiction — that is fact. Therefore, it was necessary for the authorities to try to convict those thought to be guilty. So it was in the public interest for the prosecution to be carried out. Is the reality not that the Director of the Public Prosecution Service is saying that it was in the public interest that that should happen?

Mr Ford: I am reluctant to go too far, but I understand that the Director's previous decision was made on the basis that those three tests were all satisfied. Clearly, there was significant public concern in north Belfast and Newtownabbey about the activities of that gang. That was part of the issue, as well as the issue of evidence and the prospect of success. Obviously, the prospect of success is one of those points that is never 100% certain, it is a matter of the balance of that prospect.

Mr A Maginness: And for years now, and even since the trial's ending, people are dismayed and dissatisfied with the fact that members of the UVF in north Belfast have not been held to account.

Mr Ford: That is clearly the case in the sense of the public mood. However, we should remember that the judge took the decision that he was not satisfied beyond all reasonable doubt, except in the case of one of the defendants.

Mr A Maginness: Yes. I have no further comment.

The Chairperson: To pick up on that, do you think that this piece of legislation is being used to particularly target the UVF, or is it a piece of legislation that is being applied across the board against whomever it would be relevant to? There is a feeling that it is being used particularly to target that loyalist community.

Mr A Maginness: Chair, I was not saying that. In these circumstances, it was being used to target the UVF, but the legislation was not brought in or used exclusively to target the UVF.

Mr Ford: The simple answer, Chair, is that I do not know what cases may be in the pipeline. I understand that the use of the legislation is being considered in others. We should acknowledge the fact that it is UK-wide legislation. Sorry; strictly speaking, it is England, Wales and Northern Ireland legislation, although there is parallel legislation in Scotland, and it has been used successfully in England and Wales, although I doubt that there was a UVF connection there. For obvious reasons, it is used against a range of organised crime.

The Chairperson: Are you aware of any independent oversight of the police investigation? Did the police have any advisers as they carried out their investigation?

Mr Ford: A measure of oversight was provided on a particular point. The former Police Ombudsman, Nuala O'Loan, and a London barrister were involved to provide a measure of oversight of the way in which the work was being done. However, I do not know the detail.

The Chairperson: Why?

Mr Ford: I think that it was because of the range of concerns that were expressed. However, I do not know the detail of that.

The Chairperson: Is that abnormal?

Mr Ford: I think that it would be fair to say that it is unusual.

The Chairperson: Why exactly were a London barrister and a previous ombudsman involved in the oversight of that investigation?

Mr Ford: The answer is that I do not know the detail. Perhaps, David has something that would help.

Mr Lavery: As far as I know, they were not involved in the investigation. I think that they were brought in because of concerns about Operation Ballast and all of the matters that arose from it. Therefore, the police, I think, engaged Nuala O'Loan and the counsel from across the water to provide a form of external reassurance. However, as to what their role was, frankly, I do not know.

The Chairperson: That was Operation Ballast, which the Northern Ireland Retired Police Officers' Association said was flawed and unreliable. From the police's perspective, that report caused huge controversy because of what it alleged about collusion. Therefore, I ask again why there was that oversight of the police's investigation.

Mr Ford: The answer is that we are not in a position to answer that question for you, Chair.

Mr May: I do not think that it was formal oversight of the police investigation. I think that they were acting as a liaison between interested families and the PSNI. An agreement was reached by the PSNI about their role. It would be wrong to say that they were overseeing the investigation.

Mr Lavery: I think that they were called "the independent oversight panel for Operation Stafford". Just before the trial began, it was suggested that it would be helpful if there were some neutral venue where families could watch the trial without having to sit in the court's public gallery. Mr Justice Hart, dealing with that as a preliminary matter, ruled that there should be a video-link facility. That was certainly the only contact that my agency had with the independent oversight panel. I am just not in a position to assist the Committee as to its role.

The Chairperson: Therefore, "the independent oversight panel" is the official title of the membership, which was two people, of the oversight panel for that police operation. They were the only two individuals on that panel. I am trying to figure out what the role was of that independent oversight panel. Minister, you said, "unusual", "abnormal" —

Mr Ford: You said "abnormal", Chair. I said "unusual".

The Chairperson: OK. It means the same thing. It was bizarre.

Mr Ford: Again, it was not established by the Department of Justice and was, I understand, in existence some time before DOJ came into existence.

The Chairperson: Can you give us more clarity? Is it commonplace that police investigations have independent oversight panels, given the history of the controversy that surrounded that particular report by the ombudsman's office? Some people will ask why there was an independent oversight panel because of families' concerns and also given the police's response to that particular report. Keep me right on all of this. It is new to me.

Mr Ford: The only answer that we can give you this afternoon is that we will seek to ascertain what we can about the operation of the panel, and whatever information we can find, we will pass to the Committee.

Mr Lavery: I think that I misled you, Chair. I think that I mentioned Operation Ballast. The actual title that I have in my notes is "independent oversight panel for Operation Stafford". I apologise for misleading you.

Mr B McCrea: It is the same.

Mr Lavery: It may be. I just want to correct the record for the Committee's benefit.

Mr B McCrea: I will let you draw your own conclusions about the constitution of the panel. However, you may wish to ask the Policing Board about it since it was set up at the police's behest, in conjunction with human rights legislation obligations, to investigate allegations of state collusion and various other issues. I will leave you to get that detail. Of course, all parties were members of that particular committee and were informed fully.

I want to come back to the independence of the judiciary. It may seem rather strange that I am following a line that Raymond McCartney brought up. At the most recent meeting, I asked about legal advice on what we are and are not allowed to say. I note in these notes that we are allowed to give the Chief Constable operational independence, but that does not mean that we are not allowed to review his actions or to suggest that things might be done differently. Your letter states:

"While he has and must have operational independence in making decisions, that does not mean that he does not account for, or will not discuss, his approach to policing."

How does that work, if we are trying to have independence for the judiciary but are not allowed to comment on it?

When I read the Justice (Northern Ireland) Act 2002, I see that it is all about the appointment of the judiciary. It does not say that you are not allowed to review its decisions or take conversations on it.

Finally, I move to section 42 of the Act. I see that you have, helpfully, put it in your notes. It states that a person commits an offence if, with the intention of perverting the course of justice, he seeks to influence the director. The whole thing is about intent. I am not seeking to pervert any course of justice; I am saying that I have a democratic right to discuss issues. I think that I made this point to the Committee last week: we need clarity on this, because every time that we deal with a justice matter, it comes down to it being sub judice, and we are told that we cannot say this or that, or question the issue. I think you draw your authority from this Assembly for the operation of Acts of Parliament. I would like to know why it is that people cannot actually discuss, without suggesting any impropriety, the decisions that have been reached and the proper application of the laws of this place, as passed.

Mr Ford: I think it was before you came in, Basil, that we discussed that issue. The Chair and I agreed that there may be a necessity for the Committee to be given more detailed legal advice about what its role is.

Mr B McCrea: I apologise for not being here for part of it, but I did hear you say that, and I followed it. However, this is a point that we talked about at the previous meeting. At that meeting, I said, on the record, that my Committee sought legal advice on issues to do with what is sub judice and what is not. Although I am not in a position to say what that advice is, I can tell you that people bandy round such words as "independence" or "sub judice" without really understanding the technical issues involved. I think that there is huge public disquiet about decisions that are taken, but, perhaps, with further investigation, they might understand or accept. On the face of it, however, people are unhappy with the issue.

We have a responsibility, Minister, none more so than you, to explain to people why decisions are reached and on what basis they were reached, without in any way seeking to pervert the course of justice or influence people in an adverse way. If we are leaving it that we are going to come back, it is not only a question of legal advice, but of a direction from you and your Department to say what the relationship is between the Justice Committee — or you for that matter — and the rest of the judiciary. If you have covered the point, I am happy to leave it at that.

Mr Ford: I am going to register a caveat. You referred to a direction from me as to the workings of the Committee. In a past life, when I sat on Committees, I would have been very reluctant to have any suggestion that a Minister could direct the Committee. If what we are agreed on is that there are difficulties with uncertainty about the precise legal position for all of us, then I think that we can agree that we need to explore it.

Mr B McCrea: Just as David clarified for preciseness, so will I, because sometimes when talking through something, you do not complete every word in the sentence. The issue that I am looking for, and which I think is within your gift, is whether we are allowed to talk about issues coming from a decision by the judiciary. Is it appropriate for us to talk about how legislation has been effective or not effective? What are the legal constraints upon a Justice Committee or any Member of this law-making Assembly? What is it that we are allowed to say or not to say? Some clarification from you on that would be a useful step forward.

Mr Ford: We will certainly review the Hansard report and see what we can do to assist on a number of similar points.

The Chairperson: Mr McCartney, do you want to make a point on that?

Mr McCartney: No, I have just one question at the end.

Mr Weir: I thought that there may have been an interesting contractual sideline that Mr Maginness and I could provide some advice to the Committee and then send in a bill. Maybe that would be a conflict of interest.

I suppose, Minister, you will be glad to hear that I will not stray too much into —

Mr A Maginness: What is he talking about?

Mr McCartney: He said that you and Peter should —

Mr Weir: I was just saying I think there is a bit of consultancy work for us there.

Mr A Maginness: Oh, right.

Mr Weir: I am surprised. I thought that the member would be hanging on my every word. Obviously, I am sorely disappointed.

Minister, I am sure you will be glad to hear that I will not press too much on judicial independence. I will not be in any way critical of the judge's verdict despite the fact that Mr Justice Gillen once ruled against me in a High Court case in a civil matter. Even so, I will not make any criticism of him.

I suppose confusion can sometimes arise with regard to what comments we can make and the distinction between comments that are allowed to be made and comments that should be made. What is legally permissible is not always necessarily sensible at times.

With regard to sub judice, there is a distinction between what is said before a verdict, which could be seen as potentially influencing that verdict and, at the extreme end, be seen as perverting the course of justice, compared with what can be said once a verdict has been reached. I would be a little bit critical of the remarks made by the Department, which did stray close to giving the appearance of gagging, to put it at its mildest.

Broadly speaking, I can accept the broad thrust of the legislation. Whether changes need to be made is another matter. However, that is distinct from what I believe, with the best will in the world, were poor decisions made within the PPS. It is clear that a lot of good work was done by the police and that, to my mind, a reasonable verdict was reached by the judge. The failing was in taking the information at PPS level through to what was, potentially, a very expensive trial.

Although there has to be independence with regard to the position of the PPS, it is an issue that we will have to scrutinise deeply. Your paper talks about proposals as regards the general accountability of the PPS. When those proposals are brought forward in about two months, we will have to look at that very closely because although I accept the general thrust of what has been said, there is a weak link in the chain with regard to accountability, and that is something that is at fault.

Perhaps if I can ask you just one question. I appreciate that these matters cannot be driven purely by money but it does play a role. In the information you gave us, the phrase you use is:

"it will take a little while"

to work out the overall costs of the case. Therefore, although I do not want you to pluck ball-park figures out of the air today, could you give us some indication as to how long you believe it will be before you are in a position to reveal publicly the overall costs of that case, or at least produce a reasonably accurate estimate even if you cannot put it down to the last penny?

Mr Ford: We would expect to have a reasonably good take by next week on issues such as the courts costs and the PPS costs. The difficulty is that the largest single element will be the legal aid defence costs. Given that a number of barristers and solicitors were involved, and the taxing master will be engaged because this is under the old rules and not under the rules that we made last year, it will be very much a question of when the taxing master takes his decision. If it is any help to you, I asked a similar question of officials, who were reluctant to stick their finger in the air and make a guess on the basis that nobody can predict what the taxing master may say.

Mr Weir: From that point of view, are you not in a position to produce, within a relatively short space of time, a certain degree of ballpark estimate even with those caveats that have been put upon it?

Mr Ford: It would be a ballpark estimate. We will see what we can do, because I appreciate that the Committee does not want to wait six months to be told the exact figure if we can get a reasonable

estimate. However, that is difficult, given the number of counsel involved and the fact that the taxing master will be involved.

Mr Lavery: There is a further point, Peter. This was certified as a category-B offence, and that is subject to an appeal. The legal teams are challenging that. Therefore before we could even attempt to do what the Minister has offered to do, we need to know what the taxing master decides because there is, as you know, a different scale for category B and category A, and they want it pushed up to category A. However, we should have all the costs other than the legal aid costs, including the police costs, probably by next week.

Mr Weir: As you indicated obviously, that is the more minor side of the costs. I suspect that when we see the figures, it may not appear particularly minor, but it is the lesser part of the overall problem.

Mr Lavery: As you will understand, eight firms of solicitors, 12 QCs and 12 junior counsel all have to submit —

Mr Weir: When you get those figures, could you give us at least a week or two's notice so that we can have Mr Wells calmed down for a little period of that particular point?

Mr Ford: You can remind Jim that this was done under the old rules and not under the rules that we introduced last year.

Mr S Anderson: I will follow on from what Peter said about the cost. If anything, I and others are being asked by the public about what they perceive to be the tremendous amount of money that will eventually come out as the cost of this case. Based on the circumstances of the information in your document about the Stewart brothers' credibility and evidence, this may not be the end of the cost, because the PPS might review it. Perhaps I am wrong, but I am sure that if their sentence is restored or a proper sentence is handed out, they may appeal. If they do, we are into another whole scenario of legal aid costs. It spirals out of all probability, and you do not know where it will end up. Therefore although my colleague asked for a ballpark figure, I understand that you cannot give one as it depends on the outcome from the PPS.

Minister, in reference to the costs of the case, there is a line in your letter that says:

"It needs to be looked at in context, however."

That relates to the good work that you did in saving money — 50% or whatever it was — in legal aid costs over the year. We all welcomed that. However, I am sure that you could confirm that those savings do not give us an open door or an open chequebook to say that we can take such cases. I am not sure about how that is written, bearing in mind that cost should not be a factor if we are trying to get convictions for criminals. Perhaps you could clarify that. Furthermore, we are not at the end of this, and there may be more costings depending on what the PPS decides to do.

Mr Ford: I take your point, Sydney, that there could be further action against the Stewarts to increase the sentences if they were deemed not to have co-operated. That would, I think, be counted as a separate case. As David highlighted, when we at least get the ballpark within which the taxing master will judge, we will be able to give the ballpark figure for the costs of this case. There would, of course, be fewer defence counsel in that case, as it would be only the two Stewarts rather than the 12 QCs.

Mr S Anderson: It will possibly be added on to what is already probably a very high figure. We have figures quoted from £6 million up to £20 million; we do not know where it is. It would be interesting to see that in a few weeks' time.

Mr Ford: We will get information as fast as we can. The other thing is that the changes that we made are permanent. That does not mean that we will relax in other areas. The changes were made because they needed to be made to live within the budget that was agreed on the devolution of justice. We will continue to live for some time with the outworkings of the old rules and the cases that started under the old rules before our rules — if you want to put it that way — come into play.

Mr McCartney: In your letter and in your presentation, you said that you can review the legislation. You said that you came to your preliminary view following an initial assessment. Will you go back to a further review of your ability to review?

Mr Ford: My preliminary view, when that letter was written, was that the legislation had worked. Some members of the Committee say that they feel that it did not work; others say that they thought that it did. When the director reviews the actions of the PPS, particularly whether there is a case for going back to the Stewart brothers' circumstances, that may raise issues for legislation. Others may raise it. At this stage, I do not see the point, but I will listen to any representations.

Mr McCartney: The challenge is to try to put such legislation through the Assembly to allow us locally to have our input so that we can say that it is not legislation drafted in England and sent over here without, in my opinion, any due consideration having been paid to what happened in mark 1 of this process. Our challenge as a local legislature is for you to review the legislation and say that you will try to put it through the Assembly.

Mr Ford: I hear what you say about mark 1; however, we did not have the SOCPA legislation 30 years ago.

Mr McCartney: You know the old saying, David: if it looks like a duck...

Mr Ford: I do not think that it does look like a duck; it may look like a goose or a swan or something.

Mr McCartney: I honestly do not see the difference. I do not see that, because we are told that they will get 10 years in prison, it makes a material difference for us to close our eyes and say that this is not a flawed process.

Mr Ford: I hear what you say, and I appreciate your viewpoint. I can only repeat that —

Mr McCartney: We are charged with legislating and with instilling public confidence in the judicial process, and we are not assisted by this legislation, particularly when comments are made that it is a long-standing convention and is pragmatic. People acknowledge that it is long-standing, and that allows us to reflect on what was once there. Most people would say that, at that particular time, it was the death knell for people's confidence in the judicial system. What you are doing here is creating the basis to repeat that. It is not to see it and to say that the legislation works. The legislation may work as a piece of legislation, but not in creating public confidence and in what it achieves. People could say that the legislation for internment without trial worked, but it certainly did not work for public confidence. People might say that the legislation that allowed people to be interned without trial went through the parliamentary system, that it worked and that due process was followed, but the outcome did not bring public confidence. That is what is key to this. The commentary last week was that public confidence in the judicial system is being undermined, and that is a critical and serious situation that we need to be able to confront.

Mr Ford: I will not go back to the issue of internment; you will certainly not find me agreeing with that proposition.

Mr McCartney: You will agree that the legislation worked.

Mr Ford: Let us not go there; it is a slightly dubious example.

Mr McCartney: It is not slightly dubious. That is what I am saying.

Mr Ford: Give me the chance to answer your first question. I said that this is long-standing because it was a common-law position for centuries. Since 2005, it has been rationalised in legislation that ensures that we have openness and transparency. It ensures that the Stewart brothers stood in the dock and received a sentence for their crimes, and it was acknowledged that the specific reduction that they got was because they were assisting offenders. As a result of that transparency, the director is reviewing the situation to see whether they complied with the terms of their agreement to provide assistance. Therefore, all those things are now out in the open and transparent in a way that they

were not 30 years ago. I accept that, from your perspective, there are still flaws, but, from my perspective, it is very different from what happened in the 1980s.

Mr McCartney: We disagree. That is why the challenge is for you as the Minister who regards this as a strong piece of legislation to set it aside and take it to the Assembly.

Mr Ford: In that case, the challenge to those who believe that the current legislation is flawed is to produce firm, specific proposals on how we deal with the issue, because I would find it very difficult, going back to some of the things that Alban said. After all, my constituency was affected by the overflow of North Belfast.

Mr McCartney: Absolutely.

Mr Ford: The notion that we would have done nothing when we had assisting offenders could have created a different public perception.

Mr McCartney: The public interest was not served in the end. Alban is right: there was public concern. Operation Ballast, which is now Operation Stafford, is also in the public interest. You cannot abstract public interest and say that it was in the public interest to do something and then ignore how you do it, because I do not think that the public wants us to create a situation in which people do not have confidence in the judicial process. You cannot say that it was in the public interest to do it and let all else stand aside. If this is flawed, it will lead people to say that they have no confidence in the future. Where is the tipping point? If there are three or four returns to this type of situation, we will be back saying that it is a flawed piece of legislation and that we have to re-examine it, but, by that stage, you will have done the damage.

Mr Ford: We are now in the difficulty between your submission that the legislation is flawed and my perspective that this case collapsed.

Mr McCartney: That is why I put the simple proposition to take it through the Assembly. Let us all have our say, and let us see what piece of legislation comes out the other side. I do not think that it will come out the other side.

Mr Lavery: Mr Maginness explained why the legislation is clear and transparent. It should be more open and public. These deals cannot be done behind the backs of the public; there is a public-facing process now under this legislation. Is the fundamental question not whether the legislation is right, but whether it is being used appropriately. That may be more about accountability. It may be in the public interest for an accomplice to give evidence in certain cases, but, obviously, you have legitimate concerns about its use in a particular context and environment.

Although we have talked a great deal this afternoon about the independence of the judiciary, the way in which we have expressed it in our consultation paper is that there is no one to answer in the Assembly on matters concerning the PPS. Surely, that is the heart of the issue. Should the PPS use this legislation at all in particular cases? Therefore, I wonder whether the challenge is not about putting new legislation through.

Mr McCartney: I realise the complexity, but Mr Weir, quite rightly, said that he felt that this was the PPS point of view. I have serious questions about trained investigators' failure to detect. David mentioned the difference between trial and being cross-examined by defendants, but, in my opinion, that does not give a great recommendation for the people who are putting them through their paces and trying to establish their credibility.

I followed this trial from television reports. However, from day one, when those two guys went into the defendants' box, it was obvious that they would not come out the other side of the case as two choir boys. Not only did they not come out as two choir boys, but they came out as liars and embellishers. It goes back to the question of providing inducements. Peter talked about the other case, but I do not know enough about it to comment on it because I do not know the process, but did that legislation have to be used at that time if the person walked off the streets? I was not part of the decision that was made at that time.

However, if the person walked off the street, the process for those two people seems to be that they were arrested. It was found that they did not know where to go, and if you have nowhere to go, what do you do? In my opinion, when someone says, "What can you do for me?" everything that they say after that is flawed.

Mr Lavery: I was making the point that the use of the legislation is a matter of legitimate public comment and debate. Surely, the legislature should be looking at how it could change what is on the statute book and how it is operated in practice. For example, there used to be a rule that to bring certain prosecutions you had to have the consent of the Attorney General. Would that be a way of addressing this? There are many different ways. I am simply making a rather narrow point that perhaps the legislation is not wrong; the real concern is how it is operated. The difficulty at the heart of this is that we cannot really answer for the PPS.

Mr McCartney: I accept that. However, if someone asked me what had changed since the 1980s, I would have to answer that honestly by saying that it is hard to explain what has changed, except that you knew that they got 10 years instead of getting off scot-free.

Mr A Maginness: There is an obvious problem here. For very good reasons, the PPS is independent, and the director is independent in the exercise of his functions. That is very important. However, on the other hand, there is a public need to know what is going on and why he made decisions. That is also in the public interest. How do we devise a system where we maintain that independence and yet have a degree of accountability? I am not sure how you do that. However, that is what people are looking for.

At the end of the day, Tommy English was murdered and nobody has been made accountable for his murder, and there were other criminal acts for which nobody has been made accountable. People in north Belfast and elsewhere are concerned about that.

Mr McCartney: Moreover, the question on people's lips is: what role did the state play in the murder of Tommy English? That is the backdrop to all of this.

The Chairperson: I get the feeling that we are starting into commentary rather than interrogation. Mr McCrea is next, and then we will draw a line under this.

Mr B McCrea: I think that you are right, Chairperson. The bit that I find disappointing is that I would take a contrary view to many about the role of the PPS in the matter because I was aware of developments over a longer period. There is a balance to be put forward about whether you want the PPS to bring forward a case in which a guilty plea is found 99.9% of the time, because you then might say that it is being very efficient and that it is really good. On the other hand, you might say that it is not for the PPS to decide who is guilty or not, and that you should come forward with the view that some people would lose, because that is the proper rule of law. Without going into the detail, I think that both the police and the prosecutors were aware that it would be a balanced decision about the way that things would go. However, it is right for them to prosecute a case where they think that they can get a conviction, but to leave it to the courts to decide. That seems to be entirely appropriate.

However, the issue is that I am not really able to have a debate with Mr McCartney about this because neither of us is fully aware of the facts that are before the police or the PPS. We also had the earlier point about saying that to do so — even to question it — might, in some people's view, be challenging the independence of the judiciary, the PPS or somebody else. For the record, I think that it is a more nuanced position than that described by Raymond, although I understand why he said what he said. We have to find a way of having a debate.

He is going to get really upset about this, but I agree with Raymond once again: there is absolutely nothing that beats bringing your own legislation through the proper channels in the Assembly and arguing about what you are trying to do. I am not talking about this specific case, but in future cases I cannot believe that anybody would want a situation where people who have carried out murder or other

heinous crimes are not brought to justice. I do not care what side of the fence you are on, that cannot be justified.

There is an issue about letting people come in and say, "It is your legislation; you scrutinised it." Perhaps you might reflect on how to have a more maturing debate on these things in future. I realise that that is not an easy task and will leave you to reflect on it.

The Chairperson: Minister, do you want to make a final comment, because people are making statements now?

Mr McCartney: God forbid.

Mr B McCrea: Sydney Anderson put me up to it, Chairperson; he said that I was being muzzled.

Mr Ford: I am not sure that, after all the other closing statements, you need one from me, Chairperson.

We have noted the points that were made and will reflect on them. We will study the Hansard report for those that we missed, and I suspect that there will be issues that we wish to engage on anyway. There are difficult issues for all of us. I hope that the fact that I am here with two of my senior officials is an indication that we recognise that there are legitimate issues to be discussed with the Committee. I hope that our relationship will continue to be reasonably constructive, including the times when we do not all agree.

The Chairperson: Minister, I thank you. Peter and David, I thank you as well for attending the meeting.