Northern Ireland Assembly

Committee on Procedures

# OFFICIAL REPORT (Hansard)

Inquiry into the extent to which Standing Orders should permit the Attorney General to participate in proceedings of the Assembly:
Briefing from the Attorney General for Northern Ireland

28 May 2013

# NORTHERN IRELAND ASSEMBLY

# Committee on Procedures

## Inquiry into the extent to which Standing Orders should permit the Attorney General to participate in proceedings of the Assembly: Briefing from the Attorney General for Northern Ireland

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**Members present for all or part of the proceedings:**
Mr Gerry Kelly (Chairperson)
Mr Jim Allister
Mr Samuel Gardiner
Mr Alban Maginness
Mr Barry McElduff
Mr Oliver McMullan
Lord Morrow
Mr George Robinson
Mr Mervyn Storey

**Witnesses:**
Mr John Larkin Attorney General for Northern Ireland

**The Chairperson:** The Attorney General (AG) has agreed to make an oral submission. You are very welcome. Would you like to make some opening remarks, and we will ask questions later?

**Mr John Larkin (Attorney General for Northern Ireland):** Chairman, rather than me simply repeating what I have written, I thought that it would be more useful if I make myself available for questions to maximise the Committee's opportunity to bring out some of the implications of what I am saying.

I am hugely grateful for this opportunity. I will make one observation. It struck me that, when I last appeared before the Committee in September 2010, if memory serves me right, the Committee took the decision afterwards to park the issue of participation pending resolution of the larger questions on the governance and accountability of the Public Prosecution Service (PPS). It is a big question, obviously, but, in the meantime, particularly through the section 8 guidance, it has become clear that, even if that issue is not looked at by the Committee for some time, there are, perhaps, more pressing immediate concerns, and it strikes me that the Committee might wish to look at the issue before coming to a view on the nature of the governance and accountability arrangements that ought to pertain in respect of the PPS.

**The Chairperson:** Thank you. That, I am informed, has not been decided yet. You sent in quite a comprehensive written presentation, and I thank you for that. I will open the meeting up to the Committee for any questions that members wish to ask.

**Mr A Maginness:** I do not know whether the Attorney General has seen the letter from the Speaker to the Chairperson of the Committee, Mr Kelly. In substance, the Speaker, in my opinion, is saying that there should not be a formal speaking role or a role to that effect for the Attorney General on the Floor of the Assembly, save really through the Committees. Do you have a view to express on that? I do not know whether you have seen the letter.

**Mr Larkin:** No, I have not seen that.

**Mr A Maginness:** I hope that I am not misrepresenting the Speaker, but, in substance, I think that I am correct.

**The Chairperson:** We will try to get you a copy.

**Mr Larkin:** Rather than make any considered response to a document that I have not read, which, usually, is an unwise thing to do, I will content myself with some general observations. First, it is good that there be engagement with the Committees, and it would probably be for each Committee to have devolved to it the power to agree with the Attorney General from time to time what engagement might be appropriate.

Secondly, it is reasonably clear that the thrust of the 2002 Act is for some form of plenary participation. The office in this jurisdiction, as I indicated and as is obviously well known to the Committee, cannot readily be equated with any model that exists elsewhere. There are important differences from the position in Scotland, England and Wales, and Dublin. However, if one takes Scotland as a fairly ready example to hand, one can see that the Lord Advocate is not a Member of the Scottish Parliament, but she, as was previously, and he, as he now is, will sit, will answer questions and may make statements from time to time. No one confuses the Lord Advocate with a Member of the Scottish Parliament. No one imagines for a moment — it is prohibited, of course, in the 2002 Act — that the Lord Advocate would try to vote on a Division. However, it strikes me that the resource, which a law officer is, is properly being made available to the relevant legislature, which, in that case, is the Scottish Parliament and here it is the Assembly.

I will give one example that brought the issue into focus for me well in advance of any decision on the ultimate question about the governance of the PPS. It is the question of the section 8 guidance. I worked extensively, as Mr Maginness knows, with the Justice Committee on the guidance that has been produced thus far, and I am happy to say that the Justice Committee appeared very happy with the guidance. Therefore, if the Committee is happy with the guidance, I do not anticipate a difficulty with the Assembly in plenary session. However, if, for example, my guidance were to be prayed against, how would the case for that guidance be made unless the Attorney General of the day was able actually to say something about the guidance and, perhaps, answer questions about it in the course of a debate?

**Mr Allister:** Given the fact that your primary role is chief legal adviser to the Executive, do you see any difficulties in taking on a speaking role in the Assembly when the Assembly is really getting down and getting its hands dirtied about what should and should not be in legislation, for example? Do you see any threat to your independence and your perceived independence with any role being accorded to you there?

**Mr Larkin:** Westminster, in enacting the 2002 Act, must have contemplated that the statutory independence that it, for the first time, enshrined, is, nonetheless, compatible with a role as set out in Standing Orders and which, I think, necessarily encompasses some role in the plenary sittings of the Assembly.

One of the things, of course, that we do not yet have but that I hope we will acquire here is a strong culture that supports what we do. A mistake that lawyers sometimes make but sometimes very quickly realise is the fact that the law and rules cannot do everything. In Westminster, for example, you have an Attorney General who is not statutorily independent, who sits as a Conservative MP, who is a member of the Government and who sits from time to time when invited in Cabinet, but who, nonetheless, in a number of discrete areas, is capable of and expected to exercise independence. He will make technical points, for example, and he did so recently on the same sex marriage Bill that is going through the House of Commons. If memory serves me right — I, of course, speak subject to correction — my recollection is that he abstained on the Second Reading. So, he is able to make technical points on —

**Mr Allister:** Just to pick up on that point: we had the recent attempted amendment to the justice Bill about the Marie Stopes clinic. It is public knowledge that a view was given by the Attorney General's office on that. Would you expect that, in that debate, for example, there would be an expectation to hear from the Attorney General? How would that leave the independence of your office?

**Mr Larkin:** That is a very strong supplementary question. I think that there is a distinction on matters of policy. Let me give another example that will be familiar to Committee members. I engaged with the Committee for Finance and Personnel and wrote to you on your private Member's Bill. I made it very clear that I have a view on the law of that Bill, following amendments made to it, but I would not, for example, ever expect to be drawn into a debate on the merits of the Bill in policy terms or on whether it is a good thing or a bad thing. However, it would not strike me as at all improper to be asked to explain a legal view on one aspect or another of it.

**Mr Allister:** The nature of debate with interventions and Members giving way, etc, is that issues are teased out. Keeping the line that circumscribes what is legal and what might overlap with something else is not easy. If that line is at all blurred, is there a threat to the office?

**Mr Larkin:** I think that you are absolutely right to say that the line is not always easy to draw, but no one has ever said that this is an easy job to do. In one sense, I speak partly against interest, because if the Committee and the Assembly ultimately decide not to make Standing Orders on these matters, I shall be spared the kind of difficult work to which you refer. It strikes me that merely because something is difficult and presents challenges, it does not mean an insuperable obstacle to its being attempted. Obviously, it could be done well or badly. Committee members and Members of the Assembly more generally will be the judges of that.

**Mr Allister:** Do you not see any danger in getting into the cut and thrust of debate?

**Mr Larkin:** I think that is a question of judgement for the individual Attorney General of the day. I hope that he or she will be mindful that although the lines between policy and law, and competence in particular, are not always easy to draw, there should be good faith and a competent effort to make that distinction.

**Mr Allister:** What about the point that you are the Attorney General to a conglomerate Executive who are not necessarily, self-evidently, of one view on particular issues? Does that not simply create more difficulties for this role?

**Mr Larkin:** Without adopting descriptions of the Executive that may or may not be regarded as favourable to them, it emphasises that where one has a mandatory coalition, a statutorily independent law officer is a safeguard to minority parties in the Executive and a resource to the Assembly as a whole. Of course, one could have the statutory enshrinement of independence and an Attorney General who does not live up to what that requires.

No one pretends that the right answers are easy or that they will always come instantly or readily to hand, but a clear objective is set out in the legislation. Merely because its operation and practice will be difficult — it will clearly be very difficult on occasions — does not strike me as a reason why the task of doing what the 2002 Act intended regarding a certain form of participation in the Assembly should not be attempted.

**Mr Allister:** Could I ask —

**The Chairperson:** Excuse me, Jim. I have always tried to avoid jumping in between two barristers. As Chair, let me —

**Mr Allister:** I have one final question.

**The Chairperson:** I will let you come in in a moment if that is OK. I am not a lawyer but I want to expand on something that you said so that it is a bit clearer in my head.

You are the chief legal adviser to the Executive and, I think that Jim Allister pointed out, to all the Departments, or at least to all the Ministers. From a layperson's point of view, there seems to be a conflict of interest. If the job of the Committees — they are known as scrutiny Committees — is to hold the Departments to account and the job of the Assembly as a whole — certainly when it sits in

plenary session — is to hold Ministers and the Executive to account, I put it to the AG that, to a layperson, there is a conflict of interest. I will use a slightly different example. I sit on the Policing Board, which holds the police to account. If the police and the Policing Board were to use the same legal advice, would that not be a conflict of interest as well?

**Mr Larkin:** Of course, the lawyer that you would be using would not be statutorily independent, as the Attorney General is. That is why I go back to the statutory protection of the Attorney General, who is independent in the discharge of his or her functions. I think that that makes a profound difference.

Again, it is worthwhile looking at the imperfect comparators, because there is no direct analogy. It has always been the case that the Attorney General of England and Wales has been available to advise Parliament corporately on important matters. The role is capable of a number of positions that, in one sense, sometimes appear not to always sit easily together. Conventions protect that in Westminster. Here, the protection is the statutory independence.

I emphasise again that the Attorney General in England and Wales is a party political MP. Even with that background, it is nonetheless felt that some of the functions that absolutely require independence are capable of being performed by someone who, for at least part of his political life, has been an entirely party political animal.

**The Chairperson:** Jim, sorry about that. Do you want to come in again?

**Mr Allister:** I just want to ask one final question. Apart from not being able to vote in the Assembly by virtue of not being a Member of the Assembly, where else do you see your vision of the role of the Attorney General being restricted?

**Mr Larkin:** It is a matter that is really left to the creativity of the Assembly. It can —

**Mr Allister:** Yes, but I was asking about your vision.

**Mr Larkin:** I am not sure that I have an overly prescriptive vision. The Scottish model strikes me as a potentially useful template. Obviously, when one starts to condescend to that level of detail, I think that one can start to make drafting suggestions. Scotland is a pretty useful model.

**Mr Allister:** Chairman, I think that, at some point, we should invite the Attorney General back after he has read the Speaker's letter to give us a response to that.

**The Chairperson:** OK, that is fair enough.

**Mr Larkin:** I would be very happy to do that.

**Mr Gardiner:** How do you do? In your opening remarks, you said that you are answerable to the First Minister and the deputy First Minister on advice and guidance and things like that.

**Mr Larkin:** No, I am not sure that I did. I am completely statutorily independent. There is —

**Mr Gardiner:** You are answerable to those two?

**Mr Larkin:** No, I am statutorily independent. I am accountable regarding misbehaviour. If, for example, the First Minister and the deputy First Minister discovered me doing something hugely improper, they themselves cannot get rid of me. They would appoint a tribunal that would investigate the matter, and it would make a decision on that.

The relationship between the First Minister, the deputy First Minister and the Attorney General is, first and foremost, that they appoint the Attorney General for the time being —

**Mr Gardiner:** They cannot sack you.

**Mr Larkin:** That is right.

**Mr Gardiner:** How do you stand on co-operation with and advice to the Speaker?

**Mr Larkin:** Of course, the Assembly has its own sources of legal advice in this Building. The Speaker writes to me at the conclusion of the passage of each Bill and asks me whether I am going to refer the Bill to the Supreme Court. I return to him as quickly as I can, indicating what my intentions are. So, formal requests for legal advice from the Speaker have not come. There is no reason why that should not come. Obviously, I would consider it important, if I could, to advise the Speaker, albeit that he has had his own sources of advice thus far. The structures of how participation, for example, might take place, would be worked out, subject to Standing Orders, by the Speaker. No doubt, he would consult beyond those issues.

**Lord Morrow:** Attorney General, your role is, to the layman, slightly confusing. That is maybe more to do with the layman than —

**Mr Larkin:** I can assure you, Lord Morrow, that it is not. It is the nature of the position.

**Lord Morrow:** When you would come to the Assembly, who would you be coming to advise?

**Mr Larkin:** The Assembly in toto.

**Lord Morrow:** Yet, that is not your role here as Attorney General. You are to —

**Mr Larkin:** The role of chief legal adviser to the Executive is an important role, but none of these positions is set out in statute. There is an extent to which, even after just over three years in post, there is still a process of finding our way collectively.

**Lord Morrow:** Attorney General, think twice before you answer this one. If I were to knock on your door tomorrow with an issue, would you receive me?

**Mr Larkin:** I would. When I appeared before the Committee for Finance and Personnel, that question was cast in almost identical terms. It was then cast up to me how I had not dealt with a particular issue. There were reasons for that, which I could not go into, and I hope that those have subsequently come to the attention of the particular Member. Absolutely, I am keen to engage, obviously, formally with the Committees and with groups of MLAs or individual MLAs. Obviously, Lord Morrow, if you were to approach me about, for example, an issue involving a constituent, you would not expect to receive legal advice about that. If for example, you were considering bringing in a private Member's Bill and wanted to discuss in broad-brush terms issues of competence that might arise, I would be entirely happy to have such a conversation.

**Lord Morrow:** I fully accept that it would not be acceptable for Members to come and knock your door about a constituent who has an issue rather than about some legal aspect. However, if you were to give a sign of approval to a Bill and it went forward on the basis that the Attorney General said that it was competent, in order and fit for purpose, would it not be reasonable to expect that every Member of the Assembly should accept that? You would have said that it was fit for purpose, so they should get on with it.

**Mr Larkin:** It is a hugely flattering invitation to have some form of infallibility conferred on me. *[Laughter.]* I fear that I must resist it, however attractively it is couched. It has been said more than once that Ministers, Departments, Committees and MLAs or groups of MLAs will get an opinion. It will be a scrupulously and conscientiously thought-out opinion, but I cannot always pretend that it will be infallible or that its infallibility will be universally recognised.

**The Chairperson:** We are going into some ecclesiastical areas.

**Mr Storey:** You are very welcome, Attorney General. Some of us have benefited over the past number of months and years from having access to legal advice from Legal Services here at the Assembly. Legal advice from the Departmental Solicitor's Office is privy to the Committee that originally asked for it. If an individual expressed to you a concern about the response, would there then be a conversation between you and Legal Services or the Departmental Solicitor's Office? Legal advice is an opinion. It all depends on the individual giving that advice and their interpretation of the legislation or whatever. Do you ever see a situation in which you could give a contrary opinion on legal advice that was given to an individual or Committee?

**Mr Larkin:** Let us concretise it to a certain extent by taking the example of advice received from the Assembly's legal advisers by a Committee. That would be privileged to the Committee. The Committee, as the client, could collectively waive its privilege and seek advice from the Attorney General. I could look at that, and if I considered that the advice was correct in every particular or some variation westwards from that, I could advise the Committee accordingly.

One of the interesting issues, of course, is that there is in place a fairly well-known convention governing the Attorney General's advice to Ministers and Departments. The convention is that it is not disclosed normally that the advice has been sought, and a fortiori the content of the advice is not disclosed. It is not always universally adhered to. Often, one can understand that. It need not always be that way. In some of the North American jurisdictions, where there is quite an intense culture of transparency, the advice of the attorney is always published. If, for example, you go to the website of the Attorney General for South Carolina, there is a section devoted to his legal advice. You will see a range of public bodies that have written to him or his senior staff about often quite technical issues, such as pensions law or issues of larger importance, and the advice is published. Let me be very clear: I am not urging that revolutionary approach, but —

**The Chairperson:** It is a nice idea.

**Mr Larkin:** It is always useful to see comparisons because they indicate that the way that we do things is not the only way. It is one way of ensuring that the public bodies to which citizens give their allegiance are not holding back the legal advice as to the way in which they conduct their affairs. Superficially, there is something very refreshing and attractive about it, even though I am going to be typically conservative and cautious and say that we should not go there just yet.

**Lord Morrow:** We started off with five or six lawyers in the room. We now have only two or three. *[Laughter.]*

**The Chairperson:** You have broken two lawyers so far. You are doing very well.

**Mr Storey:** At least we are not being charged by them.

**The Chairperson:** That is why we are worried about it.

**Mr McMullan:** My question centres on the same issues as those of Mervyn and Lord Morrow. Is there a need for legal advice at the Assembly? Is there a need for legal advice from you? According to the Speaker, there is no role for you in any procedures, Standing Orders or roles of the Assembly. Lord Morrow said that if he came to you with a problem with putting a Bill down, you would give him advice. Is that the legal advice that we could expect the Assembly to follow, or do you see a case in which the Members could argue your views?

**Mr Larkin:** They might well do that. I suppose the value of a private Member who is anxious to introduce a piece of legislation getting a view, in broad terms, from the Attorney General is that if the Bill is introduced in the same shape or form, and continues its passage likewise, there is a pretty good chance that that Bill will not be referred because it is the Attorney General who has given the indication that it seems reasonable. Obviously, the Attorney General of the day will consider any point that is made during the Bill's passage and any point that is made when it concludes its passage, but if the Attorney General has researched the point before the Bill is introduced, and the Bill, as introduced, faithfully reproduces the terms in which it was described by its sponsor, one can see that that would be a powerful reassurance to the private Member or Members who introduced it.

**Mr McMullan:** Do you foresee any stage at which you would have to intervene with legal advice given at the Assembly?

**Mr Larkin:** My impression now is that the approach of the Speaker is to acknowledge that there is a range of safeguards in relation to the possibility of a Bill being referred and that the Speaker is not going to stop a Bill being substantively debated at any stage, but I speak subject to correction, and, as I understand it, that might be notwithstanding the fact that the Assembly's Legal Services may have a view expressing concern about aspects of its competence.

I am keen to emphasise what, in many ways, Mr Allister's question brought out. In one sense, a lot of this is very difficult, and, for us at least, it is untried. It is not that I am anxious to do more work than I have to in human terms. However, when it comes to the section 8 guidance, principally, and in relation to complex legal issues that might arise from time to time with Bills, it strikes me that there is a service that the Attorney General can move and offer to the Assembly, of which the Assembly might well wish to avail itself from time to time.

**Mr McMullan:** Lastly, in layman's terms, do you think the present system is confusing? You have England, Scotland, Wales and Northern Ireland on different systems. Is there any way that people could question the legal advice that is given in the different jurisdictions?

**Mr Larkin:** I suppose that the difference of approach between England, Wales, Scotland and Northern Ireland is historically conditioned. Scotland's legal system has, for centuries, been profoundly different from the common law system as it operates in England, Wales and Ireland. No particular issues of difficulty arise from that. As a law student, it caused difficulties because we simply could not use English text books. We had to do the research ourselves and make do with what was available to us. Life as a law student would have been easier if we could have used English text books, but I think the beauty — that is not a word that is used very often in this context — of devolution is that, within the areas of competence of the Assembly, we can make our decisions and plot paths that are suitable for us here.

**The Chairperson:** Let me ask a couple of questions. In practical terms, what do you envisage? Will you answer a series of questions at Question Time, in the same way that Ministers do? Or, will there be an ad hoc approach to it, which means that sessions would be set aside for an issue that was raised? I am wondering whether you had a view of where that would go, but maybe you do not. I do not want to confuse the issue, but I am a bit confused about giving evidence and giving legal advice. Can you explain the difference?

**Mr Larkin:** I will take the second question first, Chairman, if that is convenient. If I am asked openly in Committee what I think about x, I am both giving evidence to the Committee and giving an opinion if what I think about x involves a conclusion about a matter of law.

**The Chairperson:** An opinion being legal advice?

**Mr Larkin:** Yes, indeed. Obviously, because that is given publicly or, at least, to the Committee, and if the Committee is not in closed session, that would not be privileged because it is broadcast. If the Committee is in closed session, it is privileged to the Committee. I hope that that is a helpful distinction. That is the broad distinction and typically the terms in which I engage with the Committee.

Similarly, if I am asked a specific question and I write to the Committee, that could involve an expression of view as to the law. Again, it depends on what the terms of engagement are with respect to the letter to which I am replying. It could be indicated that it will be confidential to the Committee or, for example, my officials could contact the Committee Clerk and indicate that the Attorney General can reply but the reply will be confidential to the Committee. There are a variety of possible approaches.

Then you referred to plenary session and questions. I hope I do not give evidence of undue cynicism by suggesting that it is probably best not to have a simple slot, because if you have a simple slot, it will be filled. It is perhaps better to leave it for issues of such importance that it is considered necessary to have questions addressed to the Attorney General. I would be content with whatever way the Assembly decided to arrange those matters.

**The Chairperson:** Finally from me, you mentioned the Scottish example, but this is a power-sharing coalition with two First Ministers — a First Minister and deputy First Minister. How would you deal with the fact that it is a very specific system here, which cannot be compared to the Scottish system in that sense?

**Mr Larkin:** In Scotland they have voluntary arrangements. There may, from time to time, be a minority Government or coalition Government on a voluntary basis in Scotland. The fundamental issue is independence. If I am asked for advice and asked what my view is about legal problem z, the people who are listening to me or who receive it in written form will get my view about legal problem z. They will not get my view about how I think it will play, how well it will be received or how popular it will make me. It is my conscientious view as to what the answer is. In the present system of governance

that we have, that statutory independence is a vital safeguard and reassurance, not for the individual Attorney General but for those who may be the recipients of his or her advice.

**The Chairperson:** OK. Are there any other questions?

**Mr Storey:** Just to clarify, the question that I asked was not in any way casting aspersions on the legal advice that we do receive.

**Mr Larkin:** No, of course not.

**Mr Storey:** It is very much appreciated.

**The Chairperson:** He is afraid that you are going to take him to court. *[Laughter.]*

**Mr Larkin:** It is an occasion of privilege, of course.

**The Chairperson:** On behalf of the Committee, I thank you for coming. It was very helpful. We have your submission and your answers to the oral questions. We may send you some other questions, if you are open to that.

**Mr Larkin:** I am indeed. If the Committee would consider it helpful, I will give some brief written observations on the Speaker's letter. I am happy to answer any questions in written form or, indeed, if the Committee would find it helpful to hear from me again, I would be delighted to speak to the Committee again.

**The Chairperson:** Thank you for that. It would be very helpful if you sent us some written stuff.