Northern Ireland
Assembly

COMMITTEE ON PROCEDURES

OFFICIAL REPORT
(Hansard)

Standing Orders in Respect of Attorney General for Northern Ireland

5 October 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Lord Browne (Chairperson)
Mr Mervyn Storey (Deputy Chairperson)
Mr Paul Butler
Mr Billy Leonard
Mr Adrian McQuillan
Lord Morrow
Mr Sean Neeson
Mr Ken Robinson

Witnesses:

Mr Ian Hearst	)	
Mr Raymond Kitson	)	Public Prosecution Service
Mr Jimmy Scholes	)	
Mr Gareth Johnston	)	Department of Justice

The Chairperson (Lord Browne):

I welcome to the Procedures Committee the new acting Director of the Public Prosecution Service, Mr Scholes, and his officials, Mr Kitson and Mr Hearst. I thank you for submitting your paper on Friday; that has given members every opportunity to study it in depth.

Mr Jimmy Scholes (Public Prosecution Service):

I thank the Committee for the invitation to speak on this inquiry. I hope that our contribution is of assistance in resolving these significant issues. I am grateful to the Chairperson for acknowledging that I am accompanied by my colleagues, Mr Kitson and Mr Hearst.

It is important that I make clear at the outset that in examining the accountability arrangements, particularly the implications of any change to those arrangements, that I recognise that those are matters for the Assembly and not the director. As the Chairperson has indicated, we have sought to assist the Committee by drawing up a background paper on the present arrangements, which we have submitted for the information of the Committee. With the Chairperson's permission, I will proceed by drawing out the main points in that paper.

I hope that it is helpful if I approach matters by identifying what I consider to be the two important issues for consideration, particularly in relation to the Public Prosecution Service (PPS). The first is: what is the origin and nature of the present accountability arrangements in relation to the Attorney General and, in particular, the relationship between the Attorney General and the director? Secondly, is there a need to change the present arrangements and, if so, in what way?

Turning to the existing accountability arrangements, it is important to recognise that at the heart of any discussion of these matters are issues concerning the independence and accountability of the prosecutor. A key consideration for the criminal justice review was ensuring the independence of the prosecution while also ensuring that appropriate accountability arrangements are in place. Therefore, it is important to examine the thinking behind the criminal justice review, the subsequent Justice (Northern Ireland) Act of 2002, the Justice (Northern Ireland) Act of 2004 and the Northern Ireland Act 2009, and to view the PPS's relationship with the Attorney General in the context of the full range of accountability mechanisms in place for the PPS.

Having examined the arrangements in other jurisdictions, the criminal justice review was clear that it is vital to maintain and protect the independence of the prosecuting authority to ensure that decisions on prosecutions are correct and the liberty of the subject is protected. That was exemplified in two particular sections of the Justice (Northern Ireland) Act 2002 and the Justice (Northern Ireland) Act 2004. Clause 42 of the 2002 Act provides that the functions of the

director shall be exercised independently of any other person, and clause 32 provides that it is an offence for a person with the intention of perverting the course of justice to seek to influence the director's decision on whether to institute or continue proceedings.

In examining the then future relationship between the Attorney General and the director, the criminal justice review considered a number of models. Following extensive public consultation, it recommended that in the particular circumstances of Northern Ireland, the independence of the PPS would be strengthened by ensuring that its relationship was consultative and not supervisory. That was viewed by the review as an important safeguard for the independence of the PPS and as essential to the building of public confidence. That was reflected in the legislation, particularly clause 42(3) of the 2002 Act, which provides for a process of consultation between the Attorney General and the director.

As I stated, the review also recognised the importance of accountability. The clear intent behind the review and the justice Acts was to ensure effective engagement between the Attorney General and the director within the consultative framework, thereby allowing the Attorney General to fulfil his duties, such as answering questions put by the Assembly. In that regard, we noted that the 2002 Act envisaged that the Attorney General may answer questions in the Assembly that relate to the operation of the system of prosecution in any particular case. That is important to bear in mind.

In his report of August 2009, the Attorney General stated that although a consultative relationship between the Attorney General and the director may be a challenging one, it could also be effective. He referred to certain conditions required for an effective relationship, including regularity of contact, sufficiency of information and frankness of challenge.

I understand that the Attorney General no longer remains of that view. However, as acting director, I am confident that the conditions that were referred to by the Attorney General can be achieved. The operation of those conditions would not compromise the independence of the prosecution and would assist the Attorney General in responding appropriately to questions in the Assembly.

Steps have been taken to develop a protocol dealing with how that relationship could be exercised in practice. Although recognising independence, it makes provision for the exchange

of information and for conferring on policies, business plans, reports and the financial administration of the PPS.

The draft protocol provided for an element of consultation on individual cases, particularly those that raise issues of concern. There was an acknowledgement that, in such circumstances, the Attorney General may give advice and guidance to the director. A similar protocol, also based in consultation, has been entered into by the director with the Advocate General on matters that remain excepted. I can arrange for a copy of that protocol to be made available to members, if it would be of assistance.

It should be noted that the relationship with the Attorney General is only one of a number of accountability mechanisms built into the existing legislation. There are other mechanisms, including the requirement to produce an annual report, the designation of the director as accounting officer for the PPS and the scrutiny of the annual resource accounts of the service by the Northern Ireland Audit Office and the Public Accounts Committee. There is also a robust inspection regime whereby the Chief Inspector of Criminal Justice may, with the consent of the Attorney General, carry out an inspection of the PPS. That may include matters relating to prosecutorial policy.

Crucially, all decisions are subject to public scrutiny at trial, and decisions not to prosecute are capable of being judicially review. In addition, there is a review mechanism in place and a comprehensive policy on the giving of reasons for decisions not to prosecute.

Openness and transparency will also be important in the PPS's interaction with the Assembly. I want to make it clear that I and my senior colleagues envisage being called to the Committee for Justice on a regular basis to discuss issues such as prosecutorial policy. We recognise that those are matters on which elected representatives will naturally have a proper interest.

Indeed, broad issues of policy and procedure, such as avoidable delay or the treatment of victims and witnesses, may arise from individual cases. That will be of concern to the Committee and, as a general rule, I welcome that type of discussion. PPS officials have appeared before the Committee for Justice already and, with the Chairperson's agreement, over the coming weeks we intend to brief members on the work of the PPS.

The second issue to which I referred at the outset is whether there is a need to change the present accountability arrangements. I reiterate that I am mindful that such decisions are a matter of policy for Ministers and the Assembly. However, I am, of course, aware that the Minister of Justice has announced that he intends to commence a process of consultation. That consultation will examine whether there is a need for change to the present accountability arrangements and, if so, what form the future arrangements might take. We intend to participate fully in that consultation process.

In those circumstances, I propose to make the following observations. The Attorney General's report of August 2009 set out what I consider to be a blueprint for the operation of the existing arrangements, the circumstances where those arrangements have been in operation for only a matter of months and where the First Minister and the deputy First Minister have, on behalf of the Executive, entered into a protocol with the Government of the United Kingdom. Based on the continued existence of those arrangements, an issue must inevitably arise over whether they have been given sufficient time to bed in.

It is clear that certain difficult issues will be required to be addressed as part of the process of consultation, to which I referred. For example, there is the issue of what is meant by superintendence in those circumstances and, in particular, whether it is intended to include a power of direction. It will be noted that, although the relationship between the Attorney General and the Director of Public Prosecutions in England and Wales is one of superintendence, both parties have recently entered into a protocol, the effect of which is that the Attorney General recognises the independence of the director in relation to prosecutorial decision-making. Again, I can make a copy of that protocol available if members wish.

It will also be understood that changing the accountability arrangements to superintendence and direction could have the result of making the Attorney General, in effect, the decision-maker in certain cases. Such a step could place the Attorney General in a position where he would be liable to be questioned in the Assembly on decisions that he had taken. That would run counter to the clear recommendation of the criminal justice review that the prosecutions decision-makers should be independent and not susceptible to political influence or, indeed, the perception of political influence. Indeed, in seeking to answer such questions, the Attorney General would not necessarily be in a position to make available to the Assembly any more information by way of explanation than he could had he consulted with the director in circumstances where the director

was the decision-maker.

Finally, the Committee will be aware that changing the arrangements to superintendence and direction will not have the effect of restoring the position with regard to accountability to what it was pre-devolution. That is because national security remains an excepted matter, and, accordingly, the director will continue to consult with the Advocate General in London in relation to any prosecution where issues of national security arise. The concordat with the Government of the United Kingdom recognises the desirability of protecting the independence of the prosecution in the context of the accountability arrangements that have been set out in the Justice Act. Those arrangements encompass the director's relationship and consultation with the Attorney General and the Advocate General.

It is possible — I put it no higher than that — that in the event of a move to superintendence and direction for the Attorney General of Northern Ireland, Parliament in Westminster may wish to give consideration to moving to similar arrangements for the Advocate General. That could involve the Advocate General in London having a power of superintendence and, possibly, direction in relation to prosecution decisions in Northern Ireland where national security issues arise.

Those are difficult issues that will require careful thought, but I shall end on a positive note. I am determined that, on our part, we will make every effort to ensure that our future relationship with the Assembly, the Attorney General, the Advocate General and Ministers will be as constructive and helpful as possible for the benefit of the people of Northern Ireland. Thank you for your time.

The Chairperson:

Thank you for your useful presentation. One of the issues that the Attorney General raised at the Committee last week was his concern about how he could be simultaneously responsible for answering questions about the Public Prosecution Service yet have no responsibility for its operation. What is your opinion on that?

Mr Scholes:

That could work effectively, by the director making available to the Attorney General all relevant facts and information. That would enable the Attorney General to answer any question in the

Assembly in the manner that he considers to be appropriate.

Mr Butler:

Thank you for your presentation. Over the past couple of years the PPS has come in for a lot of criticism for not instilling public confidence and not explaining its decisions to victims and their families. I accept that there is a fine line and that a balance has to be struck in relation to political influence on the PPS, particularly in this part of the world.

Although the Attorney General has a superintendent or consultative role and may be called to the Assembly or Committees, whereas the PPS is held accountable for financial and administrative matters, over the past couple of years the real spotlight has been on the PPS. Without going into detail, there have been some cases in which public confidence has not been great. People have had a low level of confidence in the ability of the PPS to come up with the right decisions.

Mr Scholes:

I entirely understand your question. First, the cases to which you refer were decisions on prosecution. The cases were in the courts, and although we interacted with victims, we also provided an explanation in court for each of the steps that we took. Each of those cases occurred under the then existing arrangements of superintendence and not under the present arrangements of consultation.

With regard to your comment on the giving of reasons, I think that there is some misunderstanding in the community about that. I accept my share of the blame in that. I certainly accept that there is a responsibility on us as prosecutors to make it clear to the community the extent to which we give reasons. I would suggest that we have a very developed policy in relation to reasons. We indicate whether a decision was taken on an evidential or public interest basis. If we receive a request for detailed reasons, we endeavour to provide that. Indeed, a range of cases that have occurred since October 2009 have been identified as being of particular concern to the community, including deaths, sexual offences and offences involving vulnerable people. If we decide that there is insufficient evidence to prosecute, we are proactive and write to the victim to explain that to them.

In the cases that you referred to there was extensive engagement with the victim. I entirely

understand that there may not have been an understanding in the community that that was the position, and I entirely understand that a victim's approach to how the system has treated them is quite often conditioned by —

Mr Butler:

Do you accept that if those were the present arrangements there would be a wider public concern, and people would ask MLAs what the PPS is and what robust mechanisms exist to keep it accountable? At the same time, I accept that that could be seen as political interference.

Mr Scholes:

I am not sure that the Attorney General would put any more information into the public domain than the PPS would in relation to the cases to which you refer. I accept that it is a measure of accountability, and I would encourage and welcome having an Attorney General in a local Assembly to answer questions about the process of prosecution. It is clear to me that the whole purpose of the Act was designed to enable that. I would welcome that development, and we would make it effective by making the relevant facts, information and files available to the Attorney General to enable him to do that.

Mr Leonard:

Thank you for the information. I am asking a couple of questions in the context of openness and transparency. If I say the word "games", I am not saying it in a negative way; obviously you have thoughts behind the words. I am looking to tease out more about how you see the move to superintendence within the context of the Ministry of Justice and of an Attorney General coming to an Assembly. Where do you see problems lying on a day-to-day basis? Some practical examples would be helpful, and you said that you can send papers to us.

I want to ask about the public interest. You know as well as I do that the public interest is a very fluid concept; mercury on a fork, some would say. Your view of the public interest might not agree with that of many others on numerous occasions. If you said to an Attorney General that you could not proceed with a case because it was not in the public interest, would you be prepared to break down the public interest and show how the decision relates to specific aspects of the public interest, A, B and C? The Attorney General could then bring the A, B and C to the Floor of the Assembly.

Mr Scholes:

I can envisage a situation whereby we would explain to the Attorney General exactly the considerations of a public interest nature that led to the conclusion that the test for prosecution was not met. It would then be a matter for the Attorney General to choose how to convey that information to the Assembly.

Mr Leonard:

Across the board, you could give that breakdown?

Mr Scholes:

Absolutely, and we would intend to do that. However, there are proper constraints on the extent to which one can provide reasons for decisions to prosecute. The Attorney General would be bound by those constraints just as much as a prosecutor would. I think of the article 2 and article 8 rights under the European Convention on Human Rights.

The appropriate place for the scrutiny of decisions about whether to prosecute is court. I entirely accept that it is appropriate and necessary for the Assembly and MLAs to have information to reassure themselves that the process of prosecution is operating effectively.

Mr Leonard:

What if a case does not get to court?

Mr Scholes:

A decision not to prosecute can be judicially reviewed in court. It is not always possible for a victim to have a decision judicially reviewed, but in such circumstances we will make the reasons for those decisions clear to the Attorney General. In my view, the Attorney General has the power to answer questions in the Assembly as to how we went about making that decision. In so doing, he will have to recognise that someone is not being prosecuted and that it is inappropriate to have tested in public whether someone is guilty of an offence without the protections that a trial offers. However, the Attorney General is a very experienced person and I have no doubt that he will be able to explain those decisions in a way that accommodates those concerns.

Mr Leonard:

And superintendence in the ongoing —

Mr Scholes:

No. That will happen under the existing arrangements. There is no difficulty. Under the consultation arrangement, we have made it perfectly clear that we will make relevant information available to the Attorney General to enable him to answer questions in the Assembly on the process of prosecution. It does not necessarily require superintendence.

Mr Storey:

You are very welcome, Mr Scholes. In our work as public representatives this issue arises frequently, where a decision has been taken not to prosecute and one of the reasons given is that it is not in the public interest. The PPS's interpretation of that varies from case to case. Is there not a role for the PPS to explain the key principle applied in its decision not to prosecute based on the case not being in the public interest, as opposed to a lack of substantial evidence?

One of the main gripes that I repeatedly come across is the number of cases that are prepared, with files sent to the PPS, and, on investigation, are rejected. I can understand when that happens on the basis of there not being enough evidence, but rejection because they are not in the public interest is another matter. A job of work must be done in order that MLAs and constituents understand the phrase "not in the public interest".

Mr Scholes:

I entirely understand where your question comes from. We make in the region of 60,000 decisions a year, and about 10% of those relate to the public interest, so it is important to get that in context.

It is very important that the Assembly understands the framework by which prosecutors decide that something is not in the public interest. That is why we developed a code for prosecutors, with 15 to 20 examples of considerations depending on the circumstances of each case. I cannot stress enough that a public interest factor depends on how far that is present in the circumstances of each case.

For example, I would require a great deal of convincing that a decision of no prosecution in the public interest could be reached in any murder case. That is simply not necessarily feasible. We take into account the seriousness of the events, the extent to which there was an abuse of trust and the extent to which the person was in a position of, let us say, in loco parentis to the victim.

There are all sorts of issues, including previous record. All those issues would have a bearing on the decision, which is individual to each case.

I accept that there is a need for greater understanding of the fact that there is a code for prosecutors, and that it provides some guidance. It is only a framework. It does not assist in the particular circumstances of each case. However, it is important to observe that in every democracy, and in most civilised countries, the legislature delegates to the prosecutor a degree of discretion to take decisions on behalf of the state. That is what is happening here.

It is important that the Assembly is reassured that those mechanisms are working effectively. The courts are the proper place for the scrutiny of individual decisions. Equally, I do not underestimate the very important role that the Assembly plays.

The Chairperson:
I remind members to try to confine their questions to the remit of the inquiry.

Mr Storey:
Just in case.

Mr McQuillan:
That was a warning. *[Laughter.]*

Lord Morrow:
I am not sure that I can, but I will try. *[Laughter.]* This whole thing is quite difficult to get one's head around. That is why I will have difficulty getting a certain question and sticking to the issues.

The PPS, Attorney General and PSNI are all in the law enforcement category, and there is utter confusion about where one organisation's role ends and the other's begins. That was manifestly demonstrated at a recent joint Justice Committee and Health Committee meeting, when questions were being put to the Justice Minister, who said, "No, I would not speak to the Attorney General about that" and, to the next question, "Why would I speak to the PPS about that?" Is it your intention to do anything by way of educating the public at large? I am not talking about you going to the local parish hall some night and saying, "We are the PPS". If you

want to do that, that is all right with me, but that is not really what I have in mind.

There is a need for an education programme, because there is utter confusion in the general public about where your role starts and finishes, where the Attorney General's role starts and finishes, and where everybody's role starts and finishes. I am sorry about the lack of focus in my question. However, there is no doubt that there is great anxiety among the public when they lift the paper and see that the PPS has decided that it is not in the public interest to go ahead with a case. They suspect that that is just a code for, "We are not pursuing it for other reasons". I know that that is not the case, but that is the perception. How would you address that issue?

Mr Scholes:

I recognise that as a concern. I suppose that it is a reflection of the fact that after a number of years we now have a devolved Administration with, quite properly, greater scrutiny brought to the actions of all elements of the justice system, including the police, the Attorney General and ourselves. I, for my part, accept our obligations to explain more fully.

I point to some of the modest steps that we have taken in that regard. I referred to the code for prosecutors. That is available on the internet. All our policies on, for example, the treatment of victims and witnesses are available.

We have also made public statements, for example, when concerns arose from taking pleas of guilty to lesser offences. I do not want to call it an education exercise, but it is a continuing exercise to ensure that the public become increasingly informed of our role and of the proper separation between investigation, which is a matter for the Chief Constable, and prosecution, which is a matter for the Director, and where that begins and ends. I intend to participate fully in seeking to ensure that the public are as educated as possible in that regard.

Lord Morrow:

And MLAs?

Mr Scholes:

Absolutely. As you are aware, we have endeavoured to begin that process.

The Chairperson:

Thank you for your contribution. It will help in our deliberations. If there is any matter that arises at a future date, I am sure that we will be able to contact you by letter. Thank you for coming and for the useful presentation.

I welcome Gareth Johnston from the Department of Justice. We look forward to hearing your short presentation, Gareth.

Mr Gareth Johnston (Department of Justice):

Thank you very much. I work in the justice strategy division of the Department of Justice, and I have responsibility for policy and legislation on a range of criminal justice issues. The request that the Department received from the Committee's secretariat was along the lines of explaining to the Committee where the Department of Justice does, or does not, fit into all of this. If the Committee is content, I will focus on that point. I am conscious that Tony Canavan set out all the history and legislation last week.

To put it basically, neither the Department nor the Minister have any direct responsibility for prosecutions, for the PPS, or for the Attorney General. We see a great deal of our colleagues in the PPS because they are very much part of the justice system, and we rightly collaborate on a whole range of issues. One of the most prominent examples at the moment is around speeding up justice and reducing delay. Through the criminal justice board, in particular, the justice agencies are working together on a wide range of projects, and the PPS is very much tied into that work. Therefore, we co-operate with the PPS, but the Department of Justice has no formal responsibility for the PPS: the PPS is a non-ministerial Department. Also, the Department of Justice does not have a responsibility for policy on prosecutions.

Last week, the Committee was briefed on the new arrangements in the Justice (Northern Ireland) Act 2002 that came into effect on devolution. That further cemented the independence of the PPS and made the relationship between the Attorney General and the PPS consultative rather than supervisory. As the Committee has been reminded today, those arrangements have their roots in the criminal justice review of 2000, which envisaged that public confidence was best served by manifest independence. The review recommended the double lock of a non-political Attorney General coupled with there being no power of direction in individual cases or in policy matters. As I said, it is a consultative rather than supervisory arrangement.

Several voices have expressed concerns about whether that arrangement is the best one for Northern Ireland in 2010. Some were from MLAs, others were from the third sector or from legal academics; and the Attorney General expressed views to the Justice Committee at the beginning of July and to this Committee last week. The Justice Minister made a speech on 7 June and noted the concerns that were being expressed and the questions to which they led.

In light of those issues, the Minister of Justice had early consultation with the First Minister, the deputy First Minister and, indeed, the Attorney General for Northern Ireland. It was agreed that we should move to consult on accountability arrangements for the PPS. Given that the Justice Minister has an overview of the justice system, the Department of Justice was asked to lead on that consultation and will do so.

I apologise that I have given you a rather long-winded answer to the question of how the Department of Justice does, and does not, fit in. It does not have responsibility for prosecutions. However, given its wider interests in the justice system, it will lead on the consultation on the balance between independence and accountability of the PPS. Of course, that will be done in close liaison with other interested parties.

I will pause for a moment before I say any more about that consultation. Mr Moore has helpfully highlighted some examples of matters that were answered by the Lord Advocate in Scotland and has suggested the question of where those matters lie in Northern Ireland and how the Justice Minister could play a role to answer questions on them. It is fair to say that in Scotland, because the Lord Advocate is a Minister in the Scottish Government, she, perhaps, answers questions that, in other jurisdictions, would be answered by a justice Minister. Therefore, for example, Mr Moore emphasised questions on Lockerbie. Recently, questions on Lockerbie have been about the compassionate release of a prisoner. In Northern Ireland, that would be a decision for the executive arm of government and a matter for the Minister of Justice.

Another example is domestic abuse. If the question were about the system's response to cases of domestic abuse, that is certainly a question that the Minister of Justice could answer. He could talk about how the system works together through the domestic violence strategy and the sexual violence strategy. Therefore, certain questions would fall naturally to David Ford to answer.

One of the other three areas that Mr Moore mentioned was lenient sentences. If it were a question of the law on unduly lenient sentences, the Department of Justice could certainly answer it. Indeed, recently, it answered the Committee for Justice's query on the extent of the law on unduly lenient sentences. However, if a question were about the policy on what gets referred and what does not, that is currently a matter for the Director of Public Prosecutions.

If a question were about legislation on assisted suicide, that, clearly, would be a matter for the Minister of Justice. However, if the question relates to prosecutorial guidelines on assisted suicide, which have been in the news recently, then that would be very much a matter for the PPS. It has consulted on those guidelines, which have been put in place by the Director.

On the final area, which is alcohol, one question that was asked in the Scottish Parliament was about statistics on prosecutions. In Northern Ireland, the Department of Justice keeps those statistics and could answer such a question here. However, a question on alcohol-related prosecutions would be a matter for the prosecution services. Therefore, in essence, because of the peculiarities of the Scottish system, Elish Angiolini answers questions on matters that, in Northern Ireland, would fall more appropriately to the Minister of Justice. That does not cover all of the areas that Tim Moore highlighted.

That was a bit of diversion. Let me return to the plans for consultation on the balance between independence and accountability of the PPS. The consultation will explore options including consideration of the supervisory power of the Attorney General and a long-stop power of direction. It will consider the position in other jurisdictions and will consider specific powers that the Attorney General used to have, such as the power to consent to certain prosecutions and the power to discontinue a prosecution — the nolle prosequi power, if I may challenge the very fine Hansard reporters with some Latin.

I expect the consultation to consider where the power to refer to the court of appeal sentences that are regarded as unduly lenient should lie. That power was moved from the Attorney General in London to the Director of Public Prosecutions on devolution, a fact that has, I know, come in for a certain amount of criticism.

Last week, the Committee referred to efficiency, which is, of course, something that any consultation needs to consider, not least in the current climate.

I emphasise that none of this impacts on the fundamental principle that individual prosecutorial decisions should be free from political interference. It will be important that that is emphasised so that the limits of what we are debating are understood.

We aim to have a draft paper by Christmas. We will use the new year to consult, with a view to bringing recommendations to the new Executive after the Assembly elections. Any changes to the arrangements would, more than likely, need legislation. However, we have early plans, subject to Executive approval, for a further justice Bill, which could accommodate any changes agreed.

Mr Chairman, I will risk going outside my remit to make a suggestion, in light of what I said about consultation. The Committee is considering changes to Standing Orders that may be needed in light of section 25(1) of the Justice (Northern Ireland) Act 2002. The work that we are doing on the bigger questions of independence, accountability and governance will take time to be consulted on, to come to fruition and for legislation to be enacted. That is almost inevitable. At this stage, before the consultation, I cannot say exactly what will come out of that.

Last week, the Attorney General suggested what the implications of his current responsibilities might be for Standing Orders. If memory serves me, and as Mr Moore has highlighted, that covered explaining decisions on legislative competence to the Assembly; making statements following, for example, the publication of his annual report; engaging on the human rights guidance that he is obliged to issue to criminal justice organisations under section 8 of the Justice (Northern Ireland) Act 2004; answering questions; and other potential aspects of engaging with or providing advice to the Assembly. It may be that those are the areas on which the Committee may want to focus its consideration now, as regards Standing Orders, on the basis that it would keep those Standing Orders under review as the way forward on the bigger questions of accountability becomes clear.

The Department of Justice will be very glad to offer whatever further briefings the Committee may want in connection with that as the project moves forward.

The Chairperson:

Thank you, Mr Johnston. I hope that I am not straying from the Committee's remit when I ask

you to outline how you think the Committee, through Standing Orders, can best draw a clear distinction between the questions for which the Minister would be responsible for answering and those for which the Attorney General would be responsible for answering.

Mr Johnston:

I suspect that that is going to be difficult to do under Standing Orders. Hard cases make bad law, and we are talking, at times, about quite delicate distinctions between different aspects of an issue. There is a similar case when it comes to deciding which Department deals with a particular question. For example, if a question is about road traffic offenses, does the Department of the Environment, which is responsible for road traffic, have responsibility, or does the Department of Justice, which is responsible for offences? I suspect that, with respect to a legalistic framework, Standing Orders will not be able to go very far in getting into the detail of those distinctions. It will probably be a matter of the Business Office developing expertise on where questions go for answers, and advising Members accordingly. Take one of the examples that I mentioned earlier: alcohol. If a question is on what the police are doing about alcohol, the Department of Justice would be responsible for answering. If a question is about statistics on alcohol-related crimes, the Department of Justice would be responsible for answering. However, if it is about policy on prosecuting alcohol-related crimes, under any arrangements, the responsibility for answering would lie in a different direction.

Those sorts of distinctions are very difficult to capture in Standing Orders.

Lord Morrow:

If I heard you right, Mr Johnston, you said that this will be extremely difficult. Therefore, it will be a case of suck it and see. However, it will be difficult for the Committee to draw up procedures and give guidance in relation to these matters. Do you agree that it is a recipe for continued confusion throughout the lifetime of the Assembly?

Mr Johnston:

I hope that, through the consultation exercise and whatever follows, if there are points of confusion, we can address those and try to get some more clarity. However, I look at what other jurisdictions have done in respect of Standing Orders. For example, in Scotland there is a general provision about the Lord Advocate answering on matters that are within her responsibility. They have been able to work that through. Last year, I was in Scotland and talked to Elish Angiolini,

and I got the impression that it works. I cannot say that there will not be teething issues. I think that there have been issues with the devolution of justice generally, including where responsibilities lie. However, as time goes on, and we all learn a bit more about what fits where, we will get over those.

Lord Morrow:

You said that Scotland gets through all right with little confusion. Are we not more complicated by virtue of the fact that the Attorney General is not a member of the legislative Assembly?

Mr Johnston:

I would not like to say that we are more complicated, but we are different. In the consultation, we have to keep bearing in mind that solutions that other people have adopted help inform what we do. However, at the end of the day, we have to come up with something that suits Northern Ireland and its particular situation.

Lord Morrow:

Mr Chairperson, now that you have listened to Mr Johnston, you are probably going to book your flight to Scotland to talk to the powers that be.

Mr Johnston:

The Chairman may not book his flight back.

Lord Morrow:

Will he be that confused?

The Chairperson:

Thank you, Mr Johnston.

Mr Johnston:

If there is any other way that we can assist, we will be very glad to do so. Perhaps we can assist as we get more clarity on the terms on which we will be consulting, and we will come back to brief the Committee again.