



THE ATTORNEY GENERAL FOR NORTHERN IRELAND, DIRECTOR OF PUBLIC PROSECUTIONS AND ACCOUNTABILITY TO THE ASSEMBLY

(1) To provide a description of the statutory relationships which, following the devolution of justice powers, will exist between the Attorney General for Northern Ireland and the Director of Public Prosecutions.

(2) To describe the ways in which the Attorney General for Northern Ireland and the Director of Public Prosecutions will be accountable to the Northern Ireland Assembly.

(3) Based on practice elsewhere in the UK or Ireland, to comment on the accountability arrangements relating to (1) and (2) above.

SUMMARY

This research paper:

- (1) Provides a description of the statutory relationships which, following the devolution of justice powers, will exist between the Attorney General for Northern Ireland and the Director of Public Prosecutions.
- (2) Describes the ways in which the Attorney General for Northern Ireland and the Director of Public Prosecutions will be accountable to the Northern Ireland Assembly.
- (3) Comments on the accountability arrangements relating to (1) and (2) above, referring to comparative experience in England and Wales, and Ireland.

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1. INTRODUCTION

This report examines the Attorney General for Northern Ireland and the Director of Public Prosecutions. The Report first discusses the Criminal Justice Review 2000 which made recommendations about these offices (section 2); it then examines the relationship between that will exist, post Devolution of policing and justice, between the Attorney General for Northern Ireland and the Director of Public Prosecutions (section 3). The following section examines their accountability to the Assembly (section 4). The final section of the Report comments on these relationships and accountability mechanisms, referring to comparative examples from England and Wales, and Ireland (Section 5).

2. CRIMINAL JUSTICE REVIEW

The 1998 Belfast or Good Friday Agreement proposed a review of the criminal justice system. In 2000, the Criminal Justice Review Group reported.¹ Its report is important: the Secretary of State for Northern Ireland described it as “the document on which much of the present and future judicial system in Northern Ireland is based.”² The Review Group referred to international law and best practice,³ analysed the existing situation,⁴ consulted interested parties⁵ and investigated arrangements in other jurisdictions.⁶

The Review Group recognised the need to balance the principle of independence with the principles of accountability and transparency.⁷ The Review Group noted that Irish legislation provided the “most clearly defined statutory safeguards for the independence of the prosecutor”.⁸

The Review Group recommended the creation of a local “non-political” Attorney General, with “oversight of the prosecution service”, appointed for a fix term of perhaps five years, and having a status similar to a High Court judge.⁹ If the Attorney General was not a member of the Assembly then there should be a possibility to speak in the Assembly.¹⁰

The Review Group recommended that, following an open competition, the Attorney General appoint the head of the prosecution service, either for a fixed term or until a retirement age.¹¹ The Group recommended that the head of the service should only

¹ Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* (Belfast / Norwich: HMSO, 2000) available at

http://www.nio.gov.uk/review_of_the_criminal_justice_system_in_northern_ireland.pdf .

² Mr. Shaun Woodward, *Hansard*, Debate on the Northern Ireland Bill 2009, 4 Mar 2009 : Column 950, available at

<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090304/debtext/90304-0020.htm>

³ See Paragraph 4.7 referring to the UN Guidelines on the Role of Prosecutors 1990, available at http://www.unhchr.ch/html/menu3/b/h_comp45.htm and to the International Association of Prosecutors Standards and Statement of Essential Duties and Rights of Prosecutors.

⁴ Paragraphs 4.15 - 4.56.

⁵ Paragraph 4.56 - 4.72.

⁶ Paragraphs 4.73 – 4.83.

⁷ Paragraph 4.102.

⁸ Paragraph 4.110.

⁹ Paragraph 4.160.

¹⁰ Paragraph 4.161.

¹¹ Paragraph 4.176.

be removed from office for misconduct or incapacity, and only upon the recommendation of an independent tribunal.¹²

The Review Group recommended that the Attorney General's relationship with the Director should be consultative and the Attorney General should have no power to issue directions.¹³ Referring to the Irish legislation, the Review Group recommended that legislation should confirm the independence of the Director, should protect the Director from inappropriate influence, and should allow for consultation between the Director and the Attorney General.¹⁴ The Group further recommended that the Attorney General should be "answerable to the Assembly for the work of the prosecution service in general terms", but should not be required to answer questions on individual cases (though in appropriate circumstances the Attorney General might choose to talk about individual cases).¹⁵ The Review Group also recommended the head of the prosecution service should be accountable to an Assembly Committee for finance and administration; standing orders should limit the type of questions that might be asked so as not to affect individual cases.¹⁶

3. STATUTORY RELATIONSHIPS BETWEEN THE ATTORNEY GENERAL FOR NORTHERN IRELAND AND THE DIRECTOR OF PUBLIC PROSECUTIONS

The Justice (Northern Ireland) Act 2002 sets out the most important rules on the appointment and removal of the Attorney General and the Director of Public Prosecutions, on their powers, and on the relationship between them.¹⁷ The legislation provides strong guarantees to ensure these officers act independently of political or other pressures. This section first discusses the office of the Attorney General and then the office of the Director of Public Prosecutions before considering the relationship between them.

THE ATTORNEY GENERAL

Prior to the devolution of policing and justice, the Attorney General for England and Wales acts as the Attorney General for Northern Ireland. Following devolution the Attorney General for England and Wales will lose most of the responsibilities relating to Northern Ireland. The Attorney General for England and Wales will however continue to have a role to play in relation to security matters in Northern Ireland, and when acting in this capacity will be known as the Advocate General for Northern Ireland.¹⁸

The First Minister and deputy First Minister, acting jointly, appoint the Attorney General for Northern Ireland.¹⁹ They must first consult the Advocate General for Northern Ireland.²⁰ The Attorney General must be a barrister or solicitor of at least ten years' standing.²¹ The Attorney General is disqualified from being a member of the House of Commons, a member of the Assembly or a member of a Northern

¹² Paragraph 4.176.

¹³ Paragraph 4.162.

¹⁴ Paragraph 4.163.

¹⁵ Paragraph 4.163.

¹⁶ Paragraph 4.163.

¹⁷ The Justice (Northern Ireland) Act 2002 is available at http://www.opsi.gov.uk/acts/acts2002/ukpga_20020026_en_1.

¹⁸ Justice (Northern Ireland) Act 2002 s 27, s 28 and schedule 7.

¹⁹ Justice (Northern Ireland) Act 2002 s 22(2).

²⁰ Justice (Northern Ireland) Act 2002 schedule 7, paragraph 13.

²¹ Justice (Northern Ireland) Act 2002 s 22(6).

Ireland district council.²² There is a process for removing the Attorney General but it is a rigorous one. The First Minister and deputy First Minister, acting jointly, may remove the Attorney General but only if a specially convened tribunal so recommends. The tribunal may only recommend removal because of “ground of misbehaviour or inability to perform the functions of the office”. The tribunal consists of two senior judges from Britain chosen by the Lord Chancellor.²³

It should be clear from the procedure for removing the Attorney General that the role of the office should be exercised in an independent manner. The Justice (Northern Ireland) Act specifies this unambiguously in section 22(5).

The Justice (Northern Ireland) Act 2002 does not set out what powers of the pre-Devolution Attorney General will be transferred to the post-Devolution Attorney General, and does not set out the functions of the Attorney General.²⁴

The Attorney General for Northern Ireland has several important statutory powers. These include the power to refer an Assembly bill to the Judicial Committee of the Privy Council (later the Supreme Court of the United Kingdom) for that court to determine whether the Bill is within the legislative competence of the Assembly.²⁵ A bill for instance is outside the legislative competence of the Assembly if it violates a right in the European Convention on Human Rights. Apart from this possibility of a reference, the Attorney General for Northern Ireland must be notified whenever any court is making a decision as to whether an Act of the Assembly is within its legislative competence.²⁶ The Attorney General may initiate legal action to determine if an Act of the Assembly or an action (or failure to act) by a Northern Ireland Minister or Department is unlawful having regard to the limitations in the Northern Ireland Act 1998.²⁷

Pre-devolution the Attorney General for England and Wales has considerable powers in relation to prosecution matters in Northern Ireland, extending even to the power to remove the Director of Public Prosecutions.²⁸ Post devolution these powers will not be transferred to the Attorney General for Northern Ireland.

DIRECTOR OF PUBLIC PROSECUTIONS

Post devolution, the Attorney General for Northern Ireland will appoint the Director of Public Prosecutions and the Deputy Director. To be appointed as the Director one must have been a barrister or solicitor of ten years' standing.²⁹ The Attorney General must consult the Advocate General before appointing someone as Director.³⁰

The Director (and the Deputy Director) are appointed until at least the retirement age of 65³¹ - this is a strong guarantee of independence. This guarantee of independence is reinforced by the procedure for removing the Director, which is similar to the procedure for removing the Attorney General. The Attorney General

²² Justice (Northern Ireland) Act 2002 s 23(6-8).

²³ Justice (Northern Ireland) Act 2002 s 24.

²⁴ During the Parliamentary Debate on the Justice Northern Ireland Bill, Lord Goldsmith noted that the Attorney General had many public interest roles to perform; Lord Goldsmith also commented that it would be for the Assembly and Executive to decide whether the Attorney General would act as legal adviser to the Executive: 13 Jun 2002: Column CWH92.

²⁵ Northern Ireland Act 1998 s 11. The Northern Ireland Act 1998 is available at http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980047_en_1.

²⁶ Northern Ireland Act 1998 s 81.

²⁷ Northern Ireland Act 1998 schedule 10.

²⁸ Justice (Northern Ireland) Act 2002 s 40.

²⁹ Justice (Northern Ireland) Act 2002 s 30.

³⁰ Justice (Northern Ireland) Act 2002 s 43(1).

³¹ Justice (Northern Ireland) Act 2002 s 43(5).

may remove the Director. To do this the Attorney General first convenes a special tribunal of two senior judges from Britain. The Attorney General may only remove the Director if the tribunal recommends the removal on grounds of misbehavior or inability to perform the functions of the office; the Lord Chancellor selects the tribunal members.³²

The Justice (Northern Ireland) Act 2002 accords the Director considerable powers in relation to initiating, taking over and ending prosecutions.³³ In exercising these powers, the Director must act “independently of any other person.”³⁴

RELATIONSHIP BETWEEN THE ATTORNEY GENERAL FOR NORTHERN IRELAND AND THE DIRECTOR OF PUBLIC PROSECUTIONS.

Pre Devolution, the Attorney General for England and Wales, acting as Attorney General for Northern Ireland, has considerable powers in prosecution matters and in relation to the Director. Pre-Devolution, the Attorney General has a power of “superintendence”³⁵ over the Director; the Attorney General may also remove the Director because of misbehavior or inability to perform the functions of the office.³⁶ The relationship between the Attorney General for Northern Ireland and the Director will be very different post-Devolution.

Post-Devolution, the Director is required to act “independently of any other person”.³⁷ Any pre-Devolution role of the Attorney General in relation to initiating, conducting or terminating prosecutions is transferred to the Director, not to the Attorney General.³⁸ The Advocate General for Northern Ireland retains some role in relation to prosecutions.³⁹

The relationship between the post-Devolution Attorney General (and the Advocate General) and the Director will cease to be one of superintendence and will be one of consultation. The Director must consult the Attorney General and the Advocate General before issuing any code for prosecutors and before preparing an Annual Report.⁴⁰ The Director must send a copy of the annual report of the Prosecution Service to the Attorney General and the Advocate General.⁴¹ Apart from these obligations, the Director may consult with either the Attorney General or the Advocate General from time to time.⁴²

³² Justice (Northern Ireland) Act 2002 s 43.

³³ Justice (Northern Ireland) Act 2002 s 31-33.

³⁴ Justice (Northern Ireland) Act 2002 s 22.

³⁵ The classic statement on “superintendence” is repeated at paragraph 4.45 of the Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* (Belfast / Norwich: HMSO, 2000).

³⁶ Justice (Northern Ireland) Act 2002 s 40. Under the earlier Prosecution of Offences (NI) Order 1972, Article 3, the Director was subject to the superintendence and direction of the Attorney General. The Attorney General rarely exercised any power direction: Criminal Justice Review Group Report at paragraph 4.103..

³⁷ Justice (Northern Ireland) Act 2002 s 42(1).

³⁸ Justice (Northern Ireland) Act 2002 s 41.

³⁹ Justice (Northern Ireland) Act 2002 schedule 7.

⁴⁰ Justice (Northern Ireland) Act 2002 s 42(2).

⁴¹ Justice (Northern Ireland) Act 2002 s 42(5).

⁴² Justice (Northern Ireland) Act 2002 s 42(3-4).

4. ACCOUNTABILITY TO THE NORTHERN IRELAND ASSEMBLY

A Cabinet Secretary once explained the difference between “accountability” and “responsibility”.⁴³ Accountability is the duty to answer questions, explain mistakes and put right any errors. The more specific concept of responsibility implies that an assembly may dismiss an office holder who no longer has its confidence. In this sense, neither the Attorney General nor the Director is responsible to the Assembly. The Assembly has no role to play in the removal process of either officer.

Neither the Attorney General⁴⁴ nor the Director may be a member of the Assembly.⁴⁵ As regards the Attorney General, this is different from the Attorney General for England and Wales who must be a member of the UK Parliament. It is also different from the Attorney General of Ireland, who may be a member of the Parliament. The Assembly has the power to require persons to present themselves and to produce documents.⁴⁶

There are mechanisms for the Attorney General to be accountable to the Assembly. The Attorney General is accountable only in the sense of answering questions in the Assembly. The Justice (Northern Ireland) Act 2002 allows the Assembly to make standing orders which allow the Attorney General to speak in the Assembly; the Assembly may not confer any right on the Attorney General to vote in the Assembly.⁴⁷ To ensure the independence of the prosecution function the Attorney General cannot be required to answer any questions or produce any documents concerning prosecution matters if it would “prejudice criminal proceedings” or “be otherwise against the public interest”.⁴⁸ The Attorney General must prepare an Annual Report, to be delivered to the Office of the First Minister and deputy First Minister; this report must be laid before the Assembly.⁴⁹

There is no provision in the Justice (Northern Ireland) Act 2002 for the Director to be given speaking rights in the Assembly, but the Director (or Prosecution staff) may appear before committees. The Director, Deputy Director and members of the Prosecution Service cannot be required to answer any questions or to produce any documents that is not relating to “finances” and “administration”.⁵⁰ The Director is obliged to prepare an Annual Report and the Attorney General is obliged to arrange for its publication.⁵¹ There is a requirement to lay this report before the Assembly.⁵²

5. COMMENT ON THE ACCOUNTABILITY ARRANGEMENTS

INTRODUCTION

According to the Explanatory Memorandum for the Justice (Northern Ireland) Act 2002, these arrangements “make the Attorney General accountable before the Northern Ireland Assembly for the operation of the Prosecution Service. He will be allowed to answer questions and make statements pursuant to standing orders, but

⁴³ Adam Tomkins, *Public Law* (Oxford: Oxford University Press, 2003) at 150.

⁴⁴ Justice (Northern Ireland) Act 2002 s 23(6-8).

⁴⁵ Northern Ireland Act 1998 s 36.

⁴⁶ Northern Ireland Act 1998 s 44.

⁴⁷ Justice (Northern Ireland) Act 2002 s 25.

⁴⁸ Justice (Northern Ireland) Act 2002 s 25(3).

⁴⁹ Justice (Northern Ireland) Act 2002 s 26.

⁵⁰ Justice (Northern Ireland) Act 2002 s 30(11).

⁵¹ Justice (Northern Ireland) Act 2002 s 39.

⁵² Justice (Northern Ireland) Act 2002 s 42(6)

without the right to vote.”⁵³ The Explanatory Memorandum adds that the Attorney General will have the “right to refuse to answer questions or produce documents on public interest grounds or where that might prejudice criminal proceedings.”⁵⁴ In relation to the Director, the explanatory Memorandum notes “that the Director cannot be required by the Assembly to answer questions or produce documents other than in relation to the finances and administration of the prosecution service. As the Director is meant to have complete independence in the exercise of his functions (subject to the accountability measures and limits set out in this legislation) it would not be appropriate for the Assembly to question him on individual cases.”⁵⁵

The 2006 NIO consultation paper on the devolution of policing and justice summarises the effect of the Justice (Northern Ireland) Act 2002 as follows:

7.6 Following devolution and the end of Ministerial responsibility for the prosecution service, the Director’s relationship with the Attorney General for Northern Ireland will be one of consultation. The Attorney General NI will have no power of direction or superintendence over the PPSNI, whether in individual cases or on matters of policy. This underpins the independence which was a key recommendation of the Criminal Justice Review.

7.7 The Attorney General NI will be responsible for appointing the Director and Deputy Director of Public Prosecutions. He will also require the Director to prepare an annual report on how he has exercised his functions, and will arrange for that report to be published and to be laid before the Assembly. The Director will not be required to answer to the Assembly except in relation to finance and administration and will consult the Attorney General NI where appropriate.⁵⁶

The terms of the Justice (Northern Ireland) Act 2002 suggest a little more detail than these summaries provide. The next sections provide some more detail, and discuss the Northern Ireland provisions in a comparative context. The sections address the Relationship between the Attorney General and the Director; Accountability to the Assembly; Removal and Completing or Changing the System under the Justice (Northern Ireland) Act.

RELATIONSHIP BETWEEN THE ATTORNEY GENERAL AND THE DIRECTOR

ENGLAND AND WALES

As noted above the relationship in the post-Devolution period will be very different from the one in the pre-Devolution period; it is also very different from the relationship between the Attorney General for England and Wales and the Crown Prosecution Service in England and Wales.

In England and Wales, the Attorney General is a Minister and a member of the Government, though not usually of the Cabinet.⁵⁷ The Director of Public Prosecutions

⁵³ Explanatory Memorandum for the Justice (Northern Ireland) Act 2002 at paragraph 50.

⁵⁴ Explanatory Memorandum for the Justice (Northern Ireland) Act 2002 at paragraph 50.

⁵⁵ Explanatory Memorandum for the Justice (Northern Ireland) Act 2002 at paragraph 59.

⁵⁶ Northern Ireland Office, *Devolving Policing and Justice in Northern Ireland: A Discussion Paper* (Belfast: NIO, 2006) at paragraphs 7.6 and 7.7.

⁵⁷ Anthony Bradley and K.D. Ewing, *Constitutional and Administrative Law* (Harlow: Longman, 2006) at 407-8.

acts under the “superintendence”⁵⁸ of the Attorney General for England and Wales.⁵⁹ Further, the Attorney General for England and Wales retains a role in consenting to specific prosecution decisions in specified areas.⁶⁰

The Attorney General for England and Wales exercises a variety of roles outside of the prosecution function: the Attorney General is also the chief legal adviser to the Government, a Minister with responsibility for some justice matters.⁶¹ The Attorney General has a large number of public interest roles. In exercising prosecutorial functions, the Attorney General is expected to act independently of Government, though the Attorney General may consult with Government ministers.⁶²

There have been occasions where the Attorney General for England and Wales has been drawn into controversy, often because of a perceived tension between these “bewildering range of roles”.⁶³ Constitutional scholar Rodney Brazier mentions the following examples:⁶⁴

- Ending the Prosecution of an editor of the Workers’ Weekly for sedition in 1924⁶⁵
- Prosecution of Clive Ponting under the Official Secrets Act
- Advising the DPP for Northern Ireland that prosecutions relating to allegations of a shoot to kill policy in Northern Ireland would be against the public interest.

The Lords Constitution Committee identified three recent controversies which led to calls for reform:⁶⁶

- The Attorney General’s Legal advice on the Iraq invasion 2003
- The Attorney General’s involvement in the decision of the Director of the Serious Fraud Office to end an investigation in to BAE.
- Speculation about the Attorney General’s possible role in prosecutions during the “Cash for Honours” investigations.

⁵⁸ The Attorney General says that “superintendence” includes “setting the strategy for the organisation; responsibility for the overall policies of the prosecuting authorities, including prosecution policy in general; responsibility for the overall ‘effective and efficient administration’ of those authorities, a right for the Attorney General to be consulted and informed about difficult, sensitive and high profile cases; but not, in practice, responsibility for every individual prosecution decision, or for the day to day running of the organisation”, Constitutional Affairs Committee, *Fifth Report: Constitutional Role of the Attorney General* (London: Parliament, 2006-7) HC 306 at paragraph 14.

⁵⁹ Prosecution of Offences Act 1985 s 3(1).

⁶⁰ Attorney General’s Office, *Functions of the Attorney General; Paper prepared for the Constitutional Affairs Committee Inquiry into Constitutional Role of the Attorney General* (2007) at <http://www.attorneygeneral.gov.uk/attachments/Constitutional%20Affairs%20Committee%20-%20Functions%20of%20the%20Attorney%20General.pdf>

⁶¹ Justice Committee, *Fourth Report: Draft Constitutional Renewal Bill (provisions relating to the Attorney General)* (UK: Parliament, 2007-2008) HC 608 at paragraphs 17 and 27.

⁶² Anthony Bradley and K.D. Ewing, *Constitutional and Administrative Law* (Harlow: Longman, 2006) at 412; Rodney Brazier, *Ministers of the Crown* (Oxford: Clarendon, 1997) at 153.

⁶³ Terence Daintith and Alan Page, *The Executive in the Constitution* (Oxford: Oxford University Press, 1999) at 232.

⁶⁴ Rodney Brazier, *Ministers of the Crown* (Oxford: Clarendon, 1997) at 170.

⁶⁵ Rodney Brazier, *Ministers of the Crown* (Oxford: Clarendon, 1997) at 153.

⁶⁶ Constitution Committee, *Reform of the Office of Attorney General* (UK: Parliament, 2007-2008) HL 93, at paragraphs 11-19.

As part of the Government's *Governance of Britain* reform package, Government proposed reforming the office of the Attorney General.⁶⁷ The Government published a Draft Constitutional Renewal Bill, which proposed minor amendments.⁶⁸ The Attorney General would retain a power of superintendence but would not be permitted to issue directions in individual prosecution decisions.⁶⁹ The Attorney General would still need to consent to any prosecutions for which such consent is required by a statute or statutory instrument;⁷⁰ the Attorney would be able to transfer any such consent function to the Director.⁷¹ The Attorney General would appoint the Director for a five year term, and would be able to remove the Director if the Director was unable, unfit or unwilling to perform the functions of the office.⁷² The Attorney General's power to issue a *nolle prosequi* to end a prosecution would be ended.⁷³ The Draft Constitutional Renewal Bill would allow the Attorney General to end any individual prosecution on grounds of national security.⁷⁴

Several Parliamentary committees produced reports that were critical of these proposals.⁷⁵ The Justice Committee notes that the Draft Bill transferred many prosecutorial functions to independent prosecutors but maintained the position that the Attorney General was supposed to be a Minister and the Chief Legal Adviser to the Government.⁷⁶ The Justice Committee also signalled concern over the provisions for the Attorney General to remove the Director, as they would appear to include the possibility to dismiss a Director for failing to head a Protocol which had not yet been drafted.⁷⁷

The Queen's Speech in 2008 referred to "constitutional renewal" but did not specifically refer to the Draft Constitutional Renewal Bill, and it is not clear that the Government intends to introduce this bill.⁷⁸

In March 2009, Lord Tyler introduced a Private Member's Bill, the Constitutional Renewal Bill 2009, which proposes reform of the Attorney General for England and Wales.⁷⁹ This Bill is modelled on the Government's Draft Constitutional Renewal Bill but includes reforms that are more radical. The Bill would disqualify the Attorney General from being a member of either house of Parliament⁸⁰ and would require the Attorney General to act independently and in the public interest.⁸¹ While the Attorney General's consent would still be required for some prosecutions, the Attorney General would not be allowed to issue directions to the Director in individual cases.⁸²

⁶⁷ UK Government, *The governance of Britain: a consultation on the role of the Attorney General* (London: TSO, 2007) Cm 7192.

⁶⁸ The Draft bill is at <http://www.justice.gov.uk/publications/constitutional-renewal.htm>.

⁶⁹ Section 2.

⁷⁰ Section 2.

⁷¹ Section 8.

⁷² Section 4.

⁷³ Section 11.

⁷⁴ Section 12.

⁷⁵ Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (UK: Parliament, 2007-2008) HL 166/ HC 551; Justice Committee, *Fourth Report: Draft Constitutional Renewal Bill (provisions relating to the Attorney General)* (UK: Parliament, 2007-2008) HC 608.

⁷⁶ Justice Committee, *Fourth Report: Draft Constitutional Renewal Bill (provisions relating to the Attorney General)* (UK: Parliament, 2007-2008) HC 608 at paragraph 36.

⁷⁷ Justice Committee, *Fourth Report: Draft Constitutional Renewal Bill (provisions relating to the Attorney General)* (UK: Parliament, 2007-2008) HC 608 at paragraph 63.

⁷⁸ The Queen's Speech is available at <http://www.number10.gov.uk/Page17665>.

⁷⁹ The Bill is available at <http://services.parliament.uk/bills/2008-09/constitutionalrenewal.html>.

⁸⁰ Constitutional Renewal Bill 2009 s 2.

⁸¹ Constitutional Renewal Bill 2009 s 3.

⁸² Constitutional Renewal Bill 2009 s 5.

The Attorney General's power to terminate a prosecution by a *nolle prosequi* order would be abolished and a new statutory power to order an end to an investigation when required in the national interest created.⁸³ In certain circumstances, a Minister would be obliged to publish any legal advice received from the Attorney General.⁸⁴ As noted above, this is a Private Member's Bill and should not be confused with the earlier Draft Constitutional Renewal Bill.

IRELAND

The Irish Attorney General is a descendent of the UK model. It is now regarded as a new office created by the 1937 Irish Constitution.⁸⁵ Originally, the Irish Attorney General had similar roles to the English one: legal adviser to Government, control of prosecutions and miscellaneous public interest roles. The Prosecution of Offences Act 1974 transferred most prosecution functions to an independent Director of Public Prosecutions.⁸⁶

Section 3 of the 1974 Act provided some exceptions to the transfer of prosecutorial powers to the Director. The Attorney General may refer a decision of the Court of Criminal Appeal to the Supreme Court if there is an important point of law to be decided; following an acquittal in a criminal case on a point of law, the Attorney General may refer the point of law to the Supreme Court; the Attorney General's consent is still required for specified prosecutions under the Geneva Conventions Act 1962, the Official Secrets Act 1963 and the Genocide Act 1973. Section 6 of the Criminal Justice (Terrorist Offences) Act 2005 also requires the Attorney General's consent for prosecutions for acts of terrorism directed at non-EU states. Further, if there is a national security reason, then the Government may transfer prosecutorial powers back to the Attorney General.⁸⁷

As in England, the fact that the Irish Attorney General is an advisor to the Government but is also expected to act independently⁸⁸ has occasionally caused controversy. The following incidents have been especially controversial:⁸⁹

- The Attorney General sought an injunction to prevent the offering of advice about abortion services available abroad.
- The Attorney General sought an injunction to prevent a 14 year old rape victim going to England for an abortion.
- The Attorney General went to court to prevent an independent Tribunal discovering details of confidential Cabinet discussions.
- The "Brendan Smyth Affair": a delay in processing an RUC warrant led to the fall of a government and the resignation of the Attorney General from his new post as President of the High Court.

⁸³ Constitutional Renewal Bill 2009 s 14-15.

⁸⁴ Constitutional Renewal Bill 2009 s 4.

⁸⁵ Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (Dublin: Butterworths, 1994) at 304.

⁸⁶ Prosecutions of Offences Act 1974 is available at <http://www.irishstatutebook.ie/1974/en/act/pub/0022/index.html>. Section 3 of the Act effects the transfer of most prosecutorial functions to the Director. Section 5 contains an exception for national security situations. See also Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (Dublin: Butterworths, 1994) at 307.

⁸⁷ Prosecutions of Offences Act 1974 s 5.

⁸⁸ Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (Dublin: Butterworths, 1994) at 304.

⁸⁹ Geraldine Kennedy "Whelehan presents Coalition with dilemma as he chases the job he once turned down" (5 March 1998) *Irish Times* 7.

One academic has called for the public interest roles to be transferred to a specially created post of "Guardian of the Community Interest".⁹⁰

As noted above the Irish Director is independent, and has a consultative relationship with the Attorney General.⁹¹ The government appoints the Director, who must have been recommended by a Committee comprising senior judges, lawyers and public servants.⁹² Section 6 of the Act prohibits any attempt to influence the Director or Attorney General inappropriately in relation to prosecution matters.

NORTHERN IRELAND

The Attorney General for Northern Ireland is not a member of the NI Executive.⁹³

Under the Justice (Northern Ireland) Act 2002, the Attorney General for Northern Ireland will have only a relationship of consultation with the Director of Public Prosecutions, not superintendence or direction. The Attorney General for Northern Ireland will have no role in consenting to prosecutions.⁹⁴ This is a more radical position than exists in either England and Wales or even in Ireland. During the debate on the Justice (Northern Ireland) Bill, a former Attorney General, summed up the reasons for this position:

Given the highly charged atmosphere of Northern Ireland ... it is important that this enormously invasive prosecution arm of the state should be exercised in Northern Ireland by an official who is entirely independent. That is a departure from the current system in England and Wales and in Northern Ireland.⁹⁵

While the Attorney General will not have a role in Northern Irish prosecutions, the Justice (Northern Ireland) Act 2002 retains a role for the Advocate General for Northern Ireland (who will be the Attorney General for England and Wales) in some prosecution matters concerning national security.

ACCOUNTABILITY TO THE ASSEMBLY

ENGLAND AND WALES

The accountability to Parliament of the Attorney General and the Director is not set out in legislation. The Attorney General for England and Wales is a member of one of the Houses of Parliament, a Minister (though not usually a Cabinet member) and so is bound by the convention of ministerial responsibility to Parliament. The Attorney General is accountable to Parliament for prosecution matters, and has the power of superintendence over the Director.⁹⁶ As a minister, the Attorney General represents the Prosecution Service on matters of administration and finance.⁹⁷ The Attorney General can answer questions on individual prosecution decisions in Parliament,⁹⁸

⁹⁰ David Gwynn Morgan "Attorney General's juggling act must be ended" (15 March 1993) *Irish Times* 12; David Gwynn Morgan "No major problem in separating AG's roles" (16 March 1993) *Irish Times* 10.

⁹¹ Prosecutions of Offences Act 1974 s 2(5-6).

⁹² Prosecutions of Offences Act 1974 s 7.

⁹³ Northern Ireland Act 1998 s 20.

⁹⁴ Justice (Northern Ireland) Act 2002 s 41.

⁹⁵ Lord Mayhew, *House of Lords*, 13 June 2002; Vol. 636, CWH 93.

⁹⁶ Prosecution of Offences Act 1985 s 3(1).

⁹⁷ Terence Daintith and Alan Page, *The Executive in the Constitution* (Oxford: Oxford University Press, 1999) at 288.

⁹⁸ UK Government, *The governance of Britain: a consultation on the role of the Attorney General* (London: TSO, 2007) Cm 7192 at paragraph 1.36.

though Parliament is diffident when it comes to interfering in prosecutorial matters.⁹⁹ Standing orders provide that the remit of Committees considering justice matters do not consider “individual cases and appointments and advice given within government by Law Officers).”¹⁰⁰

IRELAND

The Attorney General may be a member of the Irish Parliament, or not. The Attorney General is not a member of the Government.¹⁰¹

The Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 makes provision for accountability before the Irish Parliament.¹⁰² Section 3 of this Act provides for the power of committees to call for evidence or documents. There are exceptions to this general principle for the Attorney General and the Director of Public Prosecutions. Only the Committee of Public Accounts may question the Attorney General and only in relation to “general administration”.¹⁰³ Concerning the Director for Public Prosecutions, only the Committee of Public Accounts may question the Director or require documents, and then only in relation to “general administration” or statistics.¹⁰⁴ The Act also provides exceptions to the general principle to protect judicial processes and the prosecution of offences.¹⁰⁵

NORTHERN IRELAND

According to the Explanatory Memorandum to the Justice (Northern Ireland) Act 2002, the Attorney General is accountable to the Assembly for the Prosecution Service. This seems limited to a duty to provide explanations. The Attorney General cannot issue any directions to the Director, and cannot require the Director to provide any explanations. The relationship is one of “consultation” not superintendence.

Further any duty to provide explanations is limited by the right of the Attorney General not to provide answers or documents in relation to prosecution matters if this would jeopardise criminal proceedings or be against the public interest (as determined by the Attorney General). Any possibility to question the Director (or any member of the Prosecution Service) is limited by the restriction that Director cannot be required to provide answers except in relation to finance and administration. Whilst the Assembly may ask questions about prosecutorial decisions or prosecutorial policy, the Director is not obliged to answer. This implies that on finance and administration matters, the Director is obliged to answer. Under the Justice Northern Ireland Act 2002, the Attorney General or the Director may *chose* to answer questions which they are not *required* to answer. Whilst the Assembly may ask

⁹⁹ Anthony Bradley and K.D. Ewing, *Constitutional and Administrative Law* (Harlow: Longman, 2006) at 412.

¹⁰⁰ House of Commons Standing Order 152 (2), available at <http://www.publications.parliament.uk/pa/cm200809/cmstords/2/2.pdf> page 151.

¹⁰¹ Constitution of Ireland 1937 Article 30(4) available at [http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20\(Eng\)Nov2004.htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(Eng)Nov2004.htm).

¹⁰² The Act is available at <http://www.irishstatutebook.ie/1997/en/act/pub/0017/index.html>.

¹⁰³ Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 s 3(5).

¹⁰⁴ Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 s 3(6)

¹⁰⁵ Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 s 5(1)(c-d).

questions about prosecutorial policy and individual prosecutorial decisions, it might also choose to adopt standing orders precluding such questions.

During the debate on the Northern Ireland Bill 2009 (now the Northern Ireland Act 2009), the Conservative spokesperson for Northern Ireland proposed an amendment to provide that the Attorney General for Northern Ireland would have a power of superintendence over the Director of Public Prosecutions.¹⁰⁶ The Conservative spokesperson argued that the system established in the Justice (Northern Ireland) Act 2002 meant the Director was “answerable to no one”.¹⁰⁷ The Conservative spokesperson did not press this amendment to a vote.

Minister of State at the Northern Ireland Office, Paul Goggins, summarised the current position, speaking in the House of Commons on the Northern Ireland Bill (now Act) 2009:

The DPP will be answerable to the Assembly for the use of resources and the administration of its office—that is very clear—but not for individual prosecution decisions, which are entirely for the independent DPP. It is important at the point of devolution that that is made absolutely clear and enshrined in the institutions. ...

If a Committee, particularly the Justice Committee, wished to take evidence from the DPP, the DPP could be invited to attend and such evidence could be given. ...

It is not only the DPP who may be invited to give evidence and have to produce an annual report—the Attorney-General, too, may be so invited. Indeed, both will have speaking rights in the Assembly [*sic*] and be able to speak to and respond to Assembly Members, whether in the Assembly or in Committee.¹⁰⁸

Despite this comment, it is not clear on what basis the Director would have speaking rights in the Assembly, other than in the sense of giving evidence to Committees. The Director has appeared before Committees to discuss finance and administration.¹⁰⁹

REMOVAL

The provisions on removal of the Northern Irish officers are much more robust than elsewhere in the UK and Ireland.

ENGLAND AND WALES

The Prime Minister appoints and may remove the Attorney General for England and Wales. The Attorney General for England and Wales must be a member of a House

¹⁰⁶ Mr. Laurence Robertson, Hansard 4 Mar 2009: Column 947, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090304/debtext/90304-0019.htm>.

¹⁰⁷ Mr. Laurence Robertson, Hansard 4 Mar 2009: Column 948, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090304/debtext/90304-0019.htm>.

¹⁰⁸ Hansard, 4 Mar 2009: Column 953, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090304/debtext/90304-0020.htm>.

¹⁰⁹ See for instance the Meeting of the Assembly and Executive Review Committee meeting of March 10 2009, available at http://www.niassembly.gov.uk/assem_exec/2007mandate/moe/2008/090310_Public%20Prosecution%20Service%20for%20Northern%20Ireland.htm.

of Parliament and may be required to resign ministerial office under the convention of ministerial responsibility.

Under the Prosecution of Offences Act 1985, the Attorney General appoints the Director of Public Prosecutions who must act under the superintendence and direction of the Attorney.¹¹⁰ The Prosecution of Offences Act 1985 does not specify the period of appointment of the Director, nor the procedure for removing the Director from office. The Government's Draft Constitutional Renewal Bill would have provided statutory rules on these matters: it specified a five year period of office for the Director; it also specified that the Attorney General could remove the Director if the latter was "unable, unfit or unwilling to carry out the functions of the office."¹¹¹

IRELAND

In Ireland, the Prime Minister (Taoiseach) effectively appoints and may remove the Attorney General, though formally the decision is made by the President.¹¹²

In Ireland, the Government may remove the Director, but only after considering a report from a committee composed of the Attorney General and the two most senior judges in Ireland.¹¹³

NORTHERN IRELAND

The provisions of the Justice (Northern Ireland) Act 2002 make it very difficult to remove either the Attorney General or the Director. There must be a specially convened tribunal consisting of two senior judges from Britain (there is no possibility for the Assembly to convene the tribunal in either case). Removal may only be recommended for reasons of misconduct or inability to perform functions. These terms would include actual corruption or a serious accident or illness, but do not allow for removal because of a disagreement over policy or indeed because the officer holder might be incompetent. To remove the Attorney General, the First Minister and deputy First Minister must act jointly.

Taken together these provisions in the Justice (Northern Ireland) Act 2002 provide strong protection for the principle that the Attorney General and the Director must act "independent of any other person".

COMPLETING OR CHANGING THE SYSTEM UNDER THE JUSTICE (NORTHERN IRELAND) ACT 2002

The statutory rules do not regulate every matter relating to the Attorney General for Northern Ireland or the Director of Public Prosecutions. This is especially true for the Attorney General. The Assembly established an Ad Hoc Committee to consider the Draft Justice (Northern Ireland) Bill.¹¹⁴ This Ad Hoc Committee noted that there were many questions relating to the Attorney General that would have to be resolved post Devolution. These included questions about the Attorney General's participation in

¹¹⁰ Section 2.

¹¹¹ Draft Constitutional Renewal Bill, Section 4.

¹¹² Constitution of Ireland, 1937, Article 30, available at [http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20\(E%20ng\)Nov2004.htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(E%20ng)Nov2004.htm)

¹¹³ Prosecutions of Offences Act 1974 s 9.

¹¹⁴ Ad Hoc Assembly Committee on the Draft Justice (Northern Ireland) Bill, *Report* (Belfast: NI Assembly, 2001-2002) Report available at http://www.niassembly.gov.uk/adhocs/flags/reports/adhoc1-01_reform.htm.

the Assembly¹¹⁵ and questions about possible roles that the Attorney General might discharge.¹¹⁶

It is possible that Assembly standing orders may provide for matters relating to the participation of the Attorney General in the Assembly or for the questioning by committees of the Attorney General or Director.¹¹⁷ The Attorney General and Director may come to some understanding or protocols as to how to work the consultative relationship between them. The current Northern Ireland Executive Ministerial Code¹¹⁸ does not address the position of the Attorney General but it is possible it may depending on how the role of the Attorney General is defined. Care should be taken in filling out such details that statutory requirements are complied with.

Following devolution of policing and justice it would also be possible to fill out details in relation to these offices by means of an Act of the Assembly. An Act of the Assembly might also change some of the statutory rules in the Justice (Northern Ireland) Act 2002. If the Assembly were to consider an Act on these matters, then these restrictions need to be remembered:

- The Assembly cannot modify section 1 (independence of the judiciary) or section 84 of the Justice (Northern Ireland) Act as these are entrenched.¹¹⁹
- To modify any element of Part Two of the Justice (Northern Ireland) Act 2002, the Assembly must have cross community support.¹²⁰ Part Two covers the Law Officers and Prosecution Service.
- The Assembly cannot pass an Act outside of its legislative competence.¹²¹ In particular, this would preclude any legislation that might violate the European Convention on Human Rights (ECHR). The ECHR includes the right to a fair trial which should always be born in mind when considering any legislation in this area.¹²²

¹¹⁵ Paragraph 57 of the Report.

¹¹⁶ Paragraph 58 of the Report.

¹¹⁷ Justice (Northern Ireland) Act 2002 s 25.

¹¹⁸ The Ministerial Code is available at <http://www.northernireland.gov.uk/ministerial-code.pdf>.

¹¹⁹ Justice (Northern Ireland) Act 2002 s 84 amending s 7 of the Northern Ireland Act 1998.

¹²⁰ Justice (Northern Ireland) Act 2002 s 84(2).

¹²¹ Northern Ireland Act 1998 s 6.

¹²² Article 6 ECHR.

