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Deputy First Minister**

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Mr Jimmy Spratt MLA  
Chairman  
Assembly and Executive Review Committee  
c/o Room 428  
Parliament Buildings  
Stormont  
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Our Ref: COR/180/10

23 March 2010

*Dear Mr Spratt*

#### **DEVOLUTION OF POLICING AND JUSTICE MATTERS**

Thank you for your letter of 16 March 2010, in which you requested access to the John Larkin report on establishing the office of the Attorney General for Northern Ireland and our response to its recommendations.

We have pleasure in enclosing with this letter Mr Larkin's original report and the response to his recommendations, which we have now sent to Mr Larkin. We hope you will ensure that these documents are circulated to members of the Committee. In addition, as we indicated in our letter of 22 February, we will arrange for the report and the response to be placed in the Assembly Library.

We would also like to take this opportunity to apologise for our inability to meet with a joint session of the AERC and the OFMDFM Committee in advance of the Easter recess.

Finally, your letter of 16 March concluded by requesting elaboration on a comment made by the First Minister at a meeting with the Committee on 18 February. The First Minister had referred to the working group on issues arising from the St Andrews Agreement. We are not yet able to outline any programme of work which that group might devise. We will write in due course to explain any implications for the future work of the AERC.

Please note this letter has been copied to the OFMDFM Committee.

Yours sincerely

**RT HON PETER D ROBINSON MP MLA**  
First Minister

**MARTIN MCGUINNESS MP MLA**  
deputy First Minister

**APPROVED BY THE MINISTERS  
AND SIGNED IN THEIR ABSENCE**

# **Establishing the Office of the Attorney General for Northern Ireland**

A report by John F Larkin QC

August 2009

## Introduction

- 1 At the start of this year I was commissioned to undertake a project on the following terms of reference:
  - (i) to carry out preparatory work to establish the office of AGNI; and
  - (ii) to prepare an initial work programme covering the key areas as identified in anticipation of the substantive appointment of the Attorney General for Northern Ireland when justice and policing powers are devolved.
- 2 I was initially asked to report to the First Minister and deputy First Minister by 30 June. Owing to some delays in establishing the project, this timescale was later revised.
- 3 In undertaking this study I had discussions with a range of key people across the justice system in this jurisdiction and further afield. My aim has been to present a set of proposals for the scope and working protocols of the Attorney General's Office which, in light of those discussions, I believe would be workable in practice and would add value to existing arrangements: in particular in putting law at the heart of government. I am very grateful for the time afforded by those I have met—whom I have listed at Annex A—and for the helpful and open approach I have invariably encountered. It has been clear to me that there is a real commitment in every quarter to ensuring that these new arrangements work.
- 4 I am grateful too to the secretariat which has assisted me during the project: Gareth Johnston from the Northern Ireland Office's Criminal Justice Directorate, and Maurice Dowling and Eamonn McConville from the Office of the First Minister and Deputy First Minister.

## Background

- b. The office of Attorney General dates back to the earlier part of the thirteenth century. In England, one Lawrence del Brok started in 1247 to receive a regular fee from the King for his legal services. Sometime after 1260 a similar appointment was made in Ireland. The title "King's Attorney" started to be used in Ireland in 1313. While not initially the senior law officer (that privilege was held by the Prime Sergeant, in formal terms until 1805<sup>1</sup>), by the fifteenth century the Attorney was in attendance at meetings of the Irish Parliament. It was in the fifteenth century in England that the title "Attorney General" gained currency, and Ireland followed suit, albeit almost a century later. By the early 1600s the Attorney General was not only representing the Sovereign at law, both civil and criminal, but proffering advice in legal and policy issues; and one Attorney in particular—Sir John Davies—had a special concern for correcting "defective administrative arrangements". By all accounts rather more so than in England and Wales, the Attorney General came to have very direct oversight of the system of prosecutions in Ireland. The Attorney and his fellow officers were also seen as part of the system of checks and balances, as when in the 1880s they vetted recommendations for detention under the Protection of Persons and Property Act, or drew up rules for the military support of the civil power.<sup>2</sup>
- c. The political or apolitical nature of the post seems to have varied. William Plunket in the early 1800s held office under governments of different political hues. But when he was appointed again in 1822 he was an MP, and the conception of the office as a political appointment has in broad terms continued since. Though it was a political appointment, the independence of judgement to be exercised by the postholder has regularly been stated.

During Direct Rule by Section 10(1) of the Northern Ireland Constitution Act 1973 the Attorney General for England and Wales is, by virtue of that office, the Attorney General for Northern Ireland also. The Attorney has had the

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<sup>1</sup> For the background see A R Hart *A History of the King's Serjeants at Law in Ireland* (Four Courts Press, 2000) p.106.

<sup>2</sup> Dr James Casey's *The Irish Law Officers* (Round Hall Sweet and Maxwell, 1996) gives a full account of the historical development.

ultimate power to direct the Director of Public Prosecutions, and certain sorts of prosecution have required the Attorney's consent. In practice the power to direct has not been used.

8 The Criminal Justice Review of 2000, which largely found legislative expression in the Justice (Northern Ireland) Act 2002, heralded a rather different arrangement. The Attorney was to be an avowedly non-political figure, appointed by the First Minister and deputy First Minister for a fixed term, enjoying security of tenure subject only to the possibility of removal for misbehaviour or inability to perform the functions of the office following a recommendation of a tribunal. In keeping with a fundamental construct of the Review—that the prosecution function should be organizationally and visibly separate so as to promote public confidence in the independence of prosecutorial decisions—the Attorney would have no power to direct the DPP, but both would be subject to a statutory requirement of a consultative relationship.

9 The Attorney's own independence was also enshrined in statute. That is not to say that he is unaccountable. The Act makes enabling provision for the Attorney to participate in Assembly proceedings and envisages that he would answer questions there (though makes clear that he is not obliged to answer questions on individual cases). He is to produce an annual report which is sent to the First Minister and deputy First Minister and tabled in the Assembly; and the numbers, terms and salaries of his staff are subject to FM's and dFM's approval. The arrangements, as set out in the 2002 Act, are reproduced in Annex B.

10 While the Attorney's engagement with the Public Prosecution Service is partly defined in statute, another role envisaged for the Attorney—that of principal legal adviser to the Executive, putting law at the heart of government and exercising a general supervisory responsibility over the legal contribution to government—finds no statutory expression at all, probably because the authors of the Act felt that that was for the devolved administration to determine.

- 1. Aside from these two key facets of the role under devolution—chief legal adviser and the role in relation to the PPS—a range of other responsibilities falls on the Attorney. He is, under Section 8 of the Justice (Northern Ireland) Act 2004, required to produce guidance for criminal justice organizations on the exercise of their functions in a manner consistent with international human rights standards. He is responsible for making references to the Judicial Committee of the Privy Council (or, shortly, the UK Supreme Court) where there is doubt about the *vires* of legislation. He has a variety of responsibilities under charities law. He can order fresh inquests in regard to disputed deaths. Annex C contains a full list of the duties.
- 2. On 18 November 2008, in a letter to the Assembly and Executive Review Committee about arrangements for the discharge of policing and justice functions by the Assembly, the First Minister and deputy First Minister indicated that they were minded to invite me to become Attorney General. This will be a full-time post.
- 3. Under Direct Rule, successive Attorneys took a genuine interest in Northern Ireland affairs, but in part by virtue of geography were consulted only occasionally and could not devote themselves to relevant issues in the same way as a locally based law officer. The changes brought about by devolution bring new expectations of an Attorney which need to be resourced. Some of the new factors are identified below.
  - (i) The Attorney is positioned as the Executive's chief legal adviser, thus it will be expected that his Office will consider and advise on major legal issues coming before the Executive. In addition to those areas referred formally for advice, the Attorney will need to consider a wide range of Executive papers.
  - (ii) The multi-party nature of the constitutional arrangements in Northern Ireland brings additional issues, for example where Ministers disagree, with which the Attorneys have not until now had to concern themselves.

- (iii) Aside from links within the Executive, it is expected that the Attorney will maintain good links with the Assembly and its Committees. The Attorney's responsibility for referral of legislation to the UK Supreme Court in certain circumstances brings a need to consider Bills, including any amendments.
- (iv) To a lesser extent, new legislation on charities, in sharpening the focus on ensuring high standards of charity regulation, places a range of responsibilities on the Attorney as guardian of the public interest.
- (v) The appointment of a local Attorney inevitably brings closer public and media scrutiny, but with it a renewed responsibility for the Attorney to demonstrate the guardianship of the rule of law which is inherent in the role, so as to promote public confidence.

#### *Comparison with other jurisdictions*

##### *Scotland*

- 14. The current Lord Advocate is the Rt Hon Elish Angiolini QC. She was appointed to the position on 5 October 2006 by the then Scottish First Minister, Jack McConnell. She is the chief legal officer of the Scottish Government for both civil and criminal matters that fall within the devolved powers of the Scottish Parliament.
- 15. The Lord Advocate is a Minister of the Scottish Government. While not regarded as a member of the Scottish Cabinet she receives all papers and retains the right to address the Cabinet where a particular matter requires this.
- 16. The Lord Advocate is principal legal adviser to the Scottish Government on all matters relating to the law of Scotland including the full range of the Government responsibilities, policies and legislation. This also includes legal advice on the implications of any Government proposals. However, the Lord Advocate does not advise on every legal issue that arises. The primary source

of legal advice for the Scottish Government is the Scottish Government Legal Directorate (SGLD), for which the Lord Advocate has responsibility. The Scottish Ministerial Code sets out the circumstances in which the Lord Advocate must be consulted. This will normally be requested through SGLD.

- 1. The Lord Advocate is the head of the systems of criminal prosecution and investigation of deaths in Scotland. She will act wholly independently of the Scottish Government in criminal proceedings.
- 2. Ministerial submissions are sometimes copied to the Lord Advocate for information or awareness. On occasions, the Lord Advocate will comment on these but more often simply note the content.
- 3. The Lord Advocate will advise Ministers whether Bills are within the legislative competence of the Parliament. She has the power to refer a Bill passed by Parliament to the Privy Council for a decision on its legislative competence.
- 4. The Lord Advocate will represent the Scottish Government in civil proceedings, although most civil litigation involving the Scottish Ministers is conducted by SGLD. Nevertheless the Lord Advocate remains responsible for the conduct of all such litigation.
- 5. The Lord Advocate also represents the public interest in a range of statutory and common law civil functions.
- 6. The advice given by the Lord Advocate to the Government (or indeed the fact of whether advice has or has not been sought) is not disclosed to the public without her prior consent.
- 7. The Lord Advocate can participate in Parliamentary proceedings including being questioned about the exercise of her functions. However, she may choose not to answer in a particular case if she feels that it might prejudice any criminal proceedings or would be contrary to the public interest.



24. The Lord Advocate may resign at any time and must do so if Parliament resolves that they no longer have confidence in the Government.

#### *England & Wales*

25. The Attorney General is chief legal adviser to the Crown in England and Wales. As a political appointment, he or she must belong to either house of Parliament. The Attorney is not usually a member of the Cabinet (though there have been exceptions), but participates in Cabinet meetings as required. He or she represents The Queen and the Government in court.
26. The Attorney has supervisory powers over prosecutions, which are the responsibility of the Director for Prosecutions, and must give consent to certain sorts of prosecutions.
27. He or she has public interest responsibilities including in taking action to appeal unduly lenient sentences and protecting charities.
28. A recent review<sup>3</sup> has focussed on the roles of the Attorney General after continuing concern about combining political responsibility with that for prosecutions. The review has concluded that the multi-faceted character of the Attorney's responsibilities (legal adviser, criminal justice Minister and guardian of the public interest) will continue, but her relationship with the prosecuting authorities has been clarified in a published protocol, underlining the independence of prosecutors. In particular, it means that the Attorney will not normally be consulted in respect of prosecutions of members of Parliament or political parties.<sup>4</sup>

#### *Republic of Ireland*

29. The Attorney General is chief adviser to the Government of Ireland on matters of law and chief Law Officer in Ireland. He is not a member of the

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*The Governance of Britain – Constitutional Renewal* (Cm 7342-1,2,3) (March 2008)  
The protocol is available at [www.attorneygeneral.gov.uk](http://www.attorneygeneral.gov.uk)

Government but participates in Cabinet and Government meetings as required.

30 Alongside other advisory duties, the Attorney advises the Government on whether proposed legislation complies with the provisions of the Constitution.

31 The Attorney does not have responsibility for criminal prosecutions, save a few under the Fisheries Act and Extradition Act. Responsibility for all other criminal prosecutions lies with the Director of Public Prosecutions.

## **Chief Legal Adviser to the Executive**

### *Provision of advice and opinions*

32 As chief legal advisers to their respective governments, Attorneys General take on advising on the most sensitive and complex issues. This work, which clearly requires careful research and consideration, is normally done through the provision of written opinions. Having a staff which is separate from the government solicitor's department is the normal model because it provides two advantages: it allows for focus on detailed consideration of the matters referred, and lets the Attorney's office act as a sort of revising chamber.

33 But the work of the Attorney does not exist in a vacuum. In considering the arrangements to recommend, I have been very conscious of wanting them to be as fully integrated as possible with the work of the Departmental Solicitor's Office; to make full use of that Office; and (while accepting that there will always be some fuzziness at the edge) to ensure as much clarity as possible as between the role of DSO and of the Attorney's Office. I have been grateful for the opportunity of a number of detailed discussions with the Departmental Solicitor.

34 The first and foremost question is what sorts of advisory work should come to the AGO. There is a fair amount of consonance in the criteria in the other jurisdictions I have seen, and the following criteria are based in models in

Ministerial Codes. **I recommend that it should be appropriate to seek the advice of the Attorney General:**

- (i) in matters of the greatest legal complexity or which have cross-cutting implications;**
- (ii) in matters of political controversy or sensitivity;**
- (iii) where a Departmental legal adviser has doubts about**
  - (a) the legality or constitutional propriety of proposed legislation;**
  - (b) the legality or constitutional propriety of proposed executive action;**
- (iv) where there is disagreement between Departments on a legal issue;**
- (v) where Ministers or the Departmental Solicitor consider the advice of the Attorney is necessary or desirable;**
- (vi) where a matter raises inter-jurisdictional issues within the UK or issues which may ultimately involve other Law Officers.**

5 The concept of a local Attorney General was widely consulted upon as part of and following the Criminal Justice Review, and it is reasonable to expect that Ministers will want to use the Office in the circumstances above. Equally, it is not impossible to imagine a situation where a Department or Minister was, for whatever reason, reluctant to submit an issue which fell into the above criteria for the Attorney's consideration. I am much seized of the fact that the Attorney is responsible to the Executive as a whole and has a responsibility for the proper conduct of public affairs. It should be open to the Attorney to call in an issue for the consideration of his Office where it

appears to him that there is a legal context and he is concerned that proper legal advice is not being sought or followed.

- 10. In order to ensure a joined-up approach and that full use is made of the resources of DSO, **I propose that the advice of the Attorney's Office should normally be sought by a reference from the DSO for an opinion.** This allows the DSO to prepare a brief for the AGO on the factual situation and the advice given to date, and helps prevent duplication of effort, but without threatening the obligation on the Attorney to give independent advice.

- 11. Models elsewhere show that there is much to be gained from good communication between the government solicitor and the Attorney. On the one hand it helps to identify issues on which the Attorney will need to get involved at a later stage; on the other it allows for feedback on emerging conclusions in the AGO. I saw a good example of this in Scotland where there are weekly stocktake meetings and manifests are maintained of the work in progress. **I recommend regular stocktake meetings between the Attorney and the Departmental Solicitor, underpinned by a "work in progress" log of the major issues being dealt with in the DSO.**

- 12. For my own part I am much convinced of the importance of the accessibility of the law, and that shapes my views on the approach I think the AGO should take to its work. It almost goes without saying that opinions, while being comprehensive and precise, can and should be written so that lay officials in Departments can find their way through and understand them. Executive summaries can be used where appropriate. While the Attorney's Office should be a centre of legal excellence it cannot be an ivory tower: there is much to be said for engagement with Departments, alongside the solicitor from DSO, on advisory work, so that problems are fully understood and addressed by the AGO. Likewise, once an opinion has been submitted, a willingness on the part of the Attorney and of the Office to meet with officials, indeed with Ministers, to explain it and respond to questions helps ensure that full value is obtained from advisory work. **These principles of**

**openness, excellence and engagement should be incorporated in the ethos and training of the Attorney's Office.**

*Engagement with the Executive*

- 39. Providing written advice is one thing, but arrangements elsewhere normally provide for direct engagement between the Attorney and the Cabinet / Executive. On the one hand, this helps to ensure that the Executive is fully informed on legal issues. It also provides a "long stop" if a matter arises where legal advice would have had a bearing on the decision but has not been sought. Timely access to draft papers coming from Departments will help in identifying the latter point.
- 40. Models for direct engagement vary between jurisdictions, and indeed have varied from time to time within jurisdictions. The previous Attorney General of England and Wales attended Cabinet meetings as a matter of course, while the current Attorney General attends when a relevant matter arises. A similar arrangement operates in Scotland, though I got the impression that a request from the Lord Advocate to be invited to a particular Cabinet meeting was likely to be met.
- 41. Based on models elsewhere there are three options: that the Attorney should attend every Executive meeting; that the Attorney has a right to attend Executive meetings; and that the Attorney is invited to Executive meetings where a relevant matter is on the agenda. I believe that the arrangement for Northern Ireland needs to be decided in the light of the particular constitutional arrangements here, and in light of the need to promote confidence in propriety.
- 42. Having the Attorney at every Executive meeting may not always be necessary. Plenty of agendas will consist of issues which do not raise legal difficulty. On the other hand, an arrangement whereby FM and dFM invite the Attorney when required could lead to allegations that political considerations could influence whether the Attorney was invited, as for

example if FM or dFM disagreed on the need, or declined to agree with another member of the Executive who wanted the Attorney to be present.

43 The role of the Attorney in relation to the Executive is principally about ensuring that top-quality legal advice is available to Ministers, but also helps to inspire public confidence in good government when the Law Officer charged with the role of guardian of the rule of law has a direct involvement. This is best achieved in a way that does not brook suspicion. **I propose that the Executive make provision to the effect that the Attorney General has a right to attend Executive meetings.**

44 But it really marks a failing in the system if some important legal matter is not picked up until the Executive discusses it. Departments should of course be consulting DSO where any legal issues arise at policy or consultation stages of a proposal or in the management of services; but the Scottish arrangement is that every Cabinet paper has a legal check. **I recommend that the Attorney's Office be copied into draft Executive papers at the same time as they are submitted by Departments to the Executive Secretariat,** so that any outstanding legal questions can be checked.

45 The Departmental Solicitor currently attends pre-Executive meetings. It would be useful for the Attorney to attend such meetings, most especially where a piece of AGO advice is central to the conclusion and questions about it may arise. **I recommend that the Attorney should be able to attend pre-Executive meetings.**

46 I recognize that, in dealing with the sort of safeguards this section of my report has discussed, I may give the impression of a very cautious approach. I hope that that will not provoke fears of an approach in the AGO in which any risk is avoided and innovation is stifled. A lawyer who takes that approach is not doing his or her job. The lawyer is there to provide expert advice, to ensure that it is understood, and to help clients balance the legal risks and benefits concomitant with the options they are exploring. But the ability of the Attorney to provide independent advice and to ensure that that

advice is heard in the right quarters are important safeguards in any constitution and are deserving of some formalised protection.

#### *Disclosure of advice*

47. Given the multi-party nature of the Executive, a practice has built up whereby a request from one Department for advice given by DSO to another is put to the original Department. Advice provided by the Attorney falls into a different category, however; first by virtue of the Attorney's role as adviser to the *Executive*, and second because the nature of issues coming to the Attorney is such that they are often likely to be cross-cutting and of interest to more than one Department. I believe AGO advice should be available across the Departments of the Executive on request.
48. There is a separate question about wider publication of advice. The idea that advice given by a lawyer is confidential to the client is one that pervades the private client situation as well as public sector law. It encourages candour between the lawyer and client, and protects the client's interests if the matter comes to litigation. The principle is recognized in the Freedom of Information provisions. As well as its more general provisions on legal privilege, section 35(5) of the Freedom of Information Act 2000 provides an exemption, subject to the public interest test, for advice from the Law Officers including the Attorney General for Northern Ireland. Indeed, even the mere fact that advice has been sought from the Law Officers is not normally disclosed.
49. While release of legal advice is not the norm, there can occasionally be circumstances where it is right and in the public interest. Given, however, the nature of the Executive as a coalition, it would be wrong for advice which is provided to the Executive to be released on the decision of one Minister. If there were a risk that the AGO's advice could be disclosed without permission, it might inhibit the provision of full and frank instructions to the Office. Accordingly, **the release of advice from the Attorney General's Office outside the Departments of the Executive, or any indication that advice has been sought, should require the permission of the**

**Attorney. An early task for the AGO's workplan should be to draft a protocol for the situations in which advice might be so released.**

50. It has been the practice to regard release of legal advice to Assembly Committees on similar lines to wider release. While I recognize the special role of Assembly Committees, and that the approach is not popular with them, I think that it has to be the right one, as legal professional privilege does not make a distinction between release to a small section of the community and release to the community at large. But this of course only applies to legal advice and does not affect the candour with which Departments should otherwise approach Committees and their queries.

#### *Litigation*

49. The decision of the First Minister and deputy First Minister in November 2008 indicated that the Attorney would be the Executive's most senior representative in the courts. Only a small number of matters in which legal advice is sought result in litigation. It makes sense that the lawyers dealing with the matter, who are familiar with the issues, should support the litigation, and **I recommend that litigation arising in matters on which the Attorney General's Office has provided advice should be led by the AGO** on behalf of the Executive.

51. In appropriate cases of the greatest import and complexity the Attorney should appear personally; for others, use may be made of Senior or Junior Crown Counsel<sup>5</sup>; of barristers on the panels; or of employed barristers, the potential for which is explored under "staffing".

52. It has been suggested to me that the Attorney's Office might take responsibility for recruitment and maintenance of the civil panels: that is to

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<sup>5</sup> to which a new name perhaps needs to be found, as they may in devolution issues find themselves in opposition to "the Crown". "Standing Government Counsel" is a possibility. The question has come up during some of my discussions whether the current arrangement of having both Senior and Junior Crown Counsel should subsist once a local Attorney is in post. I have taken no firm view, but it is a matter that could be reviewed in the light of early experience.



say of the “call-off” lists of barristers in various areas of expertise used by government. There is new talent entering the Bar continually, and it is important in the interests of fairness and of development of the profession that the panels are regularly refreshed. The same panels have until now been used by both the UK Government and the devolved administration, which seems a sensible efficiency. The Bar’s professional rules deal with conflicts of interest. **I therefore recommend that the Attorney General’s Office takes responsibility for the government civil panels.**

54. It is sometimes necessary to go off panel where an issue requiring particular specialism arises. The arrangement at present, where the Attorney General’s Office needs to agree to any such digression, helps ensure that use of the panels remains the norm.

55. I believe it would be useful for the AGO to consider the potential for the panels to be recruited in future on the basis of hourly rates, rather than the traditional system of brief fees and refreshers. It is a practice being adopted increasingly by private clients and public corporations such as the BBC as it is seen to offer value for money, transparency for the client and certainty for the counsel.

56. **For cases in which the Attorney is appearing or organizing the appearance, DSO, which has extensive experience of providing solicitor services for litigation, should I believe normally provide those services.** But there is a need for some residual capacity in the AGO, eg for cases which have occasionally arisen where two members of the Executive have taken different views and have required separate representation.

57. For completeness, I mention here the provisions in the Northern Ireland Act 1998 and Order 120 of the Rules of the Supreme Court (NI) 1980, as amended, making the Attorney (as well as the appropriate Minister or Department) a notice party in litigation where a devolution issue<sup>6</sup> arises. The

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<sup>6</sup>Defined in Schedule 10 of the Northern Ireland Act 1998

purpose of these provisions is so that the broader public interest is protected, and also so that the Executive as an entity may make submissions to the Court if it desires.

## Legislation

55 The Northern Ireland Act also contains provision for the Attorney General to refer to the Judicial Committee of the Privy Council—shortly to be subsumed within the UK Supreme Court—a “devolution issue”. This unusual set of circumstances is most likely to arise where there is doubt about the legislative competence of the Assembly to deal with a proposed piece of legislation, perhaps because there are different views about its compliance with the ECHR, or because it impacts on some excepted issue which has not been devolved. It may be a situation where Attorney has concerns about the *vires* of legislation proposed which it has not been possible otherwise to resolve, but perhaps more likely there may be a situation where all agree it is best to refer so as to be confident that a new arrangement is robust.

60 Assembly legislation is of course subject to legal scrutiny already in at least two respects. DSO certifies legislation to Ministers who in turn sign a certificate, and the Assembly’s own legal service supports the Speaker’s responsibilities. If the Attorney is to fulfil the responsibilities implicit under the Northern Ireland Act then it would be appropriate that **the advice to Ministers prior to certification that legislation is within legislative competence should be given by the Attorney and all advice from DSO on legislative competence should be sent to the AGO to be issued by the Attorney with appropriate modifications if required.**

65 Again, any concerns about *vires* are best tackled at the policy stage. The DSO will keep the AGO apprised of legislative proposals, but it will further assist if **Ministerial correspondence on legislation is copied to the AGO for information.**

70 I think there is a role for the Attorney as chief legal adviser in promoting high standards of clear legislative drafting across Government, particularly in the

secondary legislation drafted within Departments, and I envisage that a little time might usefully be spent working between the Office of Legislative Counsel and Departments to that end.

#### *Oversight of Government legal services*

52. The First Minister and deputy First Minister have indicated that the Attorney should oversee the work of Departmental legal advisers. I have assumed that this refers only to quality of legal advice, and not to the likes of finance and staffing issues which properly fall to existing line management.
53. I believe that this oversight is best exercised without a great deal of formality once the principle of oversight is acknowledged. The Attorney will in any event see a fair amount of material which has been prepared by Departmental legal advisers, and from discussions with the DSO it would be relatively easy to give access to the main pieces of DSO advice through the document management system. If any concerns arise they can be discussed with the Departmental Solicitor.
64. **I recommend therefore that the Attorney should be entitled to see DSO material, with oversight exercised through feedback to the Departmental Solicitor.**
65. The Government Legal Service NI is an umbrella organization of legal offices in the service of government in Northern Ireland. Each office retains its own accountability structures and they come together for training and career development purposes. I have raised a suggestion as to whether there may be potential in the establishment of the AGO to put in place a full-time co-ordinator for the GLSNI to help build on arrangements for training and career development. I recognize however that the GLSNI embraces certain non-devolved functions which would not be the responsibility of the Attorney.

### *Codification of these arrangements*

60 The criteria governing the issues with which an Attorney General or equivalent deals are elsewhere contained in Ministerial Codes. That is a possible route, but Northern Ireland has a more concise model of Ministerial Code than other jurisdictions. I understand that the mechanism of the issue of procedural guidance approved by the Executive has been used in other situations, and I think that that would carry the necessary weight. I am inclined to recommend, therefore, that **guidance to Ministers and Departments, approved by the Executive, should issue covering the circumstances in which it is appropriate to seek the Attorney's advice and the rules on publication of that advice.**

61 While not specifically mentioned in Ministerial Codes, the convention has long subsisted in other jurisdictions that the legal advice of the Attorney, as the most senior legal adviser, should be followed. Given that the active involvement of an Attorney General represents a new approach in Northern Ireland, I believe that there is considerable merit in making this implicit principle explicit. **I propose that the procedural guidance should indicate that it is expected that legal advice provided by the AGO will be followed.**

62 But such guidance can only provide the broad framework. What is as important if his responsibilities towards the Executive are to be executed effectively is a good and healthy working relationship between the Attorney, Ministers and officials. I believe that this can be encouraged and supported by regular contact between the Attorney and members of the Executive, starting with a series of initial meetings soon after devolution aimed at jointly exploring the added value the AGO can bring to the work of Departments.

### *Supporting policy development*

63 Policy is of course for Ministers. But like other key players in the justice system, the Attorney has an important role to play in contributing to the development of policy and strategy at consultation stage, particularly in the

role of guardian of the rule of law and of the public interest which is brought out in various of the office's responsibilities. Allied to this, and while accepting that the decisions are for Ministers, the Attorney can draw from cases in which he has been involved and from the legal research which was carried out in preparation for them to suggest changes in the law which might assist in future.

70. There is a growing European dimension in the justice arena. A range of framework decisions in place, under consideration or being revised now covers arrest warrants, the rights of victims, exchanges of information, mutual recognition of sentences and many more issues besides—even the protection of the environment through criminal law.
71. SGLD has recently found benefit from a lawyer in Brussels, complementing the team of mainstream Scottish civil servants based there. The advantage has gone wider than the justice field, as knowledge of law and experience of legislation has allowed for advance warning of issues to be picked up across a wide range of fields in spotting the potential local implications of EU legislative proposals. **I commend consideration of a legal secondee to the Northern Ireland Executive Office in Brussels, who would have a professional link back to the Attorney General's Office.**

### **Relationship with the Assembly**

72. The Criminal Justice Review in 2000 focussed on the role of an Attorney in relation to the Assembly in respect of the relationship with the Public Prosecution Service:

“We recommend that the formulation in Section 27 of the Scotland Act 1998 be adopted in that, although not a member of the Assembly, the Attorney should be enabled by Standing Orders to participate in Assembly business, for example through answering questions or making statements, but without voting rights.”

23 These provisions were carried forward into Section 25 of the 2002 Justice Act. The Attorney may, under subsection (1), participate in the proceedings of the Assembly to the extent permitted by standing orders, but may not vote. Under subsection (2), standing orders may in other respects provide that they are to apply to the Attorney General as if he were a member of the Assembly, a provision which ensures that the usual rules of engagement in the Chamber apply to the Attorney. Subsection (3), without giving a positive provision enabling the Attorney to answer questions, presumes it by making an exception: the Attorney is not obliged to answer a question relating to "the operation of the system of prosecution of offences in any particular case" if he considers that it might prejudice criminal proceedings or be otherwise against the public interest. Subsection (4) brings the Attorney within the usual provisions on interests of MLAs. Elsewhere (at Section 42(6)) it is provided that the Attorney must lay annual reports of the PPS before the Assembly.

24 During the passage of the Justice (Northern Ireland) Act 2002, Mr Des Browne gave assurances to the Commons, harking back to the Criminal Justice Review, that the Attorney would be accountable for prosecution policy<sup>7</sup>. He made clear that he did not see that as reducing the independence of the PPS, and in practice it is subject to the safeguards in subsection (3) just mentioned.

25 Mr Browne's assurances would seem to put the Attorney in the curious position of being accountable for something for which he is not ultimately responsible under the 2002 Act since the Director is the arbiter of policy for his Service. This serves to underline the vital importance (on which I shall expand in the next section) of a relationship between the Attorney and DPP in which policy matters are discussed in good time and thoroughly, in order that as far as possible any concerns, comments or proposals from the Attorney are discussed and taken into account as policies are being prepared.

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<sup>7</sup> House of Commons *Hansard*, 5 February 2002, col 174

As I understand it, the procedure to be followed hereafter in terms of drafting, considering and approving the necessary changes to standing orders is that the First Minister and deputy First Minister would trigger this through a motion on the floor of the house that the necessary amendments be considered by the Procedures Committee. After consideration the Committee will report so that the amendments can be approved in plenary session.

**While I recognize that their content is a matter for the Assembly, it may be helpful if I recommend the four areas which I believe they would most usefully cover.** Given the Criminal Justice Review's commendation of Scottish arrangements, I have taken particular account of what I have seen in Scotland.

- (a) **The exercise of the Attorney's responsibilities in relation to the Public Prosecution Service.** I think that this should allow the Assembly to hear statements from the Attorney about the publication of the Public Prosecution Service's annual report, when it is laid, and about other significant developments. On questions, the Scottish system is to incorporate these with Justice questions, but I am not convinced that that is the right arrangement here, not least when accountability for the finance and administration of the Service will, when it becomes a non-ministerial department, be to the Department of Finance and Personnel. I propose that instead a member wishing to ask a question of the Attorney General should contact the Table Office who, after checking that it is within scope, will arrange with the member concerned and with the Attorney's Private Office for a date on which the Attorney can be present in the chamber to answer it and supplementary questions over a defined block of time: perhaps ten minutes.
- (b) **Addressing the Assembly on issues of legislative competence.** While existing protections mean it is likely to happen very infrequently if at all, the fact that the Attorney can refer Assembly legislation to the Supreme Court implies that there ought to be a mechanism for him to explain the considerations to the Assembly.

- (c) **In the interests of transparency, addressing the work of his own Office**, through regular statements on its work, eg when its annual report is published.
- (d) Finally, I would submit that **there is potential for the Attorney to assist the Assembly in certain other circumstances**. This may include when proposals of a technical legal nature are being discussed; or in areas evoking his interest given his responsibilities in the criminal justice system he could have a contribution to make, particularly as (given the PPS is to be a non-ministerial department) the prosecution perspective might not otherwise be available to the Assembly. This is not intended to signal any frequent intervention, but it would be useful to leave the possibility open through appropriate provision.

18. The Committee will doubtless want to consider where the Attorney might stand in the chamber when making statements or answering questions: perhaps to the side of Speaker's Chair.

19. **The provision of a "touchdown room" in Parliament Buildings, similar to the space provided for Executive members and linked to the AGO's computer network, would facilitate not only the official engagement of the Attorney with the Assembly and its committees but also more regular informal contact with members** to help build relationships and explain the role and work of the Office.

## **Relationship with the Public Prosecution Service**

20. I have set out in an Annex the extracts from the Justice (Northern Ireland) Act 2002 setting out the Attorney's responsibilities in relation to public prosecutions. Put broadly, the Attorney:

- (i) appoints the Director and Deputy Director after consulting the Advocate General. He also deals with suspension or removal, if needed, after an appropriate tribunal recommends action;



- (ii) is consulted by the DPP on the annual report and amendments to the Code for Prosecutors;
- (iii) arranges for the annual report to be published;
- (iv) in other respects has a consultative relationship with the Director.

80. The Public Prosecution Service, having taken on the responsibilities for prosecutions previously conducted by Police, has been through a period of enormous growth coupled with an ambitious programme of regionalisation. Alongside this it has made useful in-roads to issues like the welfare of victims of crime, relationships with the media and the provision of reasons where a decision is made not to prosecute a case. But the Service is still relatively young and faces a range of challenges including taking further steps to maximize public confidence.

81. It is important that I make clear that I believe that a consultative relationship can be a challenging relationship in this context of continued development. Making the relationship effective, however, depends on regularity of contact; sufficiency of information; and frankness of challenge.

82. I have therefore taken the opportunity as part of the preparations for the Office which were part of my terms of reference to consider with the Director the terms of a possible memorandum of understanding between the Director and the Attorney, dealing with how the relationship is to be exercised in practice. This is of course to be regarded as a work in progress, but a working draft is at Annex D. While recognizing proper independence, it makes provision about the exchange of information, conferring on policies, plans and reports and indeed on the finance and administration of the Service. In the latter context the Attorney would be able to speak at Executive on any important issues. The memorandum includes the Director and Attorney conferring on individual cases which raise particular issues, and recognizes that in those circumstances the Attorney may give advice and guidance. There is reference to the "Shawcross" situation where the Director

seeks facts and information from Ministers which are relevant to a decision to prosecute: for example this might be relevant where there has been a campaign about a particular issue.

84 **I recommend that a memorandum of understanding between the Attorney General and the Director of Public Prosecutions be put in place immediately following devolution of justice.**

85 The relationship with the PPS is of course one of a set of wider relationships in the criminal justice system, including with the Minister for Justice and Criminal Justice Board, which an Attorney should develop in order to be fully informed and to be able to exercise influence, particularly on public interest issues. In this connexion I understand that consideration is being given to the continued representation of the Attorney's Office on the Criminal Justice Board.

## **Section 8 guidance**

86 Section 8 of the Justice (Northern Ireland) Act 2004 puts an obligation on the Attorney General to produce guidance to criminal justice organizations on the exercise of their functions in a manner consistent with international human rights standards relevant to the criminal justice system; to keep the guidance under review; and to keep under review the list of organizations to which it applies. The latter list may (in a legislative power which, unusually, rests in a non-political Attorney General) be amended or added to by the Attorney. The list cannot however be extended to courts or tribunals.

87 This is a significant provision, in particular for two reasons. First, it goes beyond the European Convention on Human Rights to encompass an unspecified but potentially wide range of international human rights standards. It therefore gives the potential to bring best practice standards across a wide range of areas into local practice. Second, while many of the international standards of themselves do not have direct effect in Northern Ireland, the fact that the organizations are (under subsection (2)) obliged to have regard to the guidance makes it likely that a failure to follow it might

give rise to judicial review. Thus getting the content of the guidance right is profoundly important. While I understand that a fair amount of preparatory work has been undertaken, the challenge of balancing what to include against the wide array of human rights standards that *could* be included has, thus far, proved a stumbling-block.

88 Deciding on the most appropriate approach will need a significant amount of the Attorney's personal attention, while the subsequent research and collation of material, while much assisted by the preparation to date, remains a substantial task. There is a continuing challenge in keeping the guidance up-to-date in light of new decisions from Strasbourg and the continuous output from, for example, the Council of Europe and UN Committees.

89 **I much believe that a small but dedicated unit is needed if this task is to be accomplished in reasonable time**, given especially what I have said about the effect of the guidance. The aim should be to keep the guidance practical—and in that respect the secondees that have been offered from PPS and PSNI<sup>8</sup> offer an opportunity for the guidance to be internally "road tested" before it is more widely consulted upon. A tome of legalese will be of no use. A "loose leaf" model would allow updates to be issued following significant ECHR decisions with specific guidance focussing on what the judgment means for the criminal justice system. After that, what is *done* in light of it is a matter for Ministers.

## Public interest litigation

90. The criminal justice system aims to bring those who breach the criminal law to account for their actions. But sometimes the more pressing priority is to get the breach stopped. The problem is that a body other than the Crown cannot normally enforce a breach of the criminal law or the creation of a nuisance (such as environmental pollution) which is against the public as a whole. They would not be granted an injunction to get the breach or nuisance stopped.

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<sup>8</sup> See paras 94, 120 and Annex E of this report. The secondees would of course be responsible day-to-day to the senior management of the Attorney General's Office.

- 81 Another example arises where an individual wants to complain to the courts about the actions of a public body. If they have suffered personal loss because of it, they will have standing to bring a judicial review, but not otherwise. So how is the public interest to be served in these cases?
- 91 The answer is that the Attorney General has scope to bring an action "at the relation of" the individual, known as a relator action. In practice, the Attorney may give the relator and then leave the individual to pursue the case. The Attorney has discretion whether or not to give the relator.
- 91 A relatively recent case (*Kirklees Metropolitan Council v Wickes Building Supplies Ltd* [1992] 3 WLR 170) has established that courts may excuse a wide range of public authorities from giving a cross-undertaking as to damages when seeking to enforce the criminal law.
- 94 While it is wise to explore other remedies first, I believe that relator actions have some scope to address situations which are better dealt with by removing the harm than by punishing it afterwards. Breaches of health and safety law through over-occupation of houses in multiple occupation, which have doubtless contributed to unrest in the Holylands, are an example. **I propose that an early task for an Attorney General's Office would be to explore with public authorities the scope for the relator to assist them in the achievement of their strategic aims.** Given the need for liaison on this and other topics, **I have welcomed an indication from PSNI that they would consider seconding an officer to the Attorney General's Office** as part of his or her development (and the offer to be part of the selection process). I believe that such wider experience of the justice system can be put to good use in the AGO, especially when considering policies and proposals on which the Attorney is being consulted.

## Charities

- 91 The Attorney's responsibility for maintaining the public interest extends also to charities law; indeed, there are thirty-six instances of the words "Attorney

General” in the Charities Act (Northern Ireland) 2008, the new framework for charity law. Where a matter is before (or on appeal from) the Charities Tribunal, the Attorney General has power to intervene so as to represent the wider public interest in the public good performed by the charity concerned. The Attorney also has a role in consenting to references to the Charities Tribunal where the Charities Commission needs a question settled; in giving directions to the Charities Commission on its discretion to authorize *ex gratia* payments by charities; and in presenting petitions for the winding-up of charities. In addition there are requirements that the Attorney be consulted on various matters.

96. In London this work sits alongside the usual advisory work in the Attorney General’s Office. That seems an appropriate location; it does not strike me that this work is so voluminous as to require its own unit. I only make the point that the new legislation and the work of the Charities Commission may in their early days bring a number of issues, which it has been difficult to challenge until now, into the open, leading to a higher than usual amount of work at first.
97. The DSO advises DSD on charities issues. As the Attorney has a specific public interest brief, it may (unusually) be advisable for the solicitor function in any charities litigation to be provided in-house.

### **Guardian of the rule of law**

98. Aside from “putting law at the heart of government”, it has been the practice of Attorneys General in recent years to seek to encourage a wider appreciation of the rule of law and of accessible law. Baroness Scotland, for example, has launched an initiative to engage young people in considering the importance of the rule of law. Elish Angiolini deliberately carves out time to visit schools and address young people on her work and that of the justice system more generally.
99. **I believe that there is an important education role for the Office, distinct from that of the Department of Justice (though there will be**

**opportunity for collaboration), in promoting the rule of law.** In the first instance there is a more practical issue of briefing MLAs and their advisers on the role of the Attorney, but that can radiate out. I should be keen, for example, to find a way of encouraging secondary schools to get involved in mock trial competitions, as existing outlets have tended to be limited to grammar schools only.

100 Alongside this sits the more mundane fact that there is bound to be media interest in the new role. I recommend that servicing this is combined with the wider education role and that **an education and communications officer, with Press Office experience, is appointed to the Office.**

101 I have dealt elsewhere with the focus that the Attorney's Office will have on human rights law, thanks particularly to Section 8 of the Justice Act 2004. I believe there is potential to explore how this could be employed for wider benefit, for example the potential for a role in the training of police officers, alongside existing coverage of human rights.

## **Wider liaison**

102 I have not yet been approached by the organizations in the voluntary and community sector with an interest in justice, but would count it important to have good relationships in that sector. There will likely be particular interest in the Section 8 work.

103 The issues which arise for Attorneys General in the UK and Ireland of course have a fair degree of cross-over, and there are regular meetings which I understand have been of real help as matters of mutual interest have been discussed. More widely there are meetings of Attorneys General of the European Union and these and perhaps other opportunities would bring a representational role for Northern Ireland further afield. **I note that there will be value in a local Attorney being tied into the wider network of related postholders in the UK, Ireland and EU.**

104 I note too that a good relationship with the Advocate General—a post occupied by the Attorney General for England and Wales, who will be responsible to the Westminster government for legal issues arising in matters concerning Northern Ireland that have not been devolved—will undoubtedly be helpful.

### **Miscellaneous matters**

105 For present purposes it is probably necessary only to mention a range of miscellaneous functions which would be performed within the Office. They are not likely to arise frequently, but they could attract considerable interest and involve difficult decisions when they do. The Attorney can order a fresh inquest into a disputed death; brings proceedings for contempt of court; applies for orders to restrict vexatious litigants; and appoints an amicus—a lawyer whose job is to assist the court—in cases where there are issues which might not otherwise be brought to the Court’s attention.

106 The Attorney General is the titular head of the Bar and receives the papers for, and can attend meetings of, the Benchers, Executive Council and Bar Council. It is right that a local Attorney should attempt to get to some of these, to keep up the liaison with the profession. There is potential for a relationship of encouragement to be developed as the Bar responds to new challenges particularly in light of the pressures on legal aid funding.

### **Staffing and resources**

#### *The nature of the Office*

107 Part of the process of establishing a new public body is to consider into what class of body it falls. DFP guidance makes the point that this helps locate the body in the Department’s overall landscape. Clarity about the responsibilities and duties of bodies helps ensure open and accountable structures.

108 The 2002 Act lays down a number of conditions about the nature of the Attorney General’s Office.

- (i) While the Attorney General is appointed by the First Minister and deputy First Minister acting jointly, his functions are to be exercised by him independently of any other person. The Attorney can be removed only by a judicial tribunal. Ministers are therefore not accountable for the work of the Attorney's Office.
- (ii) The Attorney is to be funded by FM and dFM acting jointly. Ministers therefore remain accountable to the Assembly for the public money spent by the Office.
- (iii) The Attorney may appoint staff, but subject to the approval of FM and dFM as to numbers, salary and other conditions of service.

109 In addition to the statutory provisions, there are two administrative considerations to inform the decision.

- (i) Having the staff of the Office employed as civil servants on NICS terms and conditions—while they would still be under the direction of the Attorney day-to-day—would allow posts to be open in practice to a mixture of those with experience of government (who will want to retain their existing rights) and new recruits from outside (who will then have the choice of pursuing a career in the Government Legal Service after their service in the AGO).
- (ii) Particularly when, as I understand it, the practice of many NDPBs to have separate financial systems is under scrutiny thanks to pressure on resources, linking the AGO to OFMDFM's financial systems, eg as a cost centre, makes practical and economic sense for a small office. It also allows internal audit systems to be provided from OFMDFM Internal Audit and for external audit to be covered in NIAO's audit of the Departmental Accounts. In the interests of transparency, a financial statement for the Office can still be included in its annual report.



10 The above considerations point to the AGO being classified as a non-departmental public body: “a body which has a role in the processes of national government, but is not a government department, or part of one, and which accordingly operates to a greater or lesser extent at arm’s length from Ministers”. Decisions NDPBs make are independent as they are removed from Ministers; Ministers are however ultimately responsible to the Assembly for an NDPB’s independence, efficiency and usefulness as an instrument of government.

11 Non-departmental public bodies are broadly classified into executive, advisory, tribunals and independent monitoring boards. An exercise has been conducted on the basis of DFP guidance, but the Attorney’s Office does not fall directly into one of these categories. While I recognize that this will need more detailed consideration, **the preliminary conclusion is that the Attorney General’s Office be classified as an NDPB. It does not fall neatly into one of the four categories of NDPB, but can be established on the basis that it appoints staff accountable to the Attorney but employed on civil service terms, and holds its own budget but uses established government financial systems.**

#### *Staffing structure*

**112. Annex E gives my proposals for the staffing of the Office, which are explained in more detail in the following paragraphs.**

113 Attorneys will be recruited for their legal knowledge, and there is no guarantee—especially if an Attorney comes from the Bar—that they will have experience of management, systems of control and the other issues germane to the running of a public body. The role of the Office’s Director, with the “chief executive” responsibility of accountability for the Office’s management, staffing and expenditure, is therefore a particularly important one. The key skills are a knowledge of how government and the justice system work and the ability to lead and organize a diverse range of professional and administrative staff. At least in the first instance, I recommend that a

Director assigned from the civil service will provide the “system” knowledge to complement the Attorney’s legal focus.

114 A full job evaluation exercise has not been carried out in the time available for this report; however based on similar posts in other NDPBs, my assumption would be that the Director post is pitched at Grade 5 / SCS payband 1. I note that this is the same grade as the officer who has led the current Attorney’s Northern Ireland work, and indeed is a little lower than the Legal Secretary in Scotland, notwithstanding that the Director would have a broader set of responsibilities. On the proposed staffing structure, the Director would be line manager for lawyers at the same grade, and though that might seem a strange arrangement I have been advised by Central Personnel Group that that is allowable and there are precedents, and that a small supervisory allowance is paid in such situations.

115 Just as the Director provides an immediate focus for the Attorney for the running of the Office, for liaison with Government and the justice system and for policy issues, on considering the range of responsibilities attaching to the post I feel that the Attorney needs a first point of contact for ad hoc legal input and advice on issues not directly related to the programme of formal opinion-writing. I would join with this the requirement for an instructing solicitor in those matters which cannot be handled by DSO, as well as on matters internal to the Office such as contempt of court and vexatious litigants.

116 Given that this post will provide personal legal support and will need to be up and running quickly—and indeed that there may be point in establishing it (and the Director’s post)—in the run-up to devolution, I suggest there might be value in establishing it on a “special adviser” model. There is already precedent in the Speaker’s office for having a special adviser to a non-political officer. As with other special advisers, the occupant would be a civil servant and subject to the usual rules.

117 The Legal Secretariat is the powerhouse of the Office, where the core work of research, writing opinions and supporting litigation takes place. I have based

the grading on the arrangements in Scotland and on the grades used in the Attorney General's Office in Ireland (Assistant Secretary, Principal and Assistant Principal, with the Director and Deputy Director sitting above that structure). Using the different grades encourages a teamwork approach: two or three heads are better than one in the complex and multi-faceted issues with which the Secretariat will deal.

18. I have proposed a Legal Secretariat of six. Scotland has three, but really needs (and there is an intention to recruit) a fourth. When first formed it was larger. When I visited, the Secretariat was dealing with about eight matters of formal opinion and advice as well as the usual range of miscellaneous matters. In Northern Ireland I would readily expect each Department to average one matter at least before the Attorney's office at any one time. We are at an earlier stage of the development of the institutions and of confidence, and are part of a more litigious society. An estimate of one issue per Department at any time implies a 50% extra workload compared with Scotland, thus my recommendation for the staffing.
19. In time I believe that the Legal Secretariat has the potential to develop into providing advocacy in the higher courts in issues in which the Attorney is involved. There is now legislative scope for such employed barristers—Section 17 of Justice (NI) Act 2004 (commenced in July 2004)—though Bar Rules would need further revision if full potential were to be realised. This is a very economic option compared with expenditure on counsel fees.
20. The Policy and Co-Ordination Unit makes the usual provision for liaison on HR issues, the paying of bills and keeping track of expenditure, ensuring the body has the right policies on hospitality, IT security and the like, as well as being the home for the Press Officer function and a law librarian. I have included a small additional capacity (making use of the proposed PSNI secondees) for assisting the Director in preparing inputs to policy proposals about which Government is consulting. The Unit would be responsible for planning and the annual report.

121. I much recognize that this structure is being proposed before there is any actual experience of the work that the Office will need to cover. I therefore recommend that **Delivery and Innovation Division should conduct a staffing review after eighteen months, to ensure that the Office remains fit for purpose.**
122. If confidence in the independence of the Attorney is to be maintained, it is important that the AGO is seen to be open in terms of recruitment. I think there is potential for the Office to offer posts which may appeal to some who have so far resisted employment in the Government Legal Service, who might then be encouraged to make longer-term contributions to the Service following their time in the AGO. But equally, there is a need to have experience and knowledge of government and ways of working in the public sector within the staff. As I have elsewhere indicated, **I believe there is value in a "mixed economy" model where the Office combines fresh input from outside with experience of government.**
123. It is likely that in the current economic climate the posts will have wide appeal. It would be prudent to have some ready means of fair but effective shortlisting. As part of the open recruitment of lawyers, there would be value in a legal examination, validated by NISRA.
124. There are real questions about timing of recruitment. The advertising period and time taken in running shortlisting arrangements and interviews, coupled with periods of one to three months for successful applicants to disentangle themselves from existing commitments, mean there is a real risk that people will not be available to fill posts when they are needed.
125. The timing of devolution of justice and policing may become clearer in the Autumn. Even so, **there would be considerable value in having all the preparatory work for the recruitment exercises—personnel specifications, shortlisting arrangements, panels—agreed with HR Connect in advance so that, when devolution is judged sufficiently close to merit proceeding with the recruitment, it can be done promptly.**

- 126 I note in passing that there is a need to confirm that the AGO is regarded as a "participant" by HR Connect.

#### Finance

- 127 The 2002 Justice Act provides that FM and dFM are jointly charged with funding the Attorney. An adequate budget is important in satisfying the requirement of the Office's independence. But independence here is distinct from the practical arrangements for accounting and audit. With a small Office it makes good economic sense for those to be provided from existing arrangements within OFMDFM.
- 128 Likewise, I think there would be practical sense in the Office being regarded alongside OFMDFM for the NIAO's external audit, albeit that the Audit Office may want to pay particular attention to the AGO at first given that it is a new area. I recognize that this will need further consideration and discussion with the Audit Office.
- 129 Based on the staffing structure proposed; on indicative figures for rental costs, rates and service charges; and on a calculation of the likely costs of a small law library which the Criminal Justice Directorate's library has helpfully calculated; I estimate that the annual cost of staff and accommodation will be in the region of **£1,610k**:

Staff	£1,405k
Rent, service charge, rates	£ 145k
Library and databases	£ 60k

There is potential for reduction in library costs if connection to the LION network can be secured. There would be an additional requirement for miscellaneous general administrative expenditure on utilities, travel costs and the like. In addition there would be "Year 1" fitting out costs estimated at **£515k**, most of which is capital.

130. When costs are awarded against third parties, there may be potential for the costs incurred in the litigation in the Office to be recovered, including an hourly rate for the Attorney's own time.

131. These calculations assume that the AGO's ordinary services are not charged to Departments, but that exceptional costs—mainly counsel fees and litigation where costs are awarded against the government—are borne by the Department or Departments concerned.

#### *Accommodation*

132. **There are very strong practical and presentational reasons for locating the Office in Belfast's legal quarter.** Presentationally, it emphasizes the independence of the Office; practically, it ensures easy access to the law courts and to DSO. Though I think it is important that all the staff of a small office are based in one location, the provision of touchdown rooms (linked to telephone and IT systems) in the Royal Courts of Justice (for consultations and ad hoc work during litigation), Parliament Buildings (as a base for liaison with MLAs) and in Stormont Castle, will make for less travelling and allow work to be progressed in each of these locations. Initial discussions have suggested that a room used by the PPS might be able to be made available in the RCJ and that the Assembly would find a room in the same way as rooms are made available to Ministers.

133. The Law Society has recently engaged with a developer to rebuild its headquarters building. There is rental space in the building which is ideally located. This option might also allow for a link with the Law Society's library that would help to limit the size of working library needed in the AGO. **I believe the option of co-location with the Law Society should be vigorously explored.**

#### **Work programme**

134. As part of my terms of reference I was asked to produce a work programme for the Office's first year of operation. I feel I need to record a caution about

this: much of the work will be reactive, in response to requests for opinions and to litigation which arises, and it is difficult to work this into a meaningful plan at this stage. But it is nevertheless possible to give a programme for the first year focussing on the full establishment of the Office, the building of relationships and the launch of wider work in education and the like. I have attached this at Annex F.

135. The work programme kicks in once the Office is established; but at the risk of stating the obvious I would make the point that there is a considerable body of work to be tackled in advance: not least in taking these proposals through OFMDFM; in preparing for and triggering recruitment; and in readying accommodation, setting up IT and the working library.
136. Aside from offering involvement in the principal task of developing these proposals, the past months have given me an invaluable opportunity to start my induction, as it were: to start to build relationships that will be key under devolution, and to build my own understanding of the issues challenging the justice system. I should be glad, therefore, to offer what help I can as preparations move forward, and to have the opportunity to continue in dialogue with key figures in preparation for devolution.

## **ANNEXES**

### **Annex A: List of meetings and visits**

Rt Hon Elish Angiolini QC (Lord Advocate), Colin Troup (Legal Secretary) and  
Norman McFadyen (Crown Agent)—Lord Advocate's Office, Edinburgh  
Jim Conn, Crown Solicitor  
Criminal Justice Board  
Evelyn Cumming, Northern Ireland Executive Office in Europe  
Rosalie Flanagan, Neill Jackson, Noel Lavery and Tony Canavan, OFMDFM  
Sir Alasdair Fraser CB QC (Director) and James Scholes (Deputy Director), Public  
Prosecution Service  
George Gray, First Legislative Counsel  
Kenny MacAskill MSP, Scottish Minister of Justice  
Dr Michael Maguire, Chief Inspector of Criminal Justice  
Paul Maguire QC, Senior Crown Counsel  
ACC Duncan McCausland, PSNI  
Kevin McGinty, Office of the Attorney General of England and Wales  
John McKervill and John McKernan, Central Personnel Group, DFP  
Rt Hon Sir Declan Morgan, Chair, NI Law Commission  
Seamus Murray, DSD Charities Branch  
John O'Hara QC (Chair), Greg Berry QC (Vice Chair) and Brendan Garland (Chief  
Executive), General Council of the Bar  
OFMDFM Special Advisers  
Ossie Paulin (Director), Brian Doherty (Deputy Director) and colleagues,  
Departmental Solicitor's Office  
Trevor Reaney, Clerk and Director General, Northern Ireland Assembly  
Murray Sinclair, Solicitor to the Scottish Government, and colleagues



## **Annex B: Extracts from the Justice (Northern Ireland) Act 2002**

### *Attorney General*

#### **22 Attorney General**

- (1) The Attorney General for England and Wales shall no longer be Attorney General for Northern Ireland.
- (2) The First Minister and deputy First Minister, acting jointly, must appoint a person to be Attorney General for Northern Ireland.
- (3) The Attorney General for Northern Ireland is to be funded by the First Minister and deputy First Minister, acting jointly.
- (4) The Attorney General for Northern Ireland may appoint staff, but subject to the approval of the First Minister and deputy First Minister as to—
  - (a) numbers,
  - (b) salary, and
  - (c) other conditions of service.
- (5) The functions of the Attorney General for Northern Ireland shall be exercised by him independently of any other person.
- (6) A person is not qualified for appointment as Attorney General for Northern Ireland unless he is—
  - (a) a member of the Bar of Northern Ireland of at least ten years' standing, or
  - (b) a solicitor of the Supreme Court of at least ten years' standing.
- (7) The First Minister and deputy First Minister, acting jointly, must make arrangements for the discharge of the functions of the Attorney General of Northern Ireland during any vacancy in that office.

#### **23 Terms of appointment of Attorney General**

- (1) Subject as follows, the Attorney General for Northern Ireland holds office in accordance with the terms of his appointment (or re-appointment).
- (2) A person may not be appointed as the Attorney General for Northern Ireland for more than five years at a time.
- (3) The Attorney General for Northern Ireland may resign by notice in writing to the Office of the First Minister and deputy First Minister.
- (4) The First Minister and deputy First Minister, acting jointly, must pay to or in respect of the Attorney General for Northern Ireland any such salary or allowances as they may determine.

- 10. Section 48 of the Northern Ireland Act 1998 (c. 47) (pensions) applies in relation to a person who has ceased to be the Attorney General for Northern Ireland.
- 11. In Part 3 of Schedule 1 to the House of Commons Disqualification Act 1975 (c. 24) (disqualifying offices), insert (at the appropriate place in alphabetical order)—  
“Attorney General for Northern Ireland.”
- 12. In Part 3 of Schedule 1 to the Northern Ireland Assembly Disqualification Act 1975 (c. 25) (disqualifying offices), insert (at the appropriate place in alphabetical order)—  
“Attorney General for Northern Ireland.”
- 13. The Attorney General for Northern Ireland is disqualified from being elected to, or being a member of, a district council in Northern Ireland.
- 14. In Part 7 of Schedule 1 to the Freedom of Information Act 2000 (c. 36) (public authorities), insert (at the appropriate place in alphabetical order)—  
“The Attorney General for Northern Ireland.”

## 24 Removal of Attorney General

- 1. The Attorney General for Northern Ireland—
  - a) may be removed from office by the First Minister and deputy First Minister, acting jointly, if a tribunal convened under subsection (3) has reported to them recommending that he be removed on the ground of misbehaviour or inability to perform the functions of the office, and
  - b) may be suspended from office by them (pending a decision whether to remove him) if the tribunal, at any time when it is considering whether to recommend his removal, has recommended to them that he be suspended.
- 2. If the Attorney General for Northern Ireland is suspended he may not perform any of the functions of the office until the decision whether to remove him has been taken (but his other rights as holder of the office are unaffected).
- 3. A tribunal may be convened by the First Minister and deputy First Minister, acting jointly.
- 4. A tribunal is to consist of—
  - (a) a person who holds the office of Lord of Appeal in Ordinary or high judicial office as defined in section 25 of the Appellate Jurisdiction Act 1876 (c. 59) (ignoring for this purpose section 5 of the Appellate Jurisdiction Act 1887 (c. 70)) and does not hold (and has never held) the office of Lord Chief Justice, Lord Justice of Appeal or judge of the High Court, and
  - (b) a person who holds, or has held, office as a judge of the High Court in England and Wales or a judge of the Court of Session.
- 5. The selection of the persons to be the members of a tribunal is to be made by the Lord Chancellor.

- (6) The chairman of a tribunal is the person mentioned in paragraph (a) of subsection (4).
- (7) The procedure of a tribunal is to be determined by its chairman.
- (8) The First Minister and deputy First Minister, acting jointly, may pay to a member of a tribunal any such allowances or fees as they may determine.

## **25 Participation by Attorney General in Assembly proceedings**

- 1. The Attorney General for Northern Ireland may participate in the proceedings of the Assembly to the extent permitted by its standing orders but he may not vote in the Assembly.
- 2. The Assembly's standing orders may in other respects provide that they are to apply to the Attorney General of Northern Ireland as if he were a member of the Assembly.
- 3. The Attorney General for Northern Ireland may, in any proceedings of the Assembly, decline to answer any question or produce any document relating to the operation of the system of prosecution of offences in any particular case if he considers that answering the question or producing the document—
  - (a) might prejudice criminal proceedings in that case, or
  - (b) would be otherwise against the public interest.
- 4. Section 43 of the Northern Ireland Act 1998 (c. 47) (interests of members of Assembly) applies to the Attorney General for Northern Ireland as if he were a member of the Assembly.

## **26 Annual report by Attorney General**

- 1. The Attorney General for Northern Ireland must, as soon as possible after the end of each financial year, prepare a report on how he has exercised his functions during the financial year.
- 2. The Attorney General for Northern Ireland must send a copy of each annual report of his to the Office of the First Minister and deputy First Minister.
- 3. The First Minister and deputy First Minister, acting jointly, must lay before the Assembly a copy of each annual report received by their Office under subsection (2).
- 4. After a copy of an annual report has been laid in accordance with subsection (3), the First Minister and deputy First Minister, acting jointly, must arrange for the annual report to be published.
- 5. But the First Minister and deputy First Minister, acting jointly, may exclude a part of an annual report from the copy laid or published if, in their opinion, the laying or publication of the part—
  - (a) would be against the public interest, or
  - (b) might jeopardise the safety of any person.

37. If the First Minister and deputy First Minister exclude a part of an annual report from laying or publication, they must lay or publish with the annual report a statement that it has been excluded.

38. "Financial year" means—

- (a) the period beginning with the day on which the first person appointed under section 22 takes office and ending with the first 31st March which falls at least six months after that day, and
- (b) each subsequent period of twelve months beginning with 1st April.

### *Relationship of Director and Attorney General*

#### **40 Superintendence and removal of Director**

39. This section applies for so long as the Attorney General for England and Wales is Attorney General for Northern Ireland.

40. The Director must exercise his functions under the superintendence of the Attorney General for Northern Ireland and is subject to any directions given by him; but a failure to comply with this subsection does not affect the validity of anything done by or on behalf of the Director.

The Attorney General for Northern Ireland may remove the Director or Deputy Director from office on the ground of misbehaviour or inability to perform the functions of the office.

#### **41 Transfer of functions etc.**

41. This section and sections 42 and 43 apply once the Attorney General for Northern Ireland is a person appointed under section 22(2).

42. Any function of the Attorney General for Northern Ireland of consenting to the institution or conduct of criminal proceedings is transferred to the Director (but subject to Schedule 7).

43. The function of the Attorney General for Northern Ireland of entering a nolle prosequi is transferred to the Director.

44. The Attorney General for Northern Ireland may not present, or direct the presentation of, an indictment against a person charging him with an offence.

45. In section 36(9)(a) of the Criminal Justice Act 1988 (c. 33) (reference to Court of Appeal of unduly lenient sentences), for "Attorney General for Northern Ireland" substitute "Director of Public Prosecutions for Northern Ireland".

46. In section 15 of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47) (reference to Court of Appeal of point of law following acquittal on indictment), for "Attorney General for Northern Ireland" (in both places) substitute "Director of Public Prosecutions for Northern Ireland".

## **42 Independence of Director**

- 1) The functions of the Director shall be exercised by him independently of any other person.
- 2) The Director must consult the Attorney General for Northern Ireland and the Advocate General for Northern Ireland—
  - (a) before issuing or making alterations to a code under section 37, and
  - (b) before preparing his annual report.
- 3) The Attorney General for Northern Ireland and the Director may (from time to time) consult each other on any matter for which the Attorney General for Northern Ireland is accountable to the Assembly.
- 4) The Advocate General for Northern Ireland and the Director may (from time to time) consult each other on any matter for which the Advocate General for Northern Ireland is accountable to Parliament.
- 5) The Director must send a copy of each annual report prepared by him to—
  - (a) the Attorney General for Northern Ireland, and
  - (b) the Advocate General for Northern Ireland.
- 6) The Attorney General for Northern Ireland must lay before the Assembly a copy of each annual report received by him under subsection (5); and the Advocate General for Northern Ireland must lay before each House of Parliament a copy of each annual report so received by him.
- 7) If a part of an annual report is excluded from publication under section 39(4)—
  - (a) the same exclusion is to be made from the copies which are laid under subsection (6), and
  - (b) a statement that the part has been excluded is to be laid with those copies.

## **43 Appointment and removal of Director by Attorney General**

- 1) The Attorney General for Northern Ireland must consult the Advocate General for Northern Ireland before appointing a person to be Director or Deputy Director.
- 2) The Director or Deputy Director—
  - (a) may be removed from office by the Attorney General for Northern Ireland if a tribunal convened under subsection (4) has reported to him recommending that the Director or Deputy Director be removed on the ground of misbehaviour or inability to perform the functions of the office, and
  - (b) may be suspended from office by the Attorney General for Northern Ireland (pending a decision whether to remove him) if the tribunal, at any time when it is considering whether to recommend his removal, has recommended to the Attorney General for Northern Ireland that he be suspended.

- 8 If the Director or Deputy Director is suspended he may not perform any of the functions of the office until the decision whether to remove him has been taken (but his other rights as holder of the office are unaffected).
- 14 A tribunal may be convened by the Attorney General for Northern Ireland after consulting the Advocate General for Northern Ireland.
- 15 A tribunal is to consist of—
- (a) a person who holds the office of Lord of Appeal in Ordinary or high judicial office as defined in section 25 of the Appellate Jurisdiction Act 1876 (c. 59) (ignoring for this purpose section 5 of the Appellate Jurisdiction Act 1887 (c. 70)) and does not hold (and has never held) the office of Lord Chief Justice, Lord Justice of Appeal or judge of the High Court, and
- (b) a person who holds, or has held, office as a judge of the High Court in England and Wales or a judge of the Court of Session.
- 16 The selection of the persons to be the members of a tribunal is to be made by the Lord Chancellor.
- The chairman of a tribunal is the person mentioned in paragraph (a) of subsection (5).
- 18 The procedure of a tribunal is to be determined by its chairman.
- 19 The Attorney General for Northern Ireland may pay to a member of a tribunal any such allowances or fees as he may determine.

## **Annex C: List of duties and responsibilities of the Attorney General for Northern Ireland**

The Attorney General for Northern Ireland has a wide range of duties and tasks, which include functions in relation to legislative and certain legal processes, responsibilities in relation to the Director and Deputy Director of Public Prosecutions and a variety of consultative and advisory roles. The main duties are as follows:

### **Legislative and Legal Functions**

- Referring, in some circumstances, a Bill being considered by the Northern Ireland Assembly to the Judicial Committee of the Privy Council for decision on whether it is within legislative competence.
- Instituting or defending proceedings in relation to a devolution issue.
- Defending the public interest in matters relating to civil law in Northern Ireland.
- Bringing procedures under the Contempt of Court Act and contempt issues generally.
- Appointment of Special Counsel in certain cases which do not pass to the Advocate General.
- Appointment of amicus curiae.
- Bringing relator actions (to claim an injunction or declaration or both in order to prevent a breach of a public law duty).
- Applying for orders to restrict vexatious litigants under section 32, Judicature (NI) Act 1978.
- Coroners Act NI.

### **Responsibilities in relation to the Director of Public Prosecutions**

- Appointing the Director and Deputy Director of Public Prosecutions for Northern Ireland (after consulting the Advocate General).
- Consulted by the Director of Public Prosecutions for Northern Ireland before the Director makes his annual report.
- Consulted by the Director of Public Prosecutions for Northern Ireland before the Director makes any amendments to the Code for Prosecutors.

- Arranging for the annual report of the Director of Public Prosecutions for Northern Ireland to be laid before the Northern Ireland Assembly.
- Consulting, from time to time, with the Director of Public Prosecutions for Northern Ireland on any matter for which the Attorney is accountable to the Northern Ireland Assembly.
- May remove the Director and/or Deputy Director of Public Prosecutions for Northern Ireland from office if an appropriate tribunal recommends such action on the ground of misbehaviour or inability to perform the functions of the office.
- May suspend the Director and/or Deputy Director of Public Prosecutions for Northern Ireland from office if an appropriate tribunal makes such a recommendation (pending a decision whether to remove from office).

### **Consultative/Advisory Roles**

- Chief legal adviser to the Northern Ireland Executive and the Executive's most senior representative in the courts.
- Overseeing the legal work of the in-house legal advisers to the Northern Ireland Executive and its departments.
- Issuing guidance on human rights standards regarding how organisations in the criminal justice field exercise their functions. (The list of applicable organisations may be amended and added to by the post-holder, but currently include the Public Prosecution Service for Northern Ireland, the Probation Board for Northern Ireland, the Police Ombudsman for Northern Ireland, the Northern Ireland Prison Service, the Youth Justice Agency, Forensic Science Northern Ireland, the State Pathologist's Department and the Compensation Agency).
- Consulted by the Chief Inspector of Criminal Justice on his programme of inspections.
- Consulted by the responsible Minister on appointments to the Law Commission for Northern Ireland.
- Consulted by the responsible Minister on the work programme of the Law Commission for Northern Ireland.



- Consulted by the Advocate General on the appointment of the Crown Solicitor.
- Consulted by the responsible Minister on the development of criminal justice policy.

The Attorney General for Northern Ireland is also responsible for appointing Standing Counsel to the Northern Ireland Executive and for overseeing the work of the in-house legal advisers to the Northern Ireland Executive and its departments.

Although not a member of the Northern Ireland Assembly, the post-holder may participate in Assembly business to the extent permitted by Standing Orders (for example through answering questions or making statements, but without voting rights).

The Attorney General must prepare an annual report to the First Minister and Deputy First Minister on how the functions of the office have been exercised.

## **Annex D: Proposed draft memorandum of understanding with the PPS**

- i) This Protocol sets out how the Attorney General and the Director of Public Prosecutions (Director) exercise their functions in relation to each other.

Details of the Attorney General and Director's statutory functions are found in the Justice (Northern Ireland) Act 2002 and the Justice (Northern Ireland) Act 2004.

The Attorney General and the Director are each subject to accountability mechanisms which are summarised in Annex 1.

- ii) In particular, it is noted that:

- i) The functions of the Director shall be exercised by him independently of any other person.
- ii) The Attorney General may answer any question or produce any document relating to the operation of the system of prosecution of offences in any particular case.
- iii) The Director may not be required in any proceedings of the Assembly to answer any question or produce any document relating to a matter other than the finances and administration of the Public Prosecution Service.
- iv) The Attorney General and the Director agree that the Attorney General may answer questions in the Assembly in relation to the Director's legal policies.

In order that these responsibilities can be effectively discharged, the Attorney General and the Director agree to consult each other from time to time on any matter for which the Attorney General or Director is accountable to the Assembly and generally.

5. The Attorney General and the Director also agree that:

- (i) The Director will provide the Attorney General with such information as is necessary, and consistent with the independent discharge of the Director's functions, to ensure that the process of consultation is effective, and, so that the Attorney General can answer questions in the Assembly in relation to the operation of the system of prosecution of offences in any particular case.
- (ii) The Director will confer with the Attorney General in relation to his Annual Report and to any business or strategic plans.
- (iii) The Director will confer with the Attorney General before issuing or making alterations to the Code for Prosecutors including the Code of Ethics. While the formulation of the Codes are for the Director to determine, the Attorney General may give advice and guidance.
- (iv) The Director will confer with the Attorney General in relation to the finances and administration of the Public Prosecution Service.

6. The Director takes decisions as to prosecution in an impartial manner based upon a professional assessment of the available evidence and the public interest. The Director will exercise this quasi judicial function in a fair and independent manner wholly in accordance with the Code for Prosecutors and the requirements of justice.

7. The Attorney General and the Director agree to confer about any case which either considers requires consultation and/or has implications for the system of prosecution or criminal justice policy or practice or reveals some systemic failure or a flaw in the framework of the law or the operation of the criminal justice system. While the decision as to prosecution is for the Director to determine, the Attorney General may give advice and guidance.

8. The Director will not confer with the Attorney General about any prosecutorial decision relating to Members of the Legislative Assembly or political parties in

the Assembly unless the Director and Attorney General both agree that such consultation is necessary.

4. In exceptional cases the Attorney General and the Director may conclude that it is necessary to consult with Ministers of the Northern Ireland Executive as part of the decision-making process so that they can provide facts and information relevant to the decision to prosecute. In such a case the Attorney General may seek Ministerial representations in a public interest consultation exercise. The purpose of the exercise is confined to identifying particular public interest considerations which are relevant to the prosecution decision of the Director. The weight to be given to such representations is a matter for the Director. The responsibility for the decision rests with the Director. The Attorney General ensures that the public interest consultation exercise is conducted with propriety and Ministers, who are consulted, are informed that the decision is for the Director alone. The Attorney General may give advice and guidance.

The Attorney General will not comment upon any prosecutorial decisions taken by the Director unless after consultation with the Director he considers it necessary to do so to answer questions in the Assembly in relation to the operation of the system of prosecution of offences.

5. Where an Assembly Committee seeks evidence from the Attorney General and or the Director about the work of the Public Prosecution Service, the Attorney General and the Director will consult to determine how best to meet the requirements of the Committee.
6. The Attorney General will safeguard the independence of the Director in his taking decisions as to prosecution to ensure that he is free from interference or pressure and takes such decisions without fear, favour or prejudice.
7. This Protocol will be reviewed annually by the Attorney General and the Director or as is otherwise necessary.

## APPENDIX

- 1. While Section 42(1) of the Justice (Northern Ireland) Act 2002 sets the context wherein the functions of the Director shall be exercised by him independently of any other person, the Director is subject to a number of accountability mechanisms.
- 2. By virtue of section 39 of the Justice (Northern Ireland) Act 2002 (the Act), the Director must prepare an Annual Report on how he has exercised his functions during the financial year. By virtue of section 42(6) the Attorney General must lay before the Assembly a copy of each Annual Report received by him from the Director and the Advocate General must lay before each House of Parliament a copy of such Annual Report so received.
- 3. By virtue of section 37(1) of the Act, the Director must prepare a Code of Practice including a Code of Ethics laying down standards of conduct and practice for public prosecutors and barristers and solicitors to whom the Director assigns the institution or conduct of criminal proceedings. He is obliged under Section 42(2) to consult the Attorney General before issuing or making alterations to the Code. The Code must give guidance on general principles to be applied in determining, in any case whether criminal proceedings should be instituted or, where criminal proceedings have been instituted, whether they should be discontinued and in determining, in any case, what charges should be preferred. The Director must publish the Code and any alterations which he makes to it.
- 4. Decisions to prosecute taken by the Director are subject to judicial and public scrutiny at trial.
- 5. Decisions not to prosecute taken by the Director are capable of being judicially reviewed.
- 6. By virtue section 47(5) of the Act the Chief Inspector of Criminal Justice may with the consent of the Attorney General carry out an inspection or review of

the Public Prosecution Service. The Chief Inspector by virtue of section 47(6) of the Act may not carry out inspections or reviews of individual cases.

The Director has formulated a policy whereby detailed reasons for his decisions can be provided.

8 The Director has appointed an Independent Commissioner for Complaints in relation to scrutiny of non-prosecutorial matters.

9 The Director is accountable to the Assembly for matters relating to the finances and administration of his Service. However, by virtue of section 30(11) of the Act, the Director (and the Deputy Director and members of staff of the Service) may not be required in any proceedings of the Assembly to answer any question or produce any document relating to a matter other than the finances and administration of the Service. The Explanatory Notes to the Act provide that 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 the legislation), it would not be appropriate for the Assembly to question him on individual cases.

10 Section 25(1) of the Act states that the Attorney General may participate in the proceedings of the Northern Ireland Assembly to the extent permitted by its standing orders, but may not vote. By virtue of section 25(3) of the Act, the Attorney General may, in any proceedings of the Assembly, decline to answer any question or produce any document relating to the operation of the system of prosecution of offences in any particular case if he considers that answering the question or producing the document might prejudice criminal proceedings in that case, or would be otherwise against the public interest.

11 During the debate on the Act, the Minister for State, Mr Browne, stated:

“One can be in no doubt about the review recommendation that the independence of the Director should not be undermined by making him accountable to politicians for his decisions on any individual cases. As we

have already discussed, the review group decided that the proper channel for accountability to the Assembly on prosecution policy was the Attorney General for Northern Ireland. That accountability for policy will not be allowed to undermine the independence of the Director of Public Prosecutions. The review considered and discarded other recommendations on the grounds that they might infringe the Director's independence. I would argue that to make the Director accountable to the Assembly for the management of, and decisions on individual cases would undermine his independence and lead to improper questions being asked. The Bill seeks to avoid that."

2. It is presently intended that a CONCORDAT between Her Majesty's Government and the Northern Ireland Executive will be entered into concerning the INDEPENDENCE OF PUBLIC PROSECUTION SERVICE. This will include the following:-

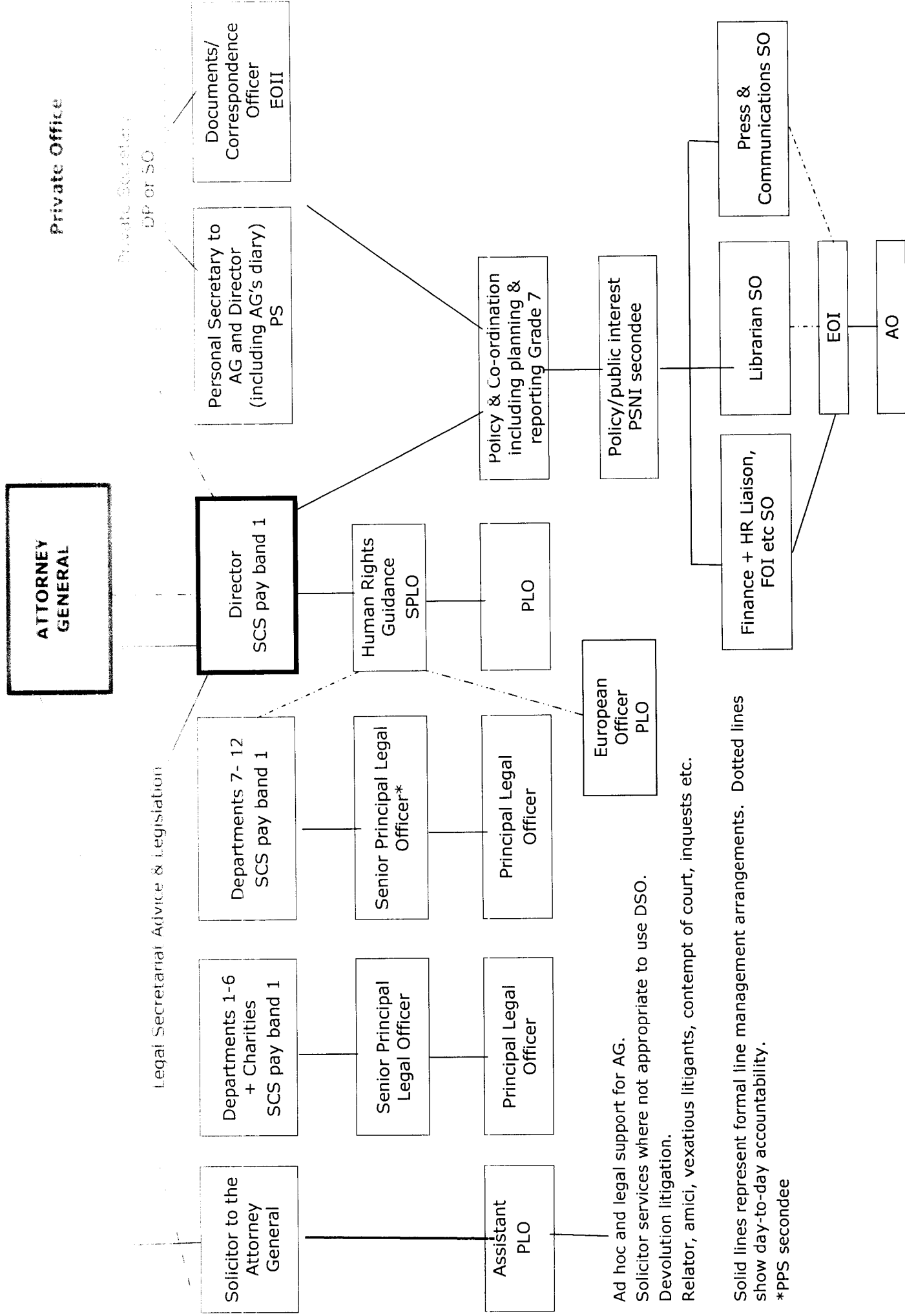
- (i) The relationship between the Director and the Attorney General will be consultative only.
- (ii) The Attorney General will have no power of direction or superintendence over the Public Prosecution Service whether in individual cases or matters of policy.
- (iii) The institution or continuance of criminal proceedings shall not be subject to the consent of the Attorney General.
- (iv) It is an essential and fundamental principle that the Public Prosecution Service is independent.
- (v) The Director will take decisions as to prosecution in accordance with law and practice.
- (vi) The Director will exercise this quasi judicial function in a wholly independent manner and not be subject to interference, question or

pressure by the Northern Ireland Executive or by members of the Assembly in relation to any prosecutorial function.

- (vii) As set out in section 32(a) of the Act, it shall be an offence to seek to influence a prosecutor with the intention of perverting the course of justice.
- (viii) The Attorney General may, in any proceedings of the Assembly, answer any question or produce any document relating to the operation of the system of prosecution of offences in any particular case if he considers that answering the question or producing the document does not prejudice criminal proceedings in that case or is not otherwise against the public interest.
- (ix) The Director will provide the Attorney General with such information as is consistent with the independent discharge of his functions.



## **Annex E: Draft staffing structure**





## **Annex F: Indicative AGO work programme – Year 1**

### **Building relationships**

Meetings with Executive members individually on role and functions of the Attorney General's Office	Month 1
Familiarisation sessions for MLAs in Parliament Buildings	Months 1-2
Meetings with "third sector" interests	Months 1-2
Press breakfasts	Months 1-2
Establishment of wider education programme	Months 4-8
Progress meetings with Executive members	Month 9

### **Establishing ways of working**

Sign PPS memorandum of understanding	Month 1
Instigate regular meetings with DSO and manifest of main work underway	Month 1
Agree protocols with Executive Secretariat – access to papers etc	Month 1
Agree approach to legislation and amendments with Executive Secretariat, DSO and OLC	Months 1-2
Develop practical procedures for dealing with requests for advice, with Executive papers and with legislation	Months 1-2
Agree procedures on miscellaneous functions including vexatious litigants, contempt of court, amicus appointments etc	Months 3-4

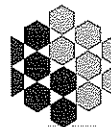
Research and draw together body of precedent material on miscellaneous functions	Months 5-9
"Working Together I" seminar for AGO's staff to review how the Office is working and identify any areas remaining to be addressed, and to clarify the Office's ethos	Month 3
"Working Together II" seminar involving key stakeholders, reviewing early experience of linkages with AGO	Month 6
Explore scope for use of the relator with PSNI and other public bodies, and agree way forward	Months 3-7
Identify internal policies needed (eg hospitality and gifts, information security) and draft	Months 1-5
Develop and consult on protocol for publication of advice	Months 3-9
Agree protocols with Charities Commission	Months 4-8

### **Staff development**

Forward job plans, personal development plans and initial identification of individual training needs	As staff arrive
Researching available development opportunities	Months 1-3
Production of menu of development opportunities	Months 4-5
Preparation for staffing review to begin	Months 11-12
Discuss Rule changes for employed barristers with Bar	Months 4-6

### Getting the substantive work underway

Produce AGO business plan for first year	Months 1-2
Consolidate work on human rights guidance, discuss broad approach with key stakeholders and agree way forward	Months 1-6
Discuss potential for input to human rights training with PSNI and agree way forward	Months 6-9
Set out plan of work and timetable for refreshing of panels of counsel	Months 4-6
Agree selection process for and terms of engagement of panels of counsel, and launch any necessary exercise	Months 7-8
Produce AGO business plan for second year--collaborative exercise involving all staff in Office	Months 9-12
Begin drafting annual report of Attorney General	Month 11



Office of the

**First Minister and  
Deputy First Minister**

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Our Ref: COR/662/09

23 March 2010

*Dear Mr Larkin*

**ESTABLISHMENT AND WORK OF THE OFFICE OF THE ATTORNEY GENERAL FOR  
NORTHERN IRELAND**

Thank you for your letter of 4 September 2009 enclosing your comprehensive report on the establishment of the office of Attorney General for Northern Ireland and on the key areas of the AGNI's work. We are very grateful for all of your work on the report and your engagement with our advisers and officials.

We have given careful consideration to the report's conclusions and have appended our response to each of your recommendations at Appendix 1 attached.

The arrangements which will impact on the operation of the Executive and on departments other than OFMDFM will require Executive agreement. Proposals will be presented at an early date.

Yours sincerely

**RT HON PETER D ROBINSON MP MLA**  
First Minister

**MARTIN McGUINNESS MP MLA**  
deputy First Minister

**APPROVED BY THE MINISTERS  
AND SIGNED IN THEIR ABSENCE**

**RESPONSE TO RECOMMENDATIONS ON THE REPORT BY JOHN LARKIN QC ON  
ESTABLISHING THE OFFICE OF THE ATTORNEY GENERAL FOR NORTHERN  
IRELAND**

**Chief Legal Adviser to the Executive**

*Provision of advice and opinions*

Paragraph

34. I recommend that it should be appropriate to seek the advice of the Attorney General:

- (i) in matters of the greatest legal complexity or which have cross-cutting implications;
- (ii) in matters of political controversy or sensitivity;
- (iii) where a Departmental legal adviser has doubts about
  - (a) the legality or constitutional propriety of proposed legislation;
  - (b) the legality or constitutional propriety of proposed executive action;
- (iv) where there is disagreement between Departments on a legal issue;
- (v) where Ministers or the Departmental Solicitor consider the advice of the Attorney is necessary or desirable;
- (vi) where a matter raises inter-jurisdictional issues within the UK or issues which may ultimately involve other Law Officers.

Comment

Our view is that it would be appropriate to seek the advice of the Attorney General on the most important and complex legal matters facing the Executive and



Ministers. This approach could be reviewed following early experience of how the arrangements have operated in practice. Alternatively, should you wish, we are content to have an early meeting to refine the circumstances when your advice would be sought. Guidance should provide that the Attorney General may have access to papers on any legal issue being dealt with by Departments or the Executive.

36. **I propose that the advice of the Attorney's Office should normally be sought by a reference from the DSO for an opinion.**

**Agreed.**

37. **I recommend regular stocktake meetings between the Attorney and the Departmental Solicitor, underpinned by a "work in progress" log of the major issues being dealt with in the DSO.**

**Agreed.**

38. **These principles of openness, excellence and engagement should be incorporated in the ethos and training of the Attorney's Office.**

**Agreed.**

#### *Engagement with the Executive*

43. **I propose that the Executive make provision to the effect that the Attorney General has a right to attend Executive meetings.**

#### **Comment**

Our view is that AGNI would be entitled to attend all meetings of the Executive, but that it is not anticipated that it would be necessary for him to attend all meetings.

44. **I recommend that the Attorney's Office be copied into draft Executive papers at the same time as they are submitted by Departments to the Executive Secretariat, so that any outstanding legal questions can be checked.**

### **Comment**

Our view is that draft Executive papers should be copied to the AGNI at the same time as they are first circulated by the originating Minister to other Ministers for comment.

45. **I recommend that the Attorney should be able to attend pre-Executive meetings.**

### **Agreed**

#### *Disclosure of advice*

47. **I believe AGO advice should be available across the Departments of the Executive on request.**

### **Comment**

Our view is that the AGNI's advice would normally be shared where requested unless the AGNI decided it was not appropriate.

49. **The release of advice from the Attorney General's Office outside the Departments of the Executive, or any indication that advice has been sought, should require the permission of the Attorney. An early task for the AGO's workplan should be to draft a protocol for the situations in which advice might be so released.**

### **Agreed**

#### *Litigation*

51. **I recommend that litigation arising in matters on which the Attorney General's Office has provided advice should be led by the AGO on behalf of the Executive.**

**Agreed**

53. I recommend that the Attorney General's Office takes responsibility for the government civil panels.

**Agreed**

56. For cases in which the Attorney is appearing or organising the appearance, DSO, which has extensive experience of providing solicitor services for litigation, should I believe normally provide those services.

**Agreed**

*Legislation*

59. The advice to Ministers prior to certification that legislation is within legislative competence should be given by the Attorney and all advice from DSO on legislative competence should be sent to the AGO to be issued by the Attorney with appropriate modifications if required.

**Agreed**

60. Ministerial correspondence on legislation is copied to the AGO for information.

**Agreed**

*Oversight of Government legal services*

64. I recommend that the Attorney should be entitled to see DSO material, with oversight exercised through feedback to the Departmental Solicitor.

**Agreed**

*Codification of these arrangements*

66. **Guidance to Ministers and Departments, approved by the Executive, should issue covering the circumstances in which it is appropriate to seek the Attorney's advice and the rules on publication of that advice.**

**Agreed**

67. **I propose that the procedural guidance should indicate that it is expected that legal advice provided by the AGO will be followed.**

**Comment**

Our view is that it would be expected that the Attorney General's advice would normally be followed without prejudice to the ultimate decision-making responsibilities of the Executive.

*Supporting policy development*

71. **I commend consideration of a legal secondee to the Northern Ireland Executive Office in Brussels, who would have a professional link back to the Attorney General's Office.**

**Comment**

Agreed but dependent on budgetary considerations and AGNI's own prioritisation.

**Relationship with the Assembly**

77. **While I recognise that their content is a matter for the Assembly, it may be helpful if I recommend the four areas which I believe they would most usefully cover.**

- (a) **The exercise of the Attorney's responsibilities in relation to the Public Prosecution Service.**
- (b) **Addressing the Assembly on issues of legislative competence.**

- (c) In the interests of transparency, addressing the work of his own Office.
- (d) Finally, I would submit that there is potential for the Attorney to assist the Assembly in certain other circumstances.

**Agreed**

79. The provision of a “touchdown room” in Parliament Buildings, similar to the space provided for Executive members and linked to the AGO’s computer network, would facilitate not only the official engagement of the Attorney with the Assembly and its committees but also more regular informal contact with members to help build relationships and explain the role and work of the Office.

**Agreed**

**Relationship with the Public Prosecution Service**

84. I recommend that a memorandum of understanding between the Attorney General and the Director of Public Prosecutions be put in place immediately following devolution of justice.

**Comment**

We understand that this Memorandum of Understanding is at an advanced stage. This should be agreed with the PPS and finalised as soon as possible.

**Section 8 guidance**

89. I much believe that a small but dedicated unit is needed if this task is to be accomplished in reasonable time.

**Comment**

Agreed but dependent on budgetary considerations and AGNI’s own prioritisation.

## **Public interest litigation**

94. I propose that an early task for an Attorney General's Office would be to explore with public authorities the scope for the relator to assist them in the achievement of their strategic aims. I have welcomed an indication from PSNI that they would consider seconding an officer to the Attorney General's Office

### **Agreed**

## **Guardian of the rule of law**

99. I believe that there is an important education role for the Office, distinct from that of the Department of Justice (though there will be opportunity for collaboration), in promoting the rule of law.

### **Comment**

Agreed but dependent on budgetary considerations and AGNI's own prioritisation.

100. I recommend that servicing this is combined with the wider education role and that an education and communications officer, with Press Office experience, is appointed to the Office.

### **Comment**

Whilst we acknowledge that there is a role for the AGNI in this regard, due to budgetary considerations we would not recommend this approach. This is, however, a matter for AGNI and his own prioritisation.

## **Wider liaison**

103. I note that there will be value in a local Attorney being tied into the wider network of related postholders in the UK, Ireland and EU.

## **Agreed**

### **Staffing and resources**

#### *The nature of the Office*

111. **The preliminary conclusion is that the Attorney General's Office be classified as an NDPB. It does not fall neatly into one of the four categories of NDPB, but can be established on the basis that it appoints staff accountable to the Attorney but employed on civil service terms, and holds its own budget but uses established government financial systems.**

#### **Comment**

Your report indicates that the status of the office requires further consideration. The advice we have received is that the nature of the office is that it is not an NDPB. The AG is an independent statutory office holder and the staff employed will have the status of civil servants. A protocol demonstrating the independent nature of the AGNI's office and its arms length relationship with OFMDFM will be agreed between FM/dFM and the AGNI. These arrangements can of course be reviewed after a period of operation if the organisational independence of your office needs to be reinforced.

#### *Staffing structure*

112. **Annex E gives my proposals for the staffing of the Office, which are explained in more detail in the following paragraphs.**

#### **Comment**

Content with the principles behind the structures and types of post proposed. Budgetary issues particularly in the current fiscal environment need to be considered. A budget process to set budgets for the period 2011/12 to 2013/14 will take place during 2010/11.

115. Just as the Director provides an immediate focus for the Attorney for the running of the Office, for liaison with Government and the justice system and for policy issues, on considering the range of responsibilities attaching to the post I feel that the Attorney needs a first point of contact for ad hoc legal input and advice on issues not directly related to the programme of formal opinion-writing. I would join with this the requirement for an instructing solicitor in those matters which cannot be handled by DSO, as well as on matters internal to the Office such as contempt of court and vexatious litigants.
116. Given that this post will provide personal legal support and will need to be up and running quickly—and indeed that there may be point in establishing it (and the Director's post)—in the run-up to devolution, I suggest there might be value in establishing it on a “special adviser” model. There is already precedent in the Speaker's office for having a special adviser to a non-political officer. As with other special advisers, the occupant would be a civil servant and subject to the usual rules.

#### Comment

We understand that a way forward has been found on this issue and that this will involve the recruitment of an Instructing Solicitor to the AG's office. A job description is to be agreed. We understand that the recruitment will be under NICS processes and that the appointee would be a civil servant. This process will be treated as an absolute priority.

121. Delivery and Innovation Division should conduct a staffing review after eighteen months, to ensure that the Office remains fit for purpose.

#### Comment

Agreed but with a review after 9 months. This should align with the process for setting budgets for the period 2011/12 to 2013/14.

122. I believe there is value in a “mixed economy” model where the Office combines fresh input from outside with experience of government.



### **Comment**

Agreed but subject to NICS recruitment and secondment policies.

125. There would be considerable value in having all the preparatory work for the recruitment exercises—personnel specifications, shortlisting arrangements, panels—agreed with HR Connect in advance so that, when devolution is judged sufficiently close to merit proceeding with the recruitment, it can be done promptly.

### **Comment**

Agreed. This process is underway.

### *Finance*

129. I estimate that the annual cost of staff and accommodation will be in the region of £1,610k.

In addition there would be “Year 1” fitting out costs estimated at £515k, most of which is capital.

### **Comment**

There is an operational deadline for draft Estimates to be put to the Assembly for 2010/11. Given the start date in April initial budget cover for £1.3m current and £500k capital expenditure will be requested in these Estimates.

### *Accommodation*

132. There are very strong practical and presentational reasons for locating the Office in Belfast’s legal quarter.

### **Agreed**

133. **I believe the option of co-location with the Law Society should be vigorously explored.**

**Comment**

This is being explored. We have asked that a business case and proposal be prepared. DFP approval will also be required.