

CAJ's submission no. S385

CAJ's response to the Department of Justice consultation on Governance and accountability of the Public Prosecution Service

May 2012

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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

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CAJ's response to the Department of Justice consultation on governance and accountability of the Public Prosecution Service, May 2012

The Committee on the Administration of Justice ('CAJ') is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

The Department of Justice (DoJ) is currently undertaking a consultation in relation to the governance and accountability arrangements of the Public Prosecution Service (PPS). Whilst the DoJ does not have responsibility for the PPS, it is leading this consultation process given its wider interest in the effectiveness of the justice system (p. 4). CAJ agrees with the view expressed in the consultation paper that prosecutorial decisions should be insulated from any risk of political interference and that decisions in relation to prosecution should be taken independently of those who gather the evidence (p. 3).

The consultation examines the governance and accountability arrangements that exist for the PPS, particularly the statutory relationship between the PPS and the Attorney General for Northern Ireland (AG for Northern Ireland) and the arrangements that exist for answering questions in the Northern Ireland Assembly in relation to the PPS. CAJ is currently undertaking research into the PPS and we intend to address the issue of governance and accountability more fully in the course of that project. However, we wish at this stage to highlight some general concerns CAJ has held for many years on this topic and also provide some comment on the consultation paper.

Summary:

- The current relationship between the AG for Northern Ireland and the Director of Public Prosecutions for Northern Ireland (DPP) is consultative. Previously the Attorney General for England and Wales had the power of superintendence and direction over the DPP in Northern Ireland;
- CAJ has made past submissions that expressed concern at the previous relationship between the Attorney General for England and Wales and the DPP. We have also expressed concern at how the recommendations of the Criminal Justice Review with

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regard to the relationship between the AG for Northern Ireland and DPP have been implemented;

- We point to differing interpretations as to how the present relationship should operate in practice and maintain our view that the present arrangements do not satisfactorily hold the PPS accountable;
- CAJ welcomes that the DoJ has considered international guidelines and standards in relation to this issue, which emphasise the need for prosecutors to be impartial, fair, objective and free from political interference. We add some further comments to this discussion;
- CAJ thinks that a delicate balance must be struck between ensuring effective governance and accountability, whilst maintaining the independence of the prosecutorial process. We provide comment on each of the options for change proposed by the DoJ.

Background:

The current arrangements regarding governance and accountability for the PPS are contained in the Justice (Northern Ireland) Act 2002 and came into effect upon devolution of justice powers in April 2010 and with the appointment of the AG for Northern Ireland. The 2002 Act followed from the recommendations in the Criminal Justice Review of 2000, which was undertaken as a result of commitments made in the Belfast/Good Friday Agreement. The 2002 Act provided for the creation of the PPS,¹ which was subsequently established in June 2005. The PPS is headed by the Director of Public Prosecutions (DPP) as the previous prosecuting authority, the office of the Director of Public Prosecutions, had been. The 2002 Act also provided that the Attorney General for England and Wales would no longer be the Attorney General for Northern Ireland and that a local AG would be appointed.²

The Act also provided at s. 42 that the functions of the DPP shall be exercised by him independently of any other person, but that the DPP may consult with the AG for Northern Ireland. Under s. 42(3) the AG for Northern Ireland and the DPP may (from time to time) consult each other on any matter for which the AG for Northern Ireland is accountable to the Assembly.

¹ Justice (Northern Ireland) Act 2002, s. 29.

² As above, s. 22.

Prior to this, the accountability arrangements between the Attorney General for England and Wales and the DPP were contained within the Prosecution of Offenders (Northern Ireland) Order 1972. It provided at art. 3(2) that the DPP shall discharge his functions under the 'superintendence' of the Attorney General and shall be subject to the Attorney General in all matters. Article 5(2) made the DPP responsible to the Attorney General for the due performance of his functions. The relationship between the AG and the DPP has therefore changed, from the Attorney General for England and Wales previously having a power of 'superintendence and direction' over the DPP, to a consultative relationship between the DPP and the AG for Northern Ireland.

Previous submissions

CAJ made a submission to the Criminal Justice Review in November 1998.³ In it we expressed the belief that the prosecution process at that time was not independent of government or the police. We gave examples of a number of cases at that time that illustrated serious problems in our view in terms of compliance with international standards, such as the United Nations (UN) *Guidelines on the Role of Prosecutors* (which are referred to in the consultation paper). We pointed to past instances where there was suspicion that the Attorney General had interfered with the decision-making processes of the office of Director of Public Prosecutions in cases involving members of the security forces. We stated that there may have been compelling reasons, which were not then in the public domain, as to why the DPP had not prosecuted in some of these cases, but that a significant degree of public scepticism existed. We suggested that the Attorney General should not be a political appointee or government minister, and that this would lessen suspicion that prosecutorial decisions were taken to avoid embarrassment for the government. We stated that the DPP could be accountable to the Attorney General in that instance. The consultation paper states the position that the formal power of direction was never used in Northern Ireland. However it does accept that the ability of the Attorney General for England and Wales to direct informed the nature of their relationship with the DPP (p. 6).

CAJ then responded to the Criminal Justice Review Report in August 2000⁴ where we welcomed the recognition that international human rights standards relating to prosecutions can only be upheld where the prosecutor can act free from political interference or prejudice. We also welcomed that our suggestion was taken on board that a local AG be recruited from the ranks of senior lawyers and that they not be a political appointee or a member of the Assembly or Executive.

³ CAJ's Submission no. S078 'Submission to the Criminal Justice Review' November 1998.

⁴ CAJ's Submission no. S101 'CAJ's Response to the Report of the Criminal Justice Review' August 2000.

We also provided comments on the implementation plan for the Criminal Justice Review and the Justice (Northern Ireland) Bill in January 2002.⁵ Whilst the consultation notes that the Criminal Justice Review states that the local AG should be accountable to the Assembly for the work of the PPS in general terms (p. 7), we argued that the Criminal Justice Review also clearly envisaged consultation between the AG and the DPP on individual cases, as it discussed what should happen if the two disagreed in relation to a case.⁶ Our concern was that the Bill only provided for consultation in relation to matters for which the AG is accountable to the Assembly, and that there was a provision allowing the AG to refuse to answer questions in relation to individual cases in the Assembly, meaning that individual cases would probably not be discussed. Whilst the Criminal Justice Review recommended that there should be provision allowing the AG to refuse to answer questions, it also stated that it did not think that answering questions should be ruled out for all time. This was in line with the Review's recommendations on the giving of reasons, which were that the balance should shift towards the giving of reasons in circumstances where there is not a prosecution, or where a prosecution is abandoned.⁷

The Justice (Northern Ireland) Act 2002 subsequently provided at s. 42 that the functions of the DPP shall be exercised by him independently of any other person, but that the Director may consult with the AG for Northern Ireland. Under s. 42(3) the AG for Northern Ireland and the Director may (from time to time) consult each other on any matter for which the AG for Northern Ireland is accountable to the Assembly. Section 25 of the 2002 Act provided that the AG 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 might prejudice criminal proceedings in that case, or would be otherwise against the public interest.

Operation of the current relationship

CAJ is aware of the varying interpretations taken by the AG for Northern Ireland and by the previous Acting Director of Public Prosecutions, James Scholes, as to how the current relationship should work in practice. The AG for Northern Ireland, referring to the s. 42(3) of the 2002 Act, has stated to the Assembly's Committee on Procedures that:

[...]the Attorney is not accountable to the Assembly for the Director or the Public Prosecution Service (PPS) generally.⁸

⁵ CAJ's Submission no. S122 'Comments from the Committee on the Administration of Justice (CAJ) on the Implementation Plan for the Criminal Justice Review and the Justice (Northern Ireland) Bill' January 2002.

⁶ Review of the Criminal Justice System in Northern Ireland, Criminal Justice Review Group, March 2000, p. 94.

⁷ As above, p. 94 – 96.

⁸ Northern Ireland Assembly, Committee on Procedures, Official Report (Hansard) 'Standing Orders in Respect of Attorney General for Northern Ireland', 28th September 2010.

The AG for Northern Ireland has also expressed his belief to this Committee that his office should have superintendence and the power to direct the PPS. He has argued that this will bring continuity and accountability from the DPP, through the AG for Northern Ireland, to the Assembly.

In contrast, the previous Acting Director of Public Prosecutions argued before the same Assembly Committee that the 2002 Act envisaged the AG for Northern Ireland answering questions in the Assembly that relate to the operation of the system of prosecution in any particular case. The Acting Director foresaw he and his senior colleagues being called to the Committee for Justice on a regular basis to discuss issues of prosecutorial policy. In this regard CAJ notes the recent appearance of the present DPP, Barra McGrory QC, before the Committee for Justice in relation to the Tommy English murder trial. The Acting Director previously stated that the consultative relationship:

[...]could work effectively, by the director making available to the Attorney General all relevant facts and information. That would enable the Attorney General to answer any question in the Assembly in the manner that he considers to be appropriate.⁹

The Acting Director also stated that:

[...]there are proper constraints on the extent to which one can provide reasons for decisions to prosecute. The Attorney General would be bound by those constraints just as much as a prosecutor would. I think of Article 2 and Article 8 rights under the European Convention on Human Rights.¹⁰

CAJ further commented on this issue in October 2010.¹¹ We stated that the need to foster public confidence in the PPS and ensure the independence of the PPS must be borne in mind. However, we noted that whilst it was perhaps not appropriate to return to the superintendence dynamic between the AG and the PPS of the past, it was important to strengthen and clarify the consultative relationship that presently exists. We believed then that the present arrangements regulating the PPS do not satisfactorily hold the PPS accountable. We would maintain that position now, and would argue that the necessity of independence from political influence does not necessarily mean that there cannot or should not be political accountability.

⁹ Northern Ireland Assembly, Committee on Procedures, Official Report (Hansard) 'Standing Orders in Respect of Attorney General for Northern Ireland' 5th October 2010.

¹⁰ As above.

¹¹ CAJ's Submission no. S268 'CAJ's commentary on the Inquiry into how the Attorney General for Northern Ireland will participate in proceedings of the Northern Ireland Assembly' October 2010.

International standards and guidelines

We welcome that the Department has considered international guidelines and standards in relation to this issue, which emphasise the need for prosecutors to be impartial, fair, objective and free from political interference. To this we would add that the International Association of Prosecutors (IAP) *Standards of Professional Responsibility* also stress that prosecutors must not only strive to be, but also must be seen to be, consistent, independent and impartial.¹² We note the consideration of Art. 2.2 of the IAP Standards (p. 13). In relation to this, we would stress that Art. 2.2 also states that instructions from non prosecutorial authorities, or directions from them to institute or stop proceedings should be transparent, consistent with lawful authority and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence. We note the reference to the UN *Guidelines on the Role of Prosecutors* in terms of independence not being detachment and the emphasis placed on cooperation (p. 13). To this we would add that the IAP Standards also advise at Art. 5, that in order to ensure the fairness and effectiveness of prosecutions, prosecutors shall cooperate with other government agencies. CAJ would also suggest that the IAP Standards provide guidance in relation to prosecutorial accountability, which is a key issue in this context. The preamble to the IAP Standards provides that the exercise of prosecutorial discretion should be as open as possible.

Options for change

Prosecutors must be independent and the independence of the prosecution process, such as the taking of decisions as to prosecution, should be guaranteed. Decisions should be insulated from political interference, or the potential for political interference. But this does not mean that the prosecution service should not be transparent in the decisions that it makes or that it should not be accountable for those decisions. We agree with the consultation paper that independence and accountability need not be mutually exclusive (p. 13).

CAJ thinks that any changes to governance and accountability mechanisms for the PPS must lead to increasing levels of transparency as to how prosecutorial decisions are reached, particularly decisions not to prosecute or to discontinue prosecutions. We think that the statement within the IAP Standards that prosecutors should not only strive to be, but also be seen to be, consistent, independent and impartial clearly states the need for these requirements to go hand-in-hand with transparency.

¹² International Association of Prosecutors, 'Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors' (1999), Art. 1.

It is also important however to consider how, if the AG for Northern Ireland is to be given more power or control over the PPS, the independence of the AG's office will be highlighted. The 2002 Act makes the AG for Northern Ireland statutorily independent in the exercise of his functions,¹³ and provides that he cannot vote in the Assembly.¹⁴ This should be emphasized to the public, so that they can have confidence that any oversight role the AG for Northern Ireland may have for the PPS does not carry with it the potential for political interference.

We note the four options for governance and accountability that the consultation paper has presented and that none of these should be considered hard and fast (p. 18). CAJ thinks that a delicate balance must be struck between ensuring effective governance and accountability, whilst maintaining the independence of the prosecutorial process.

The options set out in the consultation paper are as follows:

- Option 1: Minimal change to the present arrangements, but AG for Northern Ireland to gain power to refer cases to the Court of Appeal where potentially unduly lenient sentences have been passed;
- Option 2: the DPP becomes responsible to the AG for Northern Ireland for the exercise of his/her functions, with an explicit power for the AG for Northern Ireland to answer in the Assembly on these matters (but with no power for the AG for Northern Ireland to direct the PPS);
- Option 3: 'Responsibility and a back-stop power' with the AG for Northern Ireland having the same powers as under option 2, but with additional powers for the AG for Northern Ireland to externally review prosecutorial decisions, to initiate prosecutions in their own name, and to stop a prosecution taken by the PPS;
- Option 4: Superintendence and the power of direction, which is an explicit power to direct on policy or individual prosecutions.

CAJ has a number of comments to make on each proposal. Firstly as is clear from our previous submissions, CAJ does not think that it is appropriate to return to the past relationship of superintendence and direction, the closest option for which is Option 4. Also as we have previously said we do not think that the present arrangements satisfactorily hold the PPS accountable, of which option 1 is the closest. Option 1 of 'minimal change' would

¹³ As above, s. 22.

¹⁴ As above, s. 25.

benefit from clarity on the contrasting interpretations of the present arrangements presented to the Assembly by the AG for Northern Ireland and the Acting Director, as we have outlined above.

In relation to the other two options, CAJ would urge further detail and exploration of how such new arrangements would operate in practice. In particular the issues CAJ has set out above should be considered, such as whether the AG for Northern Ireland would provide answers to the Assembly on individual cases.

Of concern in relation to option 3 is the power to stop a prosecution initiated by the PPS, or initiate a prosecution where the PPS had decided not to prosecute, which could lead to the specter of undue interference reemerging. Whilst the AG for Northern Ireland is statutorily independent in the exercise of his functions, and cannot vote in the Assembly, there is still potential for the perception of undue interference to emerge in controversial and high profile cases. We think this should be borne in mind together with the points we have made above regarding raising awareness of the independence of the AG for Northern Ireland.

In general terms, CAJ would urge greater clarification as to the distinction that could be drawn between the AG for Northern Ireland's potential powers in relation to prosecutorial policy as opposed to individual prosecutorial decisions in relation to all of the above options. We would welcome further clarity as to the sorts of circumstances that could result in the AG for Northern Ireland not answering questions in the Assembly due to a risk that criminal proceedings would be prejudiced, or because it would be against the public interest.

Regardless of whichever option is chosen, CAJ would recommend that its operation be reviewed independently after a set period of time, in order to ensure that it is delivering effective governance and accountability whilst maintaining independence.

CAJ makes these observations without prejudice to other changes that could be made to the PPS to improve transparency and accountability that are not directly related to the service's relationship with the AG for Northern Ireland.

Committee on the Administration of Justice
May 2012