



**Attorney General**  
for Northern Ireland

# **Attorney General for Northern Ireland**

## **Fifth Annual Report**

**2014/15**

*Laid before the Northern Ireland Assembly  
under Section 26 (3) of the Justice (Northern Ireland) Act 2002  
by the First Minister and deputy First Minister*

*on*

*30 October 2015*



Attorney General  
for Northern Ireland

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# Attorney General for Northern Ireland

## Contents

<b>Preface by the Attorney General for Northern Ireland</b>	1
<b>Introduction</b>	2
<b>Overview of Work in 2014/15</b>	5
Chief Legal Adviser to the Executive	5
Departmental Litigation	6
Devolution Notices	8
Other Litigation	12
Appointment of Amicus Curiae and Special Counsel	14
Relationship with the Assembly	15
Legislative Process	16
Public Prosecution Service	18
Criminal Justice Inspectorate	19
Relator Actions	19
Inquests	20
Charities	21
Human Rights	24
Contempt of Court	25
Declaration of Parentage	26
Vexatious Litigants	26
Mental Health	27
The Matrimonial Causes (Northern Ireland) Order 1978	27
Relations with both branches of the Legal Profession	27
Development of External Relations	28
Living Law	29
Miscellaneous	32
Staff	32
Senior Management Structure	33
Corporate Services	33
<b>Conclusion</b>	34



## **Preface by the Attorney General for Northern Ireland**

This is my fifth annual report as Attorney General for Northern Ireland pursuant to section 26 of the Justice (Northern Ireland) Act 2002.

If a single theme can be said to emerge from these reports over five years it is that the law and legal system – whose health is vital to any community – are not substitutes for, and cannot themselves deliver the kindness, integrity and generosity that we seek in our neighbours and they in us.

Should this be true of the law and the legal system generally, then it is a truth particularly observable in the procedures and processes with which we surround ourselves. Procedure is, or should be, the servant of justice not her master. Lawyers and non-lawyers alike will know that procedure is, or should be, always a means to an end and never itself an end.

One of the purposes of this annual report is to give interested citizens an overview of my work. I hope that consideration of my work will contribute to a wider and well-informed debate on the role of law in our public life, its potential as well as its necessary limitations.

As in previous years, I hope that this report will be widely read and I welcome public interest in its contents.

John F Larkin QC  
Attorney General for Northern Ireland

## **Introduction**

1. On 12 April 2010, the provisions of the Justice (Northern Ireland) Act 2002 relating to the Office of Attorney General for Northern Ireland came into effect. These created a statutory platform for a new approach to the office of Attorney General for Northern Ireland. At that time it had been widely known that the structure of the Attorney General's role contemplated by the 2002 Act gave rise to substantial differences from that of other Law Officers in these islands.
2. I was appointed as Attorney General for Northern Ireland on 24 May 2010 for a four year term of office. On 23 May 2014 I was re-appointed by the First Minister and deputy First Minister until 30 June 2016.
3. With the experience of almost five years as Attorney General my belief about the centrality of my responsibility as guardian of the rule of law grows stronger. The rule of law does not merely mean playing according to the rules in a technical sense; it also connotes the idea that the law should respect fundamental human values<sup>1</sup>. A responsibility for protecting the rule of law is not the same thing as a general commission to investigate (or remedy) abuses. Guardianship of the rule of law, in the context of this office, informs and governs the discharge of my specific duties. These include:
  - Serving as chief legal adviser to the Northern Ireland Executive for both civil and criminal matters that fall within the devolved powers of the Northern Ireland Assembly
  - Acting as the Executive's most senior representative in the courts

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<sup>1</sup> See the valuable discussion in the late Lord Bingham's [The Rule of Law](#) (London, 2010)

- Discharging specific functions to protect the public interest in certain charity matters
  - Deciding whether or not to direct inquests under section 14 (1) of the Coroners Act (Northern Ireland) 1959
  - Participating in the proceedings of the Assembly to the extent permitted by its Standing Orders but not voting in the Assembly
  - Appointing the Director and Deputy Director of the Public Prosecution Service for Northern Ireland
  - Producing guidance for criminal justice organisations on the exercise of their functions in a manner consistent with international human rights standards
  - Protecting the public interest in the courts which can include both bringing proceedings as well as participating in proceedings that are already extant.
4. By section 22 (5) of the Justice (Northern Ireland) Act 2002 my functions are exercised independently of any other person. This means, for example, that I am statutorily independent of the First Minister and deputy First Minister, the Northern Ireland Executive and the Northern Ireland Departments. Independence for the Attorney General under the 2002 Act means having sufficient material and institutional autonomy to permit the conscientious discharge of the duties of Office. I continue to reflect on how the obligation to act independently can be effectively and transparently discharged and I welcome the active interest of the public in this office.
5. The role of staff appointed to my Office under section 22 (4) of the Justice (Northern Ireland) Act 2002 is to assist me in carrying out my statutory and other functions. I am fortunate to be assisted by talented and dedicated colleagues and I thank them again for the quality of their work and commitment throughout the period covered by this report.

6. I have, of course, no formal role to play in relation to non-devolved matters. Legal advice in relation to them is the responsibility of the Advocate General for Northern Ireland who is also the Attorney General for England and Wales.
  
7. The Overview of Work detailed in the following section of this report offers some illustration of how the rule of law and legal excellence can be placed at the heart of government in Northern Ireland.

## **Overview of Work in 2014/15**

### Chief Legal Adviser to the Executive

8. As Attorney General I may attend the meetings of the Northern Ireland Executive. Draft Executive papers are copied to me at the same time as they are submitted by Departments to the Executive Secretariat, so that relevant issues can be explored and addressed timeously. Normally the pattern of circulation begins with a paper addressed by one Minister to his colleagues inviting their views. My views are usually addressed to the Minister issuing the paper, but are normally sent also to everyone on the circulation list. On occasion it may be a response to the original paper rather than the original paper itself that attracts substantive comment from me. Often comments from me are followed up by detailed discussions between the relevant Department and this office.
9. My role as Attorney vis-à-vis the Executive is principally about ensuring that excellent legal advice is available to Ministers, and I consider it also helps to maintain or improve public confidence in good government when it is known that the Law Officer who is guardian of the rule of law can decide when direct interface with the Executive Committee as a whole is required. Having reflected on the matter, my current position continues to be that it is appropriate to attend Executive Meetings only for an issue or issues in which oral advice would be plainly required.
10. One of my key responsibilities is to provide legal advice to the Executive on both civil and criminal matters that fall within the devolved powers of the Northern Ireland Assembly. It is my responsibility to consider and advise on matters of the greatest legal complexity or which cut across the responsibilities of two or more Departments. I also advise in matters of political controversy or sensitivity.

11. Throughout the year I have given legal advice on a large number of matters. The nature of those matters, and the contents of the advice are, by reason of a long standing constitutional convention, not normally disclosed.

### Departmental Litigation

12. In cases of particular significance it will often be appropriate for me to represent a Minister or Department in court. During the period covered by this report I appeared in several such cases.
13. I continued to represent the Department of Health Social Services and Public Safety in a judicial review case, brought by JR 65. As set out in the last annual report the JR 65 case arose from a challenge brought in relation to the lifetime deferral of blood donation by persons who had engaged in male to male sexual relations (MSM). Treacy J gave judgment on 11 October 2013 and found in favour of the applicant. This judgment is currently the subject of an appeal both by the Department as well as the United Kingdom Department of Health. In a further judgment given in January 2015 Mr Justice Treacy concluded that Minister Poots's decision was "infected with apparent bias". This judgment is also the subject of an appeal by the Department. The appeal was scheduled for late 2014 but in the summer of 2014 I became aware of the case of *Léger v the French Ministry of Health and the French Blood Service*, which also deals with MSM blood donation being referred to the European Court of Justice (ECJ). This case was brought to the attention of the Court of Appeal and the appeal hearing has been deferred until October 2015.
14. In the last annual report I also referred to a case in which I acted for the Department of Health Social Services and Public Safety in a judicial review application brought by a patient ("*HM*") detained in Holywell Hospital Antrim pursuant to the provisions of the Mental

Health (Northern Ireland) Order 1986 who wished to change his nearest relative. Article 32 of the 1986 Order defines “nearest relative” and Article 36 makes provision for applications to be made to the County Court for a change of nearest relative by any relative of the patient, any other person with whom the patient is residing (if in hospital, was last residing) or an approved social worker but not the patient. An application was made by an approved social worker to the County Court to change his nearest relative considered on the basis that Article 36 should be read compatibly with Articles 5 and 8 of the Convention but Judge Marrinan rejected this contention. The judicial review application was heard in February 2014. I was pleased that, on 4 April 2014, Mr Justice Treacy held that Articles 32 and 36 of the 1986 Order could be read in a Convention compliant manner to allow the patient to be added to the list of people entitled to apply to the County Court for a change of the nearest relative.

15. During the course of the last year I acted on behalf of the Department for Culture, Arts and Leisure in a judicial review brought by Mooreland and Owenvarragh Residents' Association who sought to challenge a decision by the Minister for the Environment to grant planning permission for the redevelopment of Casement Park. My involvement was limited to assisting the Department with affidavit evidence that it wished to place before the court in relation to the financial implications of any delay in the project. In the event Horner J quashed the decision of the Department of the Environment to grant planning permission.
16. I also acted on behalf of the Department of Justice who intervened in an appeal before the United Kingdom Supreme Court, *Coventry v Lawrence and Another*, which gave rise to concerns about the high cost of litigation and in particular gave rise to an issue about the relevant costs regime (success fees and ‘After The Event’ premiums) namely whether the provisions in the Civil Procedure Rules and

Practice Directions and the primary legislation (the Legal Services Act 1990, Part II, as amended by the Access to Justice Act 1999) infringed the defendant's right to a fair trial under Article 6 of the Convention. Lord Neuberger commented that the fact that it can cost two citizens £400,000 in legal fees to establish and enforce their right to live in peace in their home is highly regrettable. As a result of the Supreme Court's concern about the issue of costs it took the unusual step of directing that the case be re-listed for further submissions in relation to costs. In the event there were a large number of interveners. I made written and oral submissions on behalf of the Department at a hearing which took place on 9, 10 and 12 February 2015. The Supreme Court reserved judgment. Plainly the issue of high costs awards in civil litigation is a matter of considerable interest to anyone concerned with securing access to justice in an era of increasing pressures on legal aid.

#### Devolution Notices

17. Section 79 of, and Schedule 10 to, the Northern Ireland Act 1998 make provision for the service of devolution notices on a number of persons including the Attorney General for Northern Ireland. In broad terms the purpose of a devolution notice is to ensure that a court dealing with issues central to the interests of the devolved administration receives all necessary assistance. During the course of this year I have been served with 8 devolution notices.
18. I was served with a Devolution Notice (17/10/14) in a judicial review application brought by Stan Carbery by which he seeks an article 2 ECHR compliant investigation into the death of his father, also Stan Carbery, who was shot by members of the British Army on 13 November 1972. Mr Carbery seeks relief/orders to the effect that it is the responsibility of the United Kingdom Government to provide an adequate and effective mechanism to investigate the

death of his father. I was not satisfied that a devolution issue arose under paragraph 1 (d) of Schedule 10 of the Northern Ireland Act 1998 and so informed the court and the parties. I am prepared to reconsider this matter further in the light of any submissions that may be made and to assist the court if requested to do so. A hearing date is awaited.

19. I was served with a Devolution Notice (14/10/14) in a judicial review application brought by a Sean McKeivitt in relation to the time limit in which to appeal an enforcement notice issued pursuant to Article 68 of the Planning (Northern Ireland) Order 1991. I entered a Notice of Appearance on 30 October 2014 but ultimately decided not to make any written submissions or to participate in the hearing which was scheduled for 27-28 April 2015.
  
20. I was also served with a Devolution Notice (12/11/14) in a judicial review application brought by "AS". I entered a Notice of Appearance on 27 November 2014 and filed a position paper on 21 January 2015. The devolution issue arose from a challenge to certain provisions contained within the Marriage (Northern Ireland) Order 2003 and the Marriage (Northern Ireland) Regulations 2003. The challenge centred on provisions which require the General Register Office to keep a public record of the Applicant's previous marital status in connection with the Applicant's marriage certificate which, it was contended, might reveal the Applicant's previous gender history, where the Applicant had changed gender and obtained a Gender Recognition Certificate. I did not participate orally in the subsequent hearing. The case was part heard in early 2014 and has been adjourned pending delivery of judgment in a relevant Supreme Court case.
  
21. A judicial review application brought by the Northern Ireland Human Rights Commission against the Department of Justice in

relation to the termination of pregnancy also gave rise to a devolution issue. The applicant contends that the criminal law on abortion in Northern Ireland is incompatible with the rights protected by the Human Rights Act and seeks a declaration of incompatibility under section 4 of that Act. The applicant further argues that the Justice Minister's failure to introduce legislation which secures lawful abortion in cases of serious foetal abnormality or where the woman is pregnant as a result of rape or incest is in breach of the Minister's/Department's obligations under section 6 of the Human Rights Act and section 6(2) (e) and 24(1) (a) of the Northern Ireland Act 1998 to act compatibly with article 3, 8 and 14 ECHR. Leave to apply for judicial review was granted on 2 February 2015 and a Devolution Notice was served on 9 February 2015. I filed a Notice of Appearance on 3 March 2015 and I intend to participate in the substantive hearing which is due to take place in June 2015.

22. I was served with a Devolution Notice (26/3/15) in a judicial review application brought by Brigid Hughes who is challenging the decision of the Secretary of State for Northern Ireland to certify under section 14(2) of the Coroners Act (NI) 1959 that the decision as to whether to hold a fresh inquest into the deaths of Declan Arthurs, Seamus Donnelly, Tony Gormley, Eugene Kelly, Patrick Kelly, Jim Lynagh, Pdraig McKearney, Gerry O'Callaghan and Anthony Hughes would be taken by the Advocate General for Northern Ireland.
23. The nature of the other cases did not require my intervention.
24. As mentioned in my 2011/12 Annual Report I entered an appearance in another devolution notice case in March 2012 and made submissions in support of the position of the Northern Ireland Local Government Officers' Superannuation Committee ("NILGOSC") on the lawfulness of the Local Government Pension

Scheme (Benefits, Membership and Contributions) Regulations (NI) 2009. In that case the applicant challenged a decision that she was not entitled to a survivor's pension following the death of her partner as he had not formally nominated her as a cohabiting partner prior to his death. The case turned on whether there is unlawful discrimination resulting from the nomination requirement, contrary to Article 1 of the Protocol 1 taken together with Article 14 of the European Convention on Human Rights, given that spouses and civil partners are automatically entitled to a pension. The hearing took place on 21 June 2012 and Treacy J gave judgment in favour of the applicant on 9 November 2012. Both NILGOSC and the Department of the Environment appealed. I made written and oral submissions in support of the appeal. The appeal was heard on 8-9 May 2013 and the Court of Appeal gave judgment on 1 October 2013 and allowed the appeal. The applicant has since sought a re-opening of the appeal on the basis that important information was not disclosed which might have had a bearing on the outcome of the appeal as well as permission to appeal to the Supreme Court. The Court of Appeal declined to re-open the appeal but leave to appeal was granted by the Supreme Court and it is anticipated that the appeal will be heard later this year.

25. In addition to the possibility of exercising my power to refer Assembly provisions to the United Kingdom Supreme Court on the basis that such provisions may be outside the legislative competence of the Assembly, I may intervene in analogous references by other Law Officers. Two such references were brought to my attention over the past year. The Attorney General for England and Wales referred the Agricultural Sector (Wales) Bill on the basis that agricultural wages constituted an employment matter and was not devolved to the Welsh Assembly. I made written submissions in support of the Counsel General for Wales who contended that the Bill was within competence. On 9 July

2014 the Supreme Court gave judgment and held that the Bill was within the legislative competence of the Welsh Assembly. The other case referred to me arose from the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill. It was the subject of a reference by the Counsel General for Wales. I decided that it was not necessary for me to participate in these proceedings. The Supreme Court gave judgment on 9 February 2015 and held that the Bill was outside the legislative competence of the Welsh Assembly.

### Other Litigation

26. When issues of importance arise I may either initiate litigation myself or intervene in litigation separately to protect important public interests.
  
27. In my last report I referred to a case before the Information Tribunal in which I intervened - *Matthew McDermott v Information Commissioner, Department of Health, Social Services & Public Safety and Attorney General for Northern Ireland*. Mr McDermott sought a copy of any advice received by the Minister for Health, Social Services and Public Safety from the Attorney General for Northern Ireland in respect of the lifetime ban on men who have sex with men from donating blood in Northern Ireland. The Information Commission found in favour of the applicant and the Department appealed against its decision. The Information Tribunal allowed the appeal on the basis of the legal professional privilege exemption and indicated that had it gone on to consider the exemption under Section 35(1)(c), either separately or cumulatively, it seemed inevitable that the Tribunal would have found in favour of DHSSPS on this issue also, especially having regard to the weight which must be attached to the Law Officers' Convention. The applicant subsequently sought permission to appeal and this is under consideration by the Upper Tribunal which was stayed for a period

pending the outcome of an appeal in *Browning v ICO and DBIS (2013) UKUT 236 (AAC)*.

28. I also applied to intervene in a UK Supreme Court case, *Keyu and others v Secretary of State for Commonwealth Affairs and Secretary of State for Defence*. These appeals arose from the respondents' decisions refusing a public or similar independent investigation into the killing on 11-12 December 1948 of 24 unarmed civilians by a patrol of Scots Guards in the village of Batang Kali which at the time, was in the State of Selangor, a British Protected State within the former Federation of Malaya. The appellants were either children in Batang Kali at the time of the killings or are closely related to those who died. They contended that the 24 civilians were executed without justification and that the relevant authorities have, by suppression or reluctance, failed to establish the truth. Amongst the issues under consideration in the appeal was the nature of the obligation to investigate under section 2 of the European Convention. I applied to intervene because I considered that it was important for public authorities in Northern Ireland to have guidance about what article 2 ECHR may *require* them to do about our troubled past and in particular, in light of the Grand Chamber judgment in *Janowiec*, the very nature of the article 2 procedural obligations and the fundamental distinction between criminal, civil and disciplinary proceedings on one hand, and other forms of inquiry on the other. The Supreme Court granted me permission to intervene and the appeal is listed for hearing on 22-23 April 2015.
29. I am also a notice party in any litigation concerning Declarations as to marital status under Article 31 of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989. This year I intervened in two cases concerning such petitions. The first case related to a declaration sought in respect of a marriage carried out in circumstances where all the relevant legislative requirements had

not been met due to one party of the marriage being critically ill and tragically dying a few hours after the marriage took place. The case raises important human rights issues around the legislative procedures concerning marriage and was heard in the summer of 2014. Judgment is awaited. I also intervened in a case concerning a petition seeking a Declaration in relation to a same sex marriage, which took place in England, seeking recognition of the marriage in Northern Ireland. A Notice of Incompatibility has been issued and the case has been listed in the High Court in November 2015 involving Departments from both Northern Ireland and England.

30. I was invited by the High Court to make legal submissions in relation to an application made by the South Eastern Health and Social Care Trust for a declaration of the lawfulness of the detention of an individual living in a care home in its area. I was happy to assist the Court in this complex and evolving area of law. The Court's decision is awaited.
31. I applied to intervene in an appeal before the Chancery division of the High Court from a decision of Master Ellison issued this year. I was conscious of the significant public impact of the issues in the case, the approach of banks to repossession on mortgage payment default. On analysis of the papers in that case, I concluded that there were grounds for thinking that the Bank of Scotland may have committed fraud. I referred the case to the Chief Constable in December 2014. The Bank withdrew its appeal against the judgment and the police consideration of the issue continues.

#### Appointment of Amicus Curiae and Special Counsel

32. Another aspect of my role as guardian of the rule of law is my function in appointing an amicus curiae or a special counsel in order to assist courts in appropriate cases.

33. An amicus curiae is a lawyer, usually a barrister, who is appointed to assist a court on matters of law connected with proceedings which are before the court. An amicus curiae is not a party to the proceedings but is appointed, at the invitation of the court, in order to assist the court by expounding the law impartially or by advancing relevant legal arguments which, due to the circumstances of the case, would not otherwise be made.
34. A special counsel is a barrister appointed to represent the interests of an accused from whom certain information or material is being withheld on public interest grounds. Special counsel perform two principal roles. Firstly they test the objections of the prosecution in order to establish whether more information could or should be disclosed. Secondly, they represent the interests of the accused person substantively in any closed hearing or proceedings. In 2014/15 I appointed Ms Neasa Murnaghan as special counsel in an appeal against conviction (*R v Louis Maguire*) before the Court of Appeal.

### Relationship with the Assembly

#### Committee on Procedures

35. Section 25 of the Justice (Northern Ireland) Act 2002 provides for the Attorney's participation in Assembly proceedings to the extent that is permitted by its Standing Orders. I gave evidence to the Committee on Procedures on 28 September 2010 and 28 May 2013 in relation to the development of such Standing Orders. The matter remains with the Committee on Procedures to take forward and I look forward to working with the Committee as it does so.

## Justice Committee

36. I gave evidence to the Justice Committee on 28 May 2014 on a possible amendment to the Legal Aid and Coroners Bill to provide me with a power to obtain information which would assist me in consideration of my statutory power to direct that the Coroner hold an inquest.
37. I gave further evidence on this proposal on 4 February 2015. At that hearing I also gave evidence on the proposed change to the law on abortion under consideration by the Committee and on my request that the Justice Bill be amended to allow rights of audience before the Higher Courts for the barristers and solicitors employed in my office.
38. I discuss below my work on producing human rights guidance for criminal justice organisations. I have found the Justice Committee to have been of particular assistance in discussing the content of the guidance with me both in evidence sessions and through written correspondence. The Committee has also been of great value in helping to explore the impact of draft guidance on those criminal justice organisations to which it is directed. I am grateful to all of the Committee members, especially the Chair and deputy Chair for their engagement with this important area of my work.

## Legislative Process

39. My role in the legislative process combines statutory and non-statutory elements. Both elements have, as a common purpose, a commitment to assisting with high quality law making in Northern Ireland.
40. By section 11 (1) of the Northern Ireland Act 1998 I may refer the question of whether any provision of a Bill would be within the

competence of the Assembly to the Supreme Court of the United Kingdom. Accordingly, I give consideration to all Assembly Bills as they complete final stage. During the period covered by this report, I undertook final statutory scrutiny of twelve Bills. These were the Health and Social Care (Amendment) Bill; the Carrier Bags Bill; the Financial Provisions Bill; the Licensing of Pavement Cafes Bill; the Local Government Bill; the Budget (No.2) Bill 2014; the Legal Aid and Coroners' Courts Bill; the Education Bill; the Work and Families Bill; the Off-street Parking (Functions of District Councils) Bill; the Budget Bill; and the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill.

41. Consideration at this stage is mirrored by consideration in advance of introduction. The form that this early consideration takes varies according to the nature of the proposed Bill and the particular needs of Departments. This year, for example, I hosted a colloquium on the Mental Capacity Bill, which was then at drafting stage. The Bill team from the Department of Health and the Department of Justice, the Office of Legislative Counsel and the Departmental Solicitor's office all participated.
42. At the commencement of the legislative process, and, on occasion even before then, I am asked for advice about the legislative competence of, and other legal issues arising from, proposed Bills. No fixed criteria exist to determine whether or not any provision of a Bill should be referred to the Supreme Court. Among the concerns that will weigh heavily with me is the desirability for a speedy determination of legal questions that would, if a reference were not made, occupy considerable time in the Northern Ireland Courts.
43. I wish to pay tribute to the First Legislative Counsel, Ms Brenda King and her staff both for the precision and elegance of their work and for the unfailing assistance they have given to me and my

colleagues during this year. The splendid work of the Office of the Legislative Counsel deserves to be more widely known outside Government.

### Public Prosecution Service

44. It is my statutory responsibility under section 30 of the Justice (Northern Ireland) Act 2002 to appoint the Director and Deputy Director of the Public Prosecution Service as necessary. I may also convene, if necessary, a Tribunal to consider removal of the Director and Deputy Director.
45. In addition to appointing the Director and Deputy Director of the Public Prosecution Service, my main responsibilities in relation to that service are as a statutory consultee of the Director on his annual report (and arranging for publication of that report) and on any amendments to the Code for Prosecutors.
46. Section 42 (3) of the Justice (Northern Ireland) Act 2002 sets out the arrangements between the Attorney General and the Public Prosecution Service: the Attorney General and the Director may consult each other from time to time on any matter for which the Attorney is accountable to the Assembly; with the exception of the matters set out in paragraphs 44 and 45 above there are no matters relating to the Public Prosecution Service for which the Attorney General is accountable to the Assembly.
47. For the purposes of clarity, it is worth emphasising that I do not currently have responsibility for referring unduly lenient sentences to the Court of Appeal. Neither do I have a role with respect to any prosecutorial decision to accept a plea of guilty to a lesser charge than that originally preferred.

48. I continue to believe that a gap exists in the current superintendence and accountability arrangements between the Attorney General and the Public Prosecution Service. The Justice Minister has consulted on this matter. There is, of course, room for a variety of legitimate positions on how the superintendence balance should be struck ever since the issue was first debated in this jurisdiction in 1972<sup>2</sup>.
49. Irrespective of how the balance of prosecutorial accountability is struck I am determined to do all that I can to ensure that we have a Public Prosecution Service that fully meets the needs of the public in Northern Ireland.

#### Criminal Justice Inspectorate

50. The Chief Inspector of Criminal Justice, Mr Brendan McGuigan and I have met to discuss a number of specific issues as well as the Criminal Justice Inspectorate Inspection programme for 2015/2016.

#### Relator Actions

51. The rule of law lies at the foundations of a civilised society. As guardian of the rule of law I have a responsibility to represent the public interest in court and to thereby ensure that all persons, institutions and entities, public and private, including the State itself, are properly accountable.
52. Where a member of the public wishes in private law proceedings to enforce (typically by injunction) a right which belongs to the public as a whole rather than a right which has an exclusively private character, she or he can ask me to allow legal proceedings to be

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<sup>2</sup> See the discussion in chapter 9 of John LL Edwards The Attorney General, Politics and the Public Interest (London, 1984)

brought to assert that public right. The action that then takes place with my consent is known as a relator action. The reason for involving the Attorney General in such a procedure is largely historical in nature, and it may be that some future widening of the traditional rules about standing for injunctions may render relator proceedings obsolete.

53. One relator action was brought during this period *Attorney General for Northern Ireland and Belfast City Council v Aiden Kerr t/a Soho Bookshops, Ian Brown, Infernal Publishing and Others* which arose from the sale of so called legal highs. In addition to the relator aspect I intervened personally in order to make the case, for the first time, that the sale of novel psychoactive substances amounts to a public nuisance. Mr Justice Deeny granted an interim injunction against the defendants, opening up a remedy for local councils and others. This case is an example of how relator proceedings can be used to deal with various forms of socially harmful behaviour.

### Inquests

54. Under section 14 (1) of the Coroners Act (Northern Ireland) 1959 I can direct a Coroner to either hold an inquest into a death, if none has been held, or to hold a further inquest if one has already been held. At the core of the statutory test I apply in considering whether to direct a Coroner to hold an inquest is a consideration of whether it is 'advisable' to do so. What is 'advisable' may vary considerably from case to case.
55. There are many circumstances that will often be considered as sufficient to warrant my direction. These include the existence of fraud, the improper rejection of significant evidence, irregularity or unfairness of proceedings, insufficiency of inquiry or the discovery of significant new evidence.

56. During 2014/15, under section 14 (1) of the 1959 Act, I directed the Coroner to hold an inquest in 18 cases. In 22 cases I determined a fresh inquest was not advisable. 38 cases are still under consideration. In a further 33 cases solicitors have not progressed the initial notice of intent to a formal application for an inquest.
57. Many of the cases in relation to which I have been requested to exercise my power under section 14 of the Coroners Act (Northern Ireland) 1959 relate to deaths which occurred in the context of the Northern Ireland troubles. The question of whether I should direct a Coroner to hold an inquest into such a death is a decision to be exercised with regard to the circumstances of the individual case. A succession of individual decisions in such cases can readily prompt consideration of whether, and if so, how Northern Ireland should deal with its troubled past in a more wide-ranging and comprehensive manner.
58. During the course of this year I have continued to reflect on the capacity of an inquest to discharge the article 2 ECHR obligations of the state in cases of deliberate killing. Given the emphasis on a criminal justice solution for such cases in the Strasbourg jurisprudence it does seem difficult to see how an inquest can ever, in itself, be a necessary or sufficient satisfaction of the article 2 obligations.

### Charities

59. As Attorney General my responsibility for protecting the public interest extends specifically to the law of charities, an area in which, historically, the Attorney has always had a central role. Where a matter is before the Charity Tribunal, I have power to intervene so as to represent the wider public interest. I can also

defend the interests of charities in proceedings before the High Court.

60. While provisions of the 1964 Act are still in force I retain a consultative and consent giving role as regards some of the Department of Social Development's functions in charity law. One such example is section 14 of the 1964 Act, which confers on the Department the power to deal with bequests under £2,500 where there are mis-described charitable beneficiaries in wills. This provides an opportunity for personal representatives to transfer property to the Department in instances where they are satisfied that the institution as described in the will does not exist and the testator intended to devise or bequeath a property to a charity. Where the Department accepts the property, I have a role in consenting to either the transfer of the property to a specific charity (if the Department are satisfied that they are the intended devisee) or legatee of the testator. In cases where the Department are unable to satisfy themselves of the intended devisee/legatee, my consent is required to transfer to a charity/charities in a class of charities as appears to them appropriate having regard to the intentions of the testator.
61. There is also a role for the Attorney in consenting to references to the Charity Tribunal where the Charities Commission needs a question of law or practice resolved; in giving directions to the Charities Commission on its discretion to authorise 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.
62. In cases where a donor has shown a clear intention that he or she wishes a gift to be given to charitable purposes but has failed to define the particular charity they wish to benefit with sufficient clarity and no trust has been interposed, use can be made of the

Royal Sign Manual procedure which now resides with the Minister of Social Development.

63. As with last year, this year, I have continued to work with the Charity Commission as ‘a critical friend’ in the development of their policies. Where a matter is before the Charity Tribunal, I have power to intervene so as to represent the wider public interest and I did so this year in the cases of *William Allen v The Charity Commission for Northern Ireland* in relation to an extension of time application which raised an important point of law in relation to the Tribunal’s jurisdiction. I am currently involved in an appeal before the High Court regarding this case and it is due to be heard later this year. I have also intervened in two High Court appeals from the Charity Tribunal in *Bangor v The Charity Commission for Northern Ireland* and *Victoria Housing Estates v The Charity Commission for Northern Ireland* and the subsequent appeal to the Court of appeal in the *Bangor* case. I can also defend the interests of charities in proceedings before the High Court and I did so this year in the case of the *O’Loughlin and Ors v Her Majesty’s Attorney General for Northern Ireland*, which concerned a cy-pres application in respect of a sizeable amount of lands, where the key issue to be determined was whether those lands were held under charitable trusts.
64. By virtue of the Charities Act (Northern Ireland) 2008 I have a consultative, direction giving and consent giving role as regards some of the Charity Commission’s functions in charity law. Examples include my role in consenting to references to the Charity Tribunal where the Charities Commission needs a question of law or practice resolved; in giving directions to the Charities Commission on its discretion to authorise 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.

65. One specific example is section 53(5) of the 2008 Act, which permits the Charity Commission to exercise the same powers with respect to, amongst other things, the taking of legal proceedings with reference to charities or the property or affairs of charities as are exercisable by the Attorney General acting ex officio. The powers exercisable by the Commission in this regard are only exercisable with my agreement. The Commission recently sought my consent to issue an application to the Charity Tribunal pursuant to paragraph 1(2) of Schedule 4 of the 2008 Act and to issue a protective writ for restitution against directors of a charity. I consented to both applications.
66. In order to ensure protection of the interests of charities, I may give or withhold my fiat or consent to allow cy-pres applications to proceed to the High Court. I am currently considering a number of potential cy-pres applications concerning a large amount of charitable funds.

### Human Rights

67. Under Section 8 of the Justice (Northern Ireland) Act 2004, I am required to produce guidance for criminal justice organisations on the exercise of their functions in a manner consistent with international human rights standards. As Attorney General I also have the responsibility of amending, by Order, from time to time, the list of organisations that are subject to the Section 8 guidance.
68. An aspect of this work includes the continuing challenge of keeping the guidance up to date in light of new developments and decisions from, for example, the European Court of Human Rights, the Council of Europe, UN Committees and other sources.

69. Over the past year I have laid before the Northern Ireland Assembly four sets of guidance addressed to the Probation Board for Northern Ireland; The Youth Justice Agency - Conditions of Detention; the Northern Ireland Courts and Tribunals Service – Support for Victims and Witnesses; and the Northern Ireland Prison Service – Prison Order and Discipline.
70. As I have previously noted, the Justice Committee has been of particular assistance to me through their detailed consideration of the draft guidance, for which I am very grateful. I am also indebted to those individuals from the Probation Board; the Youth Justice Agency; the Courts and Tribunal Service and the Prison Service whose valuable knowledge, assistance and input contributed to this work.
71. I am very grateful for the work done by the ad hoc committee and justice committee on bringing forward my proposal to add the Police Service of Northern Ireland to the list of s. 8 organisations to which guidance can be issued. The Assembly debated and approved the Order in March 2015.

#### Contempt of Court

72. The Attorney General has a public duty to protect the rights of parties to litigate in a fair and dispassionate atmosphere of objectivity. It is crucially important to maintain confidence in the administration of justice and foster a culture in which the independence of the judiciary is both recognised and respected. This, of course, does not preclude informed comment and critique.
73. I may be asked either to consider seeking an order from the court restraining a possible contempt of court or else to consider bringing contempt proceedings against someone who has allegedly engaged in actions which might amount to contempt. During this year I have on 8 occasions had to consider bringing contempt

proceedings in relation to concerns about possible interference with the administration of the justice process.

#### Declaration of Parentage

74. The Attorney General must be placed on notice of every application to court seeking a declaration of parentage. In 2014/15 there were 49 such applications. While it would be unusual for me to seek to intervene in such cases every application must be carefully considered in case issues of wider concern arise which might merit my intervention. Occasionally the facts revealed in the applications make it necessary for me to refer those facts to the PSNI. This year I sought further papers and considered intervention in a declaration of parentage application which includes a human rights based challenge to the Human Fertilisation and Embryology Act 2008, in particular the provisions relating to artificial insemination and the registration of births. The case has been listed for November 2015.

#### Vexatious Litigants

75. Under section 32 of the Judicature (Northern Ireland) Act 1978 the Attorney General may ask the High Court to make an order declaring someone to be a vexatious litigant which, if such an order is granted, precludes them from bringing further proceedings without the leave of the High Court. One such application was made by me in 2014 and Mr Justice Stephens granted the application. The litigant in question has appealed this decision and his appeal is due to be heard by the Court of Appeal in Autumn 2015. Otherwise, during 2014/2015 I declined to make an application in one case and two other applications remain under consideration by me.

## Mental Health

76. By Article 72 of the Mental Health (NI) Order 1986 (“the Order”) I may refer the case of a patient<sup>3</sup> to the Mental Health Review Tribunal. I made my first referral to the Tribunal this year. I did so in order to ensure compliance with article 5(4) ECHR (review of detention) in relation to a very isolated patient who lacked the capacity to make his own application to the tribunal. I am grateful to the clinician who brought this case to my attention, having read the new guidance issued by the Department of Health on compliance with article 5 ECHR [Circular MHU 1/14].

## The Matrimonial Causes (Northern Ireland) Order 1978

77. Under Article 10 of the Matrimonial Causes (Northern Ireland) Order 1978 the Attorney General may intervene in the case of a petition for divorce where either the Judge hearing the petition or any other person has provided material to the Attorney which he believes makes an intervention by him appropriate. This is linked to the more general right of the Attorney to intervene when a divorce case gives rise to an important issue of public policy<sup>4</sup>.
78. No interventions were made by me this year.

## Relations with both branches of the Legal Profession

79. During the period of this report I have continued to build and maintain good relations with both branches of the legal profession. As Attorney General I see my role with the Bar and the Solicitor professions principally as one of encouragement and support and to that end I have spoken at several events during the year. It is right that I acknowledge the strong sense of public spirit that I

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<sup>3</sup> As defined by Article 2 (2) of The Mental Health (NI) Order 1986

<sup>4</sup> See *Adams v Adams* [1970] 3 All ER 572 at 577

have observed in both branches of the legal profession and, in particular, the commitment to ensure that citizens enjoy access to justice.

80. As Attorney General I am the titular Head of the Bar and can attend meetings of the Bar Council, the Executive Council and the Benchers of the Inn of Court. I am grateful to the Chairman of the Bar, Gerald McAlinden QC, the Vice Chair, Siobhan Keegan QC as well as the Chief Executive, David Mulholland for the assistance they have provided me in my work with the Bar.
81. While I have no institutional relationship with the Law Society I am grateful to both its President, Arleen Elliot, and its Chief Executive, Alan Hunter, for their continued cooperation and constructive engagement with my Office.

#### Development of External Relations

82. The legal system of Northern Ireland does not exist in isolation; in addition to obvious links with other jurisdictions in the United Kingdom it can safely be said that the influence – sometimes the dominant influence – of EU law and the law of the European Convention on Human Rights runs throughout our legal system and substantive law. It is essential that lawyers in Northern Ireland are aware not only of the formal content of EU law and the law of the European Convention on Human Rights but also how other European jurisdictions develop techniques to cope with these demands.
83. In May 2014, I along with members of my staff met judges and senior lawyers of the European Court of Human Rights in Strasbourg. As in previous years, the opportunity for dialogue on developing jurisprudence, particularly in relation to article 2 ECHR, was particularly beneficial.

## Living Law

84. The Living Law programme consists of three elements and is aimed at raising knowledge about the importance of law as well as generating an interest in and appreciation for the law generally. Now in its fifth year, the programme continues to thrive, and builds on the successes of previous years.
85. The first of the three elements is an enrichment programme for students from non grammar schools with A Level classes who may be interested in studying law or learning more about how law operates in society. Past participants in this element of the programme are now studying law at universities throughout the United Kingdom.
86. Throughout the year 44 pupils from 11 schools across Northern Ireland took part in the schools element of the Living Law Programme designed to give young people a fresh and lively introduction to law and the justice system. The programme included a series of debates, case study analyses, a court visit, a session with the Public Prosecution Service, a session at the Northern Ireland Assembly and culminated with the pupils taking part in mock bail applications.
87. The second element is a general outreach programme to community and other groups aimed at raising public understanding about law.
88. The third element is the provision of conferences and seminars bringing together practising lawyers, academics and policy makers for reflection on themes of general importance or topics of contemporary significance.

89. In April, I hosted a staged reading of Sophocles' Antigone translated and directed by award winning director Conall Morrison. After the reading in the Great Hall, Parliament Buildings, I joined in a discussion on the themes of the play with the actors; Paul Givan MLA and Raymond McCartney MLA, Chair and deputy Chair respectively of the Justice Committee; and invited guests. There was discussion of the rule of law, conflict between written law and fundamental justice, and the resonance for contemporary Northern Ireland in the themes of dignified burial, betrayal and conflict. I was pleased and grateful that the event was supported by both TLT Northern Ireland and Politics Plus.
90. I was also pleased in April to host a 'law schools conference' for undergraduate students at both Queen's University and Ulster University, this year on article 2 ECHR. I am grateful to Dr Natasa Mavronicola and Professor Rory O'Connell for their active support of, and participation in, this important facet of the living law programme.
91. A colloquium on Article 2 ECHR and inquests: new perspectives and problems took place in September. It brought together a small focused group for reflection and discussion of ideas about this important aspect of dealing with our troubled past. I focused on the potential implications of the European Court of Human Rights' decision in *Janowiec v Russia*, which were then explored in part, in my intervention in the Supreme Court hearing in *Keyu*, (see paragraph 28 above).
92. I was honoured that the former Irish Judge of the European Court of Human Rights, Anne Power-Forde, gave the opening speech at a colloquium in October on the interplay between law and religious freedom (one of the most important issues facing citizens as believers across the world). Judge Power-Forde gave a presentation on religious freedom in the case law of the European Court of Human Rights. I was delighted to host a diverse and expert panel

discussion including contributions from Paul Givan MLA, then Chair of the Justice Committee; Professor Stephen Williams, Professor of Systematic Theology at Union Theological College in Belfast; Dr Katy Radford, senior researcher at the Institute for Conflict Research; and Father Tim Bartlett, Catholic Commission on Social Affairs.

93. November saw the inaugural meeting of law officers from the Crown Dependencies and devolved regions of the United Kingdom. I hosted fellow law officers from Scotland, Wales, Jersey, Guernsey, and the Isle of Man to initiate a framework for discussion and exchange. This was a welcome opportunity to hear from colleagues in a similar position throughout these islands and to discuss issues of mutual interest. I was particularly interested in our shared experience of the balance and challenges arising from our role as both chief legal adviser to government and guardian of the rule of law. The next meeting is due to take place in Edinburgh in 2015.
94. The Attorney General's Young Bar and Young Solicitor's Seminar Series is an integral part of the Living Law programme. The series of seminars was attended by delegates from the Young Bar and Young Solicitors' Associations. Speakers from my office along with other barristers and solicitors explored current issues.
95. For the fourth year I offered a Pupillage Scholarship as support to pupil barristers who are unable to undertake paid advocacy during the first six months of their pupillage. The Scholarship (together with the opportunity to do pro bono work for this office) was awarded to Leona Gillen. I take this opportunity to wish her well in her career at the Bar.

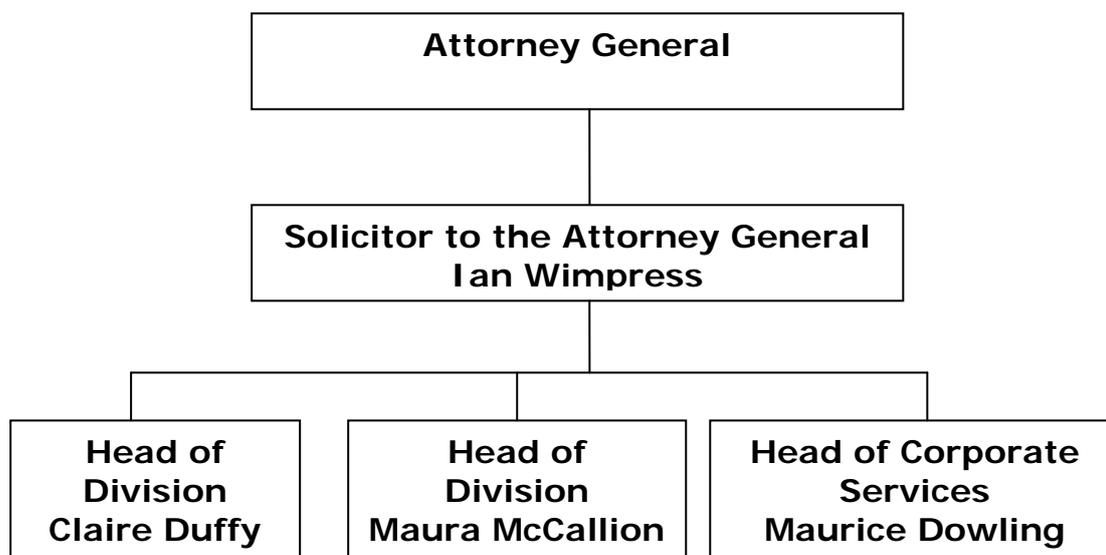
## Miscellaneous

96. In addition to the significant themes of work outlined above, I have also dealt with a number of miscellaneous issues:
- I received 64 Departmental Consultations for consideration.
  - The Office of the Attorney General provided responses to 4 Freedom of Information requests.
  - I spoke at 7 external events.
  - I hosted 9 work experience students and 1 internship.
  - Lawyers from my office have participated in the work of the Court of Judicature Rules Committee, the Crown Court Rules Committee, the Criminal Justice Board and the Criminal Justice Issues Group.

## Staff

97. Subject to the approval of the First Minister and deputy First Minister as to numbers, salary, and other conditions of service I may appoint staff to the Office of the Attorney General.
98. During the year I launched a third Attorney General Solicitor Trainee competition for law graduates at Queens University and the University of Ulster. Following a comprehensive selection process I was delighted, in September 2014, to appoint a Trainee Solicitor on a fixed two year contract.
99. As of 31 March 2015, my office consists of 13 full time staff, including 8 lawyers, who are all members of the Northern Ireland Civil Service.

## Senior Management Structure



## Corporate Services

100. By section 22 (3) of the Justice (Northern Ireland) Act 2002 the Attorney General is to be funded by the First Minister and deputy First Minister acting jointly.
101. For practical administrative and economic reasons my office avails of the Office of the First Minister and deputy First Minister's financial and audit systems.
102. In 2014/15 the Office of the Attorney General had a budget of £1.4m. The year end financial spend was £1.5m. The overspend was in relation to salaries which had been communicated to the Office of the First Minister and deputy First Minister.
103. Robust systems and processes are in place to ensure effective corporate governance.
104. The office website [www.attorneygeneralni.gov.uk](http://www.attorneygeneralni.gov.uk) outlines the work and responsibilities of the Attorney General. It is regularly updated.

## **Conclusion**

105. Thanks are due, in advance, to those citizens who, having read this report, take time to share their reflections on it with me. Giving legal advice is a confidential exercise but, whether directly or indirectly, the work that is detailed in this report is done on behalf of all of the citizens of Northern Ireland, and everyone who benefits from the protection of our laws, and I welcome public participation in an assessment of that work.