



**Attorney General**  
for Northern Ireland

# **Attorney General for Northern Ireland**

## **Sixth Annual Report**

**2015/16**

*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*

*16 January 2017*



Attorney General  
for Northern Ireland

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# Attorney General for Northern Ireland

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

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

As time passes I am increasingly conscious of how great a privilege it is to serve the Northern Ireland public as Attorney General. I am fortunate not only to have such excellent colleagues working with me in this office but also to have the pleasure of working with so many excellent officials elsewhere within Government, including in the Office of Legislative Counsel and the Departmental Solicitor's Office.

We do not as citizens exist for the benefit of the law; the law exists for our benefit and the task of shaping or applying it to our benefit is shared by many people: Ministers, MLAs, officials, but also judges, prosecutors, and Law Officers.

In comparison with Law Officers in England and Wales, Scotland and Ireland, the office I am privileged to hold enjoys the greatest level of independence. That independence, underpinned by section 22 (5) of the Justice (Northern Ireland) Act 2002, reflects a view about the nature of the office that need not, as devolved Government here develops, remain immutable or unreflecting of changed conditions within Government.

It is not for me to guess how the nature of the Office of Attorney General may change over time. What I very much wish to do is to ensure that the present nature of the Office and its work are

understood by the public. This report can contribute to that public understanding and I hope, to that end, it is widely read.

A handwritten signature in black ink, appearing to read 'J F Larkin', followed by a period.

John F Larkin QC  
Attorney General for Northern Ireland

## Introduction

1. On 28 September 2015, First Minister and deputy First Minister extended my appointment as Attorney General for Northern Ireland until 23 May 2019. The Attorney General's role as developed by the Justice (Northern Ireland) Act 2002 gives rise to some substantial differences from that of other law officers in these islands. The nature of the office and its work will, I hope, become clearer from this annual report.
  
2. With the experience of almost six 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 (far less to remedy) abuses. While I very much welcome contact from the public it is often disheartening to have to advise correspondents, many of whom may have legal problems of significant complexity, that I cannot act as a lawyer for private citizens.
  
3. 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
  - Discharging specific functions to protect the public interest in certain charity matters

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

- 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 very much 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, the Right Hon Jeremy Wright QC 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 2015/16**

### 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. This position will be reviewed when the new Assembly and new Executive meet after the 2016 Assembly Election.
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.
12. I continued my practice of providing bespoke training to Departments to address the specific needs of the relevant Department. This year I focused on human rights law and on judicial review. A recurring theme which I sought to emphasise is the importance of obtaining early legal advice and my readiness as well as that of my colleagues in DSO to provide it.

#### Departmental Litigation

13. 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.
14. I represented the First Minister and the deputy First Minister in a challenge to legislation recently passed by the Northern Ireland Assembly. The applicant for judicial review, a woman who earns her living through prostitution, challenges the lawfulness of section 15 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 which made it an offence to obtain sexual services from a person in exchange for payment. Initial submissions were heard on the interesting question as to who should be responsible for defending a piece of legislation which came into being as a result of a Private Member's Bill. The leave hearing will take place in October 2016.

15. I continued to represent the Department of Health Social Services and Public Safety (“DHSSPS”) 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. In a further judgment given in January 2015 Mr Justice Treacy concluded that Minister Poots’s decision was “infected with apparent bias”. Both judgments were appealed. The appeals were heard in November 2015 and the Court of Appeal delivered judgment on 16 March 2016. By a majority the Court allowed the appeal of the DHSSPS and the Department of Health on the correct decision maker and, unanimously, allowed the appeal of the DHSSPS on irrationality and apparent bias.
16. 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)*. The stay has been lifted on the appeal following judgment being delivered in *Browning*. No date has been fixed as yet for the appeal hearing.

17. The Health Minister also instructed me to defend a judicial review application brought by a woman who sought to compel the Minister to publish guidelines on the termination of pregnancy in Northern Ireland. The application for leave to apply for judicial review was listed before the court on several occasions during the period covered by this report without adjudication on the grant or refusal of leave. The publication of guidelines at the end of March 2016 will no doubt impact on whether or not the case should continue.
18. I represented the Department of Education in two judicial review cases concerning school development proposals. In the case of *XY's application [2015] NIQB 75* I successfully defended the Minister's decision to close the Avoniel Primary school. That Ministerial decision was linked to another Ministerial decision to approve a Development Proposal to increase admission and enrolment numbers at Elmgrove Primary School and to establish 52 full-time nursery units at Elmgrove Primary School. These decisions were made on the context of capital investment project of £9- 10 million to refurbish and extend the existing premises on the Avoniel Primary School site with the intention that after these works were completed an enlarged Elmgrove Primary School would move to the site of what had been Avoniel Primary School.
19. The second judicial review related to Drumragh Integrated College challenge against the Ministerial decision to refuse a Development Proposal to increase admission numbers at Drumragh Integrated College. I have brought on behalf of the Department an application to set aside the grant of leave (leave was granted on the papers). A hearing was held on 12 February 2016 before Treacy J and further

written submissions and affidavit evidence has been lodged with a further hearing date to take place in respect of this application.

20. I was instructed by the Minister of Culture Arts and Leisure to defend an application for leave to apply for judicial review in respect of the release of certain inquest and court files by the Public Records Office. Junior Counsel was instructed by my Office to contest the grant of leave. An oral leave hearing took place on 10 September 2015 and judgment is awaited.
21. I also acted for the Department of Culture Arts and Leisure in an application for judicial review brought by the Minister of Justice in relation to a decision to make the draft Court Files Privileged Access Rules ((Northern Ireland) 2016 without referring the matter to the Executive for discussion and agreement. The matter came before the court on the afternoon of 4 March 2016 by which stage the Rules had been made and as a result, after hearing brief submissions, the application was adjourned by Mr Justice Maguire with the application being subsequently withdrawn.
22. The Department of Justice instructed me to intervene 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 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. As noted in my last report I made

written and oral submissions on behalf of the Department at a hearing which took place in February 2015. On 22 July 2015 the Supreme Court handed down judgment in the case and by a majority of 5-2, held that the Access to Justice Act regime is compatible with the European Convention on Human Rights. Plainly the issue of high costs awards in civil litigation remains a matter of considerable interest to anyone concerned with securing access to justice in an era of increasing pressures on legal aid. I understand that at least one of the original parties to that litigation has made an application to the European Court of Human Rights.

### Devolution Notices

23. 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.
24. A devolution notice was issued this year in judicial review proceedings in which the applicants sought to challenge Article 6 (6) (e) of the Marriage (Northern Ireland) Act 2003 on the basis that it unlawfully prevented individuals of the same sex from entering into a civil marriage. The applicant also challenged the use of Petitions of Concern in the Assembly on the basis that such petitions could not be lawfully invoked in matters seeking to advance, protect and promote human rights. I entered an appearance, highlighting that there is no obligation on Contracting States under the ECHR to grant same sex couples access to marriage and neither the Belfast Agreement nor the Northern Ireland Act 1998 limit the use of petitions of concern in the manner suggested by the applicant. The hearing took place on 3-4

December 2015 and I made written and oral submissions. Judgment is awaited.

25. I was served with a devolution notice and an incompatibility notice in judicial review proceedings brought by the General Council of the Bar of Northern Ireland and the Council of the Law Society of Northern Ireland in respect of the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015. This challenge arose because of the reduction of fees payable to solicitors and counsel in Crown Court proceedings. I did not participate in these proceedings which were ultimately resolved through mediation.
  
26. A judicial review application brought by the Northern Ireland Human Rights Commission (“NIHRC”) against the Department of Justice in relation to the termination of pregnancy also gave rise to a devolution issue. The applicant contended that the criminal law on abortion in Northern Ireland is incompatible with the rights protected by the Human Rights Act and sought a declaration of incompatibility under section 4 of that Act. The applicant further argued 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 participated in the substantive hearing in June 2015. I made written and oral submissions at the hearing. Mr Justice Horner gave judgment on 30 November 2015 in favour of the NIHRC and in a separate judgment on remedies on 16 December 2015 made a Declaration of Incompatibility under section 4 of the Human Rights

Act 1998 in respect of sections 58 and 59 of the Offences against the Person Act 1861 and section 25 of the Criminal Justice Act (Northern Ireland) 1945. Both the Minister of Justice and I have appealed to the Court of Appeal. The appeal is listed for hearing on 20 -23 June 2016.

27. I was served with a devolution notice in a judicial review challenge brought by Brigid Hughes who sought to challenge a decision of the Secretary of State 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 death of her husband and eight others at Loughgall would be taken by the Advocate General for Northern Ireland rather than me. In the event the Advocate General ordered fresh inquests and as a result the proceedings were withdrawn.
  
28. I applied to intervene in proceedings brought by Gareth Lee against Ashers Bakery and others, both at first instance and before the Court of Appeal. The District Judge was not persuaded that the case gave rise to a devolution issue but the Court of Appeal took a different view and issued a devolution notice and a notice of incompatibility on 3 March 2016. The appeal is listed for hearing on 9-12 May 2016 and I intend to make both written and oral submissions. My concerns focus on the provisions in the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 Regulations and the Northern Ireland Act 1998 in particular the vires of Article 28 of the Fair Employment and Treatment (Northern Ireland) Order 1998 insofar as this provision impedes or places a burden on certain forms of political or religious expression by suppliers of goods or services given the prohibition on Northern Ireland legislation discriminating on the ground of political opinion contained in section 17 of the Northern Ireland Constitution Act 1973, a limitation on the power under Schedule 1 to the Northern Ireland Act 1974 to make subordinate legislation.

29. As mentioned in my 2011/12 Annual Report I had entered an appearance in a devolution notice case in March 2012, making 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 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. The appeal is listed for hearing in the UK Supreme Court on 24 November 2016.
30. As referred to in my last report a devolution notice was served in a judicial review application brought by Stan Carberry by which he seeks an article 2 ECHR compliant investigation into the death of his father, also Stan Carberry, who was shot by members of the British Army on 13 November 1972. Mr Carberry seeks relief 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. 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. These proceedings remain active at the leave stage.

31. In my last report I also referred to a devolution notice in a judicial review application brought by "AS". 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 filed a position paper on 21 January 2015 but did not participate orally in the subsequent hearing. The case is part heard and has been adjourned pending delivery of judgment in a relevant Supreme Court case. No date was set for the resumption of the judicial review hearing within the period covered by this report.

#### Other Litigation

32. When issues of importance arise I may either initiate litigation myself or intervene in litigation separately to protect important public interests.
33. The Supreme Court granted me permission to intervene in a case which it heard in April 2015, *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. I made written submissions in advance of the hearing and the Supreme Court gave judgment on 25 November 2015. There was a measure of support for my position on the inapplicability of article 2 ECHR in the judgment of Lady Hale.

34. I am also a notice party in any litigation concerning declarations as to status under Part V of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989. This year I intervened in two applications under Article 31 seeking declarations as to marital status. 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 still awaited.

35. The second case in which I intervened arose from 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 was heard in the High Court in November and early December 2015 involving Departments from both Northern Ireland and England. Judgment is also awaited.
  
36. The Family Judge, Mr Justice O'Hara sought my assistance in an appeal brought against a decision by the Recorder of Belfast to dismiss an application to revoke freeing orders made in relation to two children. The appeal gave rise to a number of interesting and important legal issues including the proper interpretation of Article 20(1) of the Adoption (Northern Ireland) Order 1987, the nature and extent of the Article 8 rights of the mother and the extent of the inherent jurisdiction of the High Court in this context. As the proceedings also raised the compatibility of Article 20 with Article 8 ECHR the learned Judge considered that it was appropriate to invite me to consider whether to intervene. I naturally was pleased to assist the court but pointed out that the compatibility issue gave rise to the need for the court to issue an incompatibility notice under Order 121 rule 3A of the Rules of the Court of Judicature so that any relevant government department would have the opportunity to participate in the proceedings. Incompatibility notices were issued on 8 January 2016 and subsequently the DHSSPS decided to participate. I made written submissions to the court and the hearing of the appeal took place on 10 March 2016. After hearing brief oral submissions the learned Judge indicated that he had decided to allow the appeal and would give a written judgment at a later date.

## Appointment of Amicus Curiae and Special Counsel

37. 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.
38. 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.
39. 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.
40. As noted above, I was invited by Mr Justice O'Hara to carry out an amicus role in family law proceedings concerning an application to revoke a freeing order for adoption and the possible issuing of a declaration of incompatibility of the applicable legislation under the Human Rights Act 1998. I provided written submissions to the court on this issue.

## Relationship with the Assembly

### Legislative Process

41. 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.
  
42. 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 particular consideration to all Assembly Bills as they complete final stage. No fixed criteria exist to determine whether or not any provision of a Bill that I consider falls outside the legislative competence 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. During the period covered by this report, I undertook final statutory scrutiny of 34 Bills. These were two Budget Bills, two Justice Bills, the Pensions Bill, the Pensions Schemes Bill, the Reservoirs Bill, the Insolvency (Amendment) Bill, the Food Hygiene Rating Bill, the Departments Bill, the Rates (Amendment) Bill, the Water and Sewerage Services Bill, the Special Educational Needs and Disability Bill, the Road Traffic (Amendment) Bill, the Health and Social Care (Control of Data Processing) Bill, the Environmental Better Regulation Bill, the Legal Complaints and Regulation Bill, the Employment Bill, the Credit Unions and Co-operative and Community Benefit Societies Bill, the Housing (Amendment) Bill, the Mental Capacity Bill, the Rural Needs Bill, the Shared Education Bill, the Houses in Multiple Occupation Bill,

the Health and Personal Social Services (Amendment) Bill, the Addressing Bullying in Schools Bill, the Health (Miscellaneous) Bill, the Fisheries Bill, the Land Acquisition and Compensation (Amendment) Bill, the Ombudsman and Commissioner for Complaints (Amendment) Bill, the Children's Services Co-operation Bill, the Public Services Ombudsman Bill, the Assembly and Executive Reform (Assembly Opposition) Bill and the Licensing Bill.

44. Consideration at the stage of possible referral under section 11 of the Northern Ireland Act 1998 is mirrored by consideration in advance of a Bill's introduction. The form that this early consideration takes varies according to the nature of the proposed Bill and the particular needs of the relevant Departments.
  
45. 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 in this busy last year of the 2011-2016 mandate. I am grateful for the unfailing assistance they have given to me and my colleagues during this year, particularly as we worked through the challenges of our pioneering mental capacity Bill. The splendid work of the Office of the Legislative Counsel deserves to be more widely known outside Government.

#### Justice Committee

46. I continued my active working relationship with the Justice Committee this year. I was very happy to support the Committee's series of Justice Innovation seminars and delivered the keynote address at the final seminar in February 2016. I focused on the problem of excessive penalisation. The Committee made two recommendations in its seminar series report drawing on my contribution. It highlighted firstly, the need for a policy debate on the use of criminal offences for non-compliance in legislation and whether administrative sanctions might be more appropriate and

secondly, the need for a review of the statute book with a view to identifying and removing obsolete offences .

### Public Prosecution Service

47. 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.
48. 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.
49. 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.
50. 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.
51. 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>.

52. 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. It has been a pleasure to work with the Director and Deputy Director of Public Prosecutions during the period covered by this report.

#### Departmental Solicitor's Office

53. In July 2015 Mr Hugh Widdis was appointed as Departmental Solicitor and Head of the Government Legal Service Northern Ireland. I have already enjoyed working with Mr Widdis and look forward to a productive relationship with him.

#### Relator Actions

54. 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.
55. 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 brought to assert that public right. The action that then takes

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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)

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.

56. As referred to in my last report I brought a relator action in relation to the sale of so called legal highs and specifically that that the sale of novel psychoactive substances amounted to a public nuisance. *Attorney General for Northern Ireland and Belfast City Council v Aiden Kerr t/a Soho Bookshops, Ian Brown, Infernal Publishing and Others*. An interim injunction was granted against the defendants and subsequently the defendants indicated that they would not resist a final injunction which the court proceeded to issue.

### Inquests

57. 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.
58. 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.
59. During 2015/16, under section 14 (1) of the 1959 Act, I directed the Coroner to hold an inquest in 3 cases. In 11 cases I determined a fresh inquest was not advisable. 45 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.

60. 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.
61. 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.
62. A feature of the last year has been judicial reviews brought seeking to challenge decisions made by me not to order fresh inquests pursuant to my power under section 14 of the Coroners Act (Northern Ireland) 1959. Most refusals have been based on my view that the proper course in many cases is to refer the matter to the Director of Public Prosecutions and the PSNI for further investigation where there is a prospect of a criminal justice solution. As I submitted in *Keyu* article 2 ECHR does not require proceedings in order to establish historic truths. It should also be remembered that a decision not to order an inquest is by definition never final and the matter can always be revisited in the event of fresh evidence coming to light or new submissions being made which may persuade me to order an inquest notwithstanding a previous refusal.

## Charities

63. My responsibility for protecting the public interest extends specifically to the law of charities, an area in which, historically, the Attorney General 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.
64. While provisions of the 1964 Act are still in force I retain a consultative and consent giving role as regards some charity matters. This includes section 29 of the 1964 Act as regards applications to the Court where there is or is alleged to be a breach of any charitable trust or where the advice or order of the Court is required in connection with the administration of any charitable trust. This year three such applications for my fiat have been made and I have granted two, with one being dealt with without the need for my fiat but rather by joining me to the proceedings.
65. There is also a role for the Attorney in consenting to references to the Charity Tribunal where the Charity Commission needs a question of law or practice resolved; in giving directions to the Charity 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.
66. 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 for Social Development. In this regard, I have been involved in two cases this year where the issue has been whether the Court has

jurisdiction to make an order or whether the matter should be dealt with by the Department using the Royal Sign Manual. One case has been resolved and the other is ongoing.

67. 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 appeal of the case 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 was successful in my appeal of the Tribunal's judgment before the High Court however the Charity Commission have appealed and it is due to be heard later this year.
68. I also intervened in the case of *Robert Crawford v The Charity Commission for Northern Ireland*. I sought leave to appeal the decision of the Charity Tribunal in October 2015 to the High Court. The High Court has not had the opportunity to consider many appeals from the Charity Tribunal, which is still a relatively new judicial body. This appeal gives the High Court the opportunity to consider issues, such as the requirements of recording and reasoning, which may be of general importance to the work of the Tribunal in the future. The appeal is listed for hearing on 20 October 2016.
69. Aside from initiating my own appeals, I have also intervened in two High Court appeals from the Charity Tribunal in *Bangor Provident Trust Ltd v The Charity Commission for Northern Ireland* and *Victoria Housing Estates Ltd v The Charity Commission for Northern Ireland* and the subsequent appeal to the Court of appeal in the *Bangor* case. This year the Victoria case which was remitted back to the Charity Tribunal was resolved as Victoria Housing Estates Ltd withdrew their appeal, Bangor Provident Trust Ltd was refused leave to appeal the Supreme Court after failing in their appeal before the Court of Appeal.

70. Last year I was involved in the case of *O'Loughlin and Others 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. Significant work was carried out to resolve the legal issues involved through legislation putting the trust on a statutory footing. I assisted a local MLA with the drafting of a Bill with the aim of introduction once new standing orders for hybrid bills in the Assembly are in place.
71. 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 Charity Commission needs a question of law or practice resolved; in giving directions to the Charity 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.
72. 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.

## Human Rights

73. 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.
74. 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, and other sources.
75. I was pleased to host my first conference on section 8 with all the criminal justice organisations in attendance in June 2015. I am grateful in particular to Forensic Science Northern Ireland for their insightful contribution to the day.
76. Over the past year I have laid before the Northern Ireland Assembly two new sets of guidance, the first addressed to the Police Service of Northern Ireland on the Protection of the Right to Life; and the second addressed to the Youth Justice Agency on Restorative Justice.
77. 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 the Police Service of Northern Ireland and the Youth Justice Agency whose valuable knowledge, assistance and input contributed to this work.

## Contempt of Court

78. The Attorney General has a 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.
79. 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 6 occasions had to consider bringing contempt proceedings in relation to concerns about possible interference with the administration of the justice process.
80. In addition, I was requested by the High Court to prosecute Mr Patrick Coyle for contempt of court. Mr Coyle had been referred to the High Court by the Master (Enforcement of Judgments Office) after Mr Coyle had refused to be sworn in proceedings before the Master. I prosecuted the contempt proceedings in accordance with Order 52 of the Rules of the Court of Judicature. After these proceedings had commenced Mr Coyle presented himself to at the Master's Court, took the oath and complied fully with the requirement to be examined by EJO staff as to his means. The case was finally heard by a Divisional Court on 30 June 2015. The Court found the contempt proved and committed him to prison for one month with this sentenced being suspended for a period of three years.
81. Also during this year, I was requested by the High Court to prosecute a case of contempt in respect of Mr Thomas Anthony Carlin, a personal litigant, who committed a prima facie act of contempt in the face of the court by attempting to arrest the Judge

on 12 January 2016. This was initiated by means of an application by me for leave to apply for an Order of Committal pursuant to Order 52, rule 1 of the Rules of the Court of Judicature. Leave was granted and the full hearing took place before a divisional court on 15, 17 and 18 February 2016. The court was satisfied that the elements of the offence had been proven to the requisite standard and sentenced Mr Carlin to three months imprisonment with an earlier release date if Mr Carlin were to apologise for his behaviour and thus purge his contempt.

### Declaration of Parentage

82. The Attorney General must be placed on notice of every application to court seeking a declaration of parentage. In 2015/16 there were 32 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 have been involved in litigation arising from two such applications concerning issues relating to the Human Fertilisation and Embryology Act 2008. These have been listed for later this year.

### Presumption of Death

83. Under section 9 of the Presumption of Death Act (Northern Ireland) 2009 the Attorney General must be served with a copy of every application to the High Court seeking a declaration that a missing person is presumed to be dead. The Attorney General may intervene in the proceedings on any application in such manner if he thinks it necessary or expedient and argue before the Court any question in relation to the application which the Court considers it necessary to have fully argued. I have to date received two such cases. Applications of this nature are relatively rare in Northern

Ireland. Over the course of my tenure as Attorney General there have only been two such cases and none were served within the period covered by this report.

### Vexatious Litigants

84. 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 him or her 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 appealed this decision and his appeal was heard by the Court of Appeal on 29 September 2015. The Court of Appeal gave judgment dismissing the appeal on 30 November 2015.
85. Two applications of this nature remain under consideration by me.

### Mental Health

86. By Article 72 of the Mental Health (NI) Order 1986 I may refer the case of a patient<sup>3</sup> to the Mental Health Review Tribunal. I referred one case to the Tribunal this year in order to safeguard the patient's rights under article 5(4) ECHR to have the lawfulness of his detention reviewed at reasonable intervals. I am grateful to Wilson Nesbitt Solicitors for drawing this matter to my attention.

### Relations with both branches of the Legal Profession

87. 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 profession principally as one of encouragement and support and to

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

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 have observed in both branches of the legal profession and, in particular, a commitment to securing access to justice.

88. 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, Dermot Fee QC as well as the Chief Executive, David Mulholland for the assistance they have provided me in my work with the Bar.
89. While I have no institutional relationship with the Law Society I am grateful to both its President, John Guerin, and its Chief Executive, Alan Hunter, for their continued cooperation and constructive engagement with my Office.

#### Development of External Relations

90. 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.
91. In June 2015, I along with members of my staff participated in a study visit to the European Court of Human Rights in Strasbourg. As in previous years, the opportunity for dialogue on developing jurisprudence, particularly in relation to the margin of appreciation

doctrine and the limits of article 2 ECHR, was particularly beneficial.

92. The second meeting of the law officers from the Crown dependencies and the devolved regions of the United Kingdom took place in Edinburgh in November 2015. I was very pleased to be able to contribute to this emerging source of legal and practical exchange and support.

### Living Law

93. 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 sixth year, the programme continues to thrive, and builds on the successes of previous years.
94. 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.
95. Throughout the year 49 pupils from 15 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.

96. The second element is a general outreach programme to community and other groups aimed at raising public understanding about law.
97. 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. The year began with a colloquium exploring pre-birth rights, drawing on the comparative perspective of both canon law and international law. I was delighted then in May 2015 to host a conference marking the 800<sup>th</sup> anniversary of the Magna Carta, with a particular focus on two themes: our tradition of responsible government and religious freedom. The conference, supported by the Bar of Northern Ireland, heard from Professor David Ibbetson, Clare Hall, Cambridge, Tim Stanley, historian and journalist and John McAllister MLA as well as from four members of the Young Bar Association: Sinead Kyle, Clare Rothwell, Andrew Clegg and Jason Elliot.
98. September 2015 saw the first of two sessions this year on domestic abuse and its fatal consequences. I was able to explore my power to direct inquests in detail with Women's Aid. I am particularly interested in ensuring that deaths by suicide in the context of domestic abuse are better understood as well as deaths for which abuse is the dominant context through our inquest system so that lessons can be learned with a view to preventing potentially fatal domestic abuse.
99. In January 2016, I was delighted to welcome prosecutors, victims campaigners, defence practitioners and policy officials for a discussion on the challenges and prospects for common law criminal procedure arising from implementation of the EU Victims Directive [2012/29/EU]. I was particularly glad that we were joined by Sara Chrzanowska from the European Commission who gave us

a useful insight into the origins, content and likely future impact of the Directive.

100. Following discussions with a local MLA and a visit to the lower Falls area, I hosted a session in February 2016 on finding effective responses to anti-social behaviour, enabling a discussion on current law and practice. I was pleased by the level of engagement by local political representatives, the judiciary, those active in community and residents' groups, agencies such as the NIHE and the Youth Justice Agency and public servants with a statutory role including police officers and prosecutors. I am hoping to work further with those involved on potential legal and practical solutions and to develop this outreach further in the coming years.

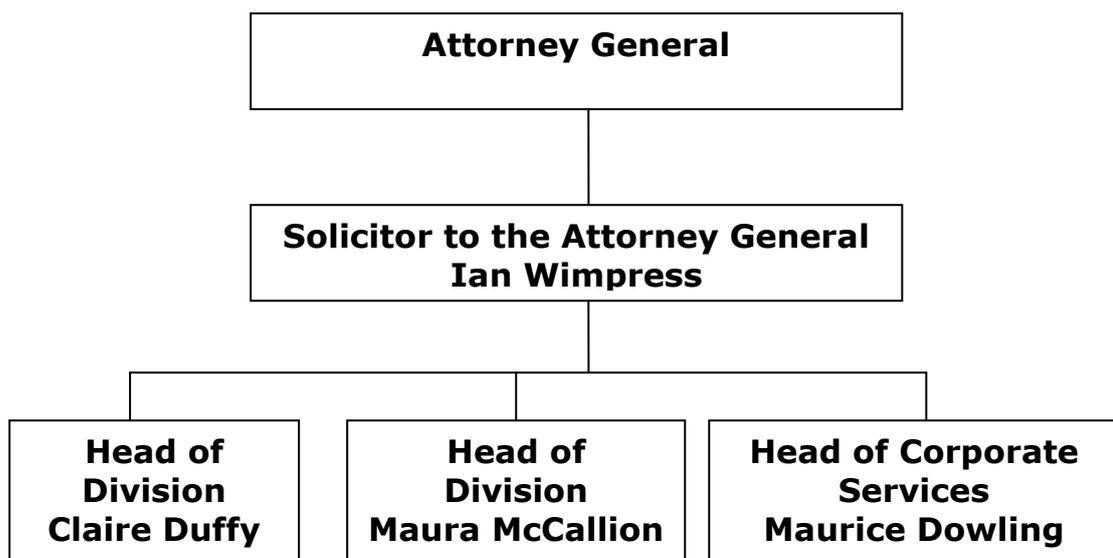
#### Miscellaneous

101. In addition to the significant themes of work outlined above, I have also dealt with a number of miscellaneous issues:
- I received 74 Departmental Consultations for consideration.
  - The Office of the Attorney General provided responses to 11 Freedom of Information requests.
  - I spoke at 6 external events.
  - I hosted 15 work experience students.
  - 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

102. 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.
103. In February one of my Principal Legal Officers, Joseph McCrisken, was appointed as a full-time Coroner. He has my warm congratulations on obtaining this important judicial office and I wish him well for the future. As of 31 March 2016, my office consists of 13 full time staff, including 7 lawyers, who are all members of the Northern Ireland Civil Service.

## Senior Management Structure



## Corporate Services

104. 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.

105. 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.
106. In 2015/16 the Office of the Attorney General had a budget of £1.87m (the budget for this year included £0.4m for a depreciation/impairment charge). The year end financial spend was £1.81m.
107. Robust systems and processes are in place to ensure effective corporate governance.
108. 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**

109. 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.