

Accountability and independence

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There is always a tension in the criminal justice system between accountability and independence, and indeed between the independence of the agencies and their management or governance as a whole.

I want to talk today especially about how accountability can be enhanced in the new arrangements for governance of the criminal justice system following devolution, but before I do that it may be worth spending a few minutes mapping out the different sorts of accountability to which the CJS is subject and the mechanisms that contribute to that accountability, so that we are clear what we are talking about at different stages of the argument.

Accountability in the CJS

I would like to distinguish three sorts of accountability, though obviously they are all related to one another:

1. 'Audit accountability', by which I mean systematic accounting for money and performance;
2. 'Openness', by which I mean being ready to (and perhaps even going out of your way to) give an explanation of what you are doing and why on a continuing basis; and
3. 'Buck stops here' accountability, by which I mean taking responsibility for specific decisions and in particular for getting things wrong.

All of those are really important characteristics for criminal justice agencies. They are important for any public bodies, but openness and accountability are especially important in the justice field because justice is about the exercise of the power of the state, which is an inherently dangerous thing. If 'justice' is done in secret and without reasons being given it very rapidly ceases to be justice at all. That is why in CJI's inspection matrix Openness and Accountability constitute the first heading against which we assess the criminal justice agencies.

If you want accountability, you need to have democratic institutions which can perform the task of holding the agencies to account, and that has been the problem in Northern Ireland. To be brutally honest, none of those sorts of accountability – not even the accounting for money - has been exercised as effectively as it should be in Northern Ireland under direct rule. There has been an absence of scrutiny and debate in democratic fora, and I shall come on to talk about how I hope the devolution of policing and criminal justice will help to rectify that. The media, of course, provide a form of accountability, but they work to their own agenda; and the courts – including the European Courts – also provide a means of holding public bodies to account, but they are no substitute for a political process.

Northern Ireland is well endowed with bodies which provide the raw material for accountability: inspectors, auditors, monitoring bodies like the Human Rights Commission, the CAJ, British Irish Rights Watch and our admirable Ombudsmen and complaints commissioners, but without a forum which can give sufficient time to the public debate of these issues their excellent work can be of only limited avail.

Audit accountability

I would guess that the majority of those present today will mainly be concerned about the accountability of the justice system for the decisions it takes in individual cases and the way in which it treats individual defendants, witnesses and prisoners. But I want to draw attention also to the importance of accountability for finance and management, because unless those are adequate the service provided to 'customers', including the extent to which their rights are respected, is liable to be unsatisfactory.

There is a huge amount spent on the CJS in Northern Ireland: it is a multiple of the corresponding expenditure in the rest of the United Kingdom, and there are good historical reasons why that is the case. The main focus of the additional expenditure has been the concern about security: the money has not gone on service to the customer. Prisons are an example. Our cost per prisoner place is two to three times what it would be for similar establishments in the rest of the UK, but the service to prisoners in terms of the provision of offender courses, education, training and preparation for release is comparatively poor. The extra money goes on a high staff/prisoner ratio, and it is all about security and for historical reasons which are no longer valid.

The PSNI presents a similar picture, with a relatively high number of officers delivering a service which is, by comparison with the most similar forces in Great Britain, not all that great. These things are part of the legacy of the past, and they can not be expected to change overnight, yielding a huge 'peace dividend'. But it is important that there should be steady public pressure for improvement, on a realistic timescale, or progress is likely to be very slow. And that brings us to the question of accountability. One of the reasons why progress is slow at present is the extent to which the criminal justice agencies are shielded from accountability under the current regime.

True, the Policing Board holds the Chief Constable to account for expenditure and performance against the Policing Plan, and it does it well up to a point. I do not want to detract from the good work the Policing Board does. But, despite having ten political representatives on it, the Board does not look at the issues in the way the Assembly would. There is not the immediate pressure of democratic accountability which asks whether we should be spending so much on this service, rather than on health or education, in relation to what we are getting from each service. The Policing Board holds the police to account within a narrowly defined frame of reference.

I stress that I am a supporter of the Policing Board as an institution. I think it needs to be preserved and even strengthened. But it is only realistic to suppose that, once there is a Justice Committee, Assembly Members will use that forum, and the Assembly itself, to air current issues on policing. The Chief Constable will inevitably

be called to give an account of himself to the Committee as well as to the Board, and it will be the Committee's proceedings that will be televised. The day to day business of holding the Chief Constable to account will remain with the Board, but the high profile incidents, like the Quinn murder or the Northern Bank robbery, will be aired first and foremost in the Committee. No protocol or concordat is going to stand in the way of that political reality.

Other agencies of the criminal justice system have comparatively little democratic oversight at present. The Public Accounts Committee at Westminster has hardly ever (has it ever?) examined areas of the CJS in Northern Ireland. The Northern Ireland Affairs Committee has done stalwart work, and some excellent thematic reports have issued, but it is not its job to monitor the CJS on a continuing basis. CJI inspects the agencies and writes reports, but there is no forum at present in which its reports can be debated. The public in Northern Ireland is dependent on the media to provide the public forum, and of course the media is highly selective about which subjects it thinks worth its while to cover.

That is perhaps the strongest argument for devolution of policing and criminal justice. The Assembly and, in particular, its Justice Committee, will provide the forum for regular questioning of the agencies and for the use of the Inspectorate's and other bodies' reports. CJI has already found the value of being able to give evidence to Committees. The other argument for devolution is the coherence argument, the fact that criminal justice interfaces with many areas of social policy which are already devolved, such as health, education, social housing, community safety and social services.

The Assembly is going to mean a sharp increase in the amount of governance the CJS will face, and basically that is all to the good. But we need to bear in mind that this is a small jurisdiction, in which the criminal justice agencies are headed by relatively small teams of individuals who could easily be overwhelmed by too much scrutiny. It will be important that those responsible for holding the agencies to account do it rigorously but at the same time exercise self-restraint. And of course the Inspectorate will want to play its part in that. We need to keep things manageable, and there may be scope for rationalising some of our supervisory bodies as we move forward.

Independence and management of the CJS

The agencies of the CJS are very keen to stress their independence, but that has to be balanced against the need to ensure coherent management of the CJS. The CJS is a system, or at the very least it is, as the Lord Advocate of Scotland said at the CJI conference last month, 'an ecology' in which the different players are all interdependent and, as it were, symbiotic. Someone needs to plan for the CJS as a whole, to determine consistent policies for it on subjects like Avoidable Delay, Hate Crime, or the treatment of Victims and Witnesses. And someone needs to allocate and re-allocate resources to the agencies. There is no hope of getting efficient and effective management of the CJS if the different agencies are allowed to go their own ways, determine their own priorities and bid for funding independently of one another.

One of the problems in securing adequate accountability for the performance of the CJS is the difficulty of measuring the quality of the service being provided. It is a particular problem with policing, because the range of activities is so vast, and very often the main measures of success are the degree to which things do not happen. If we have a year without any serious further offences being committed by high risk sex offenders does that prove the effectiveness of our management arrangements, or is it just luck? To be honest, there would always have to be a degree of luck about it, because we know that no arrangements are ever going to be foolproof. We are always just managing down risks, not eliminating them.

There may be statistical validity in tracking the trends of increases or falls in particular types of crime, but very often there are external factors behind the trends, such as the technical improvements in car security and even home security, the greater availability of cheap drugs, and changing social trends which influence patterns of offending. Some aspects of police performance can meaningfully be benchmarked against most similar forces in England and Wales, but often there are underlying differences even from those forces which explain differential performance and there is a danger that one ends up comparing performance on the basis of a very limited and unrepresentative sample of indicators. Just as 'what gets measured gets done', so what gets measured (even if it is measured unreliably) is what provides the basis for comparisons, and what can not be measured is likely to be ignored.

I spoke last month about my fear that the agencies of the CJS are to far too great an extent managed by reference to selected short-term targets, rather than being managed holistically with the right sort of long-term developmental perspective. When we are holding them to account we need to take that broader view, not just asking them whether they achieved X, Y and Z as stated in their Business Plan for the year, but trying to assess whether the organisations are developing their assets, becoming stronger and more capable and delivering the sort of service the 'customer', however defined, would want to receive.

Independence and accountability for individual case decisions

The most difficult area, both now and probably also under the devolved regime, is the question of accountability for individual case decisions.

At the management level the principle is very clear: the police, prosecution and courts have operational independence, so that no Minister can, or should ever be in a position to, order the arrest of someone or influence the decision of the Director of Public Prosecutions to prosecute anyone, or (it goes without saying) influence the decisions of a court.

Independence in relation to individual case decisions is perfectly compatible with co-ordination of policy and resources. There should be no problem about guaranteeing that in whatever structure we end up with. I do not think we should exaggerate the difficulty of ensuring that independence or let it lead us into unnecessarily complex administrative solutions. The problem arises at the other end of the process, when questions are asked about whether the right decisions were taken.

So far as the judiciary are concerned, there is a high degree of scrutiny and accountability through the appeals process, which is (normally) entirely in public. Judges give their reasons fully and rigorously. There is little scope for politicians to add value through the discussion of individual judicial decisions. The media will sometimes pick up a case where the sentence seems unduly lenient, but unless one has studied the case, heard the evidence and read the judge's summing up carefully *and* has a knowledge of the precedents and sentencing norms it is hazardous for any person to second guess a court. It is reasonable for lay persons to raise questions, but it must be for the Prosecution Service and for the Appeal Court to decide whether there is anything to the complaint. If politicians are tempted to go further they will quickly learn the unwisdom of doing so.

As regards the police, the police no doubt make mistakes all the time, but PACE is there to make sure that most of the time no great harm is done: if we can just leave on one side for a moment the current debate about lengthening the period people can be held without charge for terrorist offences, for the general run of offences nobody is held unreasonably long just on the say-so of the police; there is a right to bail unless there are compelling reasons to the contrary; and any misconduct by the police is subject to the rigorous independent scrutiny of the Police Ombudsman.

The main complaints about the police that would be likely to surface at the political level would be complaints about failure to investigate properly or failure to handle forensic evidence properly, as we heard in the Sean Hoey trial. These are all matters that can be looked at case by case by the Police Ombudsman, and there should be a strong presumption that that is where they belong: the Assembly and its Justice Committee would not have much to contribute until the Ombudsman had reported, at which point they could debate his report and ask the Chief Constable whether he proposed to act upon it. Another sensitive topic is the use of informers, and I shall come back to that presently.

That leaves the Public Prosecution Service, where there is at present something of a deficit of public accountability for individual decisions. It has to be recognised that the business of giving reasons for prosecutorial decisions, and specifically for decisions not to prosecute, is a complex field, and that the PPS has improved in this regard in recent years, partly in response to the recommendation of the Criminal Justice Review on this subject. The Director made an important on-the-record statement about 18 months ago about the Service's practice regarding the giving of reasons, explaining the constraints the Service was under where, for example, the safety of individuals was at stake. Nevertheless there is nowhere at present, and there will be nowhere under the devolution proposals, where any person – either the DPP or the Attorney General – can be questioned about such decisions.

It was interesting to hear from the Lord Advocate of Scotland that she can be, and is, questioned in the Scottish Parliament about decisions not to prosecute, and she gives an explanation whenever she can – which she said was about 75 per cent of the time. The Parliament understands, and is prepared to accept, that in the other 25 per cent of cases for a variety of considerations reasons cannot be given in public. Scotland has an entirely different legal system, and it is hazardous to draw direct parallels, but I am sure the example of Scottish practice is worth reflecting upon.

In practice, in cases where the PPS feels that it cannot give reasons, very often the simple declaration of that fact leads the media and the public to an immediate (and correct) conclusion about the status of a potential witness, namely that he was an informant or a state agent in some capacity. Where the inference is obvious it may be better, and even safer for the individual, for the PPS to be explicit. Silence does not really help to protect human rights.

Perhaps the best thing that can happen in such cases is for the police to inform the PPS at an earlier stage if there is a state agent involved in a case. Problems arise when the PPS is presented with this information after a prosecution has been launched, which is a public event. If they knew at an earlier stage a prosecution might never have been brought.

The use of informants (or CHIS, as it is known in the trade) tends to be seen as distasteful, but it is an essential tool of police forces and security services in all countries, even in those with the most liberal regimes. There is in RIPA a well-developed legal framework for regulating the use of CHIS, designed to ensure that all intelligence gathering is conducted in accordance with human rights. It would be good for the Justice Committee or (as with the Policing Board) an appropriate sub-committee to receive regular briefings from the relevant services.

These are activities which are conducted legitimately on behalf of all of us, and if MLAs have questions about them they should have the opportunity to ask the responsible agencies face to face and receive an honest account of the policies and practices of the agencies, without of course having access to sensitive operational detail or going into matters of national security. They should also hear from, and be able to question, the Surveillance Commissioner and the Investigatory Powers Commissioner for Northern Ireland to check that rigorous inspections are being made and that the rules of RIPA are being complied with.

Complaints: accountability for the handling of individual cases

Finally, I would like to say a word about the importance of good complaints procedures as a tool for ensuring accountability. The Criminal Justice Review said that complaints handling was “*an essential part of effective accountability mechanisms*”, and it recommended (Rec. 16) that systems should be “*accessible, understood, administered sensitively and expeditiously, and having an independent element where appropriate*”.

CJI undertook a review of complaints handling in the criminal justice system last year. The most important area is of course complaints against the police, handled by the Police Ombudsman, whose office we had inspected separately a year earlier. The service provided by the Police Ombudsman is a model of its kind, and is internationally recognised as good practice.

Policing is the most important service, because that is where the overwhelming proportion of the public's contacts with the criminal justice system take place. But other services deserve attention too. And here we found that the picture was inconsistent. Most criminal justice agencies had a system of appeal or independent oversight of their complaints system, but the oversight bodies had different remits

and different legal status. Inspectors have nothing against the concept that independent agencies should be able to have their own bespoke complaints systems which suit the requirements of their businesses. However, we do believe that there is scope for developing a system of unified, independent oversight of complaints within the compact jurisdiction of Northern Ireland. We recommended that consideration should be given to forming a single complaints oversight body to fulfil the role of an external, independent assessor of complaints for all the main criminal justice agencies in Northern Ireland.

Finally, it is worth mentioning the position of the Prisoner Ombudsman, since I know there is concern about this and a lot of sympathy, which I share, for Brian Coulter personally. Most of you will know that he has tendered his resignation because he was dissatisfied with the legal status of his office, which was not fully independent but was lodged within the NI Prison Service. It seems evident that the post was mis-described as an 'Ombudsman' post, when it was in reality more of an internal complaints commissioner. Brian Coulter has done excellent work as Prisoner Ombudsman, and his reports have been highly informative, but I wonder whether devolution may not offer us the opportunity to re-name the post to reflect its actual status and transfer the external oversight of prisoner complaints to a genuinely independent body?

In a way, it would be logical to extend the functions of the Police Ombudsman to give him oversight over all complaints within the criminal justice system, but that would be seen as diluting his focus on the police, and it may be too early for such a change. Alternatively, the responsibility for overseeing complaints arising in the prison service and in other criminal justice agencies apart from the police could be given, upon devolution of criminal justice, to the Assembly Ombudsman, who already has the title of 'Commissioner for Complaints'. I believe that would be the right solution at this stage. At some stage it may be that external review of all complaints against public services in Northern Ireland can become the responsibility of the Assembly Ombudsman, but that time is not yet.