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ICOS No:

*Judgment: approved by the court for handing down  
(subject to editorial corrections)*

Delivered: 11/03/2026

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL BY CASE STATED FROM BELFAST MAGISTRATES' COURT

Between:

PUBLIC PROSECUTION SERVICE

Complainant/ Respondent

and

DAVID STITT

Defendant/Appellant

John Larkin KC and Lara Wallace-Thorpe (instructed by Phoenix Law) for the Appellant  
Tony McGleenan KC and Lauren Cheshire (instructed by the Public Prosecution Service)  
for the Respondent

Before: McCloskey LJ, Colton LJ and McLaughlin J

Glossary

AG	The relevant Attorney General
DPPNI	Director of Public Prosecutions for Northern Ireland
PPSNI	Public Prosecution Service for Northern Ireland
The Police Service	The Police Service of Northern Ireland
The 2002 Act	The Justice (NI) Act 2002
The 1987 Order	The Public Order (NI) Order 1987

McCLOSKEY LJ (*delivering the judgment of the court*)

*Introduction*

[1] The question of law posed in this case stated by Belfast Magistrates' Court is the following:

“Whether in a summary prosecution for an offence under Article 10 of The Public Order (NI) Order 1987 to which the

consent requirement of Article 25 of that Order applies (as modified by section 41(2) of the Justice (NI) Act 2002) the court has jurisdiction to hear and determine the complaint in the absence of a consent to prosecute of the Director of Public Prosecutions (DPPNI) or the Deputy Director of Public Prosecutions in accordance with section 33 of the [2002 Act].”

Having first alerted the parties, this court considers that a division into two questions is appropriate:

- (a) In a summary prosecution for an offence under Article 10 of The Public Order (NI) Order 1987 to which the consent requirement of Article 25 (as modified by section 41(2) of the Justice (NI) Act 2002) applies, does the magistrates’ court have jurisdiction to hear and determine the prosecution if there is no consent to prosecute from the Director of Public Prosecutions for Northern Ireland “DPPNI”?
- (b) In a summary prosecution for an offence under Article 10 of The Public Order (NI) Order 1987 to which the consent requirement of Article 25 (as modified by section 41(2) of the Justice (NI) Act 2002) applies, must the requisite consent be in all cases fully compliant with section 33 of the Justice (NI) 2002?

### *Overview*

[2] David Stitt (the “appellant”) stands prosecuted for the offence of (in summary) publishing written material that was threatening, abusive or insulting, which he denies. His prosecution is of the summary variety in the magistrates’ court. At first instance it was contended on his behalf that by virtue of the relevant statutory provisions (*infra*) the consent of the DPPNI to his prosecution was required and, no consent having been provided, the court was deprived of jurisdiction. The court, having rejected this contention, acceded to the appellant’s application to state a case for the opinion of this court. This appeal by case stated follows.

### *The prosecution*

[3] The offence alleged against the appellant is said to have been committed by a post which he made on his Facebook account on 31 July 2024. This publication was in the following terms:

“Please Share

Don't normally post anything political on my page but with recent events "Enough is Enough"

"Get up and stand up"

Protest areas please forward and share to many people as possible the aim is to bring the country to a standstill.

SATURDAY 3rd OF AUGUST

Newtownabbey: roundabout at hazelbank 12 to 2pm women and children to front

North Belfast: lights at yorkgate and underpass. Mount Vernon lights also. 12 to 2pm women and children

West Belfast: Carlisle circus closed completely 12 to 2pm women and children to front

Carrickfergus/Larne all entry points on Belfast road. Larne roundabout and carriageway 12 to 2pm women and children to front

East Belfast : bottom of Newtownards road. 12 to 2pm women and children to the front

Bangor /north down: Belfast road 12 to 2pm women and children to the front

South Belfast: Boucher lights 12 to 2pm women and children to the front

Please share far an wide.. this about all of our families.

Not about being british or Irish. Orange or green. This is the Christian west under siege when children aren't safe the places we send them to express happiness joy and fun.

Government won't help. Police are powerless. Were will you be. And what can you say you to your children in years to come when we had one chance to stop the spread of evil islam"

The thrust of the publication was to publicise and encourage anti-Islamic public demonstrations protesting against the suggested evil of Islam. There is no dispute about the actus reus: the appellant accepts that he is the author of the offending publication.

[4] On 22 August 2024, the appellant was arrested and, following interview by the police, was charged with the following offence:

“That you, on 31/07/2024, distributed written material which was threatening, abusive or insulting intending thereby to stir up hatred or arouse fear or having regard to all the circumstances hatred was likely to be stirred up or fear was likely to be aroused thereby, contrary to Article 10(1) of The Public Order (NI) Order 1987\*\*.”

[\*\* the “1987 Order.”]

Upon first remand at Belfast Magistrates’ Court, on 23 August 2024, the prosecution was in the hands of DPPNI and remained so thereafter, Upon that first listing, the charge was amended by the substitution of “published” for “distributed.” The appellant was remanded on bail.

[5] Thereafter, there were intermittent listings at Belfast Magistrates’ Court. The not guilty plea of the appellant was made on 3 December 2024. Ultimately, on 26 June 2025, that court, having considered the oral and written argument of both parties, dismissed the appellant’s contention of no jurisdiction based on the absence of a DPPNI consent to prosecution. This case stated followed, raising (in essence) the question of law formulated in the Introduction above.

### *Legislative History*

[6] Historically, in the present context the first relevant measure of legislation was the Prosecution of Offences (NI) Order 1972 (the “1972 Order”). The functions of the Director were listed in Article 5. The hierarchical arrangement which it established was, per Article 5(2), to make the DPPNI –

“... responsible to the Attorney General for the due performance of the functions of the Director under this Order.”

This superintendence arrangement was unsurprising given the prevailing context, namely the prorogation of the Northern Ireland Parliament and related measures for the governance of Northern Ireland, which included the abrogation of the office of Attorney General for Northern Ireland. The 1972 Order was the first “direct rule” Order-in-Council in Northern Ireland following prorogation.

[7] The 1972 Order contained the following “consent to prosecution” provisions, in Article 7:

“7.(1) In this Article –

‘consent provision’ means any [statutory provision], whether passed before or after the coming into operation of this Order whereby the consent of the Attorney General

[or the Director] is required (whether by itself or as an alternative to the consent of any other authority or person) to the initiation or carrying on of proceedings for an offence; ...

['relevant consent provision' means -

- (a) any enactment of the Parliament of Northern Ireland whereby the consent of the Attorney General is required (whether by itself or as an alternative to the consent of any other authority or person) to the initiation or carrying on of proceedings for an offence;
- (b) any enactment of the Parliament of the United Kingdom whereby -
  - (i) in Northern Ireland, the consent of the Attorney General is required (whether by itself or as an alternative to the consent of any other authority or person) to the initiation or carrying on of proceedings for an offence; but
  - (ii) in England and Wales, the consent of the Director of Public Prosecutions for England and Wales is required (whether by itself or as an alternative to the consent of any other authority or person) to the initiation or carrying on of proceedings for the like offence.]

(2) Unless the Attorney General otherwise directs, a [relevant consent provision] passed before the coming into operation of this Order shall be deemed to be complied with as respects the initiation after such coming into operation of proceedings for an offence to which it applies if the consent to the initiation or carrying on of those proceedings is given by the Director.

(3) Without prejudice to anything contained in a consent provision or in any other [statutory provision] a consent provision -

[Sub-para (a) rep by 1975 c59 s14(5) sch 6 PtII]

- (b) shall be deemed to be complied with if the consent is produced to the court, in the case of an indictable offence, at any time before the indictment is presented or, in the case of an offence to be tried summarily, at any time before the plea of the accused person is taken.
  
- (4) For the purposes of a consent provision it shall be sufficient to describe the offence to which the consent relates in general terms and –
  - (a) to describe or designate in ordinary language any property or place to which reference is made in the consent so as to identify with reasonable clearness that property or place in relation to the offence; and
  - (b) to describe or designate the accused person or any other person to whom reference is made in the consent in terms which are reasonably sufficient to enable him to be identified in relation to the offence, without necessarily stating his correct name, or his abode, style, degree or occupation.
  
- (5) A consent required by a consent provision may be amended at any time before the arraignment of the accused person or, in the case of a summary trial, before the plea of the accused person is taken, and if at any subsequent stage of a trial it appears to the court that the consent is defective the court may afford the person or authority giving the consent the opportunity of making such amendments as the court may think necessary if the court is satisfied that such amendments can be made without injustice to the accused person.
  
- (6) Any document purporting to be the consent, authorisation or direction of the Director or his deputy to or for the initiation or carrying on of criminal proceedings or criminal proceedings in any particular form, and to be signed by the Director or his deputy, as the case may be, shall be admissible as prima facie evidence without further proof.”

[8] The next statutory milestone in the matrix is, as noted, the 1987 Order. Article 10(1) provides:

“(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if-

- (a) he intends thereby to stir up hatred or arouse fear;  
or
- (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.”

Paragraphs (2) and (3) of Article 10 do not arise for consideration. Article 10 is one of an assortment of provisions arranged in Part III of the 1987 Order.

[9] Article 25, another member of Part III, which bears the title “Consent to Prosecution”, provides:

“A prosecution for an offence under Part III or Article 21(1) shall not be instituted except by or with the consent of the Attorney General.”

While this is the statutory provision lying at the heart of this appeal, as will become apparent it must be considered in conjunction with several others.

### *The Justice (NI) Act 2002*

[10] There followed the Justice (NI) Act 2002 (the “2002 Act”). This statute was one of several major measures of primary legislation of the Westminster Parliament designed to provide the statutory foundation for the devolution of policing and justice provisions in the historic constitutional settlement in this jurisdiction which preceded it in April 1998. The 2002 Act, re-established the office of Attorney General for Northern Ireland (“AGNI”) [section 22, 2002 Act] and created the new office of Advocate General for Northern Ireland, which was held by the Attorney General for England & Wales. During the interim period between the enactment of the 2002 Act and the devolution of policing and justice functions in 2010, the relevant functions of the AGNI were discharged by the Attorney General for England & Wales [section 40, 2002 Act] (see para [16] *infra*).

[11] The 2002 Act, in particular, made extensive new provision for the institution and conduct of prosecutions in Northern Ireland. Part 2 is directed exclusively to the topic “Law Officers and Public Prosecution Service”. One of its major innovations was to establish the Public Prosecution Service for Northern Ireland (“PPSNI”). The office of DPPNI was preserved. Section 30 of the 2002 Act provides:

“30(1) The Attorney General for Northern Ireland must –

- (a) appoint a person to be Director of Public Prosecutions for Northern Ireland, and
- (b) appoint a person to be Deputy Director of Public Prosecutions for Northern Ireland.

DPPNI, thenceforth, assumed responsibility for all prosecutions in Northern Ireland, with specified exceptions.

[12] The summary prosecutions function previously exercised by the Police Service was transferred to the DPPNI: this was arguably the stand out reform. The topic of “Conduct of Prosecutions” is regulated by Section 31 (considered more fully in [56]ff infra) which, in subsection (1), provides:

“The Director must take over the conduct of all criminal proceedings which are instituted in Northern Ireland on behalf of any police force ...”

This is the second provision bearing directly on the central issue to be determined by this appeal. It is appropriate to note the terminology employed in section 31:

“... must take over the conduct of all criminal proceedings [section 31(1)&(1A)]... may institute, and have the conduct of, criminal proceedings [section 31(2)] ... instituting any criminal proceedings [section 31(3)(a)] ... conducting any criminal proceedings [section 31(3)(b)] ... take over the conduct of any criminal proceedings ... [section 31(4)].”

[13] It is convenient to consider the relevant interpretation section, section 44, at this juncture. Subsection (1) addresses the question of when criminal proceedings are “instituted”, providing:

“(1) For the purposes of this Part proceedings in relation to an offence are instituted –

- (a) where a summons is issued under Article 20 of the Magistrates’ Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I. 26)), when the complaint for the offence is made under that Article,
- (b) where a warrant is issued for the arrest of any person under that Article, when the complaint for the offence is made under that Article,

- (c) where a person is charged with the offence after being taken into custody without a warrant, when he is informed of the particulars of the charge,
- (d) where an indictment is presented under section 2 of the Grand Jury (Abolition) Act (Northern Ireland) 1969 (c. 15 (N.I.)) in a case falling within paragraph (c) or (e) of subsection (2) of that section, when the indictment is presented to the court.”

[Emphasis added.]

Section 44(3) contains a single cross reference to section 31(1):

“Where proceedings are instituted on the making of a complaint under Article 20 of the [Magistrates’ Court’s Order], section 31(1) does not require the Director to do anything until the summons or warrant issued under that Article has been served or executed.”

As will become apparent, this provision has no application to the prosecution in the present case, as the present prosecution is of the “charge sheet” species viz. section 44(1)(c) above.

[14] Section 33 of the 2002 Act regulates the subject of “Consents to Prosecutions”:

“(1) This section has effect in relation to every provision requiring the giving of consent by the Director (whether or not as an alternative to the consent of any other person) to the institution or conduct of criminal proceedings (“a consent provision”).

(2) A consent provision is deemed to be complied with if the consent is produced to the court –

(a) in the case of an indictable offence, at any time before the indictment is presented, or

(b) in the case of an offence to be tried summarily, at any time before the plea of the accused person is taken.

(3) For the purposes of a consent provision it is sufficient –

- (a) to describe the offence to which the consent relates in general terms,
  - (b) to describe in ordinary language any property or place to which reference is made in the consent so as to identify with reasonable clarity that property or place in relation to the offence, and
  - (c) to describe the accused person or any other person to whom reference is made in the consent in terms which are reasonably sufficient to enable him to be identified in relation to the offence, without necessarily stating his correct name, or his address or occupation.
- (4) A consent required by a consent provision may be amended at any time before the arraignment of the accused person, or before his plea is taken.
- (5) And if at any subsequent stage of a trial it appears to the court that the consent is defective, the court may afford the person giving the consent the opportunity of making such amendments as the court may think necessary if the court is satisfied that such amendments can be made without injustice to the accused person.
- (6) Any document purporting –
- (a) to be the consent of the Director or the Deputy Director to the institution or conduct of criminal proceedings, or criminal proceedings in any particular form, and
  - (b) to be signed by the Director or Deputy Director, is admissible as prima facie evidence without further proof.”

There are clear parallels between section 33 and its statutory predecessor, Article 7 of the 1972 Order (para [7] supra).

[15] Section 36(1) empowers the Director to delegate any of his powers to any Public Prosecutor or any other member of staff of PPSNI:

- “(1) The Director may delegate any of his powers (to such extent as he determines) to –

- (a) any Public Prosecutor, or
- (b) any other member of staff of the Public Prosecution Service for Northern Ireland.”

We shall address infra the delegation provisions of section 36(1).

[16] Section 40, the successor provision to Article 5(2) of the 1972 Order (para [6] supra), regulates the relationship between the relevant AG and DPPNI:

**“Superintendence and removal of Director**

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

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

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

This was essentially a transitional provision, establishing a superintendence arrangement which expired upon the devolution of policing and justice powers on 12 April 2010, when the power conferred by section 22(2) on the First Minister and Deputy First Minister was exercised (per SR 2010/113, article 2, Sch. para. 2).

[17] Section 41 regulates the transfer of functions of the Attorney General for Northern Ireland (“AGNI”) to the DPPNI:

**“Transfer of functions etc.**

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

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

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

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

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

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

By section 42:

"The functions of the director shall be exercised by him independently of any other person."

Sections 41–43 took effect upon the appointment of AGNI under section 22(2). That event occurred on 24 May 2010, coinciding with the devolution of criminal justice to this jurisdiction (per SR 2010/113, art. 2, Sch. para. 2).

[18] The final statutory provision belonging to the broad statutory matrix is section 12 of the Criminal Jurisdiction act 1975. The cross heading of this provision, which applies throughout the United Kingdom, is "Consents to Prosecution etc." It provides:

"(1) This section applies to any enactment which prohibits the initiation or carrying on of proceedings for any offence except –

(a) with the consent (however expressed) of a Law Officer of the Crown, or of the Director of Public Prosecutions, or

(b) where the proceedings are initiated or carried on by or on behalf of a Law Officer of the Crown, or the Director of Public Prosecutions,

and so applies whether or not there are other exceptions to the prohibition (and in particular whether or not the consent is an alternative to the consent of any other authority or person).

- (2) An enactment to which this section applies –
  - (a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence, and
  - (b) shall be subject to any enactment concerning the apprehension or detention of children or young persons.

(3) In this section –

“Law Officer of the Crown” means the Attorney General or the Attorney General for Northern Ireland, the Solicitor General and, in Scotland, the Lord Advocate,

“Director of Public Prosecutions” includes the Director of Public Prosecutions for Northern Ireland,

“consent” includes sanction, fiat, direction or order,

“enactment” includes any provision having effect under or by virtue of an Act of the Parliament of the United Kingdom or the Parliament of Northern Ireland,

and this section applies to enactments passed or made before the passing of this Act, or later.”

Summarising, none of the criminal process measures or steps specified in subsection (2) is precluded or invalidated by the absence of a relevant statutory consent .

***DPPNI consent to prosecution: The facts***

[19] It is uncontested that as regards the appellant’s prosecution DPPNI did none of the following things (with some possible overlap):

- (a) provide a consent compliant with section 33 of the 2002 Act;
- (b) provide any other form of written consent;

- (c) provide an oral consent;
- (d) communicate its consent to prosecution in any way to the court;
- (e) communicate its consent to prosecution in any way to the appellant or any agency;
- (f) record internally its consent to prosecution.

Given this factual framework, the main question for this court is whether the magistrates' court lacks jurisdiction to hear and determine the charge against the appellant under Article 10 of the 1987 Order, in consequence of DPPNI's outright failure to give his consent to the prosecution.

### *The two questions of law*

[20] The two questions of law to be determined are rehearsed in para [1] above. Arising out of the submissions of the parties, two specific subsidiary questions, belonging to the territory of the first main question, have emerged, namely:

- (i) Does section 41(2) of the 2002 Act transfer to DPPNI the function of instituting a prosecution for an offence under Part III or article 21(1) of the 1987 Order conferred on (UK)AGNI by Article 25 thereof? (the 'transfer of functions' question)
- (ii) Were the criminal proceedings against the appellant instituted by DPPNI? (the 'institution of criminal proceedings' question).

### *The competing arguments*

[21] On behalf of the appellant, the following are the central submissions of Mr Larkin KC and Ms Wallace-Thorpe, of counsel:

- (i) When Article 25 of the 1987 Order was first enacted, only the Attorney General for Northern Ireland could institute proceedings charging an offence under Article 10(1) of the 1987 Order and only the Attorney General could consent to the institution of such proceedings.
- (ii) In the absence of such consent, then, save when proceedings charging an offence under Article 10(1) were actually instituted by the Attorney General, no court had trial jurisdiction for that offence.
- (iii) This function of the Attorney General of "consenting to the institution or conduct of criminal proceedings" has, since May 2010, been transferred, by section 41(2) of the 2002 Act, to the DPPNI.

- (iv) Section 41(2) of the 2002 Act did not transfer the Attorney's power under Article 25 of the 1987 Order to institute proceedings.
- (v) When the plea of the appellant was made (on 3 December 2024), the DPPNI had not consented to the charge under Article 10(1) of the 1987 Order. Section 33(2)(b) of the 2002 Act required that such consent be produced to the court before the plea of the appellant was made.
- (vi) Section 12(2) of the Criminal Jurisdiction Act 1975 permits arrests and remands in custody or on bail when consent provisions apply and the relevant consent is not yet in place.
- (vii) Section 33(2)(b) of the 2002 Act provides in summary proceedings the ne plus ultra for the facility conferred by section 12(2) of the Criminal Jurisdiction Act 1975.
- (viii) There has ceased to be jurisdiction to try the appellant because when his plea has been made no consent to prosecute had been produced to the court.
- (ix) The power transferred by section 41(2) of the 2002 Act cannot be delegated by the DPPNI to any person other than the Deputy Director of Public Prosecutions by reason of section 33(6) of the 2002 Act.
- (x) Even if the power transferred to the DPPNI under section 41(2) of the 2002 Act could be delegated more widely, no such delegation has occurred in this case.

[22] The core argument advanced is that the magistrates' court lacks jurisdiction to try the appellant for the offence under Article 10 of the 1987 Order in the absence of the consent of DPPNI. Mr Larkin submitted that Article 25 of the 1987 Order self-evidently reflects a Parliamentary intention that the type of offence to which it applies should be assigned to the familiar narrow category of cases requiring consideration and decision making by one of the Law Officers. This was a legislative choice, which is reflected in a range of other statutory provisions.

[23] The central submissions of Mr McGleenan KC and Ms Cheshire, of counsel, on behalf of the DPPNI are these:

- (i) Section 41(2) of the 2002 Act transferred the function of the AGNI in relation to both the consent to and the institution of criminal cases to the DPPNI.
- (ii) The purpose of section 41(2) was plainly to remove the involvement of the AGNI in criminal proceedings and to transfer all functions relating to the conduct of criminal proceedings to the DPPNI. Rules of statutory interpretation require both that provisions be interpreted so as to give effect to their underlying purpose and that interpretation avoid absurd results.

- (iii) There is no apparent rationale explaining why section 41(2) must be interpreted contrary to its purpose so as to retain for the AGNI the power to institute summary proceedings in circumstances where this Law Officer is explicitly prohibited from so doing on indictment (under section 41(4)).
- (iv) In this case, no consent was required as the proceedings were instituted by the DPPNI. The PPS was conducting the prosecution at the time at which the appellant was offered the opportunity to indicate his plea. Indeed, by the time of the first appearance of the appellant at court the PPSNI had arranged for the amendment of the police charges and assumed control over the case.
- (v) Decisions were taken by a senior public prosecutor, acting on the authority delegated to him by the DPPNI. There is nothing in the legislation that required that the DPPNI give his personal consent in this case, or that prohibited him from delegating his functions pursuant to section 36 to a prosecutor within his employ.

[24] Mr McGleenan's submissions drew particular attention to the provisions of the 2002 Act which transferred functions of the Attorney General to DPPNI (subsections (3)–(6) of section 41, supra). Mr McGleenan submitted that the statutory language indicates a legislative intention that section 41(2) would transfer to the DPPNI both (a) the consent function previously conferred upon the Attorney General and (b) the prosecutorial 'conduct' function previously conferred on the the Attorney General; and that the 'conduct' function included the power to institute proceedings for certain offences (all three functions cross-referring to Article 25 of the 1987 Order). This interpretation of section 41(2), it was submitted, is further supported by its contextual setting.

[25] Mr McGleenan argued, finally, that a construction of section 41(2) reserving to the AGEW the exclusive power to prosecute for offences contrary to Article 25 of the 1987 Order would produce an absurdity. Specifically, (he submitted) the legislature cannot have intended that the relevant AG the same time (a) removing from the relevant AG and transferring to DPPNI the function of entering a nolle prosequi and (b) prohibiting the relevant AG from presenting or directing the presentation of an indictment against a person: see section 41(3) and (4).

### *Statutory consent to prosecution provisions generally*

[26] The rationale of statutory consent to prosecution provisions ("consent provisions", in shorthand) lies at the heart of the main issue of law before this court (issue (iii) above). The "Consents to Prosecution" Report of the Law Commission of England and Wales, published in 1998, provides a convenient starting point. The Commission suggested that the statutory requirement of the provision of consent to prosecution by a Law Officer is typically required in cases involving issues of public policy, national security or relations with other countries.

[27] There is also a historical source of note. In its report the Law Commission cited the evidence of Sir Donald Somervell QC (Attorney General) to a Parliamentary select committee in 1939:

“Where parliament provides that the fiat of the Attorney General or the Lord Advocate is a condition precedent to a prosecution taking place, it is not their business to get a prosecution. It is their business to exercise their discretion to the best of their ability, it being clear from the fact of their consent being necessary that this is a case where parliament thinks it particularly important that a discretion should be exercised and that prosecutions should not automatically go forward merely because the evidence appears to afford technical proof of an offence.”

Notably, the Law Commission specifically recommended that the consent provision of the 1986 Act, section 27, should be retained. One of the main justifications proffered was that, in the absence of this requirement, there was a risk of infringing a defendant’s rights under the ECHR. This recommendation prevailed.

[28] Paragraph 6.62 of the Law Commission’s Report provides the following useful information:

“The following are examples of statutes in which we believe the consent provisions specified below should be retained due to the likelihood that a defendant will reasonably contend that a prosecution would violate his or her Convention rights:

- the Public Order Act 1986 (section 27, in relation to offences involving racial hatred);
- the Children and Young Persons (Harmful Publications) Act 1955 (section 2(2), in relation to offences of printing, publishing and selling works to which the Act applies);
- the Theatres Act 1968 (section 8, in relation to offences of the presentation of obscene performances of plays, the provocation of a breach of the peace by means of a public performance of a play and the publication of defamatory matter in the course of a performance of a play);

- the Contempt of Court Act 1981 (section 7, in relation to proceedings for contempt under the ‘strict liability rule’, and section 8(3) which relates to proceedings for contempt regarding breach of confidentiality of jury deliberations); and
- the Obscene Publications Act 1959 (section 2(3A) in relation to the offence of publication of obscene matter under that section).”

[29] The rationale of statutory consent provisions of the kind under scrutiny in this appeal was addressed in a Home Office memorandum to the Franks Committee in 1972 (see the report: CMMD 5104, Volume 2, p125, para 7) which was cited with approval by Lord Hope in *R (Purdy) v Director of Public Prosecutions* [2009] UKHL ... at [45]–[46]:

“... the point was made that the basic reason for including in a statute a restriction on the bringing of prosecutions was that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances ...

Among the five reasons that were given by the Franks Committee were to secure consistency of practice, to prevent abuse of the kind that might otherwise result in a vexatious private prosecution, to enable account to be taken of mitigating factors and to provide some central control of the use of the criminal law where it has to intrude into areas which are particularly sensitive or controversial.”

[30] We consider that offences under Part III and Article 21(1) of the 1987 Order belong to the first of these categories (this was not contested). A decision whether to prosecute under any of these provisions will customarily require of the prosecuting authority an exercise of balancing competing rights and interests and weighing public interest considerations. There may also be elements of public and political controversy. On one side of the notional pendulum, a person’s right to freedom of expression will habitually feature. Article 9 ECHR rights may also be in play. On the other side, issues of insult, offence and discrimination, sometimes involving minority groups, will typically arise. The necessary balancing exercise will frequently be of a delicate and challenging nature.

### *The decided cases*

[31] Having regard to the highly specific and narrowly focused nature of the statutory provisions under scrutiny in this appeal, the absence of any decided case directly in point is unsurprising. The most important of the decided cases considered

below sound on the rationale and importance of statutory consent provisions of the type under scrutiny and the consequences of non-compliance. We begin with three Northern Irish decisions which have featured in the parties' submissions.

[32] The first is *R v Smyth* [1982] NI 271. There the issue was whether the AGNI's consent was required for prosecuting offences in Northern Ireland in circumstances where elements of the actus reus had taken place in the Republic of Ireland. The Crown Court (Hutton J) ruled that the AGNI's consent was a prerequisite to jurisdiction and in its absence the proceedings were invalid (see p276 E & F especially). While this decision predates the major criminal justice reforms effected by the 2002 Act, we consider that it sounds on the third of the questions tabulated in para [24] above.

[33] The second in this trilogy of decisions is *Young v Public Prosecution Service for Northern Ireland* [2012] NICA 35. This case concerned a dispute about the validity of a second prosecution purportedly brought with the consent of DPPNI in the wake of an earlier prosecution considered null and void and, therefore, struck out, on the ground that no such consent had been provided. We consider that this decision does not illuminate the task before this court, because (a) the court accepted the PPSNI argument that the criminal proceedings in question had (in the language of the statute) been "instituted by" DPPNI, thereby rendering the DPPNI consent issue moot and (b) the case involved section 44(1)(a) of the 2002 Act (summary prosecution by summons) and, hence, Article 20 of the Magistrates' Courts (NI) Order 1981: unlike the present: police charge in custody, engaging section 44(1)(c) of the 2002 Act.

[34] In the initial written argument of the DPPNI the decision in *Re Crawford's Application* [2022] NIQB 24 featured with some prominence. This was a case where the Divisional Court (a) rejected the applicant's contention that his prosecution was invalid in the absence of the consent of the DPPNI; and (b) resolved in favour of DPPNI a delegation of authority issue under section 36(1) of the 2002 Act. Three observations are appropriate. First, no clear submission based on this decision was formulated before this court. Second, the *Young* case concerned the delegation provisions in section 36 of the 2002 Act, which do not relate directly to any of the issues for this court formulated above. Finally, little assistance is derived from the reliance by the DPPNI in this case upon statutory provisions in which the legislature has prescribed that the consent to prosecution of the DPPNI must be given "personally": neither this issue nor anything related or ancillary thereto arises in this appeal.

[35] The English Court of Appeal has provided a noteworthy analysis of the requirement for AG consent to prosecution in *R v Lalchan* [2022] EWCA Crim 680. That case concerned the English equivalent of Article 25 of the 1987 Order, namely section 27(1) of the Public Order Act 1986, which provides:

"No proceedings for an offence under this part may be instituted in England and Wales except by or with the consent of the Attorney General."

The appellant was convicted of an offence contrary to section 18(1) in proceedings which were instituted without the consent of the Attorney General. A consent was provided belatedly, following conviction and prior to sentence. The Court of Appeal quashed the conviction, stating at para [42]:

“We therefore have this position. The natural and ordinary meaning of the statutory language, set in context, strongly supports the defendant’s case. Purposive considerations strongly support the defendant’s case. The weight of previous legal authorities strongly supports the defendant’s case. Since all the arrows point in the same direction that is the direction we propose to follow. Accordingly, since the consent of the Attorney General was not obtained before the proceedings (in the form of count 5) were instituted those proceedings were invalid. It follows that the conviction on count 5 was itself invalid. The conviction on that count therefore must be adjudged unsafe and be set aside. The appeal is therefore allowed.”

[36] To similar effect is *R v Clarke and McDaid* [2008] UKHL 8. There the statutory provisions in play were sections 1 and 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933. Section 2(1) stipulated that “... the proper officer of the court shall ... sign the bill [of indictment]”, thereby transforming it into an indictment, in every case. The Parliamentary intention ascertained by the House of Lords was that absent compliance with this requirement there could be no valid trial on indictment (per Lord Bingham at [18] and [19] particularly). The contribution of Lord Brown at [42] is noteworthy:

“Here, to paraphrase Lord Lane CJ in *Morais*, the legislation was designed to ensure that the proper requirements have been fulfilled before a trial proper can start, a fact to be certified by the signature of the proper officer **indicating that he has properly satisfied himself that this is so**. So, at least, it was perceived by those who enacted it. In short, the signature (which thereby translates a bill of indictment into an indictment) is **no less a condition precedent to a proper trial than is the consent (whether of a High Court judge for a civil claim or the DPP for a criminal prosecution) required for the commencement of valid proceedings under the Mental Health Act.**”

[Emphasis added.]

The first of the two highlighted passages expresses pithily the essence of statutory consent to prosecution provisions.

[37] There are earlier decisions to like effect: see *R v Angel* [1968] 1 WLR 669 and *R v Morais* [1988] 87 Cr App 9. The latter case was the precursor to *Clarke and McDaid*. In *Angel*, the defendant pleaded guilty at York Assizes to certain sexual offences and was sentenced to four years' imprisonment. Section 8 of the Sexual Offences Act 1967 provided:

"8. No proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions against any man for the offence of buggery with, or gross indecency with, another man ..."

No DPP's consent had been provided. The Court of Appeal quashed the convictions, Lord Parker CJ stating at 670C:

"... in the result the whole of the trial, including the committal proceedings, has been a complete nullity, having been instituted without that necessary consent."

[38] In *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, the statutory provision in play was section 139(2) of the Mental Health Act 1983, which provided that the initiation of civil proceedings under the statute required the leave of the High Court:

"No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court ..."

The House of Lords, by a majority, held that the civil proceedings in question had been invalidated by the failure to obtain the requisite leave. The rationale for the decision of the majority rested mainly on the legislative history. In particular, the requirement for leave under scrutiny had been reflected in a series of statutes spanning several decades. As Lord Bingham observed at [18]:

"... the words first introduced in section 16(2) of the 1930 Act ('No proceedings, civil or criminal, shall be brought ...') appear to be clear in their effect and have always been thought to be so. They were introduced with the obvious object of giving mental health professionals greater protection than they had enjoyed before. To uphold the decision of the three courts which have already considered the issue in this case and decided it in accordance with a clear consensus of professional opinion is ... [appropriate]."

This may be linked to an earlier passage in para [15]:

“When Parliament legislated in 1982-1983 there was, as it would seem, a clear consensus of judicial, professional and academic opinion that lack of the required consent rendered proceedings null, and Parliament must be taken to have legislated on that basis.”

[39] Lord Brown, another member of the majority, reasoned to like effect at para [71]ff. Of note is his observation at para [74] that the question of whether the relevant restriction is “necessary or desirable” is for the legislature and not the courts. That the nature of the relevant statutory requirement is self-evidently of importance emerges with particular clarity from Lord Brown’s reasons for contrasting the decision of the Court of Appeal in *R v The Secretary of State for the Home Department, ex parte Jeyanthan* [2000] 1 WLR 354, at para [74]:

“I cannot see the ‘procedural requirement’ here in question as remotely akin to that under consideration [in *Jeyanthan*] - essentially a failure to use the prescribed form of application for leave to appeal with the consequential omission of a declaration of truth.”

### *Statutory construction principles*

[40] The task for this court is fundamentally one of statutory construction. Certain well-established principles fall to be considered. Most recently, the United Kingdom Supreme Court has drawn up a useful code, in *For Women Scotland v Scottish Ministers* [2025] UKSC 16, at paras [9]-[14], quoting firstly from *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, in which Lord Hodge DPSC, giving the leading judgment, stated (paras 29-31):

“29. The courts in conducting statutory interpretation are ‘seeking the meaning of the words which Parliament used’: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: ‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context’ (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary

source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: ‘Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.’

30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on *Statutory Interpretation*, 8<sup>th</sup> ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. ...

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. ...”

[41] *For Women Scotland* continues, at [10]-[12]:

“[10] In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, Lord Bingham of Cornhill warned against giving a literal interpretation to a particular statutory provision without regard to the context of the provision in the statute and the purpose of the statute. He stated (para 8):

‘The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should

be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'

[11] The general approach of focussing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the court must resolve, the indicators of the legislature's purpose outside the provision in question, including the external aids described in para 30 of R (O) quoted above, must be given significant weight. As Lord Sales has stated in an extra-judicial writing, 'sometimes the purpose for which legislative intervention was required may be the very prominent focus for the legislative activity which follows from it, and thus may frame in a particularly strong way the context in which that activity takes place' (see 'The role of purpose in legislative interpretation: inescapable but problematic necessity', Presentation at the Oxford University and University of Notre Dame Seminar on Public Law Theory: Topics in Legal Interpretation, 19 September 2024). Such aids can explain the meaning of a statutory provision which is open to doubt and can themselves alert the court to ambiguity in the provision, but they cannot displace the meanings conveyed by the clear and unambiguous words of a provision construed in the context of the statute as a whole."

[12] Lord Nicholls' important constitutional insight in *Spath Holme*, that citizens with the help of their advisers should be able to understand statutes, points towards an interpretation that is clear and predictable. As Lord Hope DPSC stated in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153, at para 14:

'The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used.'"

[42] The presumption against absurdity, which features in Mr McGleenan’s argument, was the subject of recent consideration by the Supreme Court, in *R (On the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] 1 WLR 2594, at [43]. It is appropriate to highlight also [40]-[42], which rehearse orthodox dogma:

**“(a) The relevant interpretative principles**

40 The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme* [2001] 2 AC 349, 396, ‘Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.’

41 As was pointed out by this court in *Rosendale Borough Council v Hurstwood Properties (A) Ltd* [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt JJSC), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):

‘Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.’

In the second, Lord Mance JSC said (para 10):

‘In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance ... In this area as in the area of

contractual construction, ‘the notion of words having a natural meaning’ is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391c, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.’

The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.

42 It is legitimate to refer to Explanatory Notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament’s meaning is to be ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2023] AC 255, paras 29–30 (Lord Hodge DPSC). Reference to the Explanatory Notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen.

43 The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool*[2018] 2018] 1 WLR 2431, paras 23–25 (Lord Kerr of Tonaghmore JSC), citing a passage in Bennion on Statutory Interpretation, 6th ed (2013), p 1753. See now Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), section 13.1(1):

**‘The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature.’ As the authors of Bennion, Bailey and Norbury say, the courts give a wide meaning to absurdity in this context, “using it to include virtually any result which is**

**impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.”** The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), **“The strength of the presumption ... depends on the degree to which a particular construction produces an unreasonable result.”** I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity ...”  
[Emphasis supplied]

#### *Section 41, 2002 Act: Statutory Context*

[43] One of the features of the constitutional settlement in Northern Ireland in 1998 was the requirement for a “wide-ranging review of criminal justice” (Policing and Justice Chapter, Paragraph 5 and Annex B of CM3883). This review was, specifically, to consider “the arrangements for the organisation and supervision of the prosecution process ...” (Annex B). The report entitled ‘The Review of the Criminal Justice System in Northern Ireland’ resulted. While the report reviewed and made recommendations about certain provisions of the 1972 Order, it was silent as regards Article 7 (para [7] supra).

[44] The choreography was, in brief terms, the following. In the wake of the 1998 settlement and the ensuing Criminal Justice Reform report, the 2002 Act emerged. Pursuant to section 37, DPPNI was required, for the first time in history, to devise and promulgate, inter alia, a Code for Prosecutors. This Code which followed in June 2005 (the current edition being that which was published in May 2023), featured in argument before this court. While the Code addresses the issue of consents to prosecute, in paras 4.51-4.53, it does so in relatively anodyne terms. It recites correctly:

“The requirement for consents for specific offences is determined by the legislature and is to ensure that cases of a particular nature are required at the appropriate level.”

This is followed by certain illustrations, coupled with a vague reference to the power of delegation (under section 36). There is also a statement in the Code that its content has been “guided by” the UN Guidelines on the Role of Prosecutors. Neither the Code nor the UN Guidelines contain anything directly material to the central issue to be determined by this court. Furthermore, as the Code postdates the statutory provisions under scrutiny it is doubtful whether it is an admissible aid to their meaning (see *R v Perry* [2024] NICA) in any event.

[45] In this context, we are mindful of Mr McGleenan’s submission that the interpretation of section 41(2) of the 2002 Act espoused by the appellant abrades with the transformative policy purpose of the 2002 Act. This policy purpose is in our view uncontroversial. The 2002 Act made provision for new structures and institutions in the justice system of Northern Ireland. The transformation which it effected is evident beyond Part 2 (supra), extending to other provisions of the statute: such as section 3 (Judicial Appointments Commission); section 9A (Judicial Appointments Ombudsman); sections 13-15 (Presiding Judicial Officers); section 22 (AG for Northern Ireland); section 27 (Advocate General); section 29 (Public Prosecution Service); section 45 (Chief Inspector of Criminal Justice) and section 50 (Law Commission). The Act further devised transitional changes to existing structures in the justice system, such as the provision made for an Advocate General (supra). The 2002 Act stands in stark contrast with previous constitutional statutes (beginning in 1925) and the 1972 Order. Together with the Northern Ireland Act 1998 and the Police Acts it reflected the advent of a new constitutional and legal order in Northern Ireland.

#### *The transfer of functions issue determined*

[46] The doctrinal requirement which shines most brightly in this appeal is the need to ascertain the Parliamentary intention underlying Article 25 of the 1987 Order, considered in tandem with section 41(2) of the 2002 Act. “Consent provisions”, as we have labelled them above, are in our estimation the clearest expression of a Parliamentary intention that especially careful, elevated and enhanced attention must be given in deciding whether a prosecution for a particular type of offence is appropriate and, further, that this function be exercised at the non-judicial apex of the criminal justice system. This special attention is required to be provided at what is constitutionally the highest relevant level, namely by the Attorney General or by the Director of Public Prosecutions. Cases of this kind belong to a special, discrete category. They are habitually distinguished by considerations of controversial and complex aspects of the public interest.

[47] The selection of cases of this kind for the special treatment noted and their attendant restrictions, requirements and formalities are a matter for the legislature. They represent a long-standing feature of criminal justice legislation throughout the United Kingdom. It is incumbent upon every court to view every “consent provision” of the kind under scrutiny in this appeal with the respect and solemnity which it demands.

[48] We consider that the decisions in *Clarke, Lalchan, Seal, Angel* and *Roulston* are indicative of a strict and narrow judicial approach to the construction of consent provisions such as Article 25 of the 1987 Order. It is striking that in the zealous statutory reforms effected by the 2002 Act, the consent requirement enshrined in Article 25 – and in other statutes – was preserved. The single material change effected was that, thereafter, this function would be exercisable no longer by the relevant AG but by DPPNI.

[49] Before the advent of section 41(2) of the 2002 Act, there were two possibilities under article 25 of the 1987 Order. The first was that a prosecution for a relevant offence could be instituted by the relevant AG. The second was that such prosecution could be instituted (by definition, by some other person or agency) with the consent of the relevant AG. Article 25 is couched in exclusive and exhaustive terms. It prescribes no other possibility. Viewed through this prism, a prosecution for a relevant offence could be effected only by one of these two permitted mechanisms. Otherwise, no valid prosecution could be instituted.

[50] Has this legal landscape been altered by section 41(2) of the 2002 Act? To begin with, we consider it clear that section 41(2) applies to the consent element of Article 25 of the 1987 Order. In particular, absent any definition/s or other provision of the statute indicating otherwise, we are satisfied that nothing turns on the slightly different wording of these two provisions, namely the terminology of “criminal proceedings” in section 41(2) and “prosecution” in Article 25. Furthermore while, superficially, the wording “institution or conduct” in section 41(2) is wider than “instituted” in Article 25, we are again mindful of the absence of any definition/s or other provision of the statute indicating that they have different meanings. Neither party sought to argue that this is a matter of moment, correctly in our view. We consider this to be an illustration of drafting caution on the part of a prudent draftsman. Our first conclusion, therefore, is that section 41(2) transferred to DPPNI the AG ‘consent’ function enshrined in Article 25 of the 1987 Order. This was not contentious as between the parties.

[51] The next aspect of the ‘transfer of functions’ issue is a little more entangled: did section 41(2) (of the 2002 Act) transfer to DPPNI the AGNI ‘institution of prosecution’ function enshrined in Article 25 of the 1987 Order? This was contentious as between the parties. The positive answer urged on behalf of DPPNI was a prerequisite to its consequential contention that the prosecution of the appellant was instituted by DPPNI: see question (ii) in para [20] above. The negative answer espoused on behalf of the appellant was designed to effectively extinguish question (ii).

[52] The statutory language under scrutiny is in section 41(2) of the 2002 Act, which (repeating) states:

“Any function of the Attorney General for Northern Ireland of consenting to the institution or

conduct of criminal proceedings is transferred to the Director (but subject to Schedule 7).”

(The words in parenthesis are immaterial in the present context)

The short sentence constituting section 41(2) has no internal punctuation. It is grammatically correct. Furthermore, it is not wanting in coherence. Its ‘consent to institution’ element is clear and unproblematic. The debate before this court centred on (a) the ‘conduct’ element of section 41(2) and (b) the consideration that section 41(2) is not in either of the following linguistic terms:

“[1] “Any function of the Attorney General for Northern Ireland of consenting to the institution or conduct of, **or instituting**, criminal proceedings is transferred to the Director (but subject to Schedule 7).

[2] “Any function of the Attorney General for Northern Ireland of consenting to the institution of, **or conducting**, criminal proceedings is transferred to the Director (but subject to Schedule 7).”  
[emphasis supplied]

The strongest argument canvassed by Mr Larkin was, in substance, that section 41(2) is not in the terms of either of these linguistic formulae.

[53] The construction of section 41(2) of the 2002 Act urged by Mr McGleenan on behalf of DPPNI in substance invited this court to endorse one of these alternatives. The question thereby raised is whether this would be harmonious with the framework of legal principle outlined in paras [40]–[42] above. In short: would either course represent a legitimate exercise of judicial statutory interpretation?

[54] Section 41(2) must be considered (a) in the immediate context of the section as a whole, (b) in the context of Part 2 of the 2002 Act, (c) in the broader context outlined in paras [43]–[45] above and (d) in the historical context noted in paras [5] to [6]. Viewed through this broad prism, we consider that the legislative intent underpinning Part 2 of the 2002 Act is readily discernible: it was to transfer to DPPNI all of the prosecutorial and related functions previously exercisable by AGNI. The question is whether this intent has been fulfilled either by the language of section 41(2) or by a legitimate judicial exercise of statutory construction. The first of these alternatives must be resolved in favour of the appellant’s argument. Our attention, therefore, will be focussed on the second.

[55] The appellant argues that the effect of section 41(2) is to reserve to AGNI the prosecutorial function in article 25 of the 1987 Order. This invites the question: what purpose would thereby be served? The argument on behalf of the appellant does not

engage meaningfully with this pertinent question. We are unable to identify any such purpose. This is the first shortcoming in the appellant's argument.

[56] Next, it is appropriate to highlight all the prosecutorial duties and functions of DPPNI. These are detailed in section 31 of the 2002 Act, which provides in material part:

**“Conduct of prosecutions**

The Director must take over the conduct of all criminal proceedings which are instituted in Northern Ireland on behalf of any police force (whether by a member of that force or any other person).

(1A) The Director must take over conduct of all criminal proceedings which are instituted in Northern Ireland by the ICRIR.]

(2) The Director may institute, and have the conduct of, criminal proceedings in any other case where it appears appropriate for him to do so.

(3) This section does not preclude any person other than the Director from—

- (a) instituting any criminal proceedings, or
- (b) conducting any criminal proceedings to which the Director's duty to conduct proceedings does not apply.

(4) The Director may at any stage take over the conduct of any criminal proceedings which are instituted in circumstances in which he is not under a duty to take over their conduct, other than any proceedings of which the Director of the Serious Fraud Office has conduct.

(5) The Director must give to police forces and to the ICRIR such advice as appears to him appropriate on matters relating to the prosecution of offences.”

Had it been the legislative intention to reserve to the relevant AG the prosecutorial function in article 25 of the 1987 Order, one would expect this to find expression in section 31, either as a freestanding provision or by the use of familiar words of exception, qualification or saving. There is no such provision. This is a further consideration militating against the appellant's argument.

[57] There are two further noteworthy features of section 31. First, this section is not expressed to be “subject to” section 41(2). The second is that a legislative intention to reserve this prosecutorial function to the relevant AG could have been reflected with ease in appropriate terms. These further considerations are antithetical to the appellant’s argument.

[58] There is a further significant consideration, namely that the appellant’s argument, if correct, would produce the result that the relevant AG could bring criminal proceedings under article 25 of the 1987 Order only with the consent of DPPNI. We consider that in the overall scheme of the statutory reforms examined above and the historical relationship between these two offices this would be anomalous. Furthermore, we are unable to identify any material purpose which would be thereby furthered. No other statutory provision entailing this arrangement was brought to the attention of the court.

[59] At this juncture, having rehearsed the general framework of statutory construction principles at paras [40]–[42] above, we turn to consider certain of the specific principles which have been endorsed at the highest judicial level. We do so, firstly, in our examination of the legitimacy of adopting the mechanism of the reading in of two words in the terms of the first of the two formulae in para [52] above, viz:

“Any function of the Attorney General for Northern Ireland of consenting to the institution of, **or instituting**, criminal proceedings is transferred to the Director (but subject to Schedule 7).”

[60] The judicial correction of a drafting error or oversight is a legitimate exercise in certain circumstances. The oft cited passage in the speech of Lord Diplock in *Jones v Wrotham Park Estates* [1980] AC 74, at 105–106 resonates in this context. The modern rule is widely considered to be expressed by Scarman LJ in *Western Bank v Schindler* [1977] Ch 1, at 18:

“Judicial legislation is not an option open to an English Judge. Our Courts are not required, as are, for instance, the Swiss Courts (see the Swiss Civil Code, Articles 1 and 2), to declare and insert into legislation rules which the Judge would have put there, had he “been the legislator. But our Courts do have the duty of giving effect to the intention of Parliament, if it be possible, even though the process requires a strained construction of the language used or the insertion of some words in order to do so: see Luke v. Inland Revenue Commissioners, (1963) Appeal Cases, 557, per Lord Reid at page 577. The line between judicial legislation, which our law does not permit, and judicial interpretation in a way best designed to give effect to the intention of Parliament is not an easy one to draw. Suffice

it to say that before our courts can imply words into a statute the statutory intention must be plain and the insertion not too big, or too much at variance with the language in fact used by the legislature. The courts will strain against having to take the first of the three courses I mentioned; that is to say, leaving unfilled the 'casus omissus.'"

Academic approval of this passage is found in Bennion, Bailey and Norbury on Statutory Interpretation ("Bennion") (8<sup>th</sup> ed), p 529 Cross (op cit), p 103 and Craies On Legislation (12<sup>th</sup> ed), para 20.1.11. Furthermore, this passage is harmonious with the analysis offered by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, cited with approval by the House of Lords in *Quintavalle* (infra), at [10].

[61] The adoption of the reading in mechanism under consideration would in our view fall short of the more radical approach identified by Lord Reid in *Luke v. Inland Revenue Commissioners*, [1963 ]AC, 557, at 577:

"To apply the words literally is to defeat the obvious intention of the legislature and to produce a wholly unreasonable result. **To achieve the obvious intention and produce a reasonable result we must do some violence to the words.** This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid the wholly unreasonable result that the words of the enactment must prevail."

[our emphasis]

[62] We consider that to adopt this reading in mechanism would be compatible with another of the leading judicial statements in this field:

"The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the

enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

(*R (Quintavalle v Secretary of State for Health* [2003] 2 AC 687, at [8], per Lord Bingham). Summarising, we consider that adoption of the reading in mechanism debated in the preceding paragraphs would be compatible with established legal principles of statutory interpretation.

[63] Next we turn to consider the two words "or conduct" in section 41(2) of the 2002 Act. The word "conduct" does not feature in article 25 of the 1987 Order. Article 25 confers on AGNI two functions, namely instituting a relevant prosecution and consenting to the institution of a relevant prosecution. The second element of section 41(2) under scrutiny purports to transfer to DPPNI the function of consenting to the "conduct" of specified criminal proceedings. We consider that this cannot be related to article 25 of the 1987 Order, as Article 25 contains no 'conduct' provision. Thus, there is no nexus between section 41(2) and Article 25 function of consenting to the "conduct" (to be contrasted with the "institution") of specified criminal proceedings. This elicited a negative response. Independently, this court is unaware of any such statutory provision. This is unsurprising, since there can be no valid proceedings without the requisite consent. Furthermore, the word "conduct", considered in its full statutory context, is typically used in the 'take over conduct' phraseology (see especially section 31, *infra*).

[64] While the starting point is the presumption that every word in an enactment is to be accorded a meaning (Bennion, p 631), this presumption, in common with all others in this field, is rebuttable. The decided cases and leading texts demonstrate that the phenomenon of judicial "taking out" statutory words is neither novel nor revolutionary: see Cross, *Statutory Interpretation* (3<sup>rd</sup> ed) pp 36, 93 and 195–196. It was unequivocally recognised by the House of Lords in *Federal Steam Navigation v DTI* [1974] 2 ALL ER 97, at 100 (per Lord Reid):

"Cases where it has been properly held that a word can be struck out of a deed or statute and another substituted can as far as I am aware be grouped under three heads: where without such substitution the provision is unintelligible or absurd or totally unreasonable; where it is unworkable;

and where it is totally irreconcilable with the plain intention shown by the rest of deed or statute.”

[65] To like effect is the statement of Brett J in *Stone v Yeovil Corporation* [1876] 1 CPD 691:

“It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but if there be a word or phrase therein to which no sensible meaning can be given, it must be eliminated”

More recently, the English Court of Appeal did not doubt its ability to take this course, in *A-G v Hislop* [1991] 2 WLR 219.

[66] The immediately preceding analysis gives rise to two possible views. The first is that the words “or conduct” in section 41(2) of the 2002 Act are redundant and, thus, must be disregarded. The second is that they are not redundant and have some discernible meaning. We are just about inclined to leave open the second possibility, since it is unnecessary to adopt the more extreme first view in the present context. This is so because it is in our estimation abundantly clear that the words “or conduct” have no application to the prosecution of the appellant.

[67] We are satisfied that by virtue of section 31(2) of the 2002 Act (*supra*) there is no lacuna regarding the institution of criminal proceedings under article 25 of the 1987 Order arising out of the preceding analysis. We consider that by reason of section 31(2) DPPNI is indubitably empowered to bring criminal proceedings for an offence contrary to article 10 of the 1987 Order.

### *The transfer of functions issue: Conclusion*

[68] The construction of section 41(2) of the 2002 Act canvassed on behalf of the appellant is contraindicated by the several considerations identified in paras [55]–[58] above. Fundamentally, we consider that it would conflict with the legislative intent identified by this court. It would, in the words of Mr McGleenan’s written argument, “abrade with” the transformative policy of the 2002 Act. Furthermore, it is unable to withstand the exercise of statutory construction conducted above.

[69] Summarising, we consider that there is a series of factors decisively confounding the construction of section 41(2) of the 2002 Act advanced by the appellant. Our answer to the ‘transfer of functions’ question posed in para [24] above is: section 41(2) of the 2002 Act transfers to DPPNI the function of instituting a prosecution for an offence under Part III or article 21(1) of the 1987 Order conferred on the relevant AG by Article 25 thereof.

[70] In passing, while the point only flickered in argument, we consider it clear that absent any definition/s or other provision of the statute indicating otherwise there is no sensible difference between the linguistic formulae “giving of consent” in section 33(1) and “consent” in section 41(2).

*The institution of criminal proceedings issue*

[71] We have traced the path of the appellant’s prosecution in paras [2]–[5] above. In order to determine the issue of whether the criminal proceedings against the appellant were instituted by DPPNI, it is necessary to connect the steps actually taken by both DPPNI and the Police Service of Northern Ireland (the “Police Service”), with the corresponding statutory provisions. In undertaking this exercise, faithful adherence to the statutory language is essential.

[72] The Police Service, which features nowhere in the statutory provisions under scrutiny, was the only criminal justice agency with which the appellant had any direct interaction initially. This entailed his arrest and interview, followed by the preferral of the relevant charge against him. The charge was recorded in a complaint in which the Chief Constable of the Police Service is named as the Complainant. The Police Service then remanded him in custody to appear before Belfast Magistrates’ Court. We consider it clear that all of this gives rise to a material and indelible fact: by these actions the Police Service instituted the relevant criminal proceedings against the appellant. This course was authorised by the 2002 Act. The effect of section 44 of the 2002 Act is that criminal proceedings can be instituted in a variety of ways. In the present case, the relevant provision is section 44(1)(c), the effect whereof is that the appellant was “... charged with the offence after being taken into custody without a warrant ... [and was] informed of the particulars of the charge ...” We are unable to identify any plausible competing analysis.

[73] Two important consequences followed. First, criminal proceedings against the appellant had been instituted. In the language of section 31(1) of the 2002 Act, these were “... criminal proceedings ... instituted ... on behalf of any police force ...”. Absent any definition/s or other provision of the statute indicating otherwise, we reject any suggested distinction between the statutory formulae of “criminal proceedings” and “prosecutions.” In concrete terms, it would be truly absurd to suggest that when the appellant first appeared before the magistrates’ court he was the subject of criminal proceedings but not a prosecution. In abstract legal terms, the suggestion that “prosecution” in Article of the 1987 Order has a meaning differing from “criminal proceedings” in section 41(2) [and other provisions] of the 2002 Act is, considering the full statutory context, manifestly unsustainable.

[74] The second consequence was that the aforementioned conduct of the Police Service triggered the DPPNI’s “take over conduct” obligation under section 31(1). This was manifested on the occasion of the first listing of the case before Belfast Magistrates’ Court. On that occasion the Police Service, having instituted the criminal proceedings against the appellant, was no longer conducting them. Rather, the

conduct of the proceedings was effected exclusively by DPPNI. By the stage of the initial remand listing, DPPNI was honouring its unqualified statutory obligation to "... take over the conduct of ..." these criminal proceedings. DPPNI had become the prosecutor.

[75] We complete this discrete statutory analysis as follows. By virtue of section 31(2) of the 2002 Act, the criminal proceedings against the appellant could have followed an alternative path. As an alternative to the criminal proceedings having been instituted by the mechanism of the Police Service post-arrest charge, they could have been instituted by DPPNI pursuant to section 31(2) (presumably following the long-recognised practice of a Police report to DPPNI). That, however, did not occur. The only other alternative which existed was the institution of the criminal proceedings by "... any person other than the Director", pursuant to section 31(3)(a), which appears to foreshadow a possible private prosecution. The possibility of the Police Service continuing to conduct the criminal proceedings, having instituted them, did not exist: this was precluded by the language of section 31(1).

[76] Summarising, adhering faithfully to the statutory language, the suggestion that the criminal proceedings against the appellant were instituted by DPPNI is quite impossible. Rather, as our analysis demonstrates, the proceedings were instituted by the PSNI. Subsequently, again in the statutory language, DPPNI took over the conduct of the proceedings. This is no technical distinction. On the contrary, there is a clear difference between instituting criminal proceedings and taking over the conduct of criminal proceedings already instituted. That distinction pre-existed the 2002 Act and it has been preserved, unequivocally so. It would be logically impossible for the DPPNI to both institute and take over the conduct of criminal proceedings. The contrary, correctly, was not argued. For the reasons given, we reject the argument that the prosecution of the appellant was instituted by DPPNI. This determines the second question formulated in para [20] above.

*Case stated question (i): The jurisdiction issue*

[77] It is uncontentious that the prosecution of the appellant has at all times proceeded without any type of consent by or on behalf of DPPNI. Mr McGleenan accepted that the 'jurisdiction question' must be answered in the affirmative (viz in the appellant's favour) in the event of this court either (a) rejecting his arguments on the 'transfer of functions' question (in which event the 'the institution of criminal proceedings question' does not arise), or (b) acceding to his arguments on the transfer of functions question but rejecting his arguments on the institution of criminal proceedings question. In the event, we have rejected his arguments on the latter issue.

[78] As our examination of the decided cases above demonstrates, statutory consent to prosecution requirements go to the jurisdiction of the court in question. The issue is binary in nature. A valid consent confers jurisdiction on the court. Conversely, its absence deprives the court of jurisdiction

[79] We are conscious that the ‘*Jeyanthan/Soneji*’ argument to the effect that the legislature did not intend that the prosecution of the appellant should be invalidated entirely in the absence of DPPNI consent was canvassed on paper. At the hearing, while the argument initially flickered, following exchanges with the bench it was not pressed by Mr McGleenan. This was a wise choice, as the preceding analysis indicates.

[80] Our conclusion on the first question in the case stated is the following. In a summary prosecution for an offence under Article 10 of the Public Order (NI) Order 1987 to which the consent requirement of Article 25 (as modified by section 41(2) of the Justice (NI) Act 2002) applies, the magistrates’ court does not have jurisdiction to hear and determine the prosecution in the absence of a consent to prosecute of the DPPNI.

*Case stated question (ii): Section 33 of the 2002 Act*

[81] The issue of law raised by this question is whether a valid DPPNI consent to prosecution must in all cases be fully compliant with section 33 of the 2002 Act. Alternatively phrased, is the section 33 model exclusive? If a valid DPPNI consent to prosecution must in all cases be fully compliant with section 33 of the 2002 Act, it follows, per section 33(6), that it must be signed by DPPNI or their deputy.

[82] On the one hand, one has the evident legislative aims underpinning section 33. These are certainty, consistency, transparency, predictability and the promotion of high quality and conscientious decision making. All of these aims are compatible with the rationale identified in paras [26]–[30] above. Furthermore, the terms of section 33 are indicative of a legislative intention to regulate the topic of consents to prosecution by a detailed and exacting code, in common with its statutory predecessor, Article 7 of the 1972 Order (para [6] supra). Why would the legislature go to such lengths if DPPNI could ignore or bypass this code with impunity? This approach favours the analysis that section 33 prescribes an exclusive mechanism for the provision of consents to prosecution.

[83] On the other hand, section 33 has certain notable textual features. These are, in particular, the “deemed to be” language of section 33(2); the absence of the word “only” or comparable terms indicative of exclusivity; the lack of familiar mandatory language such as “shall” or “must”; and the lack of any provision stating (in terms) that non-compliance will be fatal to the validity of any DPPNI purported consent. Furthermore, where a consent in whatever form has been provided by DPPNI, under section 33(5) post-arraignment amendments are possible. The combined effect of these textual features inclines towards a non-exclusive construction of section 33.

[84] We have considered whether certain decided cases have some bearing on this question. Post-hearing, the court invited, and received, the parties’ submissions on the decisions in *R v Bull* (1994) 99 Cr. App. R. 193, *R v Jackson* [1997] Crim LR 293; [1996] Lexis Citation 3678 and *R v Whale & R v Lockton* [1991] Crim LR 692; [1991] Lexis Citation 3017. The *Bull* and *Whale & Lockton* cases concerned the timing of the

provision of a DPP consent and the statutory remand provision. They are rather remote from the present context. The *Jackson* case is more pertinent. It concerned both the form of consent and the exercise of the DPP's functions by a Crown Prosecutor. Notably, while the requisite DPP's consent had not been provided in any form, the English Court of Appeal was prepared to infer it from the Crown Prosecutor's preparation and service of the indictment and certain related factors arising out of his affidavit.

[85] These decisions are indicative of some flexibility, viz. the antithesis of rigid exclusivity, in the matter of providing consents to prosecute. They are forgiving in nature. They also engage the settled principle of statutory construction that when enacting new legislation, Parliament is presumed to be cognisant of the existing law (*Bennion et al*, Section 24.5).

[86] On the other hand, as a matter of precedent these decisions are not binding on this court. Furthermore, we are mindful that the E&W statutory provisions featuring in these cases do not mimic their Northern Ireland counterparts and in particular have no section 33 equivalent. In addition, the principle of statutory construction noted is obviously weakened where, as here, there are significant differences between the two statutory codes being compared. For these reasons, we treat the E&W cases with appropriate caution and resolve this issue without reliance on any of them.

[87] In this case, no consent to prosecution in any form was provided by the DPPNI to this prosecution. Accordingly, the section 33 issue arises in abstract fashion. As appears from para [1] above, we have reformulated the question of law posed in the case stated by the substitution of two questions. In view of the importance of the section 33 issue and taking into account that the court has received the parties' considered arguments, we have eschewed the option of a reformulation which confines this court to the first question only.

[88] As the preceding paragraphs indicate, the issue is quite finely balanced. On balance, we consider the textual features listed in para [83] above, taken together, to be determinative. The language of the statute points firmly to an underlying legislative intention which tips the balance in favour of the following conclusion: section 33 does not prescribe an exclusive model for the provision of DPPNI consents to prosecution, where required. It would be inappropriate for this court to attempt any prescription of what does constitute a lawful method of providing DPPNI consent to prosecution. This will be an unavoidably fact sensitive question, involving a case-by-case analysis in which the *Jackson* case might conceivably arise.

[89] Notwithstanding the foregoing conclusion, we take the opportunity to stress that the section 33 model enshrines the highest standards of decision making, a level to which, this court trusts, DPPNI would surely (and certainly should) aspire and ought to achieve in every case.

*Section 36: the delegation of DPPNI powers issue*

[90] This issue is not raised in the question(s) of law raised in the case stated. Bearing in mind that this court has received some argument thereon, we shall make some limited, and plainly obiter, observations.

[91] Section 36(1) permits only the delegation of any of the “powers” of DPPNI. The concept of “powers” could be viewed as alien to consents to prosecution. Powers import the element of choice, or discretion. “Powers” contrasts with “responsibilities” or “duties.” This is a long-entrenched feature of statutes.

[92] There is a respectable argument that DPPNI has no choice, or discretion, as regards the provision of consent in prosecutions requiring them: a consent must be provided as a prerequisite to the relevant court having jurisdiction to proceed. This would mean that DPPNI is required to do so as a matter of duty. This would be harmonious with the solemnity attendant upon statutory consents to prosecution generally.

[93] Furthermore, every act of consciously and expressly providing a consent to prosecute would, of course, have to be preceded by conscientious consideration, entailing in particular full examination of all available evidence and any representations made and careful weighing of all public interest facts and factors.

[94] On the other hand, it is arguable that the word “powers”, considered in its full contest, embraces the provision of DPPNI consents to prosecution, thereby favouring the analysis that the provision of a DPPNI consent to prosecute entails the exercise of a power rather than the performance of a duty.

[95] If the first analysis is correct, this would seemingly not exclude scope for the argument in a given case that non-compliance with section 33 of the 2002 Act, as elaborated above, might not be fatal to the prosecution concerned, thereby engaging the *Jeyanthan/Soneji* principles. This is so because section 33 does not prescribe the consequences of non-compliance. No consent and a defective consent are not one and the same thing. Any *Jeyanthan/Soneji* argument would of necessity be intensely case and fact sensitive.

[96] To determine this issue would be a purely abstract exercise. It forms no part of the questions of law raised in the case stated. Furthermore, the factual matrix before this court contains nothing relating to the section 33 delegation issue. The significance of this is that resolution of this issue is likely to be fact sensitive. Potentially wide-ranging factual scenarios might conceivably arise. For example, delegation of the consent exercise to a senior Public Prosecutor would scarcely be the same as delegation to a trainee lawyer or a paralegal. We are also mindful that a Northern Irish Divisional Court has expressly held that a DPPNI consent to prosecution can be lawfully delegated to a Public Prosecutor, in *Re Crawford’s Application* [2022] NIQB 34. As appears from the preceding paragraphs, we have identified the potential for more

detailed argument on this issue. Furthermore, we have received no argument on the precedent issue arising out of the interaction between Divisional Court and Court of Appeal decisions in this jurisdiction. For the several reasons given we venture no further.

### *Disposal*

[97] We answer the two questions of law posed in the case stated, as modified in para [1] above, thus:

- (a) In a summary prosecution for an offence under Article 10 of the Public Order (NI) Order 1987 to which the consent requirement of Article 25 (as modified by section 41(2) of the Justice (NI) Act 2002) applies, does the magistrates' court have jurisdiction to hear and determine the prosecution if there is no consent to prosecute from the Director of Public Prosecutions for Northern Ireland? **No.**
  
- (b) In a summary prosecution for an offence under Article 10 of the Public Order (NI) Order 1987 to which the consent requirement of Article 25 (as modified by section 41(2) of the Justice (NI) Act 2002) applies, must the requisite consent be in all cases fully compliant with section 33 of the Justice (NI) Act 2002? **No.**