

5.6 Deputy M.R. Higgins of the H.M. Attorney General regarding the test used by the Law Officers' Department when deciding whether to defend States Departments:

What test, if any, is used by the Law Officers' Department when deciding whether to defend States departments and officers from legal proceedings brought against them?

Mr. M.H. Temple Q.C., H.M. Solicitor General (Rapporteur):

I thank the Deputy for his question. Firstly, it is important to distinguish between a civil claim brought against a Minister or officer and a criminal prosecution brought by the Attorney General. The Law Officers' Department would not defend a States department which is prosecuted for a criminal offence nor would it represent an individual officer who is so prosecuted. Secondly, the Law Officers' Department does not act for individual officers or Ministers in relation to civil claims which arise in their private capacity. If a claim is made against a Minister or officer in relation to the exercise of his or her ministerial functions or the officer's duties then the Law Officers' Department would defend the claim. The decision on the approach to be taken in relation to the defence of a civil claim against a Minister or officer is taken on a specific case-by-case basis. So if the claim is strong my advice might be to settle the claim but if it is weak then the advice would be to defend it to trial.

[10:30]

But the merits of a case can change over time as further evidence is received and I emphasise that the approach taken to the defence of a claim will be particular to the claim.

5.6.1 Deputy M.R. Higgins:

Giving an example of defamation, where an officer has defamed a member of the public through ...when I say "members of the public" I mean you could say in the course of their duty they have made statements which are false, totally untrue and so on. Would the Law Officers' Department defend those individuals in cases such as that?

The Solicitor General:

If the claim was made in the course of the officer's duties then the presumption would be that it is appropriate for the Law Officers to get involved in that claim. As to the Deputy's assertions about whether those statements that have been made by the officer were totally untrue, then that would need to be a case that would need to be investigated by the Law Officers' Department and then a decision taken following that review. Until that review had been undertaken, until the evidence had been assessed, the approach taken to defend the claim could not be determined.

5.6.2 Senator S.C. Ferguson:

It has been shown by Save Our Shoreline that the Department for Infrastructure has been breaking the terms of their discharge permit for the Bellozanne outfall. The total nitrogen levels have reached a factor of up to 6 times the legal limit and, for the period January 2009 to August 2016, the levels have been consistently well above permitted levels. At what point do you, as Her Majesty's Attorney General, decide that a case should be brought against the Department for Infrastructure for such breaches and, if not, why not?

The Solicitor General:

I would have to say that I am not personally familiar with this claim; I know a little about it, but very little. So it may be a case of looking at historic levels of pollution or whether those levels of pollution are continuing currently, and there would need to be expert evidence in relation to whether or not it was possible to prevent those levels of pollution and how they can be remediated. But I do not think I can assist the Senator further in relation to that beyond

what I have said, because I regret that I am not sufficiently familiar with that particular claim to comment further.

5.6.3 Senator S.C. Ferguson:

I might have a supplementary. If the Attorney General does decide that a case should be brought against the department for such breaches, would you also defend it?

The Solicitor General:

No, we clearly could not both prosecute and defend the same department.

5.6.4 Deputy M. Tadier:

Getting back to Deputy Higgins's question about the defence: what weight does the department give to the veracity of the allegations, be it defamation or anything else, and not simply versus the chances of success of defending the case?

The Solicitor General:

Sorry, could I ask the Deputy to explain that question further; I did not understand it?

Deputy M. Tadier:

I will try and put it in a different way: when defending a case, for example in the case where a Minister or a department has allegedly defamed somebody, is any reference or consideration given to whether that claim is true and not simply just to the fact of whether it can be defended successfully, when deciding whether to defend that case?

The Solicitor General:

Clearly, we would assess the nature of the claim on its face but, in my experience, there are always 2 sides to a story and we would also have to try and look at the other side of the story. If we are acting for the defendant to that claim then we have a duty towards that defendant to advance the defence as best we possibly can. Clearly, we would not simply ignore the merits of a statement; we could not do that. We would have to assess it in its proper context and we would have to look at the other side of the story.

5.6.5 Deputy M. Tadier:

A supplementary that I think arises from this: how does the Attorney General, or Law Officers' Department decide when to defend a case and when to prosecute and, if in fact, there are arguments on both sides, of course, if a Minister or a department is being prosecuted, he or she presumably still needs to be defended; how is it decided in the Law Officers' Department who does that, or if they do it at all? What mechanisms are there for Chinese walls and proper separations to be kept within that department?

The Solicitor General:

I think a number of questions arise there. As I said at the outset: if it is a criminal prosecution then we would not be acting to defend the claim because we are bringing the claim to prosecute a criminal proceedings. If it is a civil claim then, potentially, we can act for the Minister or officer concerned, but I do not think I can add further to what I have said.

5.6.6 Deputy S.Y. Mézec:

This follows on from the question that Senator Ferguson asked. It would be entirely reasonable for local businesses which feel that they are suffering a loss as a result of the consequences of the Bellozanne outfall, which have been shown to be drastically exceeding the legal limit, may want to bring legal proceedings against the department for allowing that to happen. So what,

therefore, happens for the Attorney General where, presumably, as the government's legal adviser, he will be asked to give legal advice or represent a department which is having a claim brought against it? But that claim is being brought against it for breaching the law and that is something that presumably in another context would want to be dealt with. Is there not at least a perception of a conflict of interest in the roles that the Attorney General would have to perform in a situation like this?

The Solicitor General:

In relation to that sort of situation, if the Attorney General is contemplating bringing criminal proceedings then he clearly could not advise the Minister or department concerned. It may be possible that another member of the department, or I, for example, as Solicitor General, could advise the Minister in relation to potential civil claims, but in those circumstances there would be strict Chinese walls that are put in place so that the Attorney General could not access, for example, my file in relation to advising the Minister, and I could not access his file in relation to any criminal prosecution. I hope that assists the Deputy.

5.6.7 Deputy M.R. Higgins:

Does the Solicitor General feel that the system is fair in the sense that a States department, when it has, let us say, committed a civil wrong, is defended by the Law Officers' Department using public funds, and the people who are bringing the actions are normally litigants-in-person? Does the Solicitor General think that the balance is totally skewed favour of States departments because of that?

The Deputy Bailiff:

I am sorry, Deputy, I do not think that falls within the parameters of the question. You are calling on the Solicitor General for an opinion as to fairness as opposed to how his department deals with matters, and I do not think that is within the parameters.

Deputy M.R. Higgins:

In that case, Sir, I will ask another question, if I may?

The Deputy Bailiff:

No, I am afraid we have run out of time for this question.

Deputy M.R. Higgins:

I will come back on the next question then, Sir.

The Deputy Bailiff:

You do have another question for the Attorney later on so I am sure you will be able to offer it at that point.