



Bill Research Paper 76/09

17th September 2009

DEPARTMENT OF JUSTICE BILL

This paper provides background to and an overview of the Department of Justice Bill, which was introduced into the Assembly on 14th September 2009. The purpose of the Department of Justice Bill is twofold. Firstly, it creates a Department of Justice and secondly, it makes arrangements to enable the appointment of a Minister of Justice.

EXECUTIVE SUMMARY

The Department of Justice Bill had its first reading in the Assembly on 14th September 2009.

The purpose of the Bill is to create a Department of Justice and to make arrangements to enable the appointment of a Minister of Justice.

These arrangements, which were inserted into the Northern Ireland Act 1998 by the Northern Ireland Act 2009, are that:

The Department of Justice is to be in the charge of a Northern Ireland Minister appointed by virtue of a nomination

- (a) made by one or more members of the Assembly; and
- (b) approved by a resolution of the Assembly passed with the support of
 - (i) a majority of the members voting on the motion for the resolution,
 - (ii) a majority of the designated Nationalists voting, and
 - (iii) a majority of the designated Unionists voting.

The development of the legislative provision for the option of a single elected minister nominated by any member of the Assembly can be traced through the work of the Assembly and Executive Review Committee (A&ERC) to the Northern Ireland Act 2009.

This Department of Justice Bill does not deal with the removal of the Minister of Justice or the dissolution of the Department of Justice. The Northern Ireland Act 2009 does, however, contain provisions relating to these matters. The 2009 Act also contains provisions relating to '*Special provisions applying to first policing and justice department*'. Amongst other things, these provisions establish that, if the initial model chosen for the justice department is the one set out in the 2009 Act (the one also contained in the Department of Justice Bill), the first justice department will be dissolved on 1st May 2012 unless the Assembly, by that date, either has passed a resolution to continue the department on the same basis beyond 1st May 2012 or has put in place alternative future arrangements for the ministerial oversight of that department.

The Department of Justice Bill does not deal with the timing of devolution or the functions to be devolved.

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1. BACKGROUND TO THE DEPARTMENT OF JUSTICE BILL

Policing and Justice issues are reserved matters under the provisions of the Northern Ireland Act 1998 (the 1998 Act). They are, therefore, issues on which the power to make laws has not been transferred from the UK Parliament to the Assembly but which may be transferred in future.

The 1998 Act as originally enacted and as subsequently amended provides for a number of options for the ministerial model which the Assembly can use to set up a Department of Justice and a number of options for the appointment of a Minister for Policing and Justice. These options have been described in the following way in a House of Commons Library paper.¹

a. Models applicable to all ministerial departments (ss.16A-18 & 21 of the Northern Ireland Act 1998)

1. Single Minister selected by d'Hondt
2. Portfolio integrated within OFMDFM
3. Portfolio in the charge of the First and Deputy First Minister acting jointly

b. Models applicable only to a department with policing and justice functions (provided for in s.21A of, and Sch.4A to, the Northern Ireland Act 1998)

4. Single elected Minister (s.21A(3) and part 1 of Sch.4A)
5. Two Ministers acting jointly (s.21A(4) and part 2 of Sch.4A)
6. Two Ministers who rotate between Minister/junior Minister roles (s.21A(5) and part 3 of Sch.4A)
7. Minister supported by a Deputy Minister (s.21A(5A) and part 3A of Sch 4A)

The Northern Ireland Act 2009 provides a further option.

8. Single elected minister nominated by any member of the Assembly (new s.21A(3A) and part 1A of Schedule 4A, provided for in Schedule 1 to the Northern Ireland Act 2009)

The development of the legislative provision for the option of a single elected minister nominated by any member of the Assembly, which is provided for in the Northern Ireland Act 2009 (the 2009 Act), can be traced through the work of the Assembly and Executive Review Committee (A&ERC).

¹ House of Commons Research Paper 09/18 (2nd March 2009)
The Northern Ireland Bill (Bill 62 of 2008-09)
<http://www.parliament.uk/commons/lib/research/rp2009/rp09-018.pdf>

In correspondence with the A&ERC, dated 18th November 2008, the First Minister and deputy First Minister (FMdFM) indicated that:

we would seek to offer the Committee further advice to inform its consideration of the issues in relation to the devolution of policing and justice. We are now able to provide you with the following further advice.

- We have agreed certain arrangements for the discharge of policing and justice functions by the Assembly. We believe that the practical experience gained during the operation of these arrangements will inform decisions on the long-term structures which would be appropriate for the continued discharge of policing and justice functions.
- The following arrangements would be subject to a sunset clause which would bring them to an end not later than May 2012. Following a period of operation they would be reviewed in light of the experience. Permanent arrangements would then be put in place by May 2012. There would be no fall-back arrangements in place and there would therefore be a necessity for the parties to agree a way forward by this time.

Attached to the 18th of November correspondence from the FMdFM was a paper detailing an agreed process (not necessarily sequential) in relation to the devolution of policing and justice. The details of this process are set out in this as Appendix 1 to this paper.

Further correspondence from the FMdFM to the A&ERC, dated 12th December 2008, clarified the process by which the FMdFM envisaged the identification of a candidate and the election of a Minister of Justice. This correspondence stated that nominations for election to the post would be invited from Members of the Assembly and added that neither Sinn Fein nor the DUP would nominate one of its own members for the post.

In January 2009, the A&ERC published its '*First Report on the Arrangements for the Devolution of Policing and Justice Matters*'.² The report contained a number of recommendations relating to the establishment of a department and the appointment of a minister for policing and justice issues.

² Assembly and Executive Review Committee (2009)

[First Report on the Arrangements for the Devolution of Policing and Justice Matters](#)

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Recommendation 1

The Committee recommends that the department which will exercise powers in relation to policing and justice matters should be created as an additional department to the existing eleven departments which go to make up the Northern Ireland Executive. (Paragraph 21)

Recommendation 2

The Committee recommends that the department which will exercise powers in relation to policing and justice matters should be known as the Department of Justice. (Paragraph 22)

Recommendation 9

The Committee recommends that the following, interim, arrangements should apply in relation to the appointment of a Minister of Justice:-
Any Member elected as the Minister of Justice, up until May 2012, would require a majority of Assembly Members, present and voting, including a majority of designated nationalists and a majority of designated unionists.

These arrangements would be subject to a sunset clause which would bring them to an end not later than May 2012. Following a period of operation, and prior to May 2012, the arrangements would be reviewed.

Permanent arrangements would be put in place by May 2012, and there would be no fall back arrangements. This will require the political parties to agree a way forward, by this time. For the duration of the interim arrangements, i.e. up until May 2012, the DUP and Sinn Féin will not nominate any Member, from their respective parties, as the Minister of Justice. (Paragraph 36)

Recommendation 10

The Committee recommends that the following, interim, arrangements should apply in relation to the appointment of the Minister of Justice, up until May 2012:-
The appointment of the Minister of Justice would require a majority of Assembly Members, present and voting, including a majority of designated nationalists and a majority of designated unionists. (Paragraph 38)

Recommendation 11

The Committee recommends that the following, interim, arrangements should apply in relation to the removal of the Minister of Justice, up until May 2012:-
The removal of the Minister of Justice would require a majority of Assembly Members, present and voting, including a majority of designated nationalists and a majority of designated unionists. (Paragraph 39)

Recommendation 12

The Committee recommends that the following, interim, arrangements should apply in relation to the replacement of a Minister for Justice, up until May 2012:-
The replacement of the Minister of Justice would require a majority of Assembly Members, present and voting, including a majority of designated nationalists and a majority of designated unionists. (Paragraph 40)

Recommendation 13

The Committee recommends that there is no requirement to have a ‘shadow Minister’, a ‘shadow department’ and a ‘shadow Statutory Committee’. (Paragraph 43)

On 23rd February 2009, the Secretary of State for Northern Ireland (Mr. Shaun Woodward) made the following Ministerial Statement to the House of Commons.

On 18 November, an historic agreement was announced by the First Minister and Deputy First Minister setting out a process which would pave the way to the devolution of policing and justice powers to the Northern Ireland Assembly.

The agreement, and the subsequent report of the Assembly and Executive Review Committee on the modalities of devolution contained a number of significant decisions on the shape of the post-devolution framework for the administration of policing and justice in Northern Ireland.

The Government are committed to helping to move the process forward in whatever way they can.

I am therefore today introducing a Bill to Parliament to give effect to those elements of the November statement and the AERC report that require primary legislation.

The Bill does not provide for when devolution will happen, nor does it provide for what is to devolve—both of these still require further consideration by the parties and ultimately by Parliament.

It does however provide a framework for the post-devolution administration of justice by providing for a new ministerial model which the Assembly can use to set up a new Department of Justice.

It also provides for certain functions in relation to judicial appointments and removals to rest with the Judicial Appointments Commission rather than the First and Deputy First Ministers.

In addition, later this week I will be laying an Order under section 17(4) of the Northern Ireland Act 1998 to increase the maximum number of ministerial offices to 11. This will enable the Assembly to give effect to the recommendation of the AERC report that a Department with policing and justice functions should be established as an additional Department to the existing Departments which make up the Northern Ireland Executive.

The Assembly is currently prevented from establishing an additional Department by section 17 of the Northern Ireland Act which limits the number of ministerial offices to ten.

Separately I will also commence a number of provisions under the Northern Ireland (Miscellaneous Provisions) Act 2006 and the Justice and Security (Northern Ireland) Act 2007. This will ensure that when the Northern Ireland

Assembly makes a decision to legislate to set up the new Department of Justice it has a full range of options to choose from.

There are still important decisions to be taken by the Northern Ireland Assembly on the timing of devolution and on what functions they wish to see devolve.

However, these measures provide the framework for those decisions to be taken and represent another significant step for Northern Ireland on the path to the completion of devolution.³

The Northern Ireland Act 2009⁴ (the 2009 Act) received Royal Assent on 12th March 2009 and the Explanatory Notes⁵ which accompany the Act state in relation to schedule 1, which addresses a Northern Ireland department with policing and justice functions, that it:

Makes amendments to the 1998 Act in relation to the power of the Northern Ireland Assembly to establish a justice department and the type of ministerial oversight that such a department may have.

Provides for a new ministerial model which the Northern Ireland Assembly can choose for a justice department.

Provides that the department may be in the charge of a minister who has been nominated by one or more members of the Assembly, and whose nomination is then approved by a resolution of the Assembly on a cross-community basis – that is, passed with the support of a majority of the members voting, a majority of designated unionists voting and a majority of designated nationalists voting.

Sets out the chronology of ministerial appointments following an Assembly election.

Provides for the post of justice minister to be filled after the appointment of the First Minister and deputy First Minister and the appointment of other ministerial posts

Disapplies section 18 of the 1998 Act in relation to the justice minister - the effect of which is that the justice minister is not selected under the d'Hondt formula and does not count towards the parties' entitlements to ministerial offices for the purposes of the d'Hondt calculation.

Sets out the arrangements for the appointment and replacement of the justice minister.

³ Hansard Volume No. 488 Part No. 31 Written Ministerial Statements for 23 February 2009
<http://www.publications.parliament.uk/pa/cm200809/cmhsrd/cm090223/wmstext/90223m0002.htm>

⁴ Northern Ireland Act 2009 2009 CHAPTER 3

http://www.opsi.gov.uk/acts/acts2009/ukpga_20090003_en_1

⁵ Explanatory Notes Northern Ireland Act 2009 2009 CHAPTER 3

http://www.opsi.gov.uk/acts/acts2009/en/ukpqaen_20090003_en_1

Provides for the justice minister to cease to hold office following a resolution of the Assembly.

Part 3 of schedule 1 to the 2009 Act is titled '*Special provisions applying to first policing and justice department*'. The Explanatory Notes state that, amongst other things, this part of schedule 1 provides that if the initial model chosen for the justice department is the one set out in the 2009 Act:

the first justice department will be dissolved on 1 May 2012 unless the Assembly, by that date, either has passed a resolution to continue the department on the same basis beyond 1 May 2012 or has put in place alternative future arrangements for the ministerial oversight of that department. (any such resolution must be passed with cross-community support)

a new Act of the Assembly may provide for the department to continue operating.

the Assembly may choose to dissolve the department at any time. It may then set up a new department in line with the provisions of the 1998 Act.

Responding to points made during the passage of the legislation in the House of Commons, Paul Goggins (the Minister of State, Northern Ireland Office) stated that:

My hon. Friend the Member for Foyle and others have asked what would happen if there were no agreement after 2012. The Bill provides no fall-back position beyond May 2012. Frankly, it is not for us in this place to determine any additional model beyond that period; it is a matter for the Assembly. If there were complete breakdown—this comment applies to devolution generally—then of course central Government might need to step in, but they could not continue indefinitely in that way. There is no fall-back position, as I have said, and it is entirely a matter for the Assembly. The hon. Member for Tewkesbury wants something built directly into the Bill to deal with this, but I think not. It is important to know that central Government do not have a major hand in determining what happens in a model beyond May 2012. That is a matter entirely for the Assembly.⁶

⁶ Hansard 4th Mar 2009 : Volume No. 488 Part No. 38 Column 918-919
<http://www.publications.parliament.uk/pa/cm200809/cmhsrd/cm090304/debtext/90304-0014.htm>

2 OVERVIEW OF THE DEPARTMENT OF JUSTICE BILL

The Department of Justice Bill⁷ had its first reading in the Assembly on 14th September 2009.

The purpose of the Bill is twofold. Firstly, it creates a department of Justice and secondly, it makes arrangements to enable the appointment of a Minister of Justice. The Bill does not deal with removal of minister or the dissolution of the dept, as these are dealt with in the Northern Ireland Act 2009. The Bill does not address the timing of devolution or the functions to be devolved

The Bill comprises the following 3 clauses and a schedule.

- *Department of Justice*
- *Minister in Charge of Department of Justice*
- *Short title and commencement*
- *Schedule - Amendments*

The first clause establishes a Department to be known as the Department of Justice. This clause also prescribes the functions of that department stating that its purpose is 'to exercise functions consisting wholly or mainly of devolved policing and justice functions within the meaning of section 21A of the Northern Ireland Act 1998'.

The first clause also makes consequential amendments to insert the Department's name in Schedule 1 of the Departments (Northern Ireland) Order 1999 (which lists the Northern Ireland departments) and also in Schedule 2 of the Ombudsman (Northern Ireland) Order 1996 (which lists the bodies subject to investigation).

The second clause sets out the arrangements for appointing the Minister of Justice. These arrangements, which were provided for in the Northern Ireland Act 2009 are that:

The Department of Justice is to be in the charge of a Northern Ireland Minister appointed by virtue of a nomination
(a) made by one or more members of the Assembly; and
(b) approved by a resolution of the Assembly passed with the support of
(i) a majority of the members voting on the motion for the resolution,
(ii) a majority of the designated Nationalists voting, and
(iii) a majority of the designated Unionists voting.

Clause 3 covers the title of the Act and arrangements for its commencement (it will come into operation on such day as the First Minister and deputy First Minister may by order appoint).

Schedule 1 of the Bill tidies reference to the new Department by amending references to "justice department" in certain other legislation to "Department of Justice", thus ensuring consistency of terminology.

⁷ NIA Bill 1/09 Department of Justice Bill
http://www.niassembly.gov.uk/legislation/primary/2009/nia1_09.htm

Commenting on the options considered in relation to the content of the Bill the Explanatory and Financial Memorandum states that:

The options were to do nothing until there is a decision of the Assembly to request the devolution of policing and justice powers or to make essential statutory preparations in advance of any such future decision so it can be given effect in the shortest possible timescale.

Given the scale and importance of the functions which would transfer on the devolution of policing and justice powers, the transfer should occur without undue delay following an Assembly decision to proceed. In order that the lead-in process to devolution should be as straight-forward and short as possible, essential statutory preparations should be made if possible in advance of an Assembly decision to proceed. The do nothing option, therefore, was not considered appropriate and the preference is for the introduction of the Bill to create the Department of Justice and establish the arrangements for the appointment of the Minister of Justice, as matters already agreed by the Assembly.⁸

Commenting on the issue of consultation on the Bill the Explanatory and Financial Memorandum states that:

The policy proposals underpinning the Bill were subject to detailed scrutiny in the Assembly debate (20 January 2009) which preceded the carrying of the motion approving the report of the Assembly and Executive Review Committee. In addition, the provisions in the Bill make only essential preparations for the future transfer of policing and justice powers and do not of themselves give effect to devolution of such powers. Consequently, pre-legislative consultation on the Bill is not considered necessary.⁹

The Secretary of State has consented under section 10(3) (b) of the Northern Ireland Act 1998 to the Assembly considering this Bill.

⁸ Department of Justice Bill – Explanatory and Financial Memorandum
http://www.niassembly.gov.uk/legislation/primary/2009/niabill1_09_efm.htm

⁹ As above

APPENDIX 1

Paper attached to correspondence from FM/dFM to Assembly & Executive Review Committee – 18th November 2008

The Process

The following actions constitute the process to effect the transfer of policing and justice powers. A number of these actions will be sequential while others will be concurrent.

Group 1

- Letter from FM/dFM to be issued to AERC
- Letter from FM/dFM to AERC to be released publicly
- Commence financial discussions with NIO, Treasury and the PM
- Preparatory briefing to outline the shape of the necessary Westminster legislation
- Preparatory briefing to outline the shape of the necessary Assembly legislation
- Consideration of P&J Paper from FM/dFM at Executive meeting

Group 2

- Discussion by AERC of agreements reached by FM/dFM and of outstanding issues
- AERC finalises modalities report
- Business Committee timetables Assembly consideration of AERC modalities report
- AERC Report tabled for consideration and approval by the Assembly
- FM/dFM consider the approved P&J modalities report
- Assembly's modalities report tabled at Executive meeting
- AERC to commence consideration of non-modality issues including finance

Group 3

- Consequential Westminster legislation drafted and introduced
- Consequential Assembly legislation drafted and introduced
- FM/dFM to set out a process to identify a candidate for the post of Minister of Justice
- Future Justice Minister publicly identified

Group 4

- AERC to conclude consideration of non-modality issues including finance
- Financial discussions between FM/dFM, NIO, Treasury and PM concluded satisfactorily
- AERC finalises non-modalities report
- Business Committee timetables Assembly consideration of AERC non modalities report
- Assembly's non-modalities report tabled at Executive meeting

Group 5

- Commence process of building confidence to achieve cross community buy-in
- Consult party organisations and external stakeholders
- Public consultation

- Secure necessary community confidence for transfer of P&J

Group 6

- FM/dFM to draft Assembly motion requesting transfer
- FM/dFM submit motion to Business Committee
- Business Committee timetables motion for Assembly consideration
- Assembly debate on motion
- Assembly votes on a cross-community basis for transfer
- Request made for transfer from Secretary of State
- Transfer of functions
- Northern Ireland Justice Minister elected
- Northern Ireland Law Officers elected