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# *The Justice (Northern Ireland) Bill* [HL]

**Bill 55 of 2003-04**

The *Justice (Northern Ireland) Bill* was introduced in the House of Lords on 4 December 2003 and is due for its Second Reading in the House of Commons on 10 March 2004.

The *Justice (Northern Ireland) Act 2002* was intended to implement recommendations of the Review of the Criminal Justice System in Northern Ireland System in Northern Ireland, which had been set up pursuant to the Good Friday Agreement. Many of its provisions were linked with the proposed devolution of responsibility for criminal justice matters to the Northern Ireland Assembly, in the expectation that devolution was imminent. The *Justice (Northern Ireland) Bill* would make amendments to the Act following a commitment entered into by the Government in the Joint Declaration of May 2003. In particular, it would allow for a Judicial Appointments Commission to be set up prior to devolution.

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## Summary of main points

The *Justice (Northern Ireland) Act 2002*, which was passed in July 2002, was intended to implement recommendations of the Review of the Criminal Justice System in Northern Ireland, which had been set up pursuant to the Belfast Agreement. Many of its provisions related to the proposal to devolve responsibility for justice matters to the Northern Ireland Assembly, or were dependent on responsibility having been devolved. It was anticipated that devolution would take effect after the Assembly elections which were then scheduled to take place in May 2003.

After the return of direct rule, in October 2002, and following the postponement of the elections, the UK and Irish Governments undertook negotiations with Northern Irish political parties which led, in May 2003, to a Joint Declaration intended to restore confidence and progress towards devolution. The UK Government announced that there would be a second Criminal Justice Bill, which would bring forward the creation of a Judicial Appointments Commission and make further provision to promote a human rights culture in the Northern Ireland criminal justice system. This was followed in June by an updated implementation plan, which listed nine provisions for inclusion in the Bill. As well as establishing a Judicial Appointments Commission, the Bill was to:

- place time limits on the length of service of its judicial members
- provide that its composition should be reflective of the community
- require it to engage in a programme to secure a judiciary reflective of the community
- amend the procedures for the appointment of the senior judiciary
- require the DPP to refer all cases of suspected police malpractice to the Police Ombudsman
- introduce a new offence of seeking, without legitimate cause, to influence the DPP in his prosecutorial decisions
- require the criminal justice agencies to have regard to international human rights conventions.

These are reflected in Clauses 1 to 7 of the *Justice (Northern Ireland) Bill*, which extends only to Northern Ireland. The Bill was also intended to provide that proposed removals from judicial office would no longer require the Lord Chief Justice's agreement, but the corresponding clause was taken out at Lords Report Stage.

The Bill also makes provision to allow the compulsory transfer of prisoners from Northern Ireland to England and Wales, in the interests of maintaining security or good order in prisons in Northern Ireland. This is one of the measures to ensure that new arrangements for the separation of paramilitary prisoners at Northern Ireland's only high security prison should not deteriorate into segregation.

On 24 February 2004, two weeks after this Bill was brought from the Lords, the Government published the *Constitutional Reform Bill* which would, among other things, establish a Judicial Appointments Commission to assume responsibility for the appointment of judges in England and Wales.



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# I Background

## A. The Good Friday (Belfast) Agreement 1998

The Good Friday Agreement (officially known as the *Belfast Agreement*) was signed on 10 April 1998, following intensive multi-party talks and participation from the Governments of the UK and Ireland.<sup>1</sup> The Agreement was endorsed by separate referendums held on 22 May 1998 in both Northern Ireland and the Irish Republic. It provided for new institutions and constitutional change to occur simultaneously, but also covered issues such as human rights and criminal justice.

There are three categories of legislative powers; reserved, excepted and transferred. Excepted matters are subjects reserved to Westminster which will not be transferred apart from by primary legislation. Schedule 2 of the *Northern Ireland Act 1998* specifies excepted matters. These include appointment and removal of judges.

Schedule 3 set out reserved matters; these are subjects which could be transferred to the Assembly at a later date. Criminal law and the justice system are included, as well as the maintenance of public order and of the police forces in Northern Ireland, but not the operation of the Parades Commission. For such reserved powers to be transferred to the Assembly, it is necessary to obtain cross-community consent. It is also possible to transfer powers back to Westminster. Section 4(2) of the *Northern Ireland Act 1998* enables the Secretary of State to lay orders making a reserved matter a transferred matter.

The Belfast Agreement set out the aims of the criminal justice system and committed participants to a wide-ranging criminal justice review. The Review was set up in June 1998 and its terms of reference were:<sup>2</sup>

Taking account of the aims of the criminal justice system as set out in the Agreement, the review will address the structure, management and resourcing of publicly funded elements of the criminal justice system and will bring forward proposals for future criminal justice arrangements (other than policing and those aspects of the system relating to emergency legislation, which the Government is considering separately) covering such issues as:

- the arrangements for making appointments to the judiciary and magistracy, and safeguards for protecting their independence;
- the arrangements for the organisation and supervision of the prosecution process, and for safeguarding its independence;
- measures to improve the responsiveness and accountability of, and any lay participation in the criminal justice system;

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<sup>1</sup> Cm 3883 April 1998 *The Belfast Agreement: An Agreement reached at the Multi-Party Talks on Northern Ireland*

<sup>2</sup> Ibid, Annex B

- mechanisms for addressing law reform;
- the scope for structured co-operation between the criminal justice agencies on both parts of the island; and
- the structure and organisation of criminal justice functions that might be devolved to an Assembly, including the possibility of establishing a Department of Justice, while safeguarding the essential independence of many of the key functions in this area.

In April 2000 the final report was published, with 294 detailed recommendations under the headings:

- Human rights and guiding principles
- The prosecution
- The judiciary
- Lay involvement in adjudication
- Courts
- Restorative and reparative justice
- Juvenile justice
- Community safety
- Sentences prison and probation
- Victims and witnesses
- Law reform
- Organisation and structure
- Research and evaluation
- Structured co-operation<sup>3</sup>

On 12 November the Parliamentary Secretary at the Northern Ireland Office, Desmond Browne, announced publication of the Government's response in the form of an Implementation Plan and a draft Bill.<sup>4</sup> The Implementation Plan asked for comments by 12 December 2001, allowing just over four working weeks for consultation, but on 12 November the period for consultation was extended by four weeks to 7 January 2002.<sup>5</sup>

## **B. *The Justice (Northern Ireland) Act 2002***

*The Justice (Northern Ireland) Bill* was introduced in the House of Commons on 18 December 2001<sup>6</sup> and published on 19 December. Some additions and other changes had been made to the draft Bill. The background and reactions to the Bill and its timetable

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<sup>3</sup> *Review of the Criminal Justice System in Northern Ireland*: March 2000. It is available on the Northern Ireland website at <http://www.nio.gov.uk/issues/justice.htm> . as is a short Guide which sets out the issues examined in the Report and the main recommendations.

<sup>4</sup> HC Deb 12 November 2001 c517W

<sup>5</sup> HC Deb 29 November 2001 c1071W

<sup>6</sup> The Bill was introduced without a press notice and before the expiry of the extended consultation period.

were set out in a Library Research Paper published on 18 January 2002.<sup>7</sup> The Bill was passed, and received Royal Assent on 24 July 2002. Its main provisions were summarised in the *Explanatory Notes* published on the same day:

- to amend the law relating to the judiciary and courts in Northern Ireland, including provision for the creation of a Judicial Appointments Commission and for the removal of judges, changes to eligibility criteria, a new oath and provisions to make the Lord Chief Justice head of the judiciary in Northern Ireland;
- to provide for the appointment of the Attorney General for Northern Ireland after devolution and to establish a public prosecution service;
- to establish a Chief Inspector of Criminal Justice and a Northern Ireland Law Commission;
- to set out the aims of the youth justice system and to make other provisions dealing with the youth justice system, including extending that system to 17 year olds;
- to provide for the disclosure of information about the release of offenders in Northern Ireland to victims of crime and to confer on victims the right to make representations in relation to the temporary release of offenders; and
- to provide for measures in relation to community safety.

At the time of the passage of the *Justice (Northern Ireland) Act 2002*, it was envisaged that there would be a transfer of justice matters to the Assembly after the next Assembly elections in May 2003:

6. A number of the Review recommendations relate to the proposal to devolve responsibility for justice matters to the Northern Ireland Assembly, or are dependent on responsibility having been devolved. Once the devolved institutions are working effectively, the Government intend to devolve responsibility for policing and justice functions, as set out in the Belfast Agreement. We need first to take some major steps to implement the Criminal Justice Review and to make some more progress on detailed implementation of the Patten report. A final decision to devolve these functions can only be taken at the time taking account of security and other relevant considerations. But the Government's target is to devolve policing and justice after the Assembly elections scheduled for May 2003.<sup>8</sup>

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<sup>7</sup> RP02/07, *The Justice (Northern Ireland) Bill*

<sup>8</sup> *Explanatory Notes to the Justice (Northern Ireland) Bill of 2001-2 Bill 75-EN*

## C. The Joint Declaration

Continued problems regarding decommissioning led to the re-introduction of direct rule through primary legislation in the form of the *Northern Ireland Act 2000* which allowed for the suspension of the operation of the Assembly and Executive, restoration of devolution by order and for Northern Ireland legislation to be undertaken at Westminster by Orders in Council. Devolution was suspended from 11 February 2000 and 30 May 2000. Devolution was restored to Northern Ireland from June 2000 and there were two further one day suspensions of devolution on 11 August 2001 and 21 September 2001.

On 14 October 2002 the then Secretary of State for Northern Ireland, Rt Hon John Reid MP, announced the return of direct rule, following a police raid on Sinn Fein offices at Stormont and the resignation of two Democratic Unionist Party ministers from the executive. The Northern Ireland Office took on the work of the Executive and Assembly Bills were introduced into Parliament as Orders in Council. The return of direct rule has been uninterrupted since October 2002.

Elections to the Assembly originally due on 1 May 2003 were postponed twice, first to 29 May 2003 and then until the autumn on the grounds that outstanding issues about the position of the IRA could not be resolved during an election campaign. The *Northern Ireland Assembly (Elections and Periods of Suspension) Act 2003* postponed the election due on 29 May and gave the Secretary of State power to specify the new date in an order. The Act provided for the temporary suspension of elections until 15 November 2003, but with power for the Secretary of State to continue the suspension for further periods of 6 months maximum.

A Joint Declaration was published on 1 May 2003 which stated that the devolved institutions, if restored, could flourish only in a climate of trust, and it stressed the necessity in this context of ‘acts of completion’ in the full implementation of the *Belfast Agreement*.<sup>9</sup>

Paragraph 20 stated:

20. The British Government has accepted, under the Agreement, the desirability of devolving policing and justice on a basis that is robust and workable and broadly supported by the parties. In accordance with the paper contained in Annex 2, the British Government would take an early initiative to facilitate a dialogue between the parties to address and agree the practicalities of such further devolution, including the necessary institutional arrangements, with a view to the introduction of the necessary legislation in the Westminster Parliament at the earliest opportunity and with a view to ensuring that it is achieved within the lifetime of the next Assembly.

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<sup>9</sup> Joint Declaration by the British And Irish Governments April 2003  
<http://www.nio.gov.uk/pdf/joint2003.pdf>

Annex Two of the Joint Declaration referred to the devolution of policing and justice, and set out the basis for the transfer, presenting a number of options including a Justice Department or adding responsibility to the work of the First or Deputy First Minister. The legislative mechanisms were set out in the Annex:

**Legislative and procedural matters**

30. A number of mechanisms under the 1998 Act would need to be brought into play to bring about a transfer of responsibilities to the devolved administration.

a. The 1998 Act provides for reserved matters to become transferred (section 4). The procedure involves, first, a resolution passed by the Assembly with cross-community support; then an Order in Council approved in draft by each House of Parliament.

b. An Order in Council under section 86, again subject to affirmative resolution, would be required to provide for associated transfers of functions from UK authorities (generally the Secretary of State) to Northern Ireland authorities - essentially Departments (subsection 3). It could also (subsection 4) provide for transfers of property etc.

c. Action by the devolved institutions would also be required. They would, quite possibly, need to set up one or more new Departments to take over the new functions (see below); as can be done by Act of the Assembly under section 21(2) of the 1998 Act. Since, at the time of passage, such an Assembly Bill would presumably be dealing with a reserved matter, it would also be subject to the Secretary of State's and Parliamentary consent.

d. the First Minister and Deputy First Minister would also need to make a new determination under section 17 of the Act, setting out the functions if the Ministerial offices were to deal with law and order issues under section 17(1). Unless this were to be achieved within the present total of Ministers (ten) by restructuring of existing portfolios, the Secretary of State would need to make an order under section 17(4) to increase the number of Ministerial offices.

e. The determination would be subject to cross-community support in the Assembly, and would trigger a fresh run of the d'Hondt procedure for the selection of Ministers.

f. A non-statutory concordat between HMG and the devolved administration covering such matters as the principles of judicial and prosecutorial independence would need to be formally endorsed by the Executive.

Paragraph 24 announced that there would be a special Oversight Commissioner and a new Criminal Justice Bill:

24. The British Government has announced its intention to appoint an independent Oversight Commissioner to provide independent scrutiny of the implementation of the Government's decisions on the Criminal Justice Review. This constitutes a major programme of transformational change and will give particular weight to modernisation, accountability, protection of human rights, ensuring a representative workforce and the effective performance of the criminal justice system. Further significant change will be introduced in the context of a second Criminal Justice Bill which will bring forward the creation of a Judicial Appointments Commission and make further provision to promote a human

rights culture in the criminal justice system in Northern Ireland. The two Governments intend to move forward quickly with the development of cooperation on criminal justice matters between the two jurisdictions, where there is mutual benefit. This will focus on issues like sharing information and research, arrangements for monitoring offenders, liaison on misuse of drugs and co-ordinating registers of dangerous offenders.

#### **D. The updated implementation plan**

In June 2003 the Government published an updated Criminal Justice Review Implementation Plan setting out the progress which had been made in implementing the recommendations of the Criminal Justice Review, together with detailed plans and timescales for the continuing implementation process. It listed matters for inclusion in the second Justice Bill:

- to establish a Judicial Appointments Commission prior to the devolution of responsibility for criminal justice matters;
- to place time limits on the length of service of all of its members, both lay and judicial;
- to provide that a key objective of the Judicial Appointments Commission will be to engage in a programme of action to secure a judiciary in Northern Ireland that is as reflective of Northern Ireland society as can be achieved consistently with the requirement of appointment on merit;
- to provide that the composition of the Judicial Appointments Commission itself taken as a whole will, as far as possible, be reflective of the community in Northern Ireland;
- to provide that in respect of appointments of the Lord Chief Justice and Lords Justices of Appeal, the First Minister and Deputy First Minister acting jointly will make recommendations to the Prime Minister, who in turn will recommend appointments on that basis;
- to remove the requirement for the Lord Chief Justice's agreement to removal or suspension on foot of a Tribunal recommendation;
- to place a duty on the Director of Public Prosecutions to refer all cases of suspected police malpractice to the Police Ombudsman;
- to make it an offence to seek to influence the DPP's prosecutorial decisions without legitimate cause; and
- to place a duty on the criminal justice agencies in Northern Ireland to have due regard to relevant international human rights conventions and standards in carrying out their functions.<sup>10</sup>

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<sup>10</sup> Criminal Justice Review Implementation Plan Updated June 2003:  
<http://www.nio.gov.uk/pdf/cjimp2003.pdf>

## E. The Justice Oversight Commissioner

Also in June 2003, the Rt Hon the Lord Clyde was appointed Justice Oversight Commissioner to provide public assurance about the implementation of the changes in criminal justice arrangements set out in the updated Implementation Plan.<sup>11</sup> In response to the announcement, the Committee on the Administration of Justice (“CAJ”), which is an organisation concerned with the defence of human rights and civil liberties in Northern Ireland, said:

Since the report of the Criminal Justice Review, CAJ has repeatedly emphasised the need for independent oversight and scrutiny in order to ensure the full implementation of the Review’s recommendations for reform. Three and a half years have now elapsed since the publication of the Review. In that intervening period the Government published a first Implementation Plan which was so inadequate, in terms of imposing timescales and activities on the relevant criminal justice agencies, that a revised version of the Plan was issued at the end of June this year. Similarly the Justice (NI) Act 2002 diluted the substance of a number of Review recommendations and failed to afford a statutory basis to certain other recommendations.

Following significant political pressure, the Government has now given a commitment in the Updated Plan, to introduce amending legislation to the Act, by means of a Criminal Justice Bill which is due to go to Parliament this Autumn. In light of this we warmly welcomed the establishment on the 18th June 2003 of the office of Criminal Justice Oversight Commissioner. This position is part-time and as with the Oversight Commissioner for Policing, it will run for an initial period of three years. We strongly believe that this Office can bring fresh impetus to the implementation process. To realise this potential however, certain measures must be taken to affirm its independence, increase its capacity and enhance its ability to ensure full implementation of the Review. In this regard, we have prepared a detailed, written submission on the Office of the Criminal Justice Oversight Commissioner.<sup>12</sup>

The *Irish News* reported on meetings which Lord Clyde had had with Sinn Féin and the SDLP, in August 2003:

[Conor] Murphy said Sinn Féin was determined to ensure the required changes are put in place and that there is a clear time-table for implementing the new criminal justice plan.

He said: “Sinn Féin will monitor implementation to ensure that there is progress on the Judicial Appointments Commission and the mechanisms that ensure its

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<sup>11</sup> “Updated Criminal Justice Implementation Plan Published”, 18 June 2003, NIO press notice

<sup>12</sup> Criminal Justice Oversight Commissioner”, September 2003, *Just News*

representativeness; action to address the issue of judicial representativeness; the duty on the DPP to refer all cases of PSNI misconduct to the Police Ombudsman; and the duty of all criminal justice agencies to have due regard of international and human rights standards.”

The SDLP, after meeting Lord Clyde, said they made clear to the Oversight Commissioner that he needed “to guard against people in the Northern Ireland Office and elsewhere who would try to frustrate or impede criminal justice change”.

Alex Attwood outlined a strategy which, he suggested, would accelerate change. It included creating a panel of experts to monitor justice issues; publication of six monthly reports; rigorous scrutiny of the forthcoming Criminal Justice Bill; wide-ranging performance indicators for all changes; and a permanent office with independent staff.

Mr Attwood said these proposals mirrored the working of Tom Constantine (the Policing Oversight Commissioner) and were benchmarks which should be faithfully followed.<sup>13</sup>

On 11 December 2003, Sir Brian Kerr was appointed Lord Chief Justice of Northern Ireland, with effect from 12 January 2004, to succeed Sir Robert Carswell on his elevation to the House of Lords. On 18 December, the Government announced republication of the document which sets out the “Purpose and Aims of the Criminal Justice System Northern Ireland”, to reflect the significant work carried out in the last two years by all the criminal justice organisations in working towards those aims, and towards implementation of the Criminal Justice Review.<sup>14</sup>

The Justice Oversight Commissioner’s First Report was published on 22 January 2004.<sup>15</sup> He said that the degree of progress which had been reported so far in the process of implementation had been significant and impressive. In Chapter 19 he listed 19 recommendations which were understood to depend on devolution, and on which no action had or could at present be taken. They were:

- Devolution of responsibility for prosecution (42)
- Attorney General for Northern Ireland (43)
- Participation in Assembly business (44)
- End to power of direction (45)
- Questions on individual cases (47)
- Accountability of Head of Prosecution (48)

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<sup>13</sup> “Pressure mounting for justice changes”, 6 August 2003, *Irish News*

<sup>14</sup> HC Deb 18 December 2003 c156WS

<sup>15</sup> First Report of the Justice Oversight Commissioner, December 2003

- Appointment of Head of Prosecution Service (59)
- Devolution of judicial appointments (73)
- Accountability after devolution (74)
- Cross-community voting (76)
- Impact of devolution on juvenile justice (188)
- Unit location post-devolution (201)
- Appointment of Commission members (250)
- Law Commission (251)
- Post-devolution arrangements (255)
- Devolution of criminal justice functions to the Assembly (256)
- Creation of a Department of Justice (257)
- Annual reports (262)
- Ministerial meetings (264)

## **F. Further political developments**

As part of the package of proposals surrounding the Joint Declaration, a draft Agreement on Monitoring and Compliance between the British and Irish Governments was published on 1 May 2003. This envisaged the establishment of an Independent Monitoring Commission to monitor the carrying out of various commitments under the Belfast Agreement. The *Northern Ireland (Monitoring Commission etc) Act 2003* was introduced to implement this proposal.

On 21 October 2003 negotiations between the Ulster Unionists and Sinn Fein resulted in a new date being announced for elections to the Northern Ireland Assembly. However, the likelihood of devolution being restored immediately after the elections was subsequently cast into doubt when David Trimble announced his dissatisfaction with the level of information disclosed in the latest round of decommissioning. Despite this, elections went ahead as planned on 26 November 2003.

The Democratic Unionist Party won the largest number of Assembly seats by gaining 30 out of the total number of 108, overtaking the pro-Agreement party, the Ulster Unionists, headed by David Trimble. The rise in support for the Democratic Unionist Party has major implications for the *Belfast Agreement*.

The Northern Ireland Office officially announced the review of the *Belfast Agreement* on 19 January 2004:

The British and Irish Governments today jointly announced that the review of the operation of the Belfast (Good Friday) Agreement will formally begin on Tuesday, 3 February. This follows a period of consultation with the parties on the agenda and conduct of the review, which continues in meetings this week. The initial meeting will be held at Parliament Buildings in Belfast at 2:30pm.

The review will be co-chaired by the UK and Irish Governments and will take place over two days per week with an expected report date of Easter. There have been indications that if the multi-party talks are unsuccessful, new elections could be held in June 2004.<sup>16</sup>

A new round of talks took place on 24 February 2004, but these were dominated by claims that the IRA ceasefire had been broken by an incident involving the false imprisonment of a dissident republican.<sup>17</sup> A joint statement was issued by the British and Irish Government, expressing deep concern and asking the Independent Monitoring Commission to examine the events, as provided for in the 2003 Act.

## **II Progress of the *Justice (Northern Ireland) Bill 2003-04***

### **A. Introduction, debates and scrutiny**

The *Justice (Northern Ireland) Bill* was introduced in the House of Lords on 4 December 2003, with Second Reading on 16 December, Committee on 15 and 19 January 2004, Report on 3 February and Third Reading on 10 February 2004.<sup>18</sup> One clause (originally clause 5, relating to removal from judicial office) was left out on a division at Report, thus affecting the numbering of the subsequent clauses. Except where otherwise specified, this paper refers to clauses as numbered in the current version of the Bill, which is Bill 55 2003-04.<sup>19</sup> *Explanatory Notes* to the Bill, prepared by the Northern Ireland Office, are published separately as Bill 55- EN.<sup>20</sup>

The Bill has been subject to scrutiny by the Joint Committee on Human Rights,<sup>21</sup> the Lords Committee on Delegated Powers and Regulatory Reform,<sup>22</sup> and the Lords Committee on the Constitution.<sup>23</sup> The Government brought forward amendments to address the concerns expressed by the Delegated Powers Committee.

The principal concerns which have been expressed about the Bill have been the subject of debate during its passage through the House of Lords, and are explained in the following discussion of individual provisions of the Bill. Some of the more general themes which have emerged are outlined below.

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<sup>16</sup> 'Ulster could face assembly election in June' *Financial Times* 2 February 2004

<sup>17</sup> *BBC News* 25 February 2004

<sup>18</sup> Introduced as HL Bill 9 2003-04, HL Bill 19 as amended in Committee, HL Bill 23 as amended on Report

<sup>19</sup> <http://www.publications.parliament.uk/pa/cm200304/cmbills/055/2004055.htm>

<sup>20</sup> <http://www.publications.parliament.uk/pa/cm200304/cmbills/055/en/04055x--.htm>

<sup>21</sup> Joint Committee on Human Rights - Fourth Report 2 February 2004.

<sup>22</sup> Delegated Powers and Regulatory Reform Committee - Third Report, 7 January 2004, Fifth report 29 January 2004

<sup>23</sup> Select Committee on the Constitution 4th Report of Session 2003-04

## B. General issues

### 1. Timing and political implications of the Bill

Serious concerns about the timing of the Bill have been voiced. It has been brought forward very soon after the *Justice (Northern Ireland) Act 2002* was passed to give effect to those Criminal Justice Review recommendations which needed to be implemented by primary legislation. Also its parliamentary passage was ahead of the *Constitutional Reform Bill* which would have wider constitutional implications, had not been published, and might need to be taken into account in the changes which this Bill would make for Northern Ireland.

During the House of Lords debates on particular clauses, there were many criticisms of the timing, in the context of clauses which either amended provisions in the *Justice (Northern Ireland) Act 2002*, or brought forward provisions to deal with matters which were not new but had not been dealt with in the Act. Less than half of the Act's 93 sections have come into force.

One suggestion was that no changes should be made to judicial appointments for Northern Ireland before seeing the Bill which would change the judicial appointments system in England and Wales. Lord Glentoran proposed a sunrise provision to delay the commencement of the relevant clauses for 12 months after Royal Assent.<sup>24</sup> The *Constitutional Reform Bill*,<sup>25</sup> which will create a Supreme Court of the United Kingdom, and a Judicial Appointments Commission, as well as abolishing the office of Lord Chancellor, was introduced in the House on 24 February, two weeks after Third Reading of the *Justice (Northern Ireland) Bill*.

In opening at Lords' Second Reading, Baroness Amos said:

When we introduced the first justice Bill for Northern Ireland two years ago, we knew that we were starting out on a journey of reform and modernisation of the criminal justice system there. That Bill did not, and could not, represent the closing chapter on criminal justice reform in Northern Ireland when it received Royal Assent in July 2002. All justice systems must continue to evolve. They cannot be allowed to sit still and to ossify or they will cease to meet the needs of modern society.<sup>26</sup>

The Conservative spokesman, Lord Glentoran, concluded that:

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<sup>24</sup> HL Deb 19 January 2004 c 886

<sup>25</sup> HL Bill 30 of 2003/04

<sup>26</sup> HL Deb 16 December 2003 c 1091

This is a political bill – certainly the first part of it. It is not a justice bill and it will play no part in restoring the confidence of the Unionist population.<sup>27</sup>

At Second Reading, he described the process leading to the passing of the 2002 Act and asked:

...what fundamental flaw in that process, and what error of judgment, has caused the Government to have to return to Parliament with a second justice Bill in the space of a little over a year? Why is it that the Government believe that now is the right time to bring forward such a Bill?

The answer is quite straightforward. The reality is that the primary motivation for the Bill is not the justice system, although it does make some important changes on which I shall comment and support later. The real motivation for this measure is politics; it is about maintaining the momentum in the peace process and trying to induce republicans into supporting the Northern Ireland criminal justice system as a precursor to the hoped-for devolution of justice during the lifetime of the current Northern Ireland Assembly, a matter just referred to by the Minister.

As noble Lords will be aware, the real origins of this Bill lie in the negotiations that took place at Hillsborough on 3rd and 4th March this year and which culminated in the Joint Declaration by the British and Irish Governments. The declaration also made clear that the Government would bring forward,

"a second criminal justice Bill which will bring forward the creation of a judicial appointments commission and make further provision to promote a human rights culture in the criminal justice system in Northern Ireland".

The Joint Declaration was intended to establish a basis on which the Assembly and the executive could be reconstituted following elections in May 2003. As we all know, those elections had to be postponed. In October the Government tried again to piece together a deal, but that too failed. Eventually, elections were held on 26th November this year....

and he added:

We also question the timing in the context of the Government's proposed constitutional reforms, including a Judicial Appointments Commission for England and Wales and the planned abolition of the Lord Chancellor.<sup>28</sup>

Lord Mayhew of Twysden,, who was Attorney General from 1987 to 1992, and then Secretary of State for Northern Ireland until 1997, who was mainly concerned with the provisions relating to the judiciary. He said:

The Explanatory Notes suggest that the Criminal Justice Review's recommendation will be more closely matched, but the Criminal Justice Review was published two years before the 2002 Act, which is now proposed to be

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<sup>27</sup> HL Deb 15 January 2004 c 693

<sup>28</sup> HL Deb 16 December 2003 c 1096

changed. There must be more to it than that. Whatever it is ought to be made known. It really is not enough for the noble Baroness the Lord President to say in introducing the Bill—I think that I accurately recall her saying—that every legal system has to evolve and cannot be allowed to ossify. That is a bit much. The ink is hardly dry on the statute of 2002. There is not much ossification going on; it is not even jelly. We would like the answers to those questions.<sup>29</sup>

Liberal Democrat Lord Smith of Clifton, accepted Lord Glentoran’s analysis of the timing, but put a different construction on it, hoping that it would encourage Sinn Fein to join fully in Northern Ireland’s legal and judicial system, and believing that it would help maintain the momentum of progress for the Belfast agreement.<sup>30</sup>

Lord Laird said that the Ulster Unionists were wholly committed to the removal of anomalies from and improving the effectiveness of the criminal justice system, but:

What we do not share, however, is this Government's persistent green agenda in the field of criminal justice. We have witnessed the introduction of three Police Acts in the space of six years and now are confronted with a second justice Act in only two years. Only two explanations are possible for repetitive legislating. Either there is negligent or incompetent translation of policy into the draft legislation—and so it follows that we, in the system of checks and balances, have failed to pick up on these failures, or indeed have been unable to halt their introduction—or the goals are continually shifting. Perhaps the truth in relation to this continuous legislating for criminal justice in Northern Ireland must be a bit of both.

He thought there was a “strong whiff of a mopping up exercise in curing omissions”, saying that there was no reason why clause 9 (Crown appeal against granting of bail) and clause 14 (making disqualified driving an arrestable offence) could not have been contained in the previous Bill.<sup>31</sup>

Lord Maginnis of Drumglass added that he wondered –

whether it is possible to think of another example where a democratic government—with all the facilities that implies, and with such extensive and expert advice as they have at their disposal—have had the capacity to make such complete and utter blunders as this Government have done with two important pieces of social legislation. In my short experience in your Lordships' House I have seen a new Northern Ireland Police Bill brought back for revision within a three-year period, and I now find a new justice Bill returning within less than two years. That is bad enough, but in both cases such incompetence has followed a comprehensive review in the areas under consideration....

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<sup>29</sup> HL Deb 16 November 2003 c 1107

<sup>30</sup> HL Deb 16 December 2003 c 1099

<sup>31</sup> HL Deb 16 December 2003 c 1102

Bearing in mind the observation of the noble and learned Lord, Lord Hutton, I ask the Minister whether political appointees will not in turn be bound to make political appointments themselves. Any clause removing reference to the First Minister and Deputy First Minister should do so on the basis that, as the review advised, no commission should be set up prior to the devolution of criminal justice. The recent election has shown how more people are becoming disappointed with the way in which the Belfast agreement is being distorted by government. Let us not add further to that concern.<sup>32</sup>

Lord Fitt queried:

whether it is advisable to rush this Bill on to the statute book. If there is to be devolution and if, as I predict, Sinn Fein and the DUP will want to be represented, they will say that this legislation was rushed through this House while they had the support of people in Northern Ireland who elected them and that they are more reflective of the community in Northern Ireland than are Members of your Lordships' House.<sup>33</sup>

## **2. Differences between the jurisdictions**

Another recurring concern was in areas where the Northern Ireland provisions might be diverging from those of England and Wales, without good ground, particularly in the context of judicial appointments and removals from office, and particularly before there was devolution of general responsibility for the criminal justice system. For example, Lord Glentoran pointed out that under the Government's proposals for England and Wales, the consent of the Lord Chief Justice would be required before removal of a judge from his office, and he urged that there should continue to be the same protection in Northern Ireland.<sup>34</sup> Lord Maginnis said that his party was opposed to the whole concept of devolving judicial appointments, and was particularly opposed to devolution of judicial appointments happening before the devolution of criminal justice.<sup>35</sup>

In other areas it was suggested that there had been undue delay in adopting reforms which were already in place in England and Wales. The Chief Constable of the Police Service of Northern Ireland had asked for the *Crime and Disorder Act 1998* to be extended to Northern Ireland, and indicated particular measures which would be beneficial, such as anti-social behaviour orders, parenting orders, local curfew schemes, racially aggravated offences, and removal of truants to designated places. This Bill would have provided a suitable opportunity to do so.<sup>36</sup>

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<sup>32</sup> HL Deb 15 January 2004 c 684

<sup>33</sup> HL Deb 15 January 2004 c697

<sup>34</sup> HL Deb 3 February 2004 c595

<sup>35</sup> HL Deb 3 February c574

<sup>36</sup> HL Deb 16 December 2003 c1098

Since June 2002, Scotland has had an independent Judicial Appointments Board:

- to provide the First Minister with a list of candidates recommended for appointment to the offices of Judge of the Court of Session, Sheriff Principal, Sheriff and Part-time Sheriff
- to make such recommendations on merit, but in addition to consider ways of recruiting a Judiciary which is as representative as possible of the communities which they serve
- to undertake the recruitment and assessment process in an efficient and effective way.

A short history and a description of its work is provided on its website at: <http://www.judicialappointmentscotland.gov.uk> .

At Second Reading, Baroness Amos gave an assurance that the Government would ensure that there were no unjustified inconsistencies between the Bill's provisions for a Judicial Appointments Commission in Northern Ireland and any wider constitutional reforms.<sup>37</sup>

At Third Reading she emphasized, in response to suggestions that the judicial appointments procedures were being politicized, and that the Lord Chancellor should continue to be consulted:

throughout our examination of the Bill we have sought to ensure that the independence of the judiciary is upheld. The noble Lord referred to what would be relevant in England and Wales. I should say to him that there are common principles relevant to all three jurisdictions of the United Kingdom—Northern Ireland, Scotland, and England and Wales. These are the ideals of enduring judicial independence, transparency, accountability and high public confidence in the judiciary.

However, the fact that there are three jurisdictions means that certain differences in approach will be taken at the operational level. In practice these differences are right, proper and necessary to reflect the differences between the jurisdictions. Moreover, one point that has been made abundantly clear in our discussions about the Bill is that there are particularities in Northern Ireland which we need to take into account. So I am sorry that the noble Lord is not convinced that the procedure on devolution for senior judicial appointments is sufficiently robust.<sup>38</sup>

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<sup>37</sup> HL Deb 16 December 2003 c1116

<sup>38</sup> HL Deb 10 February 2004 c1048

### 3. Human rights

The Secretary of State has made a statement of compatibility under the *Human Rights Act 1998* s19. The *Explanatory Notes* identify four clauses which might engage rights under the *European Convention on Human Rights*, and explain why the Government believes that there is no breach, or unjustifiable interference with rights. The Joint Committee on Human Rights has considered the Bill and concluded that it does not raise issues relating to human rights requiring to be drawn to the attention of either House.<sup>39</sup>

## III Commentary on individual provisions in the Bill

### A. Clauses 1-4: The judiciary

#### 1. Part 1 of the Justice (*Northern Ireland*) Act 2002

Clauses 1 to 4 make amendments to Part 1 of the *Justice (Northern Ireland) Act 2002*. Those provisions related to, or were dependent on, devolution of responsibility for justice matters to the Northern Ireland Assembly, and have therefore not been brought into force.<sup>40</sup>

Part 1 provided for the creation of a new Judicial Appointments Commission to be responsible for making recommendations to the First Minister and deputy First Minister on appointments to the listed judicial offices, which would be from the level of High Court judge downwards. The Commission was to have 13 members, who would be:

- the Lord Chief Justice as chairman
- five judicial members (one from each tier)
- a barrister
- a solicitor, and
- five lay members.

The Act provided that the non-judicial members should not be appointed for longer than five years at a time, or for more than ten years in aggregate, while judicial members could be members for as long as they held the relevant judicial office. In appointing persons to be lay members, the First Minister and deputy First Minister were, so far as possible, to secure that the lay members (taken together) were *representative* of the community in Northern Ireland. The Commission was to be obliged, so far as it was reasonably practicable to do so, to secure that a range of persons *reflective* of the community in Northern Ireland was available for consideration by the Commission whenever it was

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<sup>39</sup> Joint Committee on Human Rights - Fourth Report 2 February 2004.

<sup>40</sup> *Justice (Northern Ireland) Act 2002*, ss 2 – 8, Sch 1 - 3

required to select a person to be appointed, or recommended for appointment to a listed judicial office, but the selection of the person to be appointed, or recommended for appointment, to the listed judicial office had to be made solely on the basis of merit.

The Act also provided that a judge holding a listed judicial office could be removed from office, by the First Minister and deputy First Minister acting jointly, but only with the agreement of the Lord Chief Justice, and on the recommendation by a specially convened tribunal that the judge be removed on the ground of misbehaviour or inability to perform the functions of the office.

Appointments of Lords Justices of Appeal, and of the Lord Chief Justice, were to be made by the Crown, but on the recommendation of the Prime Minister, who could only make a recommendation after consulting the First Minister, deputy First Minister and Lord Chief Justice. The Commission would be required to give the First Minister and deputy First Minister advice as to the procedure which, whenever they are consulted by the Prime Minister, they should adopt for formulating their response to him

## **2. The changes which the Bill would make**

### ***a. Ministerial responsibility***

The *Criminal Justice Review* had recommended that the legislation enabling responsibility for judicial appointments to be devolved should include provision for the establishment of a Judicial Appointments Commission.<sup>41</sup> They said:

6.102 We believe that in Northern Ireland an appointments commission would enhance public confidence. But the factor which, above all, sways us in favour of recommending such a body is the imperative that if political responsibility for judicial appointments is to be devolved, the appointments process must be transparent and responsive to society's needs on the one hand, but on the other it must be clearly seen to be insulated from political influence. Given the political and community divisions that exist in Northern Ireland, we do not believe that it would be feasible, particularly from the perspective of judicial independence, to leave significant discretion on appointments matters in the hands of Ministers on the Executive Committee[ie the Northern Ireland Executive].

The Government's commitment, in the Joint Declaration, to establish a Judicial Appointments Commission in advance of devolution, could not be achieved under the existing legislation, which was designed as a post-devolution package, with functions being carried out by the First Minister and Deputy. Clause 1 overcomes the difficulty by providing for the relevant functions to be "transferred" to the Lord Chancellor. In the Bill as introduced, the transfer would have been to the "Secretary of State", but at Committee

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<sup>41</sup> Recommendation 77

the Government accepted Conservative amendments substituting the Lord Chancellor. At Lords Second Reading, Baroness Amos said that it would be the Secretary of State for Constitutional Affairs who would have ministerial responsibility for the Judicial Appointments Commission prior to devolution.<sup>42</sup> Lord Glentoran made the point that the Secretary of State for Constitutional Affairs was currently the Lord Chancellor who, by convention was a legal figure of some standing, who had taken the judicial oath. But the Government intended to abolish the office of Lord Chancellor, so the Secretary of State would be a politician, perhaps without any legal background, which made it hard to see how political influence in the judicial appointments process was being reduced.<sup>43</sup> Lord Maginnis of Drumglass was more concerned that “Secretary of State” could equally have referred to the Secretary of State for Northern Ireland.<sup>44</sup>

Otherwise most of the Lords debates on clause 1 related to the wisdom of the decision to go ahead with setting up a Commission, both before devolution, and before Parliament had considered the then imminent Bill which would set up a Judicial Appointments Commission for England and Wales.<sup>45</sup>

Lord Kingsland pointed out that, although the *Explanatory Notes* to the Bill said that clause 1 was making the transfer so that the Commission could be brought into operation before devolution, the scope of clause 1’s amendments to the 2002 Act suggested a longer term scope.<sup>46</sup>

The *Explanatory Notes* also say that:

On devolution of criminal justice, these functions will be transferred back to the First and Deputy First Ministers, acting jointly, as provided for in the 2002 Act.<sup>47</sup>

The transfer of functions back to the First and Deputy First Minister may be effected through an Order in Council under section 86, as set out in the Joint Declaration above. The Order in Council is subject to the affirmative resolution procedure, and more generally agreement on transferring justice matters would need to be reached in the Assembly on a cross community basis as well.

***b. Membership of Commission to be reflective of the community***

Clause 2 was debated at some length by the House of Lords, both in Committee and at Report. Clause 2(1) would modify and widen the existing duty, to secure in making

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<sup>42</sup> HL Deb 16 December 2003 c 1092

<sup>43</sup> HL Deb 16 December 2003 c 1099

<sup>44</sup> HL Deb 3 February 2004 c 575

<sup>45</sup> See now the *Constitutional Reform Bill*, HL Bill 30, to abolish the office of the Lord Chancellor, create a Supreme Court of the United Kingdom, and create a Judicial Appointments Commission.

<sup>46</sup> HL Deb 15 Jan 2003 c683

<sup>47</sup> Para 6

appointments that the lay members taken together should be representative of the community in Northern Ireland, so that those making the appointments (or nominations) of all the members (including the judicial members) would have a duty to make such arrangements in connection with the exercise of their functions as would, so far as was practicable, secure that the membership of the Commission was reflective of the community.

Lord Glentoran queried the use of the word “reflective”, while Lord Smith of Clifton was glad that “reflective” had replaced “representative”, explaining that:

it gives a greater precision in the sense that the word "representative" does not easily translate across the Irish Sea. In Northern Ireland, it tends in our view to mean something more like a delegate. We believe that "reflective" is a better way in which to describe the sort of balance that one would want to achieve between both communities, and gender and, if necessary, disability.<sup>48</sup>

Lord Maginnis of Drumglass was concerned that the provisions were inherently “sectarianising”, and wondered what element of society that was permitted to be part of the lay element (precluding those who have ever held judicial office or have been barristers or solicitors) was able to make an informed judgment as to who may be best suited to be a High Court judge. He thought that expertise, no matter how little, was an absolute necessity: there would not be much point in employing a sausage maker to repair his motor car.<sup>49</sup> The Conservatives accepted that there was a case for a significant lay element, but considered it important that the judiciary should be seen to be in the majority. In moving an amendment to increase the number of judicial members from five to six, with a corresponding reduction of lay members from five to four, Lord Glentoran said:

The risk of politicisation is not merely overt: it can be insidious. Only the judges are in a position to decide who should be chosen on merit. The balance at present is tipped strongly the wrong way and should be corrected. The fact that the Lord Chief Justice and five judges could be outvoted on this commission can make no sense if one has the objective of maintaining that the judicial system be depoliticised and clear of political influences.<sup>50</sup>

He challenged Government Minister Lord Filkin’s analysis of the membership, as provided in the Act, that eight of the thirteen (including a lay magistrate, a barrister and a solicitor) would be judicial professionals.<sup>51</sup> In support of the amendment, Lord Mayhew of Twysden said:

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<sup>48</sup> HL Deb 16 December 2003 c1100

<sup>49</sup> HL Deb 3 February 2004 c582

<sup>50</sup> HL Deb 15 January 2004 c687

<sup>51</sup> HL Deb 3 February 2004 c580

As we have been reminded, the Government insist, correctly, that merit shall be the overriding and dominant criterion for the appointment to the judiciary. That must be right. However, I believe that most people will have difficulty in seeing by what means lay members of an appointments commission can measure judicial merit. I suggest that judicial merit has to be assessed by reference to an informed knowledge and understanding of the record of a particular candidate. By that I do not mean the record in terms of political convenience to one politician or another but in terms of serving the rule of law in a manner that we expect of our judiciary; that is, impartially, without fear or favour and bringing high qualities of character and intellect to bear. For the life of me I see great difficulty, if I were a lay member, in assessing those qualities or, indeed, any of them. I can, however, see dangers of a public perception that lay members will be expected to bring political considerations to bear...

...the whole question of lay participation in an appointments commission is a very difficult one indeed if one is seeking to justify these reforms by reference to the need to improve public confidence in the judiciary. If we had the misfortune to have to undergo surgery, I do not think that we would be particularly confident in our surgeon in the knowledge that he had been chosen by a majority of lay people rather than by a majority of his fellow professionals. One can make the same point, perhaps even more vividly, when talking about the selection of airline pilots or the engineers who ensure that the maintenance is properly carried out. Therefore, there is considerable difficulty regarding the concept of the participation of lay people. I believe that that difficulty is confounded and made much worse by the proposal regarding equal numbers.<sup>52</sup>

For the Government, Lord Filkin said that it was surprising to be debating the amendment-

because the Bill does nothing to change the composition of the Judicial Appointments Commission which this House and another place passed into legislation nearly two years ago. That was a decision that Parliament made at that point in time, and I think it was the right decision. The composition was debated at length in both Houses during the passage of the Justice (Northern Ireland) Act 2002.

The 2002 Act reflected Recommendation 78 of the Criminal Justice Review which sought to have a careful balance in terms of the commission's membership. Indeed, as I made clear in Committee, out of a total of 13 commission members, eight will have knowledge of the law, legal processes and legal systems. I sought to say that there would be eight members of a commission of 13 who would either be judicial or legal professionals. It may well have been slightly condensed in the process of transmutation. However, the point I was making was that there were eight people who were either acting as judges or who were professional lawyers.<sup>53</sup>

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<sup>52</sup> HL Deb 15 January 2004 c689

<sup>53</sup> HL Deb 3 February 2004 c584

Identifying which candidates have judicial skills is clearly part of the job of the commission. Judicial skills are partly about knowledge of the law and partly about knowledge of judicial processes. They also include some of the other human skills needed to manage the judicial process in ways that build the confidence of the community that justice is being fairly done. Undoubtedly the judicial members of the commission will be powerfully positioned to have their arguments on some of those skills, but lay members may make a contribution when it comes to some of the other skills as well. Lay members will also make a contribution in terms of looking at the selection procedures—the advertising, recruitment and attraction of people—to ensure that a rich pool of talented candidates is coming forward for consideration by the panel.<sup>54</sup>

The amendment was rejected on a division by 156/115.

**c. *Judicial members of Commission to have time-limited tenure***

Clause 2(2) would amend the 2002 Act so that judicial members, like the other members, may not be appointed for more than five years at a time. It would also limit the aggregate period for which a person could be a judicial member by virtue of his holding a qualifying judicial office, to ten years.

In response to some concerns expressed at Lords' Committee, Lord Filkin explained that the subsection would not limit the time for which the Lord Chief Justice could be a member, since he would be there *ex officio*. Also, a judicial member who was promoted to another tier of the judiciary would thereby have another opportunity to be a member of the Commission.<sup>55</sup> He repeated that assurance at Report, when Lord Glentoran expressed doubt about the proper construction of the subsection.<sup>56</sup>

The underlying concern about setting a maximum term for judicial membership was that the pool, from which members at each judicial tier could be nominated, was necessarily limited. There were only 8 High Court judges, and 3 Lord Justices. The Government response was that there was benefit in such bodies having some refreshment and turnaround. They should not become completely fossilized around one set of members to the exclusion of others.<sup>57</sup>

**d. *Commission to have duty to secure judiciary reflective of the community***

While s5 of the 2002 Act provides:

- first, in subsection (8) - that the Commission must, so far as it is reasonably practicable to do so, secure that a range of persons reflective of

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<sup>54</sup> HL Deb 3 February 2004 c585

<sup>55</sup> HL Deb 15 January 2004 c695

<sup>56</sup> HL Deb 3 February 2004 c588

<sup>57</sup> HL Deb 15 January 2004 c694

the community in Northern Ireland is *available for consideration* by the Commission whenever it is required to select a person to be appointed, or recommended for appointment, to a listed judicial office,

- then, in subsection (9) - but the selection of the person to be appointed, or recommended for appointment, to the listed judicial office (whether initially or after reconsideration) must be made solely on the basis of merit,

Clause 3 of the Bill would replace those subsections, reversing the order and expanding the Commission's duty by requiring it at all times to engage in a programme of action which :

..is designed to secure, so far as it is reasonably practicable to do so, that appointments to listed judicial offices are such that those holding such offices are reflective of the community in Northern Ireland;(clause 3(10)(a))

... requires the Commission, so far as it is reasonably practicable to do so, to secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is required to select a person to be appointed, or recommended for appointment, to a listed judicial office; (clause 3(10)(b)); and

... is for the time being approved by the Commission for the purposes of this section. (clause 3(10)(c).

The words “at all times” were added by Government amendment at Report stage, to confirm that the programme of action would be a continuing one, not limited to just a few years.<sup>58</sup>

Otherwise, the debates on clause 3 concentrated on whether it was necessary to include provisions aimed at securing a judiciary which was reflective of the community, and whether was consistent with or could weaken the merit principle. Baroness Amos explained at Second Reading:

Merit has been and will continue to be the overriding principle for judicial appointments. That is non-negotiable. A key objective of the commission will be to engage in a programme of action to secure a judiciary that is reflective of Northern Ireland society. I want to make it clear that we are not in the business of appointing applicants on the basis of political opinion. Also, reflectiveness applies not just to religious background. There is a strong need for more applications from women and those from an ethnic minority background. Again, this change will help to promote confidence in the judiciary among all the people of Northern Ireland. The duty set out in the 2002 Act—to ensure that a range of applicants reflective of the community is available for consideration by the commission—is retained alongside this key objective.

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<sup>58</sup> HL Deb 3 February 2004 c593

It is envisaged that the programme of action will focus on any equal opportunity issues that could have implications for the judicial appointments process, as well as how to stimulate interest from a broader range of applicants suitable for judicial office. It is intended to establish an outreach consultative forum which will include representatives of the judiciary, the Bar, the Law Society and the Equality Commission. The forum's terms of reference will be to consult on what measures may be taken to secure a judiciary in Northern Ireland that is reflective of society, consistent with the requirement of appointment on merit. The matters likely to emerge from the forum will include consideration of the scope for part-time working, use of deputies, the present eligibility requirements and the judicial career path.<sup>59</sup>

For the Conservatives, Lord Glentoran asked how placing such a duty on the Commission could be squared with the principle of appointment solely on merit. He suggested that the Government was weakening the merit principle at the same time as strengthening the political influence in appointments that Lord Hutton had warned against in debate on the 2002 Act. He added:

Moreover, judicial appointments will never strictly be reflective of the community, due to the nature of those who become solicitors or barristers. Northern Ireland, like other parts of the United Kingdom, has a criminal community, as well as communities of both persuasions still mainly under the influence of paramilitaries. Surely the Minister is not suggesting that they be reflected among the judiciary. However well intentioned, the aim is simply unachievable and could result in endless judicial reviews over appointments.<sup>60</sup>

Lord Maginnis of Drumglass also thought that the merit principle was “watered down” by being made subject to being reflective of the community. He added:

Such is the situation in Northern Ireland that the judiciary is not reflective of the community in one area—that of gender. So the judicial element cannot meet the requirement of subsections (9) and 3(10). If that is the case, I shall give your Lordships an example of how ridiculous this can become. If the judicial element cannot be reflective of the community, neither can the lay element, because the commission as a whole will then be looked at to see how it can be made reflective of the community. Virtually all the judicial element is male. To match that, all the lay element will have to be female. That is not reflective of the community. Perhaps I may give an example of how this has created a problem for me in terms of district police partnerships. I am chairman elect of a district police partnership and we found ourselves—a number of councillors of every persuasion—sitting round a table and selecting the lay members. We were in total agreement—nationalist and Unionist, Protestant and Catholic—because in my council we work as a team, irrespective of politics or religion. The noble and learned Lord, Lord Mayhew, will bear me out on that matter. Having reached a decision on

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<sup>59</sup> HL Deb 16 December 2003 c1093

<sup>60</sup> HL Deb 16 December 2003 c1098

which we were all agreed, the police board decided that because Sinn Fein within the council was not participating in the district police partnerships and, therefore, under the d'Hondt system, Unionists had a majority among the elected members, then, among the non-elected members, seven out of eight should be Roman Catholic.<sup>61</sup>

At Report, he pointed out that the title of the clause was -

“Duty of Commission to secure judiciary reflective of the community”.

The House of Lords Committee on the Constitution published their correspondence with the Government on these issues, after the Bill had been sent to the Commons. They had suggested, in their letter dated 20 January 2004, that it might not be appropriate for the body responsible for making judicial appointments, solely on merit, to be the same body as was responsible for promoting equal and open access. At the very least, there was a risk that the Appointments Commission might be accused of being unduly influenced by the “reflective of the community” test in choosing the best candidate.<sup>62</sup>

In her reply dated 30 January, Baroness Amos wrote:

The Judicial Appointments Commission will be chaired by the Lord Chief Justice. It will comprise other eminent and able members of the judiciary, the legal profession and society at large. I believe we may trust them to recognise the difference between selecting an individual to fill a particular judicial office, solely on the basis of merit, and the separate obligation, to engage in a programme of action, which may identify any systemic obstacles to and ways to promote equality and diversity. The programme of action would, of course, focus on general processes whereas the merit principle will be applied at the level of individual appointments.<sup>63</sup>

*e. Appointment of the most senior judiciary*

Clause 4 would modify the new procedure for the appointment of Lords Justices of Appeal and Lord Chief Justice. The Commission would still be required to advise the First Minister and Deputy over the procedure they should adopt. But instead of obliging the Prime Minister to consult the First Minister, Deputy First Minister and Lord Chief Justice, it places the obligation on the First Minister and deputy First Minister, acting jointly, to make a recommendation which the Prime Minister must consider. He would no longer be required to consult the Lord Chief Justice, but the First Minister and Deputy would.

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<sup>61</sup> HL Deb 15 January 2004 c696

<sup>62</sup> Select Committee on the Constitution, 4<sup>th</sup> Report of Session 2003-04, HL Paper 40, 1 March 2004

<sup>63</sup> *ibid*

Baroness Amos explained at Second Reading that this improved on the formulation used in the 2002 Act, bringing it closer to the original recommendation of the Criminal Justice Review, which was:

75. For the appointment of the Lord Chief Justice and Lords Justices of Appeal, responsibility for making recommendations to Her Majesty The Queen would lie with the Prime Minister, as now, but on the basis of recommendations from the First Minister and Deputy First Minister.[para.6.96]

At para 6.108 -9 of their report, the Review body had explained their reasoning:

6.108 We have given some thought to the role of the Commission in relation to the most senior appointments (that is those of the Lords Justices of Appeal and the Lord Chief Justice), when it would be for the Prime Minister to make the recommendation to Her Majesty The Queen, following advice from the First Minister and Deputy First Minister. In doing so, we were conscious that the judiciary at this level are important in constitutional terms and have responsibilities going beyond Northern Ireland in that they are members of the Privy Council. Also in certain circumstances there might be difficulties in convening an appropriate panel from the Judicial Appointments Commission, especially given the small size of the jurisdiction. We are aware too that the position of Lord Chief Justice requires particular skills in the field of organisation and management.

6.109 We note that in some other jurisdictions procedures for the top judicial appointments vary from the rest; in South Africa for example the President consults with the Judicial Services Commission over the appointment of the most senior judges, whereas he is required to accept the Commission's advice for other judicial appointments. In all the circumstances, we recommend that the First Minister and Deputy First Minister should consult with the Judicial Appointments Commission over the procedure to be adopted in appointments to the positions of Lord Chief Justice and Lord Justice of Appeal and submit such procedure to the Prime Minister for approval. The same principles of transparency and appointment on merit should apply as with other appointments.

The updated Implementation Plan says:

The Government has given a commitment to bring forward fresh legislation to provide that in respect of such appointments, the First Minister and Deputy First Minister acting jointly will make recommendations to the Prime Minister, who in turn will recommend appointments on that basis.

The human rights organisation CAJ objected that -

the published Bill has failed to meet the expectation raised in the Updated Plan that the Prime Minister will appoint persons to these positions based on the recommendations of the First and Deputy First Minister". Instead the Bill has diminished the role of the First and Deputy First Minister by requiring the Prime

Minister only to “consider” any recommendation for appointment made by the First and Deputy First Minister. This falls short of the Criminal Justice Review recommendation on this point which the Government purported to accept without qualification in the first Plan.

The Review had provided that responsibility for making recommendations for the appointment of the Lord Chief Justice and Lords Justices of Appeal would lie with the Prime Minister, but on the basis of recommendations from the First and Deputy First Minister.<sup>64</sup>

Both Lord Smith of Clifton and Baroness Harris of Richmond for the Liberal Democrats, and Baroness Goudie, expressed disappointment that the clause failed to meet the expectations raised by the updated Implementation Plan. But in response to a Liberal Democrat amendment to require the Prime Minister to base his recommendation on that made to him by the First Minister and deputy, Lord Filkin commented that this would make the Prime Minister no more than a postman, and:

The Prime Minister will, of course, take very seriously the recommendations of the two Ministers acting jointly. We must rely on him to act appropriately. One could not conceive of a Prime Minister lightly dismissing the recommendations of the First Minister and the Deputy First Minister. However, one would not need to be too Machiavellian in nature not to conceive of some circumstances in which he might wish to test, or have some further exploration or probing of, that process. In the circumstances in which we find ourselves, I believe that the discretion that is available to him is exactly right.<sup>65</sup>

When Lord Glentoran asked what would happen if the First Minister and Deputy First Minister could not agree on a recommendation, Baroness Amos replied:

We cannot plan for failure. Justice will be devolved only when it is clear that the local parties are able to work together. That is part of the process in which we are engaged now.<sup>66</sup>

He was concerned that the perception would be that the process was politically influenced, and that the “my turn now, your turn next time” would come into play. His suggestion was that the clause would be improved if –

- There was a requirement to consult the Lord Chancellor as well as the Lord Chief Justice
- The Judicial Appointments Commission gave advice about candidates as well as advising on the procedure for making recommendations, and

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<sup>64</sup> Committee on the Administration of Justice, December Newsletter

<sup>65</sup> HL Deb 15 January 2004 c726

<sup>66</sup> HL Deb 16 December 2003 c1117

- The First Minister and deputy were required to put forward at least three names when making their recommendation.

The suggestions were rejected on the grounds that the Lord Chancellor would have no post-devolution role in relation to Northern Ireland Justice, that it would be for the Commission to advise on the selection process, which might or might not involve members of the Commission, and that the clause as drafted gave the Prime Minister a flexible discretion to specify whether he wanted a recommendation bringing forward one or more names, with or without ranking.<sup>67</sup>

In Committee, Lord Filkin thought it would be helpful to put on record the process as it would operate in practice:

I am suggesting that, because I found it difficult and because in practice they work in reverse chronological order—going backwards rather than forwards in time when being read.

The first part of the process is essential—that before any vacancy arises the Judicial Appointments Commission would advise the First Minister and the Deputy First Minister on the procedure that they should adopt in formulating a recommendation to the Prime Minister on the appointment of the Lord Chief Justice or a Lord Justice of Appeal. So the procedure would have to be set out. The First Minister and the Deputy First Minister would have considered the advice of the commission and agreed, with the approval of the Prime Minister, the procedure that would be used. So, the commission would make recommendations to the First Minister and Deputy First Minister; they would consider a process; and that would then require the agreement of the Prime Minister, the First Minister and the Deputy First Minister before there was a vacancy.

The agreed procedure would be essential to ensure the overall integrity, fairness and transparency of the recommendations. One would expect that it would cover issues such as criteria; whether the process would involve applications or expressions of interest; the type of evidence on which criteria would be measured; the stage at which the Lord Chief Justice would be consulted; and the time that the overall procedure would take. Essentially, the process by which recommendations are to emerge, and the process for testing candidates—if that is not too formal a term—would have been set up.

Assuming that a vacancy arose, the Prime Minister would require the First Minister and the Deputy First Minister to make a recommendation to him in such form as the Prime Minister specified. That would allow the Prime Minister to ask for a single name, or perhaps two or three. The wording "in such form" would give discretion to the Prime Minister to decide on the number of names to be put

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<sup>67</sup> HL Deb 15 January 2004 c733

forward and whether they were ranked. Again, we believe that the discretion provided by the Bill is right.

The First Minister and the Deputy First Minister then apply the procedure in reaching their recommendations. Before finalising them, they consult with the Lord Chief Justice and then submit their recommendations to the Prime Minister together with whatever views the Lord Chief Justice has expressed to them. Alternatively, the Lord Chief Justice may copy his views directly to the Prime Minister. As we signalled at Second Reading, we felt it right that there should be a direct route for advice from the Lord Chief Justice to the Prime Minister before he makes his decision.

The Prime Minister will then consider the recommendations and will no doubt have regard to the advice that the Lord Chief Justice gave to the First Minister and Deputy First Minister. The Prime Minister will then make a recommendation to Her Majesty, who will make the appointment. I apologise for taking time to explain the procedure, but it is a fundamental issue of concern to the Committee. It is our interpretation of the meaning of the clause.<sup>68</sup>

Returning to the issue at Third Reading, Lord Glentoran said:

It is also desirable that the Lord Chancellor should continue to be consulted. As I read the Bill, the Lord Chief Justice of Northern Ireland will have either no or very little input, and the Judicial Appointments Commission absolutely no input. In that context, it may be that, in practice, the convoluted provisions for devising apparently ad hoc procedures for each such appointment set out in Clause 4(5) and (6) will take some or all of the above into account. But the Judicial Appointments Commission is certainly not permitted to recommend names. Both this and what is to happen generally need to be spelt out clearly on the face of the Bill, otherwise there is a real danger that such appointments will lack well-informed and carefully considered advice, and degenerate into political horse-trading.

The Government say that they set out to ensure the depoliticisation of judicial appointments in Northern Ireland. But what they have done is the opposite and in my opinion it was done in a cynical way. I believe that most of the Bill has emerged as the result of debate, discussions and negotiations with political parties. Much of what is in it, including these clauses, is at the behest of one or other of those political parties. In anyone's book, that is not depoliticisation; it is politicisation.

We only have to compare this with what Her Majesty's Government think is right for England and Wales. I refer to some of the provisions. For appointments to the Court of Appeal, a senior appointments panel will be established by the Judicial Advisory Commission for England and Wales comprising the Lord Chief Justice,

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<sup>68</sup> HL Deb 15 January 2004 c730-1

a head of division or other Court of Appeal judge chosen by the Lord Chief Justice, the chairman of the Judicial Appointments Commission or a deputy chosen by him—a lay member, and a further lay member of the JAC chosen by the chairman. This panel will provide one name for the vacancy specified and a list of other candidates who might be suitable.

The Secretary of State—I am not being political in saying that; while the provision refers to the Lord Chancellor's Department, it will involve the Secretary of State for Constitutional Affairs—can ask the panel once to reconsider, and he can reject a candidate once.

For appointments to the head of division, including the Lord Chief Justice, the senior appointments panel will be made up of the most senior of the judges from England and Wales who are members of the Supreme Court from England or a deputy chosen by him; the Lord Chief Justice or, if appointing to the post of Lord Chief Justice, a head of division or other appropriate judge chosen by the senior judge as mentioned above; the chairman of the Judicial Appointments Commission or a deputy chosen by him—a lay member; and a further lay member of the JAC chosen by the chairman.

In conclusion, not only does the Judicial Appointments Commission for England and Wales have a hand in the consultation process, it can recommend the candidates. For Northern Ireland, however, the First Minister and Deputy First Minister consult the JAC only about procedure in making a single recommendation to the Prime Minister. I suggest that this is monstrously inconsistent and very political.<sup>69</sup>

In response, Baroness Amos said that the fact that there were three jurisdictions meant that certain differences in approach would be taken at the operational level. In practice, these differences were right, proper and necessary to reflect the differences between the jurisdictions.<sup>70</sup>

During the debates it was several times said that the views of the Lord Chief Justice would be made known to the Prime Minister. In their letter to the Government, the Constitution Committee commented that the involvement of the Lord Chief Justice appeared to be less than in the 2002 Act, and wondered why the Bill did not at least require his views to be communicated to the Prime Minister.<sup>71</sup>

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<sup>69</sup> HL Deb 10 February 2004 c1047

<sup>70</sup> HL Deb 10 February 2004 c1048

<sup>71</sup> Select Committee on the Constitution, 4th Report of Session 2003-04, HL Paper 40, 1 March 2004

*f. Removal from judicial office: clause taken out at Lords Report*

Clause 5 of the Bill as introduced would have amended s7 of the *Justice (Northern Ireland) Act 2002*, which has not yet been brought into force. As it stands, that section would give the First Minister and deputy First Minister the power to remove a person holding a judicial office listed in Schedule 1 for misbehaviour or inability to perform the functions of the office, but only on the basis of the recommendation of a tribunal convened under section 8 and only with the agreement of the Lord Chief Justice. The list in Schedule 1 includes resident magistrates and High Court judges as well as county court judges.

The original clause 5 of this Bill would have taken out the requirement of the Lord Chief Justice' consent to any removal, and substituted a requirement that he should have been consulted. The clause was taken out of the Bill at Lords Report, when the Government was defeated on a division by 149 to 128.

The Review Body had said:

6.136 Consistent with the exhortations of human rights instruments about security of tenure, we endorse the current arrangements that give full-time judges and magistrates tenure during good behaviour until a statutory retirement age. Currently Supreme Court judges may be removed by Her Majesty The Queen on an address by both Houses of Parliament, while other appointees may be removed by the Lord Chancellor on grounds of incapacity or misbehaviour. Under devolution however, we would not envisage a political authority having the power to remove judges on the basis of an address from the Assembly; this would have serious implications for their independence. Rather, we suggest the adoption of a procedure more akin to the Scottish model. We recommend that removal from office of a judge or lay magistrate should only be possible on the basis of the finding of a judicial tribunal constituted under statutory authority and convened by the First Minister and Deputy First Minister or the Lord Chief Justice, that a magistrate or judge was unfit for office by reason of incapacity or misbehaviour. It would be necessary for such a tribunal to have been established specifically to consider the possibility of removal. This recommendation applies in respect of all judicial posts.

When section 7 was debated in Lords Committee, in 2002, Government spokesman Baroness Scotland of Asthal had stressed that removal of judges from the listed offices could only be effected with the agreement of the Lord Chief Justice. She said:

Members of the Committee should be reassured that the Bill also provides the safeguard that any removal—I stress that—can take place only on the

recommendation of the tribunal and with the agreement of the Lord Chief Justice. We therefore have a safety net in relation to removal<sup>72</sup>

The updated implementation plan recites:

The Government has given a commitment to bring forward fresh legislation to remove the requirement in the existing legislation (section 7(5) of the Act) that the Lord Chief Justice must agree to removal or suspension on foot of a recommendation by a judicial tribunal.

CAJ considered the substitution to be positive, commenting that the 2002 Act –

had far exceeded the recommendations of the Review by conferring this effective veto power on the Lord Chief Justice.

The clause was the subject of spirited debate before being removed from the Bill at Report stage. Government spokesman Lord Filkin believed that it was the most important and challenging issue that would be debated on the Bill, but he also said that the measure was superfluous in practice as he could not conceive of circumstances in which the Lord Chief Justice would wish to oppose a decision of a properly constituted tribunal.

Those who spoke against the clause included Lord Kingsland, the Shadow Lord Chancellor, who devoted the whole of his wind up speech at Second Reading to this issue, Lord Glentoran, Lord Mayhew of Twysdale, and Lord Maginnis of Drumglass. At Second Reading Lord Mayhew said:

I preface what I want to say with the remark that security of tenure for senior judges is one of the most important safeguards for their independence and for the rule of law. Only last year the Government thought that it was a proper protection that the Lord Chief Justice's agreement would have to be obtained for the removal of a senior judge. Now it is to be sufficient only that he be consulted. He may disagree with the proposed removal but he can still be overridden. I hope that the noble Baroness the Lord President of the Council—I know that she has many responsibilities—will find it possible to answer the following questions. Why has that change been brought about after so short an interval? Who prompted it and in what circumstances? What was the attitude to the change of the Lord Chief Justice of Northern Ireland, Sir Robert Carswell, before he announced his retirement this week?

The Explanatory Notes suggest that the Criminal Justice Review's recommendation will be more closely matched, but the Criminal Justice Review was published two years before the 2002 Act, which is now proposed to be changed. There must be more to it than that. Whatever it is ought to be made known. It really is not enough for the noble Baroness the Lord President to say in

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<sup>72</sup> HL Deb 11 June 2002 CWH54

introducing the Bill—I think that I accurately recall her saying—that every legal system has to evolve and cannot be allowed to ossify. That is a bit much. The ink is hardly dry on the statute of 2002. There is not much ossification going on; it is not even jelly. We would like the answers to those questions.<sup>73</sup>

Lord Kingsland referred back to the debates on the 2002 Act:

I make no apologies for repeating the words of the noble and learned Lord, Lord Hutton, expressed in the debate on the Second Reading of the Justice (Northern Ireland) Bill last year and already cited by my noble friend:

"It is clearly vital that a judge should be appointed on merit alone and that appointments should not be influenced by political considerations. That is all the more important in the highly charged political atmosphere of Northern Ireland. If judges are not appointed on merit, the administration of justice will suffer, as will public confidence in that administration".—[Official Report, 3/5/02; col. 969.]

What the noble and learned Lord said about the influence of political considerations on appointment applies, in my submission, a fortiori to the influence of political considerations on dismissals.

Until that Bill became law later in 2002, High Court judges in Northern Ireland could be dismissed, like High Court judges in England and Wales, only on an Address to Her Majesty by both Houses of Parliament. For reasons that were deplored by many of your Lordships in the course of Committee and Report stage debates, the Bill removed that protection, a protection that has existed since the Act of Settlement of 1701; that is to say for over 400 years...

What conceivable reason can the Government have for making that further revision so soon after the previous legislation had found its way on to the statute book? The noble Baroness said in her opening remarks that the justice systems should not be allowed to ossify; but as the noble and learned Lord, Lord Mayhew of Twysden, has already observed, as yet we have no experience at all as to how the 2002 Act will operate. Moreover, the proposed clause seems to move away from one of the cardinal principles of the Convention on Human Rights, the independence of the judiciary; a principle which, together with other principles contained in the convention, is purported to be the whole basis for these further changes.<sup>74</sup>

At Committee, he asked again:

What is the motive behind this extraordinary change? It is not as though we have any evidence upon which to base it. Not only did the Act which the Government are now seeking to amend receive royal assent as recently as 2002; but we have as yet no experience whatever of its operation. In the absence of any convincing

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<sup>73</sup> HL Deb 16 December 2003 c1107

<sup>74</sup> HL Deb 16 December 2003 c1116

answer from the Minister, I am forced to conclude that the effect of the change will be to elevate political considerations as a factor in the dismissal of judges.<sup>75</sup>

Lord Maginnis of Drumglass pointed out that less than two years before, the Government had taken the view – not blindly he hoped, but with consideration – that it was appropriate to secure the agreement of the Lord Chief Justice, and he asked the Government to look very carefully at the implications and the dire potential consequences of the change.<sup>76</sup>

Lord Filkin replied for the Government. He said:

...the Lord Chief Justice will be consulted on the removal. Clause 5 more closely reflects the recommendation of the Criminal Justice Review.

Perhaps I may set out why we do not believe that there is a risk or a weakness here in relation to the independence of the judiciary. First and fundamentally, the removal of a judicial office holder can only follow the recommendation of a judicial tribunal. Such a tribunal will be brought into existence either by, or in consultation with, the Lord Chief Justice. Therefore, at the start of the process, the Lord Chief Justice will be consulted or he himself may have convened the tribunal.

As the Committee will recall from the 2002 Act, the membership of the tribunal consists of two judges and one lay person. The nature of the judge varies according to the nature of the office holder who is being considered for misconduct. The appointment of the judge to the tribunal is recommended by the Lord Chief Justice. Therefore, the Lord Chief Justice has a very strong hand in setting up the tribunal and in its procedures, its terms of reference and its membership. At its simplest, there will always be two judges and one lay person on such a tribunal.

No judge can be dismissed unless such a tribunal recommends dismissal. That is stated categorically in the legislation. Therefore, the process is effectively in the hands of appropriately senior members of the judiciary with a lay member also present....<sup>77</sup>

In reply to enquiry about the views of the present Lord Chief Justice, Sir Brian Kerr (who took office on 12 January 2004) and his predecessor, Lord Carswell, about the change, Lord Filkin said:

The question of consultation with the noble and learned Lord, Lord Carswell, and Sir Brian Kerr is a difficult issue on which to go into full detail. However, I can

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<sup>75</sup> HL Deb 15 January 2004 c735

<sup>76</sup> HL Deb 15 January 2004 c735

<sup>77</sup> HL Deb 15 January 2004 c736

give a categorical assurance that the noble and learned Lord, Lord Carswell, has been fully consulted on these issues and that Sir Brian Kerr has also recently been consulted by officials in the Northern Ireland court service. Therefore, they have been part of the process of considering this matter, although I am not necessarily putting or not putting their names to it. I shall leave that question suitably anonymous.<sup>78</sup>

When asked why the Government thought it necessary in so short a time to make the change, he said:

For two reasons. The noble and learned Lord, Lord Mayhew, being knowledgeable about Northern Ireland affairs, will have read the Hillsborough agreement as well as I have. More fundamentally, in many situations when a tribunal is set up, the Lord Chief Justice will already have been part of the process. So that situation is a circular one. When he is not part of the process, it will have been chaired by a member of the Appellate Committee of the House of Lords. In our view, one could hardly have a stronger test than that. And the final reason is that it brings us into line with the Criminal Justice Review report and if we think there is no strong reason not to do so, we do think that there is merit in doing so.<sup>79</sup>

Lord Kingsland then commented:

Until 24 July 2002, when the Justice (Northern Ireland) Act 2002 came into force, all High Court judges in Northern Ireland were protected from dismissal by a requirement that it could only take place on an Address of both Houses of the United Kingdom Parliament. This procedure was replaced in the 2002 Bill by an equivalent double lock procedure. For a dismissal to take place, first the tribunal, with a majority of judges, was required to recommend dismissal. The second part of the lock was that the Lord Chief Justice of Northern Ireland also had to give his or her approval.

Thus the previous situation was the double lock of both Houses of Parliament. The new situation since July 2002 is the double lock of the tribunal and the Lord Chief Justice. The Government were entirely satisfied with that situation in the middle of 2002. They fought for it, they argued for it, they rationalised it. Now, less than two years later, the Government have decided to remove one of those two locks.

I have listened to what the Minister said with interest and a degree of sympathy. However, I am forced to conclude that a reasonable person, observing what the Government are proposing and listening to what the Government have said in this debate, would conclude that the reason for the removal of the second part of the lock is wholly political. There seems absolutely no legal rationality whatsoever

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<sup>78</sup> HL Deb 15 January 2004 c737

<sup>79</sup> HL Deb 15 January 2004 c738

for doing what the Government have done. If that conclusion is right, it is a very serious matter. I shall not ask your Lordships' House to vote on this matter today but I shall certainly return to it at Report.<sup>80</sup>

His amendment to remove the clause, at Report, was carried on a division 149/128. he drew attention to the Government's proposal for England and Wales –

the Lord Chief Justice the noble and learned Lord, Lord Woolf, has confirmed this—that the consent of the Lord Chief Justice is essential. It should be the same in Northern Ireland. What possible reason can the Government give for proposing otherwise?<sup>81</sup>

Lord Dubs spoke in support of the clause, saying:

we are talking about a situation that is not identical to that pertaining in England and Wales. The Government gave their commitment at Hillsborough in the Joint Declaration. It would be a sad day if the Government were to renege on a promise they made to the Northern Ireland parties.

I understand that that is the main reason why there will be a different approach from that which noble Lords believe to be appropriate for England and Wales. Furthermore, the argument was also put in the implementation plan of the Criminal Justice Review that was updated in June 2003, when the point was clearly stated in the foreword to the document. It is not a new issue; it has been in print and understood by the main Northern Ireland political parties for some time. It would be a sad day if the House were to say, "Never mind what undertakings the Government made; we think differently". The situation in Northern Ireland, with the start of the talks today on the review of the Good Friday agreement, is sensitive. It would be unhelpful if this House were to change the Bill in the way the amendment suggests.<sup>82</sup>

Lord Maginnis of Drumglass retorted that he understood that Parliament was supreme, and that no politician could arbitrarily usurp its authority. Lord Filkin said that the commitment was given as part of the Hillsborough agreement, was reasonable and did not undermine judicial security or judicial independence. It was clearly important that we honour our commitments if we are to expect others to do so also.

Former Lord Chancellor Lord Mackay of Clashfern pointed out that it was contrary to judicial independence to alter the terms of service of a judge once he was appointed: if the proposal were to affect judges differently accordingly to the time at which they were appointed, that would be a serious and difficult situation for the judiciary in Northern Ireland to accommodate.

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<sup>80</sup> HL Deb 15 January 2004 c739

<sup>81</sup> HL Deb 3 February 2004 c595

<sup>82</sup> HL Deb 3 February 2004 c597

The exchange of correspondence between the Lords Constitution Committee and the Government was completed before, although not published until after the clause had been removed. The Committee referred to the explanation which the Government had given for the change, that it brought the position closer to the procedure recommended by the Criminal Justice Review.

But it is not apparent why the position of the Lord Chief Justice in this sensitive matter, settled by Parliament in the 2002 Act should now be varied in the manner proposed.<sup>83</sup>

The response was:

As to why we are moving on from the 2002 Act, this change is part of a wider process of finessing the implementation of the Criminal Justice Review with a view to further enhancing public confidence in the Northern Ireland justice system. The explanatory notes to the Bill set out the milestones in the change process since the 2002 Act received Royal Assent, notably the Joint Declaration and the updated Implementation Plan for the Review published in June, and the impact these have had on the legislation.<sup>84</sup>

## **B. Clause 5: Duty of DPP to refer matters to Police Ombudsman**

Clause 5 would impose a *duty* on the Director of Public Prosecutions to refer to the Police Ombudsman any matter which -

- (a) appears to the Director to indicate that a police officer—
  - (i) may have committed a criminal offence; or
  - (ii) may, in the course of a criminal investigation, have behaved in a manner which would justify disciplinary proceedings; and
- (b) is not the subject of a complaint,

unless it appears to the Director that the Ombudsman is already aware of the matter.

The DPP would already have a *discretion* to make such a reference, under the provisions of the *Police (Northern Ireland) Act 1998*, (as it would be amended by the *Justice (Northern Ireland) Act 2002*). Recommendation 21 of the *Criminal Justice Review* was that a duty should be placed on the prosecutor to ensure that any allegations of malpractice by the police were fully investigated. The updated Implementation Plan announced that the new legislation would do so.

The CAJ said:

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<sup>83</sup> Select Committee on the Constitution, 4th Report of Session 2003-04, HL Paper 40, 1 March 2004

<sup>84</sup> *ibid*

Clause [5](3) of the new Bill, on the duty of the Director of Public Prosecutions to refer matters of police malpractice to the Ombudsman, also falls short of the Review and of what had been promised in the Updated Plan. The wording of the clause confers an excessive degree of discretion on the Director to decide whether a matter is one which must be referred to the Ombudsman. The degree of subjectivity involved in this assessment could make it very difficult to judicially review the Director on this matter.

During the House of Lords debates, that point was put to the government by Lord Smith of Clifton,<sup>85</sup> while other Peers took the view that it was inappropriate to replace the existing discretion with a duty to refer such matters. Lord Hylton was concerned that the duty would impede the DPP in cases where the DPP intended to prosecute, but was assured by Lord Goldsmith that:

where a proper prosecution ought to be pursued in the view of the DPP, then it will be pursued. That must be the priority...<sup>86</sup>

He confirmed that the DPP's discretion whether or not to prosecute would be unchanged. At Report and at Third Reading, he expanded, saying:

As I said in Committee, decisions as to whether there should be a prosecution will still lie entirely with the director and his staff. It is his decision as to whether a prosecution should take place, and that will continue to be the position. If there is to be a prosecution, that will take place before reference to the ombudsman. So, there is no question of delegating a decision. The point is that the ombudsman has a different function. The ombudsman is not concerned to make a decision as to whether there should be a prosecution. As I said, that is for the director. The issue for the ombudsman is a different one and not one which falls within the director's responsibilities.<sup>87</sup>

...the decision on prosecution remains absolutely and completely that of the director, not of the ombudsman. It is only after the director has made a decision, one way or another, that the matter will go to the ombudsman, if it goes at all.<sup>88</sup>

Further concerns about replacing the discretion with a duty were that it would impose an administrative burden, leading to –

a way of life within the DPP's department where one is always looking to see whether the police have done something slightly wrong and whether one ought to be pushing everything on to the police ombudsman<sup>89</sup>

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<sup>85</sup> HL Deb 19 January 2004 c846

<sup>86</sup> HL Deb 19 January 2004 c847

<sup>87</sup> HL Deb 3 February 2004 c606

<sup>88</sup> HL Deb 10 February 2004 c1054

distracting DPP staff from their job of prosecuting cases, and that it would subject police officers to a double jeopardy. Lord Maginnis of Drumglass explained the double jeopardy concern:

If it is believed that a police officer has committed a criminal offence the matter will obviously be referred to the Director of Public Prosecutions, who will make a considered judgment based on the evidence before him. If there is a good chance that he will achieve a conviction, he will take the matter to court. If there is a 50-50 chance, he may decide to take the matter to court. If there is a 40 per cent chance, he will make an assessment.

But let us consider the case where the Director of Public Prosecutions looks at the information and evidence brought before him and decides that there is a 5, 10 or 15 per cent chance—in other words, a case where he would not recommend prosecution through the courts. That should be the end of his responsibility...

I have experienced a poorly prepared prosecution coming out of the DPP's office. If that happened, and there is an "inquest" into why a prosecution has failed, is there not likely to be a natural fall-back position, asking the police ombudsman to examine the evidence that the police provided in bringing the prosecution in the first place?

... If we adopt this clause, we give the Police Ombudsman a second opportunity to find evidence against a policeman which, in turn, may lead to a prosecution, because if she finds something within the scope of her investigations that suggests criminality, she is bound to refer the matter back. The situation will be such that, having considered the case against the policeman, and decided that there is no case to answer, the case is passed to the ombudsman and then handed back. The DPP has to make the same judgment on a second occasion. That is absolute nonsense. If it is not double jeopardy, it is what I always believed double jeopardy to be.<sup>90</sup>

In response, Lord Goldsmith pointed out that police officers would not be in a different position from that of many other people who belonged to professional bodies and might find themselves, after trial, to their professional bodies or other disciplinary bodies for consideration.<sup>91</sup>

It may be that the wording of the clause would require the DPP to refer a matter even after an acquittal, since there would not have been a prosecution unless it had appeared that the officer might have committed an offence, and an acquittal will not amount to a finding that he did not do so: it is a finding that the prosecution have not proved the case to the criminal standard of proof.

Lord Goldsmith also explained what the duty would involve for the DPP:

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<sup>89</sup> Lord Glentoran HL Deb 19 January 2004 c848

<sup>90</sup> HL Deb 10 February 2004 c1056

<sup>91</sup> HL Deb 10 February 2004 c1055

The noble Lord, Lord Rogan, makes an important point in saying that the director is not necessarily an expert in what would constitute disciplinary conduct on the part of police. But the director is not required to reach a definitive conclusion on that. He is required to consider whether the conduct, when one looks at it, may mean that an officer has behaved in a manner that would justify disciplinary proceedings. I know that the director will want to provide to his staff guidance with assistance from those who are more expert in what those matters would be, but experienced prosecutors who deal with police conduct in the course of investigating and considering prosecutions day in and day out form a view as to what may be conduct that justifies disciplinary action.

Of course, the decision is in no way final and the whole point is that the matter is then referred to the ombudsman. The discretion will lie with him and the expertise will be with the ombudsman to decide whether the conduct merits disciplinary activity. The provision therefore delineates the respective roles of the DPP and the police ombudsman by ensuring that any decisions which might need to be taken about the conduct of the police are referred to the appropriate authority; that is, the police ombudsman.<sup>92</sup>

An amendment which was made at Committee was a government amendment dealing with the issue of retrospection. It was intended to ensure that referrals made pursuant to the new duty would be treated consistently with other referrals to the Ombudsman, namely limiting the Ombudsman to investigating complaints about matters no more than 12 months old, subject to exceptions (where there are grave or exceptional circumstances and it appears that a criminal offence has been committed or an officer has behaved in a manner which would justify disciplinary proceedings).<sup>93</sup>

### **C. Clause 6: New offence of influencing a prosecutor**

Clause 6 would create a new statutory offence of seeking, with the intention of perverting the course of justice, to influence the Director of Public Prosecutions, the Deputy Director, or a Public Prosecutor in any decision as to whether to institute or continue criminal proceedings. According to the *Explanatory Notes*, it follows recommendation 46 of the Criminal Justice Review, although Lord Goldsmith explained in Committee that the Government had not followed precisely the proposals of recommendation 46 -

because we wanted a clearer provision that had regard to existing law that would enable people to judge whether conduct would break the law.<sup>94</sup>

During the debates in the House of Lords, the Government was pressed by several peers to explain why a new offence was needed, and whether it would catch any conduct which did not also amount to the common law offence of perverting the course of justice. The

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<sup>92</sup> HL Deb 19 January 2004 c848

<sup>93</sup> RUC (Complaints etc) Regulations 2001, Statutory Rule 2001 No. 184

<sup>94</sup> HL Deb 19 Jan 2004 c857

response has been to the effect that it is necessary to have a clear statement about the absolute independence of the DPP, after the devolution of justice, and that no-one should seek to influence him with the intention of perverting the course of justice.

## 1. The common law offence

Pollock B's description, in 1891, of the common law offence of perverting the course of justice, has been cited with approval in many subsequent cases. He said:

The real offence here is the doing of some act which has a tendency and is intended to pervert the administration of public justice.<sup>95</sup>

The act's tendency to pervert the course of justice must be proved, as well as the defendant's intention to do so.<sup>96</sup> Examples of acts which have been held to do so include discontinuing a prosecution in return for payment, making false allegations, and interfering with witnesses, evidence or jurors. In December 2003, Maxine Carr was found guilty of conspiring to pervert the course of justice. Ian Huntley had pleaded guilty to that charge, although not guilty to the murders for which he was convicted.

## 2. The recommendation of the Criminal Justice Review

Recommendation 46 was that -

legislation should: confirm the independence of the prosecutor; make it an offence for anyone without a legitimate interest in a case to seek to influence the prosecutor not to pursue it; but make provision for statutory consultation between the head of the prosecution service and the Attorney General, at the request of either.<sup>97</sup>

Section 42 of the *Justice (Northern Ireland) Act 2002* already declares the independence of the Director of Public Prosecutions in the exercise of his functions and provides for consultation with the Attorney General and Advocate General. The original Implementation Plan said that the Government is considering the practicalities of a new offence, particularly in light of the approach in the Republic of Ireland, to which the Review Group were attracted.

The review body looked at how the independence of prosecutors was safeguarded in several other jurisdictions. They considered that the Republic of Ireland model provided the most attractive precedent:

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<sup>95</sup> *R v Vreones* [1891] 1 Q.B.360,369

<sup>96</sup> *R v Machin* [1980] 1 W.L.R. 763

<sup>97</sup> Review of the Criminal Justice System in Northern Ireland, para 4.163  
<http://www.nio.gov.uk/pdf/mainreport.pdf>

4.110 Of all the jurisdictions visited, the Republic of Ireland has perhaps the most clearly defined statutory safeguards for the independence of the prosecutor, contained in the Prosecution of Offences Act 1974. Section 2(5) states that the DPP shall be independent in the performance of his or her functions, while section 6 makes it unlawful to communicate with the DPP or others involved in the prosecution process in order to influence them not to prosecute or to withdraw proceedings; this provision does not, however, apply to the defendant, the defendant's professional advisers, the defendant's family or to a social worker or anyone personally involved in the case.

Section 6 of the 1974 Act provides:

6.—(1)

(a) Subject to the provisions of this section it shall not be lawful to communicate with the Attorney General or an officer of the Attorney General, the Director or an officer of the Director the Acting Director, a member of the Garda Síochána or a solicitor who acts on behalf of the Attorney General in his official capacity for the Director in his official capacity, for the purpose of influencing making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.

(b) If a person referred to in paragraph (a) of this subsection becomes of opinion that a communication is in breach of that paragraph, it shall be the duty of the person not to entertain the communication further.

(2)

(a) This section does not apply to—

(i) communications made by a person who is a defendant or a complainant in criminal proceedings or believes that he is likely to be a defendant in criminal proceedings, or

(ii) communications made by a person involved in the matter either personally or as legal or medical adviser to a person involved in the matter or as a social worker or a member of the family of a person involved in the matter.

The Office of the DPP does not consider the section to create a criminal offence: it does not provide for any penalty. In practice, communications which would fall foul of the section are not passed on to prosecutors.

The effect of the section was, however, considered in a recent application for judicial review of the DPP's decision to prosecute in a case where the applicant had been informed that she would not be prosecuted, but had not been informed that the decision might be subject to review. The DPP had reviewed the decision following representations by the deceased victim's father, who had also been in contact with the Minister of Justice, making it likely that the applicant would (wrongly) have believed that the decision not to

prosecute had been changed on account of political influence. Her application succeeded on the ground that the reversal of the decision was a breach of her right to fair procedures. Section 6 did not apply: it applied only to attempts to influence a prosecutor *not* to prosecute, or to discontinue a prosecution. The judge at first instance commented that the section contained an anomaly, in that it did not cover approaches designed to persuade a prosecutor to proceed, however injudicious and improper they might be, having regard to the requirement for absolute impartiality and independence on the part of the DPP in the discharge of his functions.

### **3. Comparing with existing provisions**

The new clause differs from the model in several ways, in particular:

- a) it expressly makes the approach an offence, rather than just declaring it not lawful;
- b) it does not expressly impose a duty on the prosecutor not to entertain a communication in breach of the prohibition;
- c) it does require that the approach should have been made with the intention of perverting the course of justice; while
- d) it contains no blanket exclusion for people, such as defendants or complainants, who are directly involved in the particular matter.

While an essential ingredient of the new offence is that the defendant should have the intention of perverting the course of justice, it does not (unlike the common law offence) appear to require that his act could have any “tendency” to do so. In other respects it would be narrower than the common law offence in that it is limited to seeking to influence prosecutors’ decisions (although that might not necessarily involve a direct approach to a prosecutor) and, like the Irish model, it would not cover approaches designed to encourage, as opposed to discourage prosecution.

### **4. Debates in the House of Lords**

At Second Reading, Baroness Amos explained that the new offence would ensure that those who attempted to impinge on the independence of the prosecution would be brought to account. The target was activities with malicious intent, and she gave as an example –

if someone were to attempt deliberately to mislead the director in making a decision about whether or not to prosecute.<sup>98</sup>

The Liberal Democrat spokesman, Lord Smith of Clifton welcomed the clause, which he described as an essential ingredient of the Bill,<sup>99</sup> but Ulster Unionist Lord Laird thought that it added nothing to the offence of attempting to pervert the course of justice and asked why the clause was there.<sup>100</sup> Baroness Amos replied that the government had linked

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<sup>98</sup> HL Deb 16 December 2003, c1093

<sup>99</sup> HL Deb 16 December 2003 c1101

<sup>100</sup> HL Deb 16 December 2003 c1103

the offence with the idea of perverting the course of justice so as to be clear about what would constitute criminal behaviour and avoiding criminalising apparently innocent behaviour.<sup>101</sup>

At Committee, Conservative spokesman Lord Glentoran probed the purpose of the clause, asking what the clause added, as an offence would already be committed at common law.<sup>102</sup> Lord Mayhew, a former Attorney-General as well as a former Northern Ireland Secretary, drew attention to the comment in the explanatory notes that case law on the common law offence was “likely to be of use in the interpretation of this new offence”, which struck him as a polite way of saying that the provision was not necessary. Lord Phillips of Sudbury asked whether it was really necessary to create a new offence where a common law offence already existed. Lord Rogan too asked for a substantial justification for its inclusion. Former Lord Chancellor, Lord Mackay of Clashfern asked for an illustration of circumstances in which there would be a breach of the clause and yet not of the common law provisions. Replying for the Government, Lord Goldsmith, said:

One thing stood out in our discussions on the previous amendments: a view shared on all sides of the Committee that the independence of the DPP and his staff was critical to the functioning of the justice system in Northern Ireland. Changes to the justice system in Northern Ireland will mean that that independence is even more warmly to be cherished. The role of Attorney-General will be changing; the director will be standing as an independent person with a different relationship to the new, local Attorney-General for Northern Ireland and indeed the Advocate General for Northern Ireland, which the English Attorney-General will continue to be.

In those circumstances I am sure all Members of the Committee would agree that it is extremely important that we send a clear message that the director's independence shall not be interfered with without proper reason. In Clause 7 we seek to make it abundantly clear that improperly seeking to influence the Director of Public Prosecutions will be an offence.

I can envisage many circumstances in which providing information to the director, even making representations, perhaps on behalf of a relative—I do not constrain the examples—would be perfectly proper and it would be proper for the director and his staff to be able to take them into account. But there will come a point at which an attempt to influence a decision will cross a boundary and begin to move into the area in which the director's independence is being subverted.

At that point we believe that an offence should be created. We found it useful in those circumstances to have regard to an existing body of law in relation to the common law offences of perverting the course of justice, which help to identify what the point is. To my mind—I hope that Members of the Committee will

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<sup>101</sup> HL Deb 16 December 2003 c1118

<sup>102</sup> HL Deb 19 January 2004 c855

agree—given that the director's independence will be at the heart of his role in the criminal justice system in Northern Ireland, it is right and desirable that we should specifically underline that through the creation of an offence.<sup>103</sup>

Returning to the issue at Report, Lord Glentoran said that he found Lord Goldsmith's arguments less than convincing, and he thought that the new offence was neither necessary nor wise. He sensed that Lord Goldsmith had not been able to answer Lord Mackay's request for an illustration of circumstances where the new statutory offence, but not the existing common law offence, would be committed:

The real problem is that while to do so adds nothing in law, it has a significant down side...The existence of this new offence is unlikely to have much effect on professional criminals or terrorists, or on those who intimidate on their behalf. It may well inhibit the innocent person who wishes to make a pressing representation, whether it be on evidential or public interest grounds. It is essential that the law be clear in this area. We suggest that this clause reduces clarity and may well restrict proper representations.<sup>104</sup>

Lord Mayhew described the clause as a harmful mystery, which would result in inexpedient criminal proceedings, and at worst it may well lead to an oppressive prosecution.

Lord Goldsmith conceded that in certain circumstances, the common law could have done the job, but insisted that it was better that what we expect from people should be clear in the statutes. He sought to explain why the new offence was both necessary and wise:

A new system of justice is being created for all the people of Northern Ireland. Under that system, the director will explicitly be an independent officer. That is unlike the position in England and Wales, although I do not suggest for a moment that the Director of Public Prosecutions in England and Wales is not independent. The position will be different in that there will be a wholly new relationship with the Law Officers.

At the moment, the Director of Public Prosecutions is subject to the superintendence of the Attorney-General—my superintendence. After the devolution of justice, that relationship will change, and the director will be in a more direct and, if I may say so, free-standing position. He will have a relationship of consultation with the new locally appointed Attorney-General and a relationship of consultation with the Advocate-General. The reason for that is to make it very clear, in the particular circumstances of Northern Ireland, that people must have absolute confidence that prosecution decisions taken in Northern Ireland are taken independently, impartially and objectively on the evidence and nothing else and, as the noble and learned Lord, Lord Mayhew of

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<sup>103</sup> HL Deb 19 January 2004 c857

<sup>104</sup> HL Deb 3 February 2004, c608

Twysden, and the noble Lord, Lord Glentoran, said, on a proper consideration of the public interest. Those of us who have to make those decisions know that it is a question of public interest and not, for example, of any party political interest, which would be an inadmissible consideration.... it is important and necessary for Parliament to express very clearly that the independence of the director is absolute and that anybody who seeks to influence him with the intention of perverting the course of justice shall not do so. It is necessary so that there is a clear statement, and it is necessary so that the people of Northern Ireland can be assured that decisions affecting them, their family, their relatives or their neighbours will be taken properly, objectively and impartially.<sup>105</sup>

#### **D. Clause 7: Guidance on human rights standards**

Clause 7, which makes provision for the Attorney General for Northern Ireland to issue guidance to specified criminal justice organisations on how to carry out their functions in accordance with relevant international human rights standards, follows from the statement in paragraph 24 of the Joint Declaration that a second Criminal Justice Bill would make further provision to promote a human rights culture in the criminal justice system.

The updated implementation plan indicated that the Bill would –

place a duty on the criminal justice agencies in Northern Ireland to have due regard to relevant international human rights conventions and standards in carrying out their functions.

The CAJ’s concerns, about how this had been translated to a “curious and convoluted formulation” in clause 7, were taken up during the Lords’ debates, and were met with explanations as follows.

One concern was that, because the provision was drafted in terms of the Attorney General for Northern Ireland, the clause could not take effect until after the devolution of justice powers, when an Attorney General for Northern Ireland would be appointed (under s.22 of the *Justice (Northern Ireland) Act 2002*). There was no certainty about when that would be. The answer to this was that the Attorney General for England and Wales is, by virtue of that office, Attorney General for Northern Ireland also.<sup>106</sup> So the effectiveness of the clause does not depend on devolution.<sup>107</sup>

Another concern was subsection (8) which provides:

- (8) Nothing in this section requires the Public Prosecution Service for Northern Ireland to have regard to so much of any guidance for the time

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<sup>105</sup> HL Deb, 3 February 2004 c611

<sup>106</sup> *Northern Ireland Constitution Act 1973*, s10

<sup>107</sup> HL Deb 16 December 2003 c1119 Baroness Amos

being in operation under this section as is inconsistent with a provision of a code of practice issued under section 37 of the 2002 Act.

That raised the question of how there could possibly be an inconsistency between the new and first ever code of practice from the DPP (which has yet to be published in draft), and the Attorney General's guidance, which would not be issued until after this Bill became law. (Moreover, subsection (7) requires the DPP to have regard to the current human rights guidance in drawing up or revising his code of practice). Lord Goldsmith explained that, although he hoped that there would not be any inconsistency, the provision had been included to give a clear steer as to which, of the code of practice and his guidance, should take precedence in the unlikely event of there being an inconsistency. He gave an assurance that the government would want to move swiftly to address any apparent anomalies. He also explained that the clause provided for the publication of guidance, rather than a bare list, because it would be significantly more helpful to the agencies for them to be provided with some kind of analysis of the relevant conventions and standards.<sup>108</sup>

The *Criminal Justice Review* conclusion had been:

3.25 Respect for human rights and dignity should be the core value of the criminal justice system in all its aspects. There needs to be constant effort to ensure that there is widespread understanding of what this means. ...

3.26 During our consultation process and in visits to other jurisdictions we heard a strong case for a shared set of guiding principles or aims for the criminal justice system as a whole. Their publication would serve an important role in allowing the public to judge the system against agreed standards. It is also a mechanism by which those working in criminal justice, in a variety of different services and agencies, can relate to the overall aims towards which they are working and through which those services and agencies can operate in a coherent, co-operative fashion.

3.27 We carefully considered the arguments for including the basic principles of the criminal justice system in legislation. While we strongly endorse the view that the principles and aims expressed should be followed and realised, we do not think that this is best achieved through incorporating them in legislation. Nor do we believe that such legislation would add significant value. Instead we suggest reliance on the human rights framework, which is rapidly increasing in importance and influence, together with enhanced systems of openness and accountability, a theme running through this report.

3.28 While we generally endorse the guiding principles and values identified in our consultation paper, we do not think that such lists provide the necessary clear direction for the criminal justice system. Nor do they communicate to the public in a succinct fashion what the criminal justice system is about.

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<sup>108</sup> HL Deb 19 January 2004, c873

In explaining in answer to Lord Rogan's question why the measure had not been included in the *Justice (Northern Ireland) Act 2002*, Lord Goldsmith referred to those difficulties and explained that:

The Criminal Justice Review did not specifically recommend legislation on human rights, but the issue was revisited during the Hillsborough discussions. The Government's view is that the provision of guidance to criminal justice agencies on the relevant human rights instruments will help them to ensure that respect for human rights is kept at the heart of the justice system, while avoiding the difficulties that the review anticipated.<sup>109</sup>

The clause was however amended by the Government at Report, to meet the recommendations of the Select Committee on Delegated Powers and Regulatory Reform. As introduced, the clause provided for the guidance to be laid before Parliament, with no further scrutiny. The Committee commented that the guidance was highly significant in that the listed organisations (and any organisations added later) must, under section 8(2), have regard to the guidance in exercising their functions. They recognised that human rights issues were highly sensitive in Northern Ireland and, for that reason, concluded that the guidance should be brought into force by an order subject to negative procedure, so allowing Parliament an opportunity to have some control over its issue.

Clauses 7(3)(c) and 21(3) together now so provide.

## **E. Clause 12: Transfer of prisoners**

### **1. Background**

#### ***a. Maghaberry Prison***

Her Majesty's Prison Maghaberry is situated near Lisburn in County Antrim. Following the closure of HMP Belfast in 1996 and HMP Maze in 2000, Maghaberry was required to absorb and accommodate a number of different prisoner groups including remand prisoners and those paramilitaries who were not released from prison early under the Belfast Agreement. HMP Maghaberry has historically functioned as an integrated establishment, in which prisoners of all persuasions and backgrounds are required to live and work together. The management of an institution dealing with such varied groups is a considerable operational challenge.

In the summer of 2003 a number of protests were mounted by prisoners claiming that the integrationist policy was putting individuals' safety at risk. A series of events within and outside the prison, in which individuals from both sides of the community divide participated, culminated in a dirty protest conducted specifically by prisoners affiliated to

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<sup>109</sup> HL Deb 19 January 2004 c876

dissident republican organisations. The publicity generated by these incidents prompted community leaders and organisations to place considerable pressure on the Government to address the safety concerns raised.

In response the Government commissioned a short review of conditions in the prison which was led by John Steele, a former head of the Northern Ireland Prison Service. Its terms of reference were:

to consider, in consultation with prison management, staff, their unions, prisoners and other interested groups and taking account of relevant practice in other jurisdictions, the options for improving conditions at Maghaberry Prison, particularly as they relate to safety, for all prisoners and staff, remembering the Prison Service's statutory obligations as set out in s. 75 of the Northern Ireland Act 1998, and bearing in mind the lessons of the past and the new environment created by the Good Friday Agreement, and to make recommendations to the Secretary of State for Northern Ireland.

The Government received the Steele Group's recommendations at the end of August. The Secretary of State for Northern Ireland made a written ministerial statement on 8 September 2003, announcing the Government's decision to accept them in principle and ask the Northern Ireland Prison Service to establish an additional regime for eligible paramilitary prisoners:

The key recommendation was that republican and loyalist paramilitary prisoners should be accommodated separately from each other and from the rest of the prison population. This is a significant change from the fully integrated prison regime that has been running at Maghaberry Prison for nearly twenty years. That regime has been successful for those who have chosen to make the most of the opportunities offered to them but, like any prison regime, it requires the co-operation of prisoners.

The Government's decision is no reflection on the professionalism and dedication of Northern Ireland Prison Service staff in pursuing a normal integrated regime. We still believe that integration is the safest regime for prisoners and staff when prisoners conform and co-operate. But we have to deal with the small minority of prisoners who have now refused that co-operation.<sup>110</sup>

On 18 September 2003, the Northern Ireland Affairs Committee issued a press notice announcing its intention to conduct an inquiry into the separation of paramilitary prisoners at HMP Maghaberry, taking as its starting point the Steele Review into the safety of staff and prisoners, and the decisions taken by the Government in response to the Review's recommendations. The Committee also wished to look at:

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<sup>110</sup> HC Deb 8 September 2003 c5WS

- The reasons behind the change in policy and the factors which were taken into account; and
- The practical consequences of separation for the management of the Northern Ireland Prison Service.<sup>111</sup>

It began taking evidence in October and published its report on 5 February 2004, shortly after a two day riot at the prison. In the summary of its report, the Committee said:

The Government's decision to implement separation, which we believe to have been taken for political reasons, was largely unwelcome to staff within the Prison Service. It was not believed that separation would result in greater safety either for prisoners or staff. It was feared that the paramilitaries would seek to take control of the separated areas as they had previously done at HMP Maze. Within the temporary arrangements which have preceded establishment of the permanent regime, there has been significant evidence of prisoners continuing to resist and challenge the management of their wings. Outside the prison, attacks on the homes of prison officers—primarily by Loyalist organisations—have continued at a high level.

The report recognises that, having made the decision to implement separation, the Government cannot now turn back from it. But it asserts that the Government must pay the full cost which arises from the decision in terms of support for the prison and for its staff. The Government must 'hold the line' within the prison and ensure that no concessions are ever made to the separated prisoners which might undermine or diminish the control exercised by prison officers. Recommendations are made on a number of subjects, such as the procedure for identifying prisoners eligible for separation, and the exercise of sanctions, where questions about the operation of the proposed new regime remain.

***b. Existing provisions for transfer of prisoners***

Schedule 1 to the *Crime (Sentences) Act 1997* currently provides for the transfer of prisoners from Northern Ireland to another part of the United Kingdom with their consent. Under Schedule 1 a prisoner may be transferred as a result of his own application or for the purposes of attending trial or for other judicial purposes.

**2. Clause 12: transfer without consent**

Clause 12 of the Bill would amend Schedule 1 to provide that if it appears to the Secretary of State that in the interests of maintaining security or good order in any prison in Northern Ireland a remand or sentenced prisoner should be transferred to another

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<sup>111</sup> "The Separation of Paramilitary Prisoners at HMP Maghaberry: New inquiry", 18 September 2003, NIAC press release

establishment in England and Wales, he may make an order to that effect (i.e. without the prisoner's consent).

At Second Reading in the House of Lords, Baroness Amos introduced the clause as one measure following the Steele Review's recommendation that the new separated arrangements at Mughaberry should be backed by a range of measures to prevent deterioration into segregation as it operated in the Maze. She said:

Northern Ireland has only one high security prison and the dispersal of troublesome prisoners within the Northern Ireland Prison Service estate is not therefore possible. The need for the prisoner to remain in England and Wales will be reviewed on a regular basis and he or she will be returned to Northern Ireland as soon as it is assessed that his or her transfer is no longer necessary. Arrangements will be made to ensure that the prisoner will not be disadvantaged as regards family visits or, in the case of remand prisoners, access to legal advice.<sup>112</sup>

Peers who spoke in the debates accepted that there was a need for some provision along these lines, but emphasized that there was a human cost, for the prisoners and their families, and that compulsory transfers should only be made as a last resort. There was some concern that the power might be too widely drawn. Baroness Amos explained that the power, required for the protection and safety of prison staff and other prisoners, would not be fully effective if it was limited to cases where there already had been misconduct by a prisoner, or a prisoner was already at risk of harm. Pre-emptive action might be an appropriate and proportionate response in extreme cases. She said that transfers would not be undertaken lightly, and each case would be considered on its individual merits.<sup>113</sup>

Subsection (4) was added at Report stage, to provide on the face of the Bill that all transfers should be "on a restricted basis".<sup>114</sup> This means that the release date of a prisoner transferred to an English prison will be determined according to the laws of Northern Ireland, not that of England and Wales. There had been some concern that otherwise a transferred prisoner might benefit from the more generous early release provisions available in England and Wales.

At Committee, Lord Hylton moved an amendment to extend the power, so that prisoners could be transferred to Scotland as well as to England and Wales. As prisons and prison transfers fall within the devolved field, the Westminster Parliament could only legislate in this way with the consent of the Scottish Parliament, by way of a "Sewel Motion". Sewel motions are the method by which the Scottish Parliament may agree to the UK Parliament legislating on a devolved matter. Baroness Amos said that a Sewel Motion was being considered and, if it was approved by the Scottish Parliament, the Government would

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<sup>112</sup> HL Deb 16 Dec 2003 c 1094

<sup>113</sup> HL Deb 19 Jan 2004 c 882

<sup>114</sup> HL Deb 3 Feb 2004, c 615

bring forward an amendment to provide for compulsory transfer to Scotland as well as to England and Wales.<sup>115</sup>

The following motion was listed in the Scottish Parliament's Business Bulletin on 1 March 2004, but is not yet listed for debate:

"S2M-936 Cathy Jamieson: Justice (Northern Ireland) Bill - UK Legislation-That the Parliament agrees that an amendment should be made to the Justice (Northern Ireland) Bill to provide for the compulsory transfer of prisoners from Northern Ireland to Scotland and that the amendment should be considered by the UK Parliament.

Supported by: Hugh Henry"<sup>116</sup>

## **F. Other provisions**

### **1. Bail**

Clause 9 would give the prosecution a right of appeal against the grant of bail by a magistrates' court. It follows the format of section 1 of the *Bail (Amendment) Act 1993* which first introduced such appeals in England and Wales, with small modifications to reflect the different court structures. It applies only where the person has been charged with an imprisonable offence (as s1 will do when an amendment made by the Criminal Justice Act 2003 comes into force) and when a professional prosecutor is involved, and did make representations against the granting of bail.

Clauses 10 and 11 create new provisions in relation to those granted bail under the *Terrorism Act 2000* (scheduled cases) and adjust current bail provisions on bail under the *Criminal Justice (Northern Ireland) Order 2003*<sup>117</sup> (non-scheduled cases) to bring both into alignment.

### **2. Driving while disqualified**

Clause 14 makes driving while disqualified an arrestable offence. Driving while disqualified was made an arrestable offence in England and Wales, with effect from 12 October 2002, by s48 of the *Police Reform Act 2002*. At Lords Second Reading, Baroness Amos explained that the power of arrest for driving while disqualified had been brought forward at the request of the Chief Constable. This Bill was the first legislative opportunity to resolve this anomaly.<sup>118</sup>

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<sup>115</sup> HL Deb 19 Jan 2004 c 883

<sup>116</sup> at - <http://www.scottish.parliament.uk/business/bb-04/bb-03-01.htm>

<sup>117</sup> (S.I.2003/1247 (N.I.13))

<sup>118</sup> HL Deb 16 Dec 2003 c 1118

### 3. Barristers

Traditionally, barristers had been unable to sue for their fees because, as a matter of law, they could not enter into contracts for their services in litigation. The justification was said to be either that if advocates made contracts their minds would be lowered and the standard of duty degraded, or that “a barrister is of too high an estate to condescend to the common arena to sue his client”.<sup>119</sup>

S61(1) of the *Courts and Legal Services Act 1990* abolished any rule of law which prevented a barrister in England or Wales from entering into a contract for the provision of his services as a barrister, with a proviso that nothing in the section prevented the General Council of the Bar from making rules which prohibit or restrict their right to do so.

Clause 16 brings the situation in Northern Ireland into line with the situation in England and Wales.

The Bar Council of England and Wales now offers the following guidance:

Barristers are generally free to negotiate fees on any basis within the law that they wish. The Bar Council has provided standard terms of work (Annex G1) under which most barristers offer their services. These terms of work do not constitute a contract and the Bar Council has provided model contractual terms (Annex G2) for those wishing to work under contractual relations. These terms apply only to solicitors.

### G. Links to relevant documents

Most of the relevant documents are available electronically and can be accessed through the NIO’s Criminal Justice pages at <http://www.nio.gov.uk/issues/justice.htm>. For convenience, some of the principal documents with particular current relevance are listed below:

*Review of the Criminal Justice System in Northern Ireland*, Criminal Justice Review Group, March 2000, <http://www.nio.gov.uk/pdf/mainreport.pdf>

*Criminal Justice Review Implementation Plan November 2001*, Northern Ireland Office, <http://www.nio.gov.uk/pdf/impplan2.pdf>

*Justice (Northern Ireland) Act 2002 c26*,  
<http://www.hmsso.gov.uk/acts/acts2002/20020026.htm>

*Justice (Northern Ireland) Act 2002, Explanatory Notes*,

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<sup>119</sup> *Rondel v Worsley* [1969] 1 A.C. 191

<http://www.legislation.hmso.gov.uk/acts/en/2002en26.htm>

*Joint Declaration by the British and Irish Governments April 2003*

<http://www.nio.gov.uk/pdf/joint2003.pdf>

*Criminal Justice Review Implementation Plan Updated June 2003*, CJSNI,

<http://www.nio.gov.uk/pdf/cjimp2003.pdf>

*First Report of the Justice Oversight Commissioner*, December 2003

*The Justice (Northern Ireland) Bill [HL]*, Bill 55 of 2003-04,

<http://www.publications.parliament.uk/pa/cm200304/cmbills/055/2004055.htm>

*The Justice (Northern Ireland) Bill [HL] Explanatory Notes, Bill 55-EN*

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