

NORTHERN IRELAND ACT 2009*

(2009 c.3)

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An Act to make provision in relation to policing and justice in Northern Ireland; and to amend section 86 of the Northern Ireland Act 1998. [12th March 2009]

PARLIAMENTARY DEBATES

Hansard, HC Vol.488, cols 22 (1R), 854 (PM), 886 (2R), 921 (Committee Stage), 958 (Report Stage) (3R) (passed); HL Vol.708, cols 810 (1R), 955 (2R), 1174 (Committee Stage), 1260 (Report Stage) (3R) (passed), 1382 (Royal Assent). Royal Assent: March 12, 2009.

INTRODUCTION AND GENERAL NOTE

The Northern Ireland Act 2009 (c.3) (“the Act”)—another statutory outworking of the 1998 Belfast Agreement—formally amends policing and justice legislation, most of which has not yet been brought into force. Substantively, it was about reassuring Sinn Féin on the devolution of these powers, being rushed through Parliament in time, it was thought, for the European elections in June 2009 (with ministerial hints of devolution before the general election expected in May 2010).

The Act did not provide for devolution, and, as the fourth measure to deal with the subject, constituted an executive abuse of the parliamentary process—something MPs and peers tolerated in their sovereign body.

Relevant Documents and Reports

The Act must be traced from 1998, and the beginning of the end of the thirty years of Northern Ireland “troubles”.

*Annotations by Austen Morgan, Barrister at Law, 3 Temple Gardens, London.

From 1972, the secretary of state for Northern Ireland, a member of the London Government, had been responsible for policing and justice (and this remains the position).

(1) The Belfast Agreement of April 10, 1998

This is an international agreement between the UK and Irish states. So much is evident from its third publication as Cm 4705, after entry into force, in May 2000. The legal face of the Belfast Agreement is the British-Irish Agreement (“BIA”), to which is annexed a multi-party agreement (“MPA”)—not all of which has legal effect. The political face of the Belfast Agreement is the MPA with the BIA annexed for, as it were, information (see further, A. Morgan, *The Belfast Agreement: a practical legal analysis*, London, 2000).

The Belfast Agreement provided principally for the restoration of devolution in Northern Ireland (which had been the system of government between 1921 and 1972 from Stormont outside Belfast). The involuntary coalition system of government, based upon the d’Hondt formula of an executive proportionate to the legislature, was to operate from December 2, 1999, but mainly from May 8, 2007.

In the section “policing and justice” (in the MPA), the Belfast Agreement provided for a commission on policing and a review of the criminal justice system. Paragraph 7 read:

“The participants also note that the British Government remains ready in principle, with the broad support of the political parties, and after consultation, as appropriate, with the Irish Government, in the context of ongoing implementation of the relevant recommendations, to devolve responsibility for policing and justice issues.”

That was all.

(2) The Patten Report

The commission on policing was chaired by Chris Patten, a former Northern Ireland Office (“NIO”) minister and most recently governor of Hong Kong. In the report of September 9, 1999, the commission recommended the re-branding of the Royal Ulster Constabulary (“RUC”), to become a reformed Police Service of Northern Ireland (“PSNI”). It did not deal with the question of devolution.

(3) The Criminal Justice Review

This was, in contrast, a committee of officials. The report, published on March 30, 2000, was to be the inspiration for a judicial appointments commission, a public prosecution service, a chief inspector of criminal justice and a law commission. It noted the devolution aspiration, but did not otherwise deal with the issue (rather assuming its inevitability).

(4) Resumed Political Negotiations

These were spread over a number of years from 2001 (to 2007), were focused mainly on the restoration of devolution, after the decommissioning of IRA arms (which is reported to have occurred in the late summer of 2005), and are the true locus—rather than the Belfast Agreement—of the idea of the devolution of policing and justice.

The Weston Park proposals of August 1, 2001, which described policing as one of four outstanding issues, did not refer to devolution.

The Hillsborough joint declaration of May 1, 2003, contained the first statement of British Government intention. Paragraph 20 reads in full:

“The British Government has accepted, under the [Belfast] 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 [that is, 2003-07].”

Annex 2 included four departmental models: (1) a single department under a single minister (perhaps with a junior minister from the opposite tradition); (2) a single department under two ministers (or the first minister and deputy first minister); (3) adding policing and justice to the

office of the first minister and deputy first minister; and (4) separate policing and justice departments, one under a nationalist, and the other under a unionist, minister.

The comprehensive agreement of December 8, 2004—which reflected the eclipsing of centrist, cross-community cooperation between David Trimble’s unionists and Seamus Mallon/Mark Durkan’s nationalists by extremist Balkanizers in the form of Paisleyites and Irish republicans—embodied a deal: devolution of policing and justice in return for Sinn Féin joining the policing board.

The St Andrews agreement of October 13, 2006 (the comprehensive agreement reheated) rearticulated the deal: the Democratic Unionist Party (“DUP”) would share power with Sinn Féin, if the latter came out in support of the PSNI. The devolution of policing and justice was scheduled, in the main text, for May 2008 (this was the objective of the UK and Irish Governments).

The St Andrews agreement, with Acts of Parliament in 2006 and 2007, led eventually, on May 8, 2007, to Peter Robinson of the DUP becoming first minister, in harness, as deputy first minister, with Martin McGuinness of Sinn Féin (a man who could not assert he had never been a IRA leader).

(5) *The Devolution Discussion Paper*

This 46-page document had been issued by the NIO on February 16, 2006, the day of the first reading of the Northern Ireland (Miscellaneous Provisions) Bill (see further below). This paper repeated the four models from the 2003 joint declaration, but it went on—denying any preference—to refer to two departments, one unionist and the other nationalist.

(6) *Policing and Justice Legislation*

The policing and justice section of the Belfast Agreement had led to the following legislation:

- Police (Northern Ireland) Act 2000;
- Justice (Northern Ireland) Act 2002;
- Police (Northern Ireland) Act 2003; and
- Justice (Northern Ireland) Act 2004.

The 2003 and 2004 Acts were because of demands for more (which are explained fully in the CLSA introductions). These four statutes implemented the Belfast Agreement reforms, and more.

(7) *Devolution Legislation*

The devolution of policing and justice was the subject of legislative provision in July 2006, November 2006 and May 2007 (amending the parent Northern Ireland Act 1998 (“NIA 1998”)):

- Northern Ireland (Miscellaneous Provisions) Act 2006 (“NIMPA 2006”) ss.16, 17 and Schs 2, 4 and 5.
- Northern Ireland (St Andrews Agreement) Act 2006 (“NISAAA 2006”) ss.9, 18 and Sch.6.
- Justice and Security (Northern Ireland) Act 2007 (“JSNIA 2007”) s.44.

The NIMPA 2006, enacted on July 25, 2006, was enabling legislation (with three departmental models). Before there could be the devolution of policing and justice, the Northern Ireland assembly had to be restored. The assembly then had to establish a department or departments. It then had to request devolution from London. Parliament and the UK Government had to agree. Only then could the secretary of state, by virtue of the NIMPA 2006, devolve these functions by order rather than fresh legislation.

The preconditions for devolution—actions by the assembly (which were fattened up by this statute), the Government and Parliament—came to be referred to as the triple lock (derived from the NIA 1998), by the DUP and (after them) by the nationalist Social Democratic and Labour Party (“SDLP”); Sinn Féin was not getting devolution that easily.

The NISAAA 2006, enacted on November 22, 2006, further provided for the three models in the earlier enactment: a single minister, nominated by the first minister and deputy first minister; two ministers; and a minister and junior minister, rotating. The Act also purported to set a deadline of March 27, 2008, when the assembly had to report on preparations for devolution to the secretary of state.

The JSNIA 2007, enacted on May 24, 2007 (after devolution), was more enabling legislation. There was a fourth departmental model: an elected minister and an elected junior minister. And there was a new principle, inconsistent with the devolution provisions of the NIA 1998. The secretary of state could create a department in Belfast by order in council, but could not (of course) give it ministers: that was the responsibility of the assembly.

(8) The DUP/Sinn Féin Agreement of November 18, 2008

These two parties dominated the involuntary coalition that took office on May 8, 2007 (introducing an element of voluntary coalitionism). Following the missed deadline of May 2008, Sinn Féin effectively went on strike (though the issue was reported as simply political disagreement). That autumn (seemingly on or before November 8, 2008), the DUP lured the republicans back into functioning government, by seemingly agreeing to the devolution of policing and justice (but without providing a date or any permanent arrangement).

The agreement is contained in three documents: (1) a joint statement by Peter Robinson and Martin McGuinness; (2) a joint letter to the chairman of the Assembly and Executive Review Committee (“AERC”) (see below); and (3) a so-called policing and justice process paper.

Peter Robinson stated in document (1) that the DUP favoured the devolution of policing and justice, and document (3) dealt fully with the question of community confidence (code for unionist fear of a Sinn Féin justice minister).

Document (2) contained agreement on: interim arrangements, to end definitively in May 2012; a justice minister to be elected by cross-community vote in the assembly (to head a department of justice); more powers for the judicial appointments commission; the nomination of John Larkin QC to be Attorney General; and funding to be discussed with the secretary of state.

It was reported that neither the DUP nor Sinn Féin could aspire to win a cross-community vote in the assembly. The rumoured victor—though he was suitably modest in public (including in the public gallery of the house of commons on March 4, 2009)—was David Ford, leader of the non-sectarian alliance party (which held only seven assembly seats, and could not normally aspire to ministerial office); the name of a freshman member of that party was also suggested.

Document (3) contained bullet points, and six groups of events (sequential and concurrent), leading to the devolution of policing and justice, but no start date for a process to end in May 2012 (some three plus years away). In group 4, there was the following: “Financial discussions between [first minister and deputy first minister], NIO, Treasury and [prime minister] concluded satisfactorily.”! Group 5 begins: “Commence process of building confidence to achieve cross community buy-in ...”, and ends: “Secure necessary community confidence for transfer of [policing and justice].”

This was an agreement between the first minister and the deputy first minister, and not a collective position of the executive committee of the Northern Ireland assembly.

(9) Assembly and Executive Review Committee Report, January 2009

The AERC of eleven assembly members owed its origins to s.11 of the NISAAA 2006. In the St Andrews agreement, the DUP had sought to reform the Belfast Agreement into oblivion. Section 11 added ss.29A and 29B to the NIA 1998, providing for a review of ss.16A-16C (on the appointment of ministers) by 2011; it also provided for a review of Pts 3 and 4 of the NIA 1998 by 2015.

But s.18 of the NISAAA 2006 also required the devolved legislature to report to the secretary of state before March 27, 2008 on its progress towards the devolution of policing and justice.

The AERC duly reported, on February 26, 2008 (having been mandated on June 4, 2007), and in two volumes, on its inquiry into the devolution of policing and justice matters. Geoffrey Donaldson MP was replaced as chairman by Jimmy Spratt, also of the DUP. The assembly approved the report on March 11, 2008.

On January 6, 2009, the AERC published its First Report on the Arrangements for the Devolution of Policing and Justice Matters (“the AERC report”). The report was short; not so the five appendices.

The AERC—having been mandated by the assembly on September 23, 2008—had worked off letters from the first minister and deputy first minister, of July 28, 2008, November 8, 2008, especially November 18, 2008 and December 12, 2008 (including a rogue letter of October 13, 2008 from Martin McGuinness, from Sinn Féin headquarters); it was the mechanism by which the DUP and Sinn Féin announced political agreement.

The AERC report was far from unanimous. It contained 15 recommendations, which had been agreed (5 by majority rather than consensus). But there was a category two list of 12 issues, requiring a second report before devolution. And a category three list of 5 issues, for decision by a justice committee of the assembly after devolution.

The 15 recommendations included: a department of justice; an interim arrangement until May 2012, with the minister elected on a cross-community vote; and a ‘convention’ that members of the policing board would not sit on the assembly justice committee.

(10) House of Lords Select Committee on the Constitution Report, March 5, 2009

This committee reported briefly on the Bill, on the day of first reading. It made two points: (1) this was not emergency legislation, but constitutional reform requiring pre-legislative scrutiny; and (2) the prime minister should no longer be involved in judicial appointments.

(11) Delegated Powers & Regulatory Reform Committee Report, March 5, 2009

This committee also reported on the Bill, on the day of first reading. The committee was concerned about only one of the four delegated powers: amendments to s.86 of the NIA 1998: “The principle of devolving functions in advance of legislative competence is a feature of the Bill which the House will have the opportunity to debate as a matter of policy.” (para.6.)

(12) The Origins of the Act

The origins of the Act are in document (3) from November 18, 2008. One of the group 1 bullet points is: “Preparatory briefing to outline the shape of the necessary Westminster legislation.” Group 3 begins: “Consequential Westminster legislation drafted and introduced.” There was no reference to enactment!

Legislative Intent

In the draft legislative programme for 2008/09, announced in June 2008, there was no reference to legislation for Northern Ireland.

The Queen’s speech was late, on December 3, 2008. It was shorter than usual. Though the Robinson/McGuinness agreement had been announced on November 18, 2008, there was only an elliptical reference: “My Government is committed to the Northern Ireland political process and will bring forward further measures for sustainable, devolved government.”

The Bill

The Northern Ireland Bill (“the Bill”) was introduced in the House of Commons on Monday, February 23, 2009, the intention being to take all remaining stages the following day (or the day after that). This was postponed to Wednesday, March 4, 2009, as a result of discussion between the whips. But first reading in the House of Lords was on the evening of March 4, 2009. Second reading in the Lords was on Monday, March 9, 2009, and all remaining stages were taken on Wednesday, March 11, 2009. Royal Assent followed on March 12, 2009.

Both Bills were accompanied by explanatory notes (Bill 62 EN and HL Bill 28 EN); while these have been noticed by the law lords in one or two cases, their cautious paraphrasing of clauses and schedules makes them relatively useless to legislators.

As is increasingly the position, the Government’s programme motion (formerly guillotine) in the House of Commons on March 4, 2009 was resisted strongly, only to be passed by 276 votes to 213 on an opposition backbench amendment. The Bill was not emergency legislation, but the Government appeared, as often with Northern Ireland, to avoid parliamentary scrutiny by expecting bipartisanship support (the term emergency Bill being used in an NIO document annexed to a secretary of state letter of December 3, 2008).

The Government was forced, following meetings with peers, to produce the legislation due to be amended (14 pp), and it also produced the legislation with the intended amendments (53pp). This related only to cl.1 and Sch.1. These documents were more useful than explanatory notes, and form a good precedent, at least for Northern Ireland legislation.

The Bill—Bill 62—began with five sections and six Schedules. It passed through the House of Commons without amendment. The same Bill was introduced in the Lords, HL Bill 28. It too passed without amendment. The Act is the Bill as first introduced.

On Saturday, March 7, 2009, while the Bill was awaiting second reading in the House of Lords, republican dissidents killed two soldiers in Northern Ireland, the first to have died there since

1997. The subtext of the chorus of subsequent parliamentary criticism was: we have to help Sinn Féin, against the dissidents, by giving them a political victory to celebrate.

The Prime Minister flew to Northern Ireland on Monday, March 9, 2009, and the Secretary of State, Shaun Woodward MP, made a statement to the House of Commons (repeated after second reading, in the House of Lords).

That evening, another dissident republican group killed a policeman, again the first to have died since 1997. The official opposition, under pressure from the Government, abandoned its amendments in the House of Lords.

The Bill was referred to variously as the Northern Ireland Bill 2008-09, referring to the session, or the Northern Ireland Bill 2009, referring to the year of introduction.

Human Rights

The Bill carried the usual s.19 (of the Human Rights Act 1998) declaration by the secretary of state. The explanatory memorandum raised art.(1) regarding an independent judiciary. The legislative provision for tribunals, it was argued (plus the possibility of judicial review!), made the possibility of removal of judges proportionate.

COMMENCEMENT

Section 5(6) provides for some of the Act coming into force on Royal Assent, namely March 12, 2009. But s.5(7) reserves ss.2 and 3(1) plus Schs 2-6 for secretary of state order. Given amendments to legislation not yet in force, very little of the Act reached the statute book on March 12, 2009.

ABBREVIATIONS

“the Act”:	Northern Ireland Act 2009
“AERC”:	Assembly and Executive Review Committee
“AERC report”:	First Report on the Arrangements for the Devolution of Policing and Justice Matters (January 6, 2009)
“BIA”:	British-Irish Agreement (of April 10, 1998)
“the Bill”:	Northern Ireland Bill: Bill 62; HL Bill 28
“DUP”:	Democratic Unionist Party
“JSNIA 2007”:	Justice and Security (Northern Ireland) Act 2007
“MPA”:	Multi-Party Agreement (of April 10, 1998)
“NIA 1998”:	Northern Ireland Act 1998
“NISAAA 2006”:	Northern Ireland (St Andrews Agreement) Act 2006
“NIMPA 2006”:	Northern Ireland (Miscellaneous Provisions) Act 2006
“NIO”:	Northern Ireland Office
“PSNI”:	Police Service of Northern Ireland
“RUC”:	Royal Ulster Constabulary
“SDLP”:	Social Democratic and Labour Party

1. Northern Ireland department with policing and justice functions

Schedule 1 (Northern Ireland department with policing and justice functions) has effect.

DEFINITIONS

“department with policing and justice functions”: NIMPA 2006 s.17 adding the NIA 1998 s.21A

GENERAL NOTE

This section simply gives effect to Sch.1, which amends the NIA 1998. Under s.5(6)-(7), this section, and Sch.1, came into force on Royal Assent on March 12, 2009. Like the previous amendments, in the NIMPA 2006, the NISAAA 2006 and the JSNIA 2007, the section amends the parent Act to no immediate particular effect.

Devolution was provided for initially, in Pt 1 of the NIA 1998. Section 4 (and Schs 2 and 3) provide for transferred, excepted and reserved matters. Transferred matters, of course, are those that have been devolved (though the term is only used with reference to the devolution order in a side note). Transferred matters are defined negatively, against excepted and reserved matters. Excepted matters in Sch.2 are those that would never be devolved. Reserved matters in Sch.3 are

either way, with a mechanism—in s.4(2)-(4)—for them to become transferred (or reserved). This mechanism is the origin of the so-called triple lock, applied in relation to policing and justice but generally applicable (amending Sch.3): (1) a cross-community vote of the assembly; (2) a draft order of the secretary of state; and (3) a vote of parliament.

2. Judicial appointments and removals

- (1) For sections 12 and 12B of the Judicature (Northern Ireland) Act 1978 (c. 23) substitute the sections 12 to 12C set out in Schedule 2.
- (2) The Justice (Northern Ireland) Act 2002 (c. 26) is amended as set out in Schedule 3.
- (3) Schedule 4 (which transfers appointment and other related functions from the Lord Chancellor to the Northern Ireland Judicial Appointments Commission etc) has effect.
- (4) Schedule 5 (which contains consequential amendments and transitional provision) has effect.
- (5) Schedule 6 (which makes provision for reviewing arrangements for judicial appointments and removals etc) has effect.

DEFINITIONS

“judicial appointments and removals”: Justice (Northern Ireland) Act 2002 ss.2-8

GENERAL NOTE

Judicial appointments (removals being a recent addition) were provided for originally in the Judicature (Northern Ireland) Act 1978.

Section 12 of this Northern Ireland Parliament Act provided for the appointment of the senior judiciary—high court, court of appeal and lord chief justice—by her majesty (there being no reference to the advisory roles of the lord chancellor or the prime minister).

Section 12 of this Act was to be replaced by the Justice (Northern Ireland) Act 2002 ss.4 and 6. Section 4 substitutes new ss.12 and 12A, and s.6 inserts a new s.12B.

The reason given was the criminal justice review, discussed in the introduction above (the mere recitation of the source invariably substituting for ministerial argument in parliament). This official report recommended a judicial appointments commission for Northern Ireland, on, but not before, devolution:

“We recommend the enactment of legislation enabling responsibility for judicial appointments in Northern Ireland to be devolved on an agreed basis at a date to be determined by the Government in the light of the prevailing circumstances ... The legislation would include provisions establishing the machinery and procedure by which appointments were to be made. [recommendation 73] On devolution, political responsibility and accountability for the judicial appointments process should lie with the First Minister and the Deputy First Minister. [recommendation 74] 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, on the basis of recommendations from the First Minister and the Deputy First Minister. [recommendation 75]”

While the first minister and deputy first minister were to have much more power than the former prime minister of Northern Ireland, it may be inferred that the criminal justice review, considering devolution, came up with a judicial appointments commission as an alternative to giving powers to a local justice minister (who could have been from Sinn Féin or the DUP).

The Government went ahead and legislated for a judicial appointments commission in advance of devolution (Justice (Northern Ireland) Act 2002 ss.2-8). This was amended by the Justice (Northern Ireland) Act 2004 ss.2-5. These sections have not been brought into force: the judicial appointments commission clearly awaits devolution.

This section, and Schs 2-6 (most of the Act), owe their inspiration to the November 18, 2008 agreement of the first minister and deputy first minister (also discussed above). There, in their letter to the AERC, Peter Robinson and Martin McGuinness wrote:

“ ... in order to ensure the independence of the Judiciary responsibilities in relation to the appointment and removal of judicial office holders would rest with the Judicial Appointments Commission.”

The exult of politicians, insofar as it was intended, would appear to have been a victory for the DUP over Sinn Féin. But neither the first minister nor the deputy first minister alluded to their powers of appointment as regards the judicial appointments commission (Justice (Northern Ireland) Act 2002 s.3).

This section gives effect to Schs 2-6, though each Schedule is variously described. The Secretary of State, Shaun Woodward MP, stated the intent in the second reading debate on March 4, 2009:

“Broadly speaking, [the section and schedules] transfer the post-devolution role that had been envisaged for the First Minister and Deputy First Minister to the Northern Ireland Judicial Appointments Commission and, in particular cases, to the Lord Chief Justice and the Northern Ireland Judicial Appointments Ombudsman. The role already set out in the legislation for Her Majesty, for the Prime Minister and the Lord Chancellor as her principal Ministers and for Parliament will remain largely unchanged.” (*Hansard*, HC Vol.488, col.887.)

3. Miscellaneous amendments

- (1) In Article 26C(5) of the Juries (Northern Ireland) Order 1996 (S.I. 1996/1141 (N.I. 6))-
 - (a) for “Attorney General” substitute “relevant authority”, and
 - (b) at the end insert “; and for this purpose “relevant authority” means-
 - (a) in relation to cases in which national security or terrorism is involved, the Advocate General for Northern Ireland;
 - (b) in relation to other cases, the Attorney General for Northern Ireland.”
- (2) After section 30 of the Justice (Northern Ireland) Act 2002 (c. 26) insert-

“30A Corporation sole etc

- (1) The Director of Public Prosecutions for Northern Ireland is a corporation sole.
- (2) The Director may do anything, apart from borrowing money, which is calculated to facilitate the exercise of the Director’s functions or which is incidental or conducive to the exercise of those functions.
- (3) An instrument or other document purporting to be signed or otherwise executed by or on behalf of the Director is to be received in evidence and is, unless the contrary is proved, to be taken to be so signed or executed.”

DEFINITIONS

“advocate general”: Justice (Northern Ireland) Act 2002 s.27(1)

“attorney general”: Justice (Northern Ireland) Act 2002 s.22(1)

GENERAL NOTE

This section contains two miscellaneous amendments, dealing with the attorney general and director of public prosecutions. The official opposition concentrated their fire on this section, but then (as recounted in the introduction) gave up the fight. The explanatory memorandum erroneously described these as technical amendments.

Subsection (1)

The Juries (Northern Ireland) Order 1996 (SI 1996/1141) was an order in council during direct rule. Then, the attorney general for Northern Ireland was the attorney general for England and Wales.

This was ended legislatively in 2002 (Justice (Northern Ireland) Act 2002 s.22). This section has not been brought into force.

Sections 10-13 of the JSNIA 2007 amended the law on juries. These sections were brought into force on August 1, 2007.

Section 10 added arts.26A-26C to the Juries (Northern Ireland) Order 1996. Articles 26A and 26B deal with the disclosure of juror information, and art.26C is interpretative. Attorney general, in art.26C(5), meant, on August 1, 2007, the attorney general for England and Wales, but, on the coming into force of s.22 of the Justice (Northern Ireland) Act 2002, it would mean the attorney general for Northern Ireland.

This subsection removes the power from the local attorney general for national security and terrorism cases, the advocate general for Northern Ireland being (under ss.27 and 28 of the Justice (Northern Ireland) Act 2002) the attorney general for England and Wales. It is technical to the extent that an advocate general was provided for in the Justice (Northern Ireland) Act 2002.

Subsection (2)

Part 2 of the Justice (Northern Ireland) Act 2002 is law officers and public prosecution service. Sections 29-39 deal with the public prosecution service, and ss.40-43 with the director's relationship with the attorney general. These sections have not been brought into force.

There has always been a director of public prosecutions. The Justice (Northern Ireland) Act 2002 created the public prosecution service (out of the director's department).

However, the public prosecution service was not created as a body corporate, and was not therefore a legal person. Seemingly, the director was only an office holder.

In contrast, the chief constable of the PSNI is a corporation sole, meaning it is not necessary to sue Sir Hugh Orde in order to sue the chief constable.

This subsection makes the director a corporation sole, detaching the public prosecution service from the secretary of state, who, like all secretaries of state, is likely to be a corporation sole (Ministers of the Crown Act 1975 s.2(1)(a)). It means that the public prosecution service will be independent, after devolution, of the justice department. It does not mean, as ministers told Parliament, that the public prosecution service would hold property in its own right.

4. Amendments to section 86 of the Northern Ireland Act 1998

- (1) Section 86 of the Northern Ireland Act 1998 (c. 47) is amended as follows.
- (2) In subsections (2)(a) and (3)(a) for “(whether by virtue of an Order under section 4 or otherwise)” substitute “other than by virtue of an Order under section 4”.
- (3) After subsection (3) insert-
 - “(3A) An Order under subsection (1) in relation to an Order under section 4 may make provision doing any of the following-
 - (a) transferring to a United Kingdom authority, with effect from any date specified in the Order under subsection (1), any function which immediately before that date is exercisable by a Northern Ireland authority;
 - (b) transferring to a Northern Ireland authority, with effect from any date specified in the Order under subsection (1), any function which immediately before that date is exercisable by a United Kingdom authority;
 - (c) conferring a function on a United Kingdom authority or a Northern Ireland authority;
 - (d) removing a function from a United Kingdom authority or a Northern Ireland authority.”

DEFINITIONS

“Northern Ireland authority”: NIA 1998 s.86(7)

“United Kingdom authority”: NIA 1998 s.86(8)

GENERAL NOTE

This section seeks to correct bad drafting in the parent (devolution) Act—the NIA 1998—though the explanatory memorandum stated that it would allow an executive function to be transferred even though the legislative power remained reserved (“such as where it remains important to retain a UK-wide framework in a particular area”).

Section 86 of the NIA 1998 (in Part 7: miscellaneous) is provision for purposes consequential on Act, etc. The section permits consequential legislation by her majesty in council (meaning in effect the secretary of state) as a result of ss.4 and 6 (transferred, excepted and reserved matters and legislative competence).

Section 86 is reciprocal, permitting any reserved matters to be transferred back to a UK authority and any transferred matters to be transferred to a Northern Ireland authority. All turned on what appeared to her majesty to be the position. And there was no need for a section 4 order. This was essentially a tidying up power.

Subsection (2)

This amends the parent Act significantly. The power now only exists, where there has been no section 4 order. This means that, if a section 4 order transfers a reserved power, there is no power under s.86(2)(a) or (3)(a) to transfer it back (on the ground that a reserved power should be in London).

Subsection (3)

This subsection introduces the concept of function to s.4 of the NIA 1998. Function is, of course, a key concept of administrative law: ministers and/or departments have functions (defined usually in terms of policy or administration). Strangely, the drafter of the NIA 1998 used “matters”.

The new subs.3A is consequential upon the amendments made by subs.(2) above. Thus the difficult wording: “an Order under subsection (1) in relation to an order under section 4”. It permits the transfer of (reserved) functions between Belfast and London.

The problem, as always, has been Sch.3 listing reserved matters. These, of course, are no longer reserved after they are transferred, which is done partly by amending Sch.3. So how does the secretary of state claw back a reserved power? The answer still lies in s.4(2)-(3) of the parent Act, and he needs the consent of the Northern Ireland assembly. The new subs.3A ignores “matter” and deploys “function”. Paragraphs (a) and (b) still use the concept of transfer, where function has the same meaning as matter. But paras (c) and (d) abandon the logic of transfer (associated with transferred functions) and relate simply to conferring and removing functions, in London and in Belfast, without reference to the s.4 and Schs 2 and 3 typology of transferred, excepted and reserved matters.

5. Final provisions

- (1) This Act may be cited as the Northern Ireland Act 2009.
- (2) An amendment or repeal contained in this Act has the same extent as the enactment or instrument or relevant part of the enactment or instrument to which the amendment or repeal relates.
- (3) The Secretary of State may by order made by statutory instrument make supplementary, incidental or consequential provision for the purposes of, in consequence of or for giving full effect to any provision of this Act.
- (4) An order under subsection (3) may contain-
 - (a) provision amending any Act or Northern Ireland legislation or any instrument made under an Act or Northern Ireland legislation;
 - (b) transitory and transitional provision and savings.

- (5) A statutory instrument containing an order under subsection (3) may not be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.
- (6) Subject to subsection (7), this Act comes into force on the day it is passed.
- (7) The following provisions come into force on the day appointed by the Secretary of State by order made by statutory instrument-
 - (a) section 2 and the Schedules mentioned in that section;
 - (b) section 3(1);
 and different days may be appointed for different purposes.
- (8) The Secretary of State may by order made by statutory instrument make transitory or transitional provision or savings in connection with the coming into force of any provision of this Act.

GENERAL NOTE

These are the normal final provisions rolled into one section. Subsections (6) and (7) deal with commencement, but with the difference that the sections being brought into force at Royal Assent are simply amending legislation that has not been brought, in the main, into force! The only sections which came into force on March 12, 2009 were ss.4 and 5, the former dealing with the transfer of reserved matters (or functions) and the latter giving legal life to the Act.

SCHEDULES

SCHEDULE 1

Section 1

NORTHERN IRELAND DEPARTMENT WITH POLICING AND JUSTICE FUNCTIONS

PART 1

PRELIMINARY

1. In this Schedule “the 1998 Act” means the Northern Ireland Act 1998 (c. 47).
2. For the purposes of paragraph 22 of Schedule 2 to the 1998 Act, treat this Schedule as being contained in Part 3 of the 1998 Act.

PART 2

AMENDMENTS TO THE 1998 ACT RELATING TO DEPARTMENTAL MODEL FOR POLICING AND JUSTICE FUNCTIONS

3.
 - (1) Amend section 21A of the 1998 Act as follows.
 - (2) In subsections (1) and (6) after “(3)” insert “, (3A)”.
 - (3) After subsection (3) insert-
 - “(3A) The Act may provide for the department to be in the charge of a Northern Ireland Minister appointed by virtue of a nomination-
 - (a) made by one or more members of the Assembly, and
 - (b) approved by a resolution of the Assembly passed with the support of a majority of the members voting on the motion for the resolution, a majority of the designated Nationalists voting and a majority of the designated Unionists voting.”

4.

- (1) Amend Schedule 4A to the 1998 Act as follows.
- (2) At the end of the heading for Part 1 insert “by virtue of section 21A(3)”.
- (3) After Part 1 insert-

“PART 1A

DEPARTMENT IN THE CHARGE OF MINISTER APPROVED BY
RESOLUTION OF THE ASSEMBLY BY VIRTUE OF SECTION 21A(3A)

Introduction

- 3A** (1) This Part of this Schedule has effect in relation to a Northern Ireland department-
- (a) the functions of which consist wholly or mainly of devolved policing and justice functions, and
 - (b) in relation to which an Act of the Assembly provides, by virtue of section 21A(3A), for it to be in the charge of a Northern Ireland Minister (the “relevant Minister”) appointed by virtue of a nomination-
 - (i) made by one or more members of the Assembly, and
 - (ii) approved by a resolution of the Assembly passed with the support of a majority of the members voting on the motion for the resolution, a majority of the designated Nationalists voting and a majority of the designated Unionists voting.
- (2) In this paragraph “devolved policing and justice function” has the same meaning as in section 21A (see subsection (8) of that section).

Modification of section 16A

- 3B** (1) Section 16A(3) shall have effect with the following modifications.
- (2) It shall have effect as if in paragraph (b) after “Ministers” there were inserted “(other than the relevant Ministerial office (within the meaning of Part 1A of Schedule 4A))”.
 - (3) It shall have effect as if after paragraph (b) there were inserted “;and
 - (c) once the offices to be filled under paragraphs (a) and (b) have been filled, the relevant Ministerial office (within the meaning of Part 1A of Schedule 4A) shall be filled by applying paragraph 3D(4) to (8) of that Schedule”.

Section 18 not to apply to relevant Minister

- 3C** Section 18 (Northern Ireland Ministers) shall not apply in relation to-
- (a) the relevant Minister, or
 - (b) the Ministerial office held by the relevant Minister (the “relevant Ministerial office”),
- and paragraph 3D shall apply instead.

Provisions relating to relevant Minister

- 3D** (1) Where any of the following conditions is satisfied-
- (a) the relevant Minister shall (if holding office at the time) cease to hold office, and
 - (b) the relevant Ministerial office shall be filled by applying sub-paragraphs (4) to (8) within a period specified in standing orders.
- (2) The conditions are-
- (a) a determination under section 17(1) takes effect;
 - (b) a resolution which causes the relevant Ministerial office to become vacant is passed under section 30(2);
 - (c) a direction which causes the relevant Ministerial office to become vacant is given under section 30A(5);
 - (d) a period of exclusion under section 30(2) or 30A(5) comes to an end (otherwise than by virtue of section 95A(6) or (7));
 - (e) such other circumstances obtain as may be specified in standing orders for the purposes of section 18(1)(e) but only so far as standing orders provide for those circumstances to be applicable for the purposes of this subparagraph.

- (3) If relevant, the relevant Ministerial office shall be filled by applying sub-paragraphs (4) to (8) after section 18(2) to (6) is applied in relation to the other Ministerial offices.
- (4) One or more members of the Assembly may nominate another member of the Assembly to hold the relevant Ministerial office.
- (5) The nomination shall not take effect unless it is approved by a resolution of the Assembly passed with the support of-
 - (a) a majority of the members voting on the motion for the resolution,
 - (b) a majority of the designated Nationalists voting, and
 - (c) a majority of the designated Unionists voting.
- (6) Once one member has been nominated, no further nominations may be made unless and until sub-paragraph (7) applies.
- (7) If-
 - (a) the nomination does not take effect within a period specified in standing orders, or
 - (b) the nominated person does not take up the office for which the person has been nominated within that period,
 a further nomination of a member of the Assembly may be made under sub-paragraph (4).
- (8) Sub-paragraphs (4) to (7) shall be applied as many times as may be necessary to secure that the relevant Ministerial office is filled.
- (9) The holding of office as First Minister or deputy First Minister shall not prevent a person being nominated to hold the relevant Ministerial office.
- (10) The relevant Minister shall not take up office until the Minister has affirmed the terms of the pledge of office.
- (11) The relevant Minister shall cease to hold office if-
 - (a) the Minister resigns by notice in writing to the First Minister and the deputy First Minister,
 - (b) the Minister ceases to be a member of the Assembly otherwise than by virtue of a dissolution, or
 - (c) the Assembly resolves that the Minister is to cease to hold office.
- (12) A resolution for the purposes of sub-paragraph (11)(c) must be passed with the support of-
 - (a) a majority of the members voting on the motion for the resolution,
 - (b) a majority of the designated Nationalists voting, and
 - (c) a majority of the designated Unionists voting.
- (13) A motion for a resolution for the purposes of sub-paragraph (11)(c) shall not be moved unless-
 - (a) it is supported by at least 30 members of the Assembly, or
 - (b) it is moved by the First Minister and the deputy First Minister jointly.
- (14) If the relevant Minister ceases to hold office at any time, otherwise than by virtue of sub-paragraph (1), the relevant Ministerial office shall be filled by applying sub-paragraphs (4) to (8) within a period specified in standing orders.
- (15) Where-
 - (a) the Assembly has resolved under section 30(2) that a political party does not enjoy its confidence, and
 - (b) the party's period of exclusion under that provision has not come to an end,
 no member of that party may be nominated under sub-paragraph (4).
- (16) Where-
 - (a) the Secretary of State has given a direction under section 30A(5) in respect of a political party, and
 - (b) the party's period of exclusion under that provision has not come to an end,
 no member of that party may be nominated under sub-paragraph (4).
- (17) In this paragraph, a reference to a period of exclusion under any provision is, in the case of a period of exclusion under that provision which has been extended, a reference to that period as extended."
- (4) In paragraph 12(1) after "21A(3)," insert "(3A)."
- (5) After paragraph 12 insert-

"13 Paragraphs 3(10), 3D(14), 7(10), 11(10) and (11) and 11E(10) of this Schedule shall have effect subject to paragraphs 2 and 3 of Schedule 12A (as those paragraphs are modified at any time by virtue of paragraph 12 of this Schedule)."

PART 3

SPECIAL PROVISION APPLYING TO FIRST POLICING AND
JUSTICE DEPARTMENT*Application*

- 5.
- (1) Paragraphs 6 to 8 apply in relation to the first Northern Ireland department established by an Act of the Northern Ireland Assembly the purpose of which is to exercise functions consisting wholly or mainly of devolved policing and justice functions (as defined in section 21A(8) of the 1998 Act).
 - (2) But-
 - (a) they apply only if that Act of the Assembly makes provision of the kind mentioned in section 21A(3A) of the 1998 Act (“the initial ministerial provision”), and
 - (b) they are not to apply at all if an Order in Council has been made under section 21A(7C) of the 1998 Act.

Section 18(1)(b) of the 1998 Act not to apply on establishment of department

6. Section 18(1)(b) of the 1998 Act does not apply to the determination under section 17(1) of the 1998 Act required by virtue of section 17(2) in relation to the establishment of the department.

Filling of Ministerial office after election

- 7.
- (1) This paragraph applies before 1 May 2012.
 - (2) For the purposes of section 16A(3) of the 1998 Act the relevant Ministerial office (within the meaning of Part 1A of Schedule 4A to the 1998 Act) may be filled after the end of the period mentioned.
 - (3) Accordingly-
 - (a) section 16A(8) of the 1998 Act does not apply to a person taking up office as the relevant Minister (within the meaning of Part 1A of Schedule 4A to the 1998 Act), and
 - (b) section 32(3)(a) of the 1998 Act applies as if the reference to the Ministerial offices to be held by Northern Ireland Ministers excluded the relevant Ministerial office.

Dissolution of department etc

- 8.
- (1) The department dissolves on 1 May 2012 unless, before 1 May 2012-
 - (a) the Assembly resolves that the department is to continue operating from 1 May 2012, or
 - (b) a second Act of the Assembly (“the second Act”) makes provision authorised by sub-paragraph (3).
 - (2) A resolution for the purposes of sub-paragraph (1)(a) must be passed with cross-community support (as defined in section 4(5) of the 1998 Act).
 - (3) The second Act may provide that the department is to continue operating from 1 May 2012.
 - (4) The second Act may repeal the initial ministerial provision with effect from a specified date.
 - (5) If the second Act repeals the initial ministerial provision, it may also-
 - (a) replace the initial ministerial provision with provision of the kind mentioned in section 21A(3), (4), (5) or (5A) of the 1998 Act with effect from the specified date (and the relevant provisions of Schedule 4A to the 1998 Act apply), or
 - (b) provide for the department to be in the charge of the First Minister and the deputy First Minister acting jointly with effect from the specified date (and section 21(3)(a) and (b) of the 1998 Act apply);
 and if no provision is made within paragraph (a) or (b), the Ministerial office of the Minister in charge of the department is to be filled under section 18 of the 1998 Act.
 - (6) If the second Act repeals the initial ministerial provision, a determination under section 17(1) of the 1998 Act must be made on the specified date.

- (7) That determination takes effect immediately (and, accordingly, section 17(5) of the 1998 Act does not apply in relation to it).
- (8) If the second Act replaces the initial ministerial provision with provision of the kind mentioned in section 21A(5A) of the 1998 Act, paragraph 11E(1) of Schedule 4A to the 1998 Act applies as if devolved policing and justice functions were first transferred to, or conferred on, the department when the determination required by sub-paragraph (6) takes effect in accordance with sub-paragraph (7).
- (9) Nothing in this paragraph stops an Act of the Assembly dissolving the department at any time.

Amendments to sections 21B and 21C of the 1998 Act

9. In section 21B(1)(a) of the 1998 Act for “and to make” to “21A(5A)” substitute “the purpose of which is to exercise functions consisting wholly or mainly of devolved policing and justice functions but only if the Act makes provision of the kind mentioned in section 21A(5A) (other than by virtue of paragraph 8(5) of Schedule 1 to the Northern Ireland Act 2009)”.
10. In section 21C(1) of the 1998 Act-
 - (a) for “a new Northern Ireland department” substitute “the first Northern Ireland department the purpose of which is to exercise functions consisting wholly or mainly of devolved policing and justice functions (as defined in section 21A(8))”;
 - (b) in paragraph (a) after “21A(5A)” insert “(other than by virtue of paragraph 8(5) of Schedule 1 to the Northern Ireland Act 2009)”.

GENERAL NOTE

This is introduced by s.1. It is unclear why amendments of the parent NIA 1998 are hidden in a Schedule; it may be because it is amending legislation not yet in force.

Paragraph 2

Paragraph 22 of Sch.2 states which sections of the NIA 1998 are excepted matters, meaning they cannot be amended by the Northern Ireland assembly. Paragraph 22(b) is Pt 3, except ss.19, 20, 22, 23(2)- (4) and 28. This Schedule, under this paragraph, is treated as contained in Pt 3 (executive authorities) of the NIA 1998; it cannot be amended by the Northern Ireland assembly.

Paragraph 3

Section 21A and Sch.4A of the NIA 1998 were (or may be) inserted by s.17 and Sch.2 of the NIMPA 2006. The latter have not come into force. Paragraph 3 simply adds another model, resulting from the November 18, 2008 agreement. It joins the three other models in s.21A(3)-(5). Paragraph 3(2) contains an error; it should read: “In subsections (2) and (6) ...”. The only difference between this model and one of the earlier three is: nomination by one or more assembly members (rather than the first minister and deputy first minister).

Section 17 of the NIMPA 2006 was, of course, amended by s.44 of the JSNIA 2007.

Paragraph 4

The distinction is made clear in the amendment to the heading of Pt 1 and the heading of the new Pt 1A. Part 1A does not entirely track Pt 1. The “modification of section 16A” is new. Section 16A was (or may be) inserted by s.8 of the NISAAA 2006. This paragraph mainly inserts para.3D in, here, Sch.1 (destined for Sch.4A of the NIA 1998). The nomination of the justice minister is outside the d’Hondt process. The cross-community vote is the same as for a nominee of the first minister and deputy first minister. The first minister or the deputy first minister could be nominated to become justice minister.

Paragraphs 5-10

These relate to the first policing and justice department, which is, of course, purely interim.

Paragraph 5(2)(b) refers to s.21A(7C) of the NIA 1998, to be inserted by s.44 of the JSNIA 2007. In the intended subss.(7A)-(7D), the Government tried to interrupt the constitutional process, by giving Westminster the power to establish a department (but without the power to give it a minister).

Paragraph 7 is important. It refers to the beginning of the interim period.

Paragraph 8 is the sunset clause of dissolution on May 1, 2012. The options, not that it is for Westminster to provide, are those in s.21A(3), (4), (5) and (5A) (and not s.21A(3A) as provided for in the interim). The other alternative is absorption in the office of the first minister and deputy first minister.

Paragraphs 9 and 10 amend intended ss.21B and 21C of the NIA 1998, inserted by s.44 of the JSNIA 2007.

SCHEDULE 2

Section 2

SECTIONS 12 TO 12C OF THE JUDICATURE (NORTHERN IRELAND) ACT 1978

Appointment of the Lord Chief Justice and Lords Justices of Appeal

- “12. (1) Whenever the office of Lord Chief Justice is vacant, Her Majesty may appoint a qualified person to that office by letters patent under the Great Seal of Northern Ireland.
- (2) Her Majesty may, from time to time, appoint a qualified person as a Lord Justice of Appeal by letters patent under the Great Seal of Northern Ireland (but subject to the limit on numbers for the time being imposed by section 3).
- (3) Her Majesty’s powers of appointment under this section are exercisable on the Prime Minister’s recommendation.
- (4) The Prime Minister must make a recommendation to fill any vacancy in the office of Lord Chief Justice or Lord Justice of Appeal.
- (5) Subsection (4) does not apply to a vacancy in the office of Lord Justice of Appeal while the Lord Chief Justice agrees that it may remain unfilled.
- (6) Before making a recommendation, the Prime Minister must consult-
- (a) the Lord Chief Justice or, if that office is vacant or the Lord Chief Justice is not available, the senior Lord Justice of Appeal who is available, and
- (b) the Northern Ireland Judicial Appointments Commission.

Appointment of judges of the High Court

- 12A Her Majesty may, from time to time, appoint a qualified person as a judge of the High Court by letters patent under the Great Seal of Northern Ireland (but subject to the limit on numbers for the time being imposed by section 2).

Tenure of office: Lord Chief Justice

- 12B (1) The Lord Chief Justice holds office during good behaviour (subject to section 26 of, and Schedule 7 to, the Judicial Pensions and Retirement Act 1993).
- (2) Her Majesty may, on an address of both Houses of Parliament, remove a person (“P”) from office as Lord Chief Justice.
- (3) A motion for such an address may be made-
- (a) in the House of Commons, only by the Prime Minister;
- (b) in the House of Lords, only by the Lord Chancellor or, if the Lord Chancellor is not a member of that House, only by another Minister of the Crown at the Lord Chancellor’s request.
- (4) No motion is to be made for the purposes of subsection (3) unless-
- (a) the Prime Minister has, after consulting the Lord Chancellor, convened a tribunal as set out below, and
- (b) the tribunal has reported to the Prime Minister recommending that P be removed from the office on the ground of misbehaviour.
- (5) No motion is to be made in the House of Commons for the purposes of subsection (3) unless the Prime Minister has laid a copy of the tribunal’s report before that House.
- (6) No motion is to be made in the House of Lords for the purposes of subsection (3) unless the person making it has laid a copy of the tribunal’s report before that House.

- (7) If the Prime Minister and the Lord Chancellor are considering the making of motions for the purposes of subsection (3), the Prime Minister may suspend P from the office.
- (8) If P is suspended, P may not carry out any functions of the office (but P's other rights as holder of the office are unaffected).
- (9) A tribunal is to consist of-
 - (a) a person who holds high judicial office (within the meaning of Part 3 of the Constitutional Reform Act 2005) and who does not hold (and has never held) the office of Lord Chief Justice, Lord Justice of Appeal or judge of the High Court,
 - (b) a person who is or has been a judge of the Court of Appeal of England and Wales or the Inner House of the Court of Session, and
 - (c) a lay member of the Northern Ireland Judicial Appointments Commission (see section 3(5)(c) of the Justice (Northern Ireland) Act 2002).
- (10) The persons within subsection (9)(a) and (b) are to be selected by the Lord Chancellor after consulting-
 - (a) the President of the Supreme Court of the United Kingdom,
 - (b) the Lord Chief Justice of England and Wales, and
 - (c) the Lord President of the Court of Session;

(or, where an office is vacant or an office holder is not available, some other appropriate person).
- (11) The person within subsection (9)(c) is to be selected by the Northern Ireland Judicial Appointments Ombudsman.
- (12) The person within subsection (9)(a) is to be the chair of the tribunal.
- (13) The tribunal's procedure is to be determined by the chair.
- (14) The justice department (within the meaning of the Justice (Northern Ireland) Act 2002) may pay a member of a tribunal any such allowances or fees as it may determine.
- (15) Before the coming into force of section 23 of the Constitutional Reform Act 2005, in subsection (10)(a) the reference to the President of the Supreme Court of the United Kingdom is to be read as a reference to the senior Lord of Appeal in Ordinary.

Tenure of office: Lords Justices of Appeal and certain High Court judges

- 12C** (1) Lords Justices of Appeal and judges of the High Court hold office during good behaviour (subject to section 26 of, and Schedule 7 to, the Judicial Pensions and Retirement Act 1993).
- (2) Her Majesty may, on an address of both Houses of Parliament, remove a person ("P") from office as Lord Justice of Appeal or judge of the High Court.
 - (3) A motion for such an address may be made-
 - (a) in the House of Commons, only by the Prime Minister;
 - (b) in the House of Lords, only by the Lord Chancellor or, if the Lord Chancellor is not a member of that House, only by another Minister of the Crown at the Lord Chancellor's request.
 - (4) No motion is to be made for the purposes of subsection (3) unless-
 - (a) the Lord Chief Justice or the Northern Ireland Judicial Appointments Ombudsman has, after consulting the other, convened a tribunal as set out below,
 - (b) the tribunal has reported to the Lord Chief Justice recommending that P be removed from the office on the ground of misbehaviour, and
 - (c) the following has occurred-
 - (i) the Lord Chief Justice has advised the Prime Minister and the Lord Chancellor to accept the tribunal's recommendation, or
 - (ii) if the Lord Chief Justice does not so advise, the Prime Minister and the Lord Chancellor have consulted the Lord Chief Justice about the recommendation.
 - (5) No motion is to be made in the House of Commons for the purposes of subsection (3) unless the Prime Minister has laid a copy of the tribunal's report before that House.
 - (6) No motion is to be made in the House of Lords for the purposes of subsection (3) unless the person making it has laid a copy of the tribunal's report before that House.
 - (7) If the Prime Minister and the Lord Chancellor are considering the making of motions for the purposes of subsection (3), the Prime Minister may, with the agreement of the Lord Chief Justice, suspend P from the office.
 - (8) If P is suspended, P may not carry out any functions of the office (but P's other rights as holder of the office are unaffected).

- (9) A tribunal is to consist of-
- (a) a person who holds high judicial office (within the meaning of Part 3 of the Constitutional Reform Act 2005) and who does not hold (and has never held) the office of Lord Chief Justice, Lord Justice of Appeal or judge of the High Court,
 - (b) a person who is or has been a judge of the Court of Appeal of England and Wales or the Inner House of the Court of Session, and
 - (c) a lay member of the Northern Ireland Judicial Appointments Commission (see section 3(5)(c) of the Justice (Northern Ireland) Act 2002).
- (10) The persons within subsection (9)(a) and (b) are to be selected by the Lord Chief Justice after consulting-
- (a) the Lord Chancellor,
 - (b) the President of the Supreme Court of the United Kingdom,
 - (c) the Lord Chief Justice of England and Wales, and
 - (d) the Lord President of the Court of Session;
- (or, where an office is vacant or an office holder is not available, some other appropriate person).
- (11) The person within subsection (9)(c) is to be selected by the Northern Ireland Judicial Appointments Ombudsman.
- (12) The person within subsection (9)(a) is to be the chair of the tribunal.
- (13) The tribunal's procedure is to be determined by the Lord Chief Justice.
- (14) If the tribunal recommends as mentioned in subsection (4)(b), the Lord Chief Justice must send the Prime Minister and the Lord Chancellor-
- (a) a copy of the tribunal's report,
 - (b) any comments that the Lord Chief Justice wishes to make on the report, and
 - (c) any comments that the Northern Ireland Judicial Appointments Ombudsman wishes to make on the report.
- (15) The justice department (within the meaning of the Justice (Northern Ireland) Act 2002) may pay a member of a tribunal any such allowances or fees as it may determine.
- (16) Nothing in subsections (1) to (15) applies to a judge of the High Court appointed after the coming into force of section 7 of the Justice (Northern Ireland) Act 2002 (as to the removal and suspension of whom see that section).
- (17) Before the coming into force of section 23 of the Constitutional Reform Act 2005, in subsection (10)(b) the reference to the President of the Supreme Court of the United Kingdom is to be read as a reference to the senior Lord of Appeal in Ordinary.

GENERAL NOTE

This is introduced by s.2(1). Schedule 2 is the first of five schedules dealing with judicial appointments and removals. The new ss.12-12C (as I shall refer to them) are to be inserted in the *Judicature (Northern Ireland) Act 1978*.

The new s.12 removes the first minister and deputy first minister. But it also significantly increases the role of the judicial appointments commission. The first, and especially the second, was inadequately considered by Parliament. Query whether the Prime Minister has any discretion? And query how the Lord Chief Justice can be consulted, when he also chairs the judicial appointments commission (*Justice (Northern Ireland) Act 2002* s.3).

The new s.12A again removes the first minister and deputy first minister.

The new s.12B deals only with the lord chief justice. Yet again, it removes the first minister and deputy first minister. This section also takes account of the changed (reduced) role of the lord chancellor, consequent upon the *Constitutional Reform Act 2005*. The first reformed Lord Chancellor, Lord Falconer, was, of course, a member of the House of Lords. His successor, and the current occupant of the office, is Jack Straw MP, a member of the House of Commons. The reference to "the justice department (within the meaning of the *Justice (Northern Ireland) Act 2002*)" is to be distinguished from the justice department envisaged in the November 18, 2008 agreement. It could include the ministry of justice in London. Section 23 of the *Constitutional Reform Act 2005* is the supreme court.

The new s.12C separates out lords justice and high court judges. Yet again, the first minister and deputy first minister are removed. The new section gives a role to the judicial appointments ombudsman, provided for initially in UK legislation (*Constitutional Reform Act 2005* s.124). New s.12C(16) is in similar terms to s.12B(10), as intended to be inserted by s.6 of the *Justice (Northern Ireland) Act 2002*.

AMENDMENTS TO THE JUSTICE (NORTHERN IRELAND) ACT 2002

1.
 - (1) Amend section 2 as follows.
 - (2) Omit subsection (1)(a).
 - (3) In subsection (5) before the definition of “listed judicial office” insert-
““the justice department” means the Northern Ireland department which for the time being meets the following conditions-
 - (a) it is established by an Act of the Northern Ireland Assembly, and
 - (b) its purpose is to exercise functions consisting wholly or mainly of devolved policing and justice functions (as defined in section 21A(8) of the Northern Ireland Act 1998),”.
2. Omit section 4.
3. For section 5 substitute-
“5 Appointment to listed judicial offices
Schedule 3 (which is about the making of appointments to listed judicial offices) has effect.”
4. In section 5A(1) for “section 5” substitute “Schedule 3”.
5. Omit section 6.
6.
 - (1) Amend section 7 as follows.
 - (2) In subsection (2) for “First Minister and deputy First Minister, acting jointly” substitute “Lord Chief Justice”.
 - (3) In subsection (3) for “First Minister and deputy First Minister” substitute “Lord Chief Justice”.
 - (4) In subsection (4) for “them” substitute “the Lord Chief Justice”.
 - (5) Omit subsection (5).
 - (6) After subsection (6) insert-
“(6A) If the Lord Chief Justice does not remove or suspend a person (“P”) in accordance with a recommendation as mentioned in subsection (3) or (4), the Lord Chief Justice must notify the following of the Lord Chief Justice’s reasons for not removing or suspending P-
 - (a) P;
 - (b) the tribunal;
 - (c) if the tribunal was convened by the Northern Ireland Judicial Appointments Ombudsman, the Ombudsman.”
 - (7) In subsection (7)-
 - (a) for “(6)” substitute “(6A)”;
 - (b) for “section 12B” substitute “section 12C”;
 - (c) omit “(inserted by section 6 of this Act)”.
7. For section 8 substitute-
“8 Tribunals for considering removal
 - (1) A tribunal to consider the removal of the holder of a listed judicial office may be convened-
 - (a) by the Lord Chief Justice after consulting the Northern Ireland Judicial Appointments Ombudsman, or
 - (b) by the Ombudsman after consulting the Lord Chief Justice.
 - (2) A tribunal is to consist of-
 - (a) a Lord Justice of Appeal or a judge of the High Court,
 - (b) a person who holds an office within section 3(6)(a) to (e), and
 - (c) a lay member of the Commission (see section 3(5)(c)).
 - (3) The persons within subsection (2)(a) and (b) are to be selected by the Lord Chief Justice and the person within subsection (2)(c) is to be selected by the Ombudsman.

- (4) Unless the Commission otherwise agrees, the persons within subsection (2)(a) and (b) must be judicial members of the Commission (see section 3(5)(a)).
- (5) The person within subsection (2)(a) is to be the chair of the tribunal.
- (6) The tribunal's procedure is to be determined by the Lord Chief Justice.
- (7) The justice department may pay a member of a tribunal any such allowances or fees as it may determine."

8.

- (1) Amend section 9B as follows.
- (2) In subsection (3) omit "or the Northern Ireland Court Service".
- (3) In subsection (4) after "Part" insert "or paragraph 2A of Schedule 11 to the Northern Ireland Act 1998".

9. Omit section 9G.**10.** In section 9H omit "or 9G".**11.**

- (1) Amend section 9I(2) as follows.
- (2) In paragraph (a) for "section 12, 12A and 12B" substitute "sections 12 to 12C".
- (3) In paragraph (b) omit "5,".
- (4) After paragraph (b) insert-
 - "(ba) Schedule 3 to this Act and paragraph 2A of Schedule 11 to the Northern Ireland Act 1998;"

12. In section 88 before ""listed judicial office"" insert ""the justice department"".**13.** For Schedule 3 substitute-

"SCHEDULE 3

APPOINTMENT TO LISTED JUDICIAL OFFICES

PART I

APPOINTMENTS BY HER MAJESTY

Application

1. This Part of this Schedule applies to a listed judicial office to which persons are appointed by Her Majesty; and "listed judicial office" is to be read accordingly.

Process

2. (1) Her Majesty's power to appoint a person to a listed judicial office is exercisable on the Lord Chancellor's recommendation.
- (2) The Lord Chancellor's power to recommend a person for appointment to a listed judicial office is exercisable only (and must be exercised) as follows.
- (3) The Commission is responsible for the selection of persons for recommendation for appointment to listed judicial offices (including, for deciding the timing of any selection or selection process).
- (4) When the Commission selects a person under sub-paragraph (3) it must notify the Lord Chancellor.
- (5) The Lord Chancellor must, as soon as reasonably practicable, recommend the selected person for appointment to the office in question.
- (6) The Commission must (in particular) exercise its power under sub-paragraph (3) to ensure that any vacancy in a listed judicial office is filled.
- (7) Sub-paragraph (6) does not apply to a vacancy while the Lord Chief Justice agrees that it may remain unfilled.

PART 2

APPOINTMENTS BY THE COMMISSION

Application

3. This Part of this Schedule applies to a listed judicial office to which persons are appointed by the Commission; and “listed judicial office” is to be read accordingly.

Process

4. (1) The Commission is responsible for the selection of persons for appointment to listed judicial offices (including, for deciding the timing of any selection or selection process).
- (2) When the Commission selects a person under sub-paragraph (1) it must appoint the person to the office in question.
- (3) The Commission must (in particular) exercise its power under sub-paragraph (1) to ensure that any vacancy in a listed judicial office is filled.
- (4) Sub-paragraph (3) does not apply to a vacancy while the Lord Chief Justice agrees that it may remain unfilled.

PART 3

MAXIMUM NUMBERS

- 5.
- (1) This Part of this Schedule applies to a listed judicial office-
- (a) to which Part 1 or 2 of this Schedule applies, and
- (b) which (apart from this Part of this Schedule) may be held by more than one person at any time.
- (2) The Commission must, with the agreement of the justice department, determine the maximum number of persons who may hold the office at any time.
- (3) The Commission may from time to time, with the agreement of the justice department, revise the determination.
- (4) A determination (or any revision) does not affect any appointments that have already been made.

PART 4

GENERAL PROVISION ABOUT SELECTIONS

- 6.
- (1) The selection under this Schedule of a person to be appointed, or recommended for appointment, to a listed judicial office must be made solely on the basis of merit.
- (2) Subject to that, the Commission must at all times engage in a programme of action which complies with sub-paragraph (3).
- (3) A programme of action complies with this sub-paragraph if-
- (a) it 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,
- (b) it 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 selecting a person to be appointed, or recommended for appointment, to a listed judicial office, and
- (c) it is for the time being approved by the Commission for the purposes of this Schedule.”

- “(3) Sub-paragraph (1) does not apply to the Ombudsman’s functions under section 7 or 8 of this Act or section 12B or 12C of the Judicature (Northern Ireland) Act 1978.”

GENERAL NOTE

This is introduced by s.2(2). The Justice (Northern Ireland) Act 2002, in terms of justice reform, remains to be brought into force, seemingly at the time of devolution. It substitutes mainly ss.5 and 8 and Sch.3.

Judicial appointments and removals were provided for also in the Constitutional Reform Act 2005 Pt 5 and Schs 5, 11, 15, 17 and 18.

Paragraph 1 removes the distinction between the lord chief justice and lords justices and high court judges (plus all non-senior judges). The new definition of justice department does not include any created at Westminster by order in council.

Paragraph 2 omits s.4, which added the original ss.12 and 12A to the Judicature (Northern Ireland) Act 1978.

Paragraph 4 refers to s.5A, inserted by s.123 of the Constitutional Reform Act 2005.

Paragraph 5 omits s.6, which added the original s.12B to the Judicature (Northern Ireland) Act 1978.

Paragraph 6 removes the first minister and deputy first minister. They are replaced by the lord chief justice.

Paragraph 7, in substituting a new s.8, again removes the first minister and deputy first minister. Again, it increases the role of the judicial appointments ombudsman (first provided for in s.124 of the Constitutional Reform Act 2005, adding a new s.9A).

Paragraph 8 refers to s.9B, inserted by s.125 of the Constitutional Reform Act 2005.

Paragraph 9 refers to s.9G, inserted by s.130 of the Constitutional Reform Act 2005.

Paragraph 10 refers to s.9H, inserted by s.131 of the Constitutional Reform Act 2005.

Paragraph 13 substitutes a new Sch.3. This is in four parts. It is introduced by s.5, as substituted above. This is a major recasting. The role of her majesty is clearer. Yet again, the first minister and deputy first minister are removed. The lord chancellor has reacquired a role in judicial appointments, even if he is more of a messenger than a decision-maker. Paragraph 6 of Sch.3 repeats s.5 of the Justice (Northern Ireland) Act 2002 as amended by s.3 of the Justice (Northern Ireland) Act 2004.

SCHEDULE 4

Section 2

TRANSFER OF APPOINTMENT AND RELATED FUNCTIONS

Pensions Appeal Tribunals Act 1943 (c. 39)

1.

- (1) Amend the Schedule as follows.
- (2) In paragraphs 2(1)(c) and 2B(2)(c) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) After paragraph 2(3B) insert-

“(3C) For an appointment under sub-paragraph (1)(c), the terms mentioned in sub-paragraph (2A) are to be determined by the Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

Coroners Act (Northern Ireland) 1959 (c. 15 (N.I.))

2.

- (1) Amend section 2 as follows.
- (2) For subsection (1) substitute-

“(1) The Northern Ireland Judicial Appointments Commission may appoint one, or more than one, coroner and deputy coroner for a district or districts on such conditions as to remuneration, superannuation or otherwise as the Lord Chancellor may determine after consultation with the Treasury.”

- (3) In subsection (1A) for “also” to “of” substitute “be consulted before a determination (or a revision of a determination) is made under Part 3 of Schedule 3 to the Justice (Northern Ireland) Act 2002 in relation to”.

County Courts Act (Northern Ireland) 1959 (c. 25 (N.I.))

3.

- (1) Amend section 107 as follows.
- (2) In subsection (1) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) After subsection (1) insert-
- “(1A) The term for which a person is appointed as a deputy judge is to be determined by the Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”
- (4) In subsection (2) after “appointed” insert “as determined under subsection (1A)”.
- (5) For subsection (3) substitute-
- “(3) Subject to subsection (4), the Commission may, with the agreement of a deputy judge and the justice department (within the meaning of the Justice (Northern Ireland) Act 2002), from time to time extend, for such period as it thinks appropriate, the term for which the deputy judge is appointed.”

Magistrates’ Courts Act (Northern Ireland) 1964 (c. 21 (N.I.))

4. For section 10(1) substitute-

- “(1) The Northern Ireland Judicial Appointments Commission may appoint fit and proper persons, being persons who are eligible for appointment as district judges (magistrates’ courts), to act as deputy district judges (magistrates’ courts)-
- (a) during such period or periods as the Commission, with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002), may direct, and
- (b) subject to such conditions as the Lord Chancellor may impose.”

5. For section 12A(2) substitute-

- “(2) Allowances under this section shall be paid by the justice department (within the meaning of the Justice (Northern Ireland) Act 2002) at rates determined by that department with the consent of the Department of Finance and Personnel.”

Lands Tribunal and Compensation Act (Northern Ireland) 1964 (c.29 (N.I.))

6.

- (1) Amend section 1 as follows.
- (2) In subsection (2)-
- (a) after “determine” insert “with the agreement of the Northern Ireland Judicial Appointments Commission”;
- (b) for “Lord Chancellor” substitute “Commission”.
- (3) After subsection (3) insert-
- “(4) Part 3 of Schedule 3 to the Justice (Northern Ireland) Act 2002 does not apply in relation to members of the Lands Tribunal.”

7.

- (1) Amend section 3 as follows.
- (2) In subsection (1) for “Governor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) In subsection (2)-
- (a) for “is satisfied” substitute “determines, with the agreement of the Northern Ireland Judicial Appointments Commission,”;
- (b) for “Governor” substitute “Commission”.
- (4) After subsection (5) insert-
- “(6) Part 3 of Schedule 3 to the Justice (Northern Ireland) Act 2002 does not apply in relation to temporary members.”

Misuse of Drugs Act 1971 (c. 38)

8. In the Table in paragraph 21 of Schedule 3 at the end of the modification for paragraph 1 insert “and for any reference to the Lord Chancellor there shall be substituted a reference to the Northern Ireland Judicial Appointments Commission”.

Rates (Northern Ireland) Order 1977 (S.I. 1977/2157 (N.I. 28))

- 9.
- (1) Amend Schedule 9B as follows.
 - (2) Omit paragraph 1(2).
 - (3) In paragraph 2(2) for “First Minister and deputy First Minister acting jointly” substitute “Northern Ireland Judicial Appointments Commission”.
 - (4) After paragraph 3(1) insert-
 - “(1A) The terms mentioned in sub-paragraph (1) are to be determined by the Northern Ireland Judicial Appointments Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”
 - (5) In paragraph 3(2) for “Office of the First Minister and deputy First Minister” substitute “Commission”.
 - (6) In paragraph 3(3) for “First Minister and deputy First Minister acting jointly authorise” substitute “Commission, with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002), authorises”.
 - (7) For paragraph 4 substitute-
 - “4 The justice department (within the meaning of the Justice (Northern Ireland) Act 2002) may pay to the members of the Tribunal such remuneration and allowances as that department may determine.”

Judicature (Northern Ireland) Act 1978 (c. 23)

- 10.
- (1) Amend section 2 as follows.
 - (2) In subsection (3) for “Her Majesty may by Order in Council” substitute “The justice department (within the meaning of the Justice (Northern Ireland) Act 2002) may, with the agreement of the Northern Ireland Judicial Appointments Commission, by order”.
 - (3) For subsection (4) substitute-
 - “(4) Part 3 of Schedule 3 to the Justice (Northern Ireland) Act 2002 does not apply in relation to puisne judges.”
11. In section 3(4) for “Her Majesty may by Order in Council” substitute “The justice department (within the meaning of the Justice (Northern Ireland) Act 2002) may, with the agreement of the Northern Ireland Judicial Appointments Commission, by order”.
12. For section 7(3) substitute-
- “(3) The Northern Ireland Judicial Appointments Commission may appoint a person qualified for appointment as a judge of the High Court to sit and act as a judge of the High Court as a temporary measure in order to facilitate the disposal of business in the High Court or the Crown Court.”
13. After section 8(1) insert-
- “(1A) For this purpose, an appointment under section 7(3) is to be made for-
 - (a) a particular case or cases determined by the Lord Chief Justice or a person within section 7(5)(a) or (b) nominated by the Lord Chief Justice to make determinations under this paragraph, or
 - (b) a period specified by the Northern Ireland Judicial Appointments Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”
14. In section 14(1) for “the Lord Chancellor” substitute “Her Majesty”.
- 15.
- (1) Amend section 70 as follows.
 - (2) For subsection (1) substitute-
 - “(1) Appointments to the offices listed in column 1 of Schedule 3 shall be made by the Northern Ireland Judicial Appointments Commission after consultation with the Lord Chief Justice; and persons holding such offices are in this Act referred to as “statutory officers”.

- (1A) The Lord Chief Justice must be consulted before a determination (or a revision of a determination) is made under Part 3 of Schedule 3 to the Justice (Northern Ireland) Act 2002 in relation to statutory officers.
- (1B) The terms and conditions of service for statutory officers are to be determined by the Lord Chancellor with the concurrence of the Treasury.”
- (3) In subsection (3)-
- (a) for “Lord Chancellor” substitute “Commission”;
- (b) for “he” (in both places where it appears) substitute “it”.
- (4) In subsection (5) for “Lord Chancellor” substitute “justice department (within the meaning of the Justice (Northern Ireland) Act 2002)”.
- (5) In subsection (6) for “Lord Chancellor” substitute “justice department”.

16.

- (1) Amend section 74 as follows.
- (2) For subsection (1) substitute-
- “(1) In order to facilitate the disposal of business, the Northern Ireland Judicial Appointments Commission may, after consultation with the Lord Chief Justice, appoint a suitably qualified person-
- (a) to act as a deputy for any statutory officer, or
- (b) to act as a temporary additional statutory officer,
- during such period or on such occasions as the Commission determines with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).
- (1A) The justice department must consult the Lord Chief Justice before giving its agreement to a period or occasion under subsection (1).
- (1B) The Lord Chief Justice must be consulted before a determination (or a revision of a determination) is made under Part 3 of Schedule 3 to the Justice (Northern Ireland) Act 2002 in relation to deputies for statutory officers or temporary additional statutory officers.”
- (3) In subsection (3) for “Lord Chancellor” substitute “Lord Chief Justice”.

17. In section 103(3)-

- (a) for “Lord Chancellor” substitute “justice department (within the meaning of the Justice (Northern Ireland) Act 2002)”;
- (b) for “so appointed” substitute “of the peace”.

18.

- (1) Amend section 119 as follows.
- (2) In subsection (1) after “Lord Chancellor” insert “or the justice department (within the meaning of the Justice (Northern Ireland) Act 2002)”.
- (3) In subsection (2) for “68(3)” substitute “2(3), 3(4), 68(3), 70(5)”.
- (4) After subsection (2) insert-
- “(2A) Any statutory rule made under section 2(3) or 3(4) is subject to affirmative resolution (within the meaning of section 41(4) of the Interpretation Act (Northern Ireland) 1954).
- (2B) Any statutory rule made under section 70(5) is subject to negative resolution (within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954).”
- (5) In subsection (3) omit “2(3), 3(4).”.

Reserve Forces (Safeguard of Employment) Act 1985 (c. 17)

19. In paragraph 2(1) of Schedule 2 for “Lord Chancellor”, where it appears second, substitute “Northern Ireland Judicial Appointments Commission”.

*Mental Health (Northern Ireland) Order 1986 (S.I. 1986/595 (N.I. 4))***20.**

- (1) Amend Schedule 3 as follows.
- (2) In paragraph 1(a) and (c)-
- (a) for “Lord Chancellor”, where it appears first, substitute “Northern Ireland Judicial Appointments Commission”;
- (b) for “Lord Chancellor”, where it appears second, substitute “justice department (within the meaning of the Justice (Northern Ireland) Act 2002)”.
- (3) In paragraphs 1(b), 2 and 3 for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (4) In paragraph 2 make the existing text sub-paragraph (1) and after that insert-

- “(2) The terms mentioned in sub-paragraph (1) are to be determined by the Northern Ireland Judicial Appointments Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

Adoption (Northern Ireland) Order 1987 (S.I. 1987/2203 (N.I. 22))

21. In paragraph 1 of Schedule 1 for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.

Child Support Act 1991 (c. 48)

22. In section 23(1) for the words from “such number” to the end substitute “other Child Support Commissioners for Northern Ireland”.
23. For paragraph 4(1) and (2) of Schedule 4 substitute-
- “(1) The Northern Ireland Judicial Appointments Commission may appoint persons to act as Child Support Commissioners for Northern Ireland (but to be known as deputy Child Support Commissioners for Northern Ireland) in order to facilitate the disposal of the business of Child Support Commissioners for Northern Ireland.
- (2) A deputy Child Support Commissioner for Northern Ireland shall be appointed-
- (a) from among persons who are barristers or solicitors of not less than the number of years’ standing specified in section 23(2), and
- (b) subject to sub-paragraph (2A), for such period or on such occasions as the Commission determines with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

Social Security Administration (Northern Ireland) Act 1992 (c. 8)

- 24.
- (1) Amend section 50 as follows.
- (2) In subsection (1) for the words from “such number” to the end substitute “other Social Security Commissioners”.
- (3) In subsection (2)-
- (a) for the words from the beginning to “appoint” substitute “In order to facilitate the disposal of the business of Social Security Commissioners, the Northern Ireland Judicial Appointments Commission may appoint”;
- (b) for “Lord Chancellor thinks fit” substitute “Commission determines with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002)”.

Tribunals and Inquiries Act 1992 (c. 53)

25. After section 6(8) insert-
- “(8A) In relation to a Reinstatement Committee mentioned in paragraph 38(a) of Schedule 1 which sits in Northern Ireland-
- (a) in subsections (1) and (2) the references to the Lord Chancellor are to be read as references to the Northern Ireland Judicial Appointments Commission, and
- (b) the terms mentioned in subsection (2) are to be determined by the Northern Ireland Judicial Appointments Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

Education (Northern Ireland) Order 1996 (S.I. 1996/274 (N.I. 1))

- 26.
- (1) Amend Article 22 as follows.
- (2) In paragraphs (2)(a) and (b) and (4)(b) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) In paragraph (3)(a) for “Lord Chancellor” substitute “justice department (within the meaning of the Justice (Northern Ireland) Act 2002)”.
- (4) In paragraph (5) omit “person or” in both places where it appears.
- (5) After paragraph (5) insert-
- “(5A) For an appointment under paragraph (2)(b), the conditions mentioned in paragraph (5) are to be determined with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

*Plant Varieties Act 1997 (c. 66)***27.**

- (1) Amend Schedule 3 as follows.
- (2) In paragraph 4(1) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) After paragraph 5(1) insert-
 - “(1A) For an appointment under paragraph 4 above, the term mentioned in subparagraph (1) above is to be determined with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”
- (4) In paragraph 16, in paragraph (c) of the definition of “appointing authority”, for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.

*Deregulation (Model Appeal Provisions) Order (Northern Ireland) 1997 (S.R. 1997/269)***28.**

- (1) Amend the Schedule as follows.
- (2) In rule 6(2) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) After rule 6(3) insert-
 - “(3A) The period and the terms mentioned in paragraph (3) are to be determined by the Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

Social Security (Northern Ireland) Order 1998 (S.I. 1998/1506 (N.I. 10))

- 29.** In Article 6(1) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.

30.

- (1) Amend Article 7 as follows.
- (2) In paragraphs (1), (2) and (4) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) In paragraph (3) for “Lord Chancellor” substitute “justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”
- (4) In paragraph (4) for “numbers” to “appointments,” substitute “terms and conditions of appointments to the panel”.

- 31.** After paragraph 1(1) of Schedule 1 insert-

“(1A) Those terms are to be determined by the Northern Ireland Judicial Appointments Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

Fair Employment and Treatment (Northern Ireland) Order 1998 (S.I. 1998/3162 (N.I. 21))

- 32.** In Article 82(1), (3) and (6) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.

*Justice (Northern Ireland) Act 2002 (c. 26)***33.**

- (1) Amend section 9 as follows.
- (2) In subsection (1) for “Lord Chancellor” substitute “Commission”.
- (3) In subsections (2)(a), (3), (4) and (5) for “Lord Chancellor” substitute “justice department”.
- (4) For subsection (11) substitute-
 - “(11) The justice department must pay to lay magistrates any such allowances as it may determine.”

34.

- (1) Amend section 90 as follows.
- (2) In subsection (1)(c) after “deputy First Minister” insert “or the justice department”.
- (3) After subsection (1) insert-

“(1A) An order containing provision made by virtue of section 9(4) shall be subject to affirmative resolution (within the meaning of section 41(4) of the Interpretation Act (Northern Ireland) 1954).”

(4) In subsection (4) omit “9(4).”

35.

(1) Amend Schedules 1 and 6 as follows.

(2) After the entry relating to the Plant Varieties and Seeds Tribunal insert-

“Deputy appointed under paragraph 6(1) of Schedule 3 to the Plant Varieties Act 1997 for the purpose of proceedings brought before the Plant Varieties and Seeds Tribunal in Northern Ireland”.

(3) At the end insert-

“President or other member of the Charity Tribunal for Northern Ireland
Adjudicator appointed under Article 7(1)(b) of the Criminal Injuries Compensation (Northern Ireland) Order 2002

Chairman appointed under Article 7(2)(b) of the Criminal Injuries Compensation (Northern Ireland) Order 2002

Adjudicator appointed under Article 29 of the Traffic Management (Northern Ireland) Order 2005”.

(4) In Schedule 1, after the entries inserted by sub-paragraph (3), insert-

“Chairman of an Appeal Tribunal for the purposes of the Adoption (Northern Ireland) Order 1987”.

36. Omit paragraphs 14 and 17(2) of Schedule 4.

37. Omit paragraph 13 of Schedule 12.

38. In Schedule 13 omit-

(a) the repeal of words in section 10(1) of the Magistrates’ Courts Act (Northern Ireland) 1964 (c. 21 (N.I.));

(b) the repeal of words in section 90(4) of the Justice (Northern Ireland) Act 2002 (c. 26).

Criminal Injuries Compensation (Northern Ireland) Order 2002 (S.I. 2002/796 (N.I. 1))

39.

(1) Amend Article 7 as follows.

(2) In paragraphs (1)(b) and (2)(b) for “Secretary of State” substitute “Northern Ireland Judicial Appointments Commission”.

(3) In paragraph (3) after “by the Secretary of State” insert “or the Northern Ireland Judicial Appointments Commission”.

(4) In paragraph (3)(a) for “Secretary of State considers appropriate” substitute “person making the appointment determines”.

(5) After paragraph (3) insert-

“(3A) For an appointment by the Northern Ireland Judicial Appointments Commission, the terms and conditions mentioned in paragraph (3)(a) are to be determined with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

(6) Omit paragraph (6).

40. In Article 13(2) for “Article 7(6)” substitute “section 7 of the Justice (Northern Ireland) Act 2002”.

Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (S.I. 2003/431 (N.I. 9))

41.

(1) Amend Schedule 2 as follows.

(2) In paragraph 1(2)(a) for “First Minister and deputy First Minister” substitute “justice department (within the meaning of the Justice (Northern Ireland) Act 2002)”.

(3) In paragraph 2(1) for “First Minister and deputy First Minister acting jointly” substitute “Northern Ireland Judicial Appointments Commission”.

(4) After paragraph 3(1) insert-

“(1A) For a member of the chairmen’s panel, the terms mentioned in sub-paragraph (1) are to be determined by the Northern Ireland Judicial Appointments

Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

- (5) In paragraph 3(2) for “First Minister and deputy First Minister” substitute “Commission”.
- (6) Omit paragraph 7 and the heading immediately before it.

Traffic Management (Northern Ireland) Order 2005 (S.I. 2005/1964 (N.I. 14))

42.

- (1) Amend Article 29 as follows.
- (2) In paragraph (1) for “First Minister and deputy First Minister acting jointly” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) After paragraph (4) insert-
 - “(4A) The term mentioned in paragraph (3) and the terms mentioned in paragraph (4) are to be determined by the Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”
- (4) In paragraph (5) for “Office of the First Minister and deputy First Minister” substitute “Commission”.
- (5) Omit paragraph (6).
- (6) In paragraph (7) for “paragraph (6)” substitute “section 7 of the Justice (Northern Ireland) Act 2002”.
- (7) Omit paragraph (8).

Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (S.R. 2005/150)

- 43.** In regulation 2(1), in the definitions of “President” and “Vice-President”, for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.

44.

- (1) Amend regulation 4 as follows.
- (2) In paragraphs (1)(a) and (2) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) After paragraph (2) insert-
 - “(2A) For a member of the panel of chairmen, the terms mentioned in paragraph (2) are to be determined by the Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

Fair Employment Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005 (S.R. 2005/151)

- 45.** In regulation 2(1), in the definitions of “President” and “Vice-President”, for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.

46.

- (1) Amend regulation 5 as follows.
- (2) In paragraph (2) for “Lord Chancellor” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) After paragraph (2) insert-
 - “(2A) The terms mentioned in paragraph (2) are to be determined by the Commission with the agreement of the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

Charities Act (Northern Ireland) 2008 (c. 12 (N.I.))

47.

- (1) Amend Schedule 2 as follows.
- (2) In paragraph 1(2) for “First Minister and deputy First Minister acting jointly” substitute “Northern Ireland Judicial Appointments Commission”.
- (3) In paragraph 1(4) for “First Minister and deputy First Minister acting jointly” substitute “justice department (within the meaning of the Justice (Northern Ireland) Act 2002)”.
- (4) After paragraph 3(1) insert-
 - “(1A) The terms mentioned in sub-paragraph (1) are to be determined by the Northern Ireland Judicial Appointments Commission with the agreement of

the justice department (within the meaning of the Justice (Northern Ireland) Act 2002).”

(5) In paragraph 3(2) for “Office of the First Minister and deputy First Minister” substitute “Northern Ireland Judicial Appointments Commission”.

(6) For paragraph 5 substitute-

“5 The justice department (within the meaning of the Justice (Northern Ireland) Act 2002) may pay to the members of the Tribunal such remuneration and other allowances as that department may determine.”

(7) Omit paragraph 11 and the heading immediately before it.

GENERAL NOTE

This is introduced by s.2(3). The judicial appointments commission was provided for in s.3 of the Justice (Northern Ireland) Act 2002. It is not yet in force. The unreformed lord chancellor then had a major role, with the prime minister, in judicial appointments, evident in the proposed ss.12, 12A and 12B of the Judicature (Northern Ireland) Act 1978.

Section 1 of the Justice (Northern Ireland) Act 2004 is transfer to lord chancellor of functions relating to judicial appointments commission. It transferred functions from the first minister and deputy first minister, as set out in Sch.1 amending the Justice (Northern Ireland) Act 2002. It was not brought into force. This was to take account of the suspension of devolution, when there would be no first minister and deputy first minister.

The Constitutional Reform Act 2005 did a great deal to turn the lord chancellor from a judicial into a ministerial figure. Part 5 on judicial appointments and removals in Northern Ireland provided for the position before devolution of justice.

This Schedule removes the lord chancellor and replaces him with the judicial appointments commission, amending 26 pieces of legislation, including the Justice (Northern Ireland) Act 2002.

SCHEDULE 5

Section 2

CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISION

PART I

CONSEQUENTIAL AMENDMENTS

County Courts Act (Northern Ireland) 1959 (c. 25 (N.I.))

1. For section 102(1) substitute-

“(1) Her Majesty may appoint a qualified person to be a judge.”

2. For section 134 substitute-

“134 Evidence of health

Before selecting any person for recommendation for appointment as a county court judge, the Northern Ireland Judicial Appointments Commission must take steps to satisfy itself that that person’s health is satisfactory.”

Magistrates’ Courts Act (Northern Ireland) 1964 (c. 21 (N.I.))

3. In section 9(1) omit “, on the recommendation of the Lord Chancellor,”.

Northern Ireland Act 1998 (c. 47)

4. After paragraph 2 of Schedule 11 insert-

“2A (1) The Lord Chancellor may only appoint persons to the Tribunal who have been selected by the Northern Ireland Judicial Appointments Commission as follows.

- (2) The Lord Chancellor may at any time by notice require the Commission to select a person for appointment.
- (3) The Commission must then select a person for appointment and notify the Lord Chancellor accordingly.
- (4) The Lord Chancellor must then appoint the selected person.
- (5) Section 5A of, and Part 4 of Schedule 3 to, the Justice (Northern Ireland) Act 2002 apply for the purposes of selections under this paragraph as they apply for the purposes of selections under that Schedule.”

Justice (Northern Ireland) Act 2004 (c. 4)

5. Omit sections 3 to 5 and paragraph 3 of Schedule 1.

Constitutional Reform Act 2005 (c. 4)

6.
 - (1) Amend Schedule 5 as follows.
 - (2) In paragraph 115(2) omit “8(7),”.
 - (3) Omit paragraphs 116 and 123.
7.
 - (1) Amend paragraph 4 of Schedule 7 as follows.
 - (2) Omit the entries for the following-
 - (a) section 102(1) of the County Courts Act (Northern Ireland) 1959 (c. 25 (N.I.));
 - (b) sections 9(1) and 12A(2) of the Magistrates’ Courts Act (Northern Ireland) 1964 (c.21 (N.I.));
 - (c) sections 1(2) and 3(1) and (2) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964 (c. 29 (N.I.));
 - (d) sections 12, 12B, 70(1), (3), (5) and (6) and 103(3) of the Judicature (Northern Ireland) Act 1978 (c. 23);
 - (e) paragraphs 1, 2 and 3 of Schedule 3 to the Mental Health (Northern Ireland) Order 1986 (S.I. 1986/595 (N.I. 4));
 - (f) Article 22(2)(a) and (b) and (4)(b) of the Education (Northern Ireland) Order 1996 (S.I. 1996/274 (N.I. 1));
 - (g) Articles 6(1) and 7(1) and (4) of the Social Security (Northern Ireland) Order 1998 (S.I. 1998/1506 (N.I. 10));
 - (h) Article 82(1), (3) and (6) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (S.I. 1998/3162 (N.I. 21));
 - (i) sections 5(3), (4), (5), (6) and (7) and 9(1) and (11) of the Justice (Northern Ireland) Act 2002 (c. 26);
 - (j) paragraph 3(2) of Schedule 2 to the Health and Personal Social Services (Quality Improvement and Regulation) (Northern Ireland) Order 2003 (S.I. 2003/431 (N.I. 9)).
 - (3) In the entries relating to the County Courts Act (Northern Ireland) 1959 (c. 25 (N.I.)) for “107(1), (3) and (7)” substitute “107(7)”.
 - (4) In the entries relating to the Judicature (Northern Ireland) Act 1978-
 - (a) at the appropriate places insert “Sections 12B and 12C” and “Section 70(1B)”;
 - (b) for “74(1), (3) and (5)” substitute “74(5)”.
 - (5) In the entries relating to the Northern Ireland Act 1998 (c. 47) after “2(1) and (3),” insert “2A,”.
 - (6) In the entries relating to the Justice (Northern Ireland) Act 2002 (c. 26) at the appropriate place insert “Schedule 3, Part 1”.
8. Omit paragraphs 36 to 39 of Schedule 17.

Northern Ireland (Miscellaneous Provisions) Act 2006 (c. 33)

9. Omit section 28.

PART 2

TRANSITIONAL PROVISION

10.
 - (1) This paragraph applies if-
 - (a) before the coming into force of this paragraph the Prime Minister has selected a person for recommendation for appointment to the office of Lord Chief Justice or

Lord Justice of Appeal under section 12 of the Judicature (Northern Ireland) Act 1978 (c. 23), but

- (b) when this paragraph comes into force the person has not been appointed.
 (2) Section 12 of the 1978 Act applies in relation to the appointment of the person, ignoring its substitution by this Act.

11.

- (1) This paragraph applies if before the coming into force of this paragraph a tribunal is convened under section 135 of the Constitutional Reform Act 2005 (c. 4) in relation to a matter (“the relevant matter”) for the purposes of-
- (a) section 134 of that Act, or
 (b) section 12B of the Judicature (Northern Ireland) Act 1978.
- (2) In a case covered by sub-paragraph (1)(a), for the purpose of dealing with the relevant matter sections 134 and 135 of the 2005 Act continue to apply, ignoring their repeal by the Justice (Northern Ireland) Act 2002.
- (3) In a case covered by sub-paragraph (1)(b), for the purpose of dealing with the relevant matter section 135 of the 2005 Act and section 12B of the 1978 Act continue to apply, ignoring-
- (a) the repeal of section 135 by the Justice (Northern Ireland) Act 2002, and
 (b) the substitution of section 12B by this Act.

12.

- (1) This paragraph applies if-
- (a) before the coming into force of this paragraph a notice under section 5(3) of the Justice (Northern Ireland) Act 2002 is given requiring the Northern Ireland Judicial Appointments Commission to select a person for appointment, or recommendation for appointment, to a listed judicial office (“the relevant requirement”), and
 (b) at the time this paragraph comes into force, no appointment has been made.
- (2) Section 5 of the 2002 Act, and any other relevant provision made by or under an Act or Northern Ireland legislation, continues to apply in relation to the relevant requirement as it applied immediately before the coming into force of this paragraph and, accordingly, the appointment is to be made as it would have been made immediately before the coming into force of this paragraph.

13. Paragraph 8(2) of Schedule 3 to this Act has no effect in relation to maladministration alleged to have occurred before the coming into force of paragraph 8(2) (whether or not a complaint is made before then).

14. Despite its repeal by paragraph 9 of Schedule 3 to this Act, section 9G of the Justice (Northern Ireland) Act 2002 (c. 26) continues to apply in relation to any matter arising before the coming into force of paragraph 9 (whether or not the matter is referred to the Ombudsman before then) and section 9H of the 2002 Act continues to apply accordingly, ignoring paragraph 10 of Schedule 3 to this Act.

15. In section 9I(2) of the Justice (Northern Ireland) Act 2002 (as amended by paragraph 11 of Schedule 3 to this Act)-

- (a) in paragraph (a) the reference to sections 12 to 12C of the Judicature (Northern Ireland) Act 1978 (c. 23) is to be read as including a reference to sections 12 and 12B of the 1978 Act before their substitution by this Act (including as applied by paragraph 10 or 11 of this Schedule);
 (b) in paragraph (ba) the reference to Schedule 3 to the 2002 Act is to be read as including a reference to section 5 of the 2002 Act before its substitution by this Act (including as applied by paragraph 12 of this Schedule).

16.

- (1) This paragraph applies in relation to a function which, by virtue of Schedule 4 to this Act, is transferred from one person (“A”) to another person (“B”). This includes cases where a function is exercisable by B with the agreement of a third person (and references below to B are to be read accordingly as necessary or appropriate).
- (2) Anything done by, on behalf of or in relation to A in relation to the function has effect as if done by, on behalf of or in relation to B, so far as necessary or appropriate for continuing its effect after the transfer.
- (3) Anything (including legal proceedings) which, immediately before the transfer, is in the process of being done by, on behalf of or in relation to A in relation to the function may be continued by, on behalf of or in relation to B.
- (4) So far as necessary or appropriate in consequence of the transfer or subparagraph (2) or (3) above, in any provision made by or under an Act or Northern Ireland legislation or in

any instrument, agreement or other document a reference to A is to be treated as a reference to, or as including a reference to, B.

- (5) In sub-paragraphs (2) to (4) above, references to A include references to any person who had the function before A.
- (6) This paragraph is subject to paragraph 12 of this Schedule.

GENERAL NOTE

This is introduced by s.2(4). Presumably, the rules on what is a consequential amendment have been followed. The Schedule amends, in Pt 1, six statutes, including the NIA 1998, the Justice (Northern Ireland) Act 2004, significantly the Constitutional Reform Act 2005 and the NIMPA 2006.

Part 2 deals with transitional provisions to account for judicial appointments and removals in progress when this Act, and other acts, are brought into force.

SCHEDULE 6

Section 2

REVIEW OF ARRANGEMENTS FOR JUDICIAL APPOINTMENTS AND REMOVALS ETC

1. After section 29B of the Northern Ireland Act 1998 (c.47) insert-

“29C Review of functions relating to judicial appointments and removals

Standing orders shall require one of the committees established by virtue of section 29 or the committee established by virtue of section 29A-

- (a) to review the operation of the amendments made by Schedules 2 to 5 to the Northern Ireland Act 2009,
- (b) to report on its review by a specified date that is before 1 May 2012, and
- (c) to include in its report any recommendations it has for changes to the way in which judicial office holders are appointed and removed.”

- 2.

- (1) From 1 May 2012, no new members may be appointed to the Northern Ireland Judicial Appointments Commission, unless the Northern Ireland Assembly resolves that this sub-paragraph is not to apply (or an Act of the Assembly overrides this sub-paragraph).

(This does not stop the re-appointment of existing members.)

- (2) A resolution for the purposes of sub-paragraph (1) must be passed with the support of-
 - (a) a majority of the members voting on the motion for the resolution,
 - (b) a majority of the designated Nationalists voting, and
 - (c) a majority of the designated Unionists voting.

“Designated Nationalist” and “designated Unionist” have the meanings given by section 4(5) of the Northern Ireland Act 1998.

- (3) If the resolution is passed on or after 1 May 2012, new members may be appointed to the Commission from the day after the day on which it is passed.

GENERAL NOTE

This is introduced by s.2(5). It inserts a new s.29C in the NIA 1998, ss.29A and 29B having been inserted by s.11 of the NISAAA 2006 (in force from May 8, 2007). Sections 29A and 29B deal with the committee to review the functioning of the assembly and the executive, what became the AERC.

The new s.29C provides for a wide-ranging review of judicial appointments and removals before May 1, 2012, and for a cross-community vote for any new system (seemingly with or without the judicial appointments commission).

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