

Justice (Northern Ireland) Act 2002

Introduction (Background to devolution in Northern Ireland)

In less than a century Northern Ireland has had four experiences of devolved government: a devolved Parliament under the Government of Ireland Act 1920, which lasted from 1921 – 1972; a devolved Assembly in 1974 with legislative powers; a devolved Assembly between 1982-1986 with no legislative powers; and the new Northern Ireland Assembly and its power sharing Executive, established under the terms of the Northern Ireland Act 1998 with capacity to exercise legislative and executive powers in the specific devolved areas of government.

The Northern Ireland Constitution Act 1973 introduced three categories of legislative powers - “*excepted*”, “*reserved*” and “*transferred*” - to denote the respective degrees of jurisdictional competence held by Westminster and the then NI Assembly. Devolution arrangements functioned on this basis and continue to do so by virtue of the Northern Ireland Act 1998. The current position is therefore as follows: excepted matters remain the competency of Westminster and can only be transferred to the devolved administration in Northern Ireland by an Act of Parliament; reserved matters also remain within the competence of Westminster but may, subject to the approval of the Secretary of State for NI, be transferred to the Assembly¹ where the matter has received the “*cross community support*” of the Assembly²; and powers in the “*transferred*” category, are those for which the Assembly has full legislative competence.

The Northern Ireland Act 1998 provided for the devolution of powers in such areas as education, social services, the arts, environment, development and agriculture. Powers in relation to justice and policing were retained as reserved matters and accordingly remained the responsibility of the Secretary of State. The Belfast Agreement however contained an obligation and government commitment to have a full and wide-ranging review of both the justice and policing systems in Northern Ireland, with a view to devolving power in this area at a later date³.

Overview of the Justice Act

The Justice (NI) Act 2002 is the final product of the Criminal Justice Review. The Act introduces a variety of changes to the current criminal justice system. These fall under the headings of “The Judiciary”; “Law Officers and Public Prosecution Service”; “Other New Institutions”; “Youth Justice”; “Miscellaneous”; and “Supplementary”.

The key provisions of the act include:

- amended procedures for appointment and removal of members of the judiciary;

¹ S.4(2), Northern Ireland Act 1998.

² Ibid. S.4(3). For definition of *cross-community support* see s.4(5).

³ Paragraph 7, Belfast Agreement.

- the establishment of a Judicial Appointments Commission and the introduction of tribunals;
- the creation of new offices of Lay Magistrate, Attorney General for NI and Advocate General;
- the appointment of the Lord Chief Justice as head of the judiciary in NI;
- the creation of a new Public Prosecution Service for NI;
- the introduction of new institutions; namely a Chief Inspector for Criminal Justice and a Law Commission;
- the development of new approaches to youth justice;
- provisions for victims of crime, including a community safety strategy;
- a new judicial oath or affirmation;
- new provisions on the display of Royal Arms and flags; and
- the power to abolish the court service.

Implementation

By virtue of the Northern Ireland Act 1998, the majority of the provisions under the Justice Act are classified as reserved matters.⁴ Until such time as these matters are transferred to the Assembly and Executive (i.e. the devolution of justice functions), responsibility for this area of the law lies with the Secretary of State. This is not to suggest however that devolution is required before the provisions of the Justice Act may enter into force. Rather, of the reserved matters under the Act, there are two types: those which, for constitutional reasons, may come into effect only on devolution; and those which may enter into force at any time, by means of an Order, made by the Secretary of State.

Of the first type, the most significant in the Act are: the amended procedures in relation to appointment and removal from judicial office; the provisions relating to the new offices of Attorney General for Northern Ireland and Advocate General; the appointment of the Lord Chief Justice as head of the judiciary in NI; and some of the provisions relating to the new Prosecution Service for Northern Ireland.

Those provisions of the Act pertaining to the latter type may be commenced by the Secretary of State,⁵ once there is sufficient political will and institutional capacity to do so. Indeed, three commencement orders have already been passed.⁶ The first brings fully into effect the judicial oath or affirmation,⁷ the new criteria for qualification for appointment⁸ and the provisions in relation to secretaries to the Lord Chief Justice⁹, judicial pensions¹⁰ and court security¹¹. The order also gives effect to the provisions in relation to the eligibility of candidates for appointment as lay

⁴ Schedule 3, Paragraphs 9 and 15, Northern Ireland Act 1998, *Reserved Matters*. Furthermore S.83 of the Justice Act 2002 adds the new institutions of the Chief Inspector of Criminal Justice, the Northern Ireland Law Commission and the local community safety partnerships to the list of reserved matters.

⁵ S.87(1) and (2), Justice Act 2002.

⁶ The Justice (NI) Act 2002 (Commencement No. 1) Order 2002, 9th October 2002; Justice (NI) Act 2002 (Commencement No. 2) Order 2002, made 10th December 2002, operational 6th January 2003; Justice (NI) Act 2002 (Amendment of section 46(1)) Order 2002, 20th December 2002.

⁷ *Supra* n.5 S.19.

⁸ *Ibid.* S.18(1) to (9).

⁹ *Ibid.* S.17

¹⁰ *Ibid.* S.21

¹¹ *Ibid.* Ss. 79-81

magistrates¹², so as to prepare the ground for their subsequent enactment and similarly makes preliminary measures to give full effect to the new office of Chief Inspector¹³. The second order brings into force, from the 6th January 2003, section 66 of the Act on the display of the Royal Arms inside and outside courtrooms. The third order gives effect to section 46(6)(a) and (7) of the Act - in relation to the institutions to which the chief inspector will have a duty - and accordingly extends this list of institutions¹⁴.

Timescale

The timescale for devolution is currently unknown. It would therefore be impossible to comment on when the provisions of the Justice Act, which depend on devolution, will come into force.

From a legal point of view, there are no obstacles to the full implementation of the remaining parts of the Justice Act which do not depend on devolution. The most obvious cause of the delay in this respect appears to be political but it is also likely to be associated with the time required to sufficiently prepare those institutions at whom the reform is directed.¹⁵

The following pages will identify some of the key provisions of the Act and provide some detail of their terms. The provisions are grouped by those whose function depends on devolution (first) and those which may come into effect in the absence of devolution (second).

(I) Key Provisions – Requiring Devolution

Part 1 – The Judiciary

(i) Independence

The Act begins by guaranteeing “*continued judicial independence*”.¹⁶

(ii) Appointment and Removal from Judicial Office

Summary

The appointment and removal of holders of judicial office was classified as an “excepted” matter under paragraph 11, Schedule 2 of the Northern Ireland Act 1998. The Justice Act amends the 1998 Act by providing for the transfer of appointment and

¹² Ibid. S.9(4), (5), (6) and (14).

¹³ Ibid. S.46(6) and (7).

¹⁴ Supra n.6, S.2(3).

¹⁵ Indeed the entire process of criminal justice review has been delayed by political inertia.

¹⁶ Ibid. S.1.

removal provisions to the category of “reserved” matters¹⁷. Subsequently, this area may potentially be *transferred* to a devolved administration in Northern Ireland, by means of an Order in Council, once it has received the necessary *cross community support* of the Assembly.¹⁸

Appointment and removal procedures are divided into those for listed judicial offices¹⁹ (i.e. those offices up to the level of high court judge) and those for most senior judicial offices²⁰ (including the offices of Lord Chief Justice and Lord Justice of Appeal). On devolution, the process of appointment and removal to listed judicial offices becomes the sole responsibility of local authorities. The process for appointment to senior judicial office on the other hand essentially remains, and is set to remain by the terms of the Act, the responsibility of the Prime Minister. The only local element in this process is the requirement that the Prime Minister must, prior to making the appointment, consult with the FM and DFM, who will have had the advice of the Judicial Appointments Commission.

Judicial Appointments Commission (Part 1, Section 3)

The Commission will assume responsibility from the Lord Chancellor for making or advising on judicial appointments. In terms of making recommendations for appointment, its remit only extends to the level of High Court judge.²¹ The Commission will make its recommendations to the OFMDFM and shall provide “*a report to that office on its process of selection, indicating the basis of its decision to select that person.*”²²

In relation to senior judicial appointments (Lord Chief Justice and Lord Justice of Appeal) the Commission may play an advisory role, that is in *assisting* the FM and DFM in making their recommendations.²³

The Commission may be asked by the FM and DFM acting jointly, (having provided reasons for so doing) to reconsider its decision in relation to any recommendation for appointment. Upon such a request, the Commission must produce reasons to substantiate the outcome of its reconsideration.²⁴ The reconsideration is final.

Composition²⁵

The Commission will consist of a chairman (the Lord Chief Justice) and twelve members. Of the twelve members, five will be “judicial members”, nominated by the Lord Chief Justice, five will be “lay members”, (presumably nominated by the FM and DFM), one will be a barrister, nominated by the Bar Council and the other a solicitor, nominated by the Law Society (“legal professional members”). All will be *appointed* by the FM and DFM acting jointly.

¹⁷ Ibid. See S.82(6)

¹⁸ S.4(2),(3) and (4), Northern Ireland Act 1998.

¹⁹ See Schedule 1, Justice Act 2002.

²⁰ Ibid. S.4.

²¹ Ibid. All listed judicial offices under Schedule 1.

²² Ibid S.5(4).

²³ Ibid. S.4 “12(3)

²⁴ Ibid. S.5(5) (6)

²⁵ Ibid. S.3(2-8)

Lay members are “*so far as possible*” required to be “*representative of the community*”²⁶ however this requirement does not extend to the judicial and legal professional members. No reason is given to explain this discrepancy.

Lay members must further make a declaration of commitment to non-violence and peaceful and democratic means.²⁷ This declaration must only be made by lay members. The oath or declaration, taken by judicial members of the Commission (by virtue of their respective judicial appointments) must in this case be viewed as sufficient to negate the requirement of a further declaration, such as that required to be taken by lay members.

Criteria for Appointment

Selection for appointment to judicial office must be based on merit only but a range of persons reflective of society should be *available for consideration* for selection by the Commission.²⁸

Reporting

Schedule 2 paragraph 5(1-8) requires the Commission to publish an annual report. It must include information on those persons who applied and those who were selected for appointment by the Commission. This information must be disaggregated by “*gender, age, ethnic origins and community background and the part of northern Ireland with which they regard themselves as being most closely associated.*”

Appointment to listed judicial office (Part 1, Section 5)

- Schedule 3 provides that the power for making recommendations for appointments to the offices listed in Schedule 1 shall be transferred from the Lord Chancellor to the FM and DFM, *acting jointly*.
- The FM and DFM, *acting jointly*, may also add or omit an office under Schedule 1 (other than the offices of Lord Chief Justice of Lord Justice of Appeal), with the consent of the Lord Chief Justice.²⁹

Removal from listed judicial office (Part 1, Section 7)

Section 7 vests in the FM and DFM acting jointly, the power to remove a person holding a listed judicial office, including that of a judge of the High Court. Such person may only be removed on the recommendation of a “tribunal”³⁰ and with the assent of the Lord Chief Justice.³¹

²⁶ Ibid. S.3(8)

²⁷ Ibid. S.3(7)

²⁸ Ibid. S.5(8-9).

²⁹ Ibid. S.2(3).

³⁰ Ibid. See S.8, Part 1.

³¹ Ibid. S.7(3-5)

This section only comes into force in the event of devolution. A judge of the High Court, *appointed before* the coming into force of this section, will be removed under the Judicature (NI) Act 1978 (as amended by S.6 Justice (NI) Act).

Appointment to senior judicial office (Part 1, Section 4)

Section 4 amends section 12 of the Judicature (NI) Act 1978. The effect of these amendments is to limit the scope of the Act to the Lord Chief Justice and Lords Justices of Appeal and remove the former provisions in relation to judges of the High Court. The amended section further provides that “*the power of the Prime Minister to make recommendations* [for the office of Lord Chief Justice and Lord Justice of Appeal].....*is only exercisable after consultation with the First Minister and Deputy First Minister*”.³²

Removal from senior judicial office (Part 1, Section 6)

The removal of the Lord Chief Justice, Lord Justice of Appeal or holder of any other judicial office falls firstly to be considered by a tribunal.³³ A tribunal to consider the removal of the Lord Chief Justice may be convened by the FM and DFM acting jointly and only once the Prime Minister has been consulted. The composition of the tribunal and the responsibility and requirements for convening a tribunal vary according to the judicial rank held by the subject of the proceedings.

The composition of all tribunals is weighted in favour of judicial members; 3-1 with lay members.

(iv) Lord Chief Justice (Part 1, Section 12)

Section 12 establishes the Lord Chief Justice as head of the judiciary in Northern Ireland.³⁴

The Lord Chief Justice must compile and publish a code of practice in relation to the handling of complaints against any person who holds a protected judicial office (including how to handle complaints in relation to the Lord Chief Justice him or herself).³⁵ There is no statutory duty on the Lord Chief Justice to consult with either the NI Human Rights Commission, the Equality Commission or any independent body on the subject of the content and substance of the code.

Part 2 – Law Officers and Public Prosecution Service

Summary

Part 2 creates the new offices of Attorney General for NI and Advocate General, as well as the Public Prosecution Service for Northern Ireland. Although a new office of Attorney General for NI is created by this section, the powers granted to the new

³² Ibid. S.4(3).

³³ Ibid. See S.8, Part 1.

³⁴ Ibid. See Schedule 5 for the transfer of duties in relation to the operation of the court, from the Lord Chancellor.

³⁵ Ibid. S.16

office holder are not comparable to those formerly vested in the Attorney General for England and Wales who exercised responsibility for Northern Ireland. The Attorney General for England and Wales will, under the Act, assume the role of Advocate General for NI. Schedule 7, paragraphs 21-36 specify the various powers (“excepted matters”) relating to national security, which will be vested solely in the Advocate General and in respect of which the new Attorney General for NI will have no authority.

(i) Attorney General (Part 2, Sections 22-26)

- Section 22(1) creates a new office of Attorney General for NI.
- It is the duty of the FM and DFM, acting jointly to appoint the AG, subsequent to consultation with the newly created office of “Advocate General” for NI³⁶.
- The office of the AG is non-political; the AG has no vote in the Assembly and is accountable to the Assembly.³⁷ This distinguishes the office from that of the AG for Scotland, England and Wales.
- In any proceedings of the Assembly, the AG can decline to answer questions where he or she “*might prejudice criminal proceedings*” or where to answer “*would be otherwise against the public interest.*”³⁸
- It is incumbent on the AG to prepare an annual report which will be presented to the Assembly and published.³⁹ Consonant with section 25(3), parts of the annual report may be omitted by the AG in the exercise of his or her discretion.⁴⁰

Removal of the AG

The AG may only be removed by the FM and DFM, acting jointly, on the basis of a recommendation for removal by a tribunal, convened for the purpose (S.24).

In this instance the tribunal is composed of only legal members, selected by the Lord Chancellor. There is no independent element.

(ii) Advocate General (Part 2, Sections 27-28)

- S.27 creates the new office of Advocate General, to assume responsibility for “excepted matters”.⁴¹
- S.28(2) provides that the Secretary of State can transfer to the Advocate General other functions, such as consent to prosecution duties (where these relate to national security).

³⁶ Ibid. Paragraph 13, Schedule 7.

³⁷ Apart from certain exceptions. Ibid. Section 25(3).

³⁸ Ibid. S.25(3), Part 2.

³⁹ Ibid. S.25.

⁴⁰ Ibid. Section 26, Part 2.

⁴¹ See Schedule 2 NI Act 1998.

(iii) Public Prosecution Service (Part 3, Sections 29-43)

Summary (DPP)

Some aspects of the new provisions in relation to the Public Prosecution Service will come into effect only upon devolution. These include, the new procedures for appointment and removal of the Director, (in terms of the roles played by the Attorney General for NI and Advocate General in this respect) and the new arrangements which govern the relationships between the Director, the Attorney General and the Advocate General.

Other provisions will however take effect before devolution. Those which should have particular impact include the change to allow the Director to take over all prosecutions which are instituted by the police and the mandatory requirement incumbent on the Director to publish a code of practice and ethics for the Prosecution Service.

- S.29(1) creates the Public Prosecution Service for Northern Ireland.
- The AG for NI must, in consultation with the Advocate General,⁴² appoint a person to be Director of Prosecutions for NI and Deputy Director.⁴³
- On devolution, new arrangements will take effect wherein the new Attorney General for NI will not *supervise* the DPP (as was formerly the case with the Attorney General for England and Wales) but he or she will nonetheless be responsible for *overseeing* the activities of the Director.
- The DPP may however be subject to a certain element of supervision by the Advocate General in cases which deal with excepted matters such as national security.
- While restating the independence of the Director, S.42 envisages that the Director *may consult* with the AG for NI on certain issues (not stated which).
- In order to preserve the independence of the prosecution service, the Director is not accountable to the Assembly other than for matters relating to “*finance*” and “*administration*” of the service.⁴⁴
- Director will take over *all* criminal proceedings which are instituted by the police and may also institute proceedings in any case where it appears “appropriate” to do so⁴⁵.
- The Director may discontinue proceedings, without the leave of any court, at any time before an accused person has appeared before court.⁴⁶
- S.33 acknowledges that certain offences are deemed sufficiently serious to require the consent of either the DPP or the current AG before a prosecution may take place. However after devolution the former AG will not retain the authority to consent to prosecutions (except in regard to "excepted matters") and the new AG

⁴² Supra n.31, Schedule 7, paragraph 13.

⁴³ The rationale for consulting with the Advocate General is based on the idea that the Director will be carrying out some prosecutions which fall within the area of responsibility of the Advocate.

⁴⁴ S.30(11), Justice Act 2002.

⁴⁵ Ibid. Paragraph 31.

⁴⁶ Ibid. S.32.

will not succeed to this role, so that responsibility will therefore pass exclusively to the Director.⁴⁷

- For the first time the Director is required to prepare and publish a code of practice and ethics for the Public Prosecution Service.⁴⁸ Again there is no requirement in the Act that the Director should consult with any of the independent NI human rights institutions in relation to the content and substance of the code but the Director must be guided, in preparing or altering the code, by the UN Principles on the Role of Prosecutors.⁴⁹
- The Director may be removed from office by the AG for NI, if a tribunal convened under the terms of the act, has so recommended.⁵⁰ The appropriate tribunal will consist of two judicial members, selected by the Lord Chancellor. A tribunal may only be convened after consulting the Advocate General.

S.89 Transitional and Savings

S. 89(2) ensures that the current holders of the DPP and Deputy will continue to hold their offices when the provisions relating to the Public Prosecution Service for NI are commenced.

(II) Key Provisions Which Do Not Require Devolution

Part 1 – The Judiciary

Magistrates (Part 1, Section 9)

- The new office of lay magistrate⁵¹ may come into effect before devolution, upon the appointment of a person to that office by the Lord Chancellor. However, consequent upon devolution, removal from office and subsequent appointments will be made by the FM and DFM, acting jointly.⁵²
- This office combines some of the powers, formerly held by lay panellists (whom lay magistrates will now replace⁵³) and justices of the peace. For example, lay magistrates will replace lay panellists in sitting as part of juvenile courts.

As explained earlier in the section on implementation, the provisions in relation to the eligibility of lay magistrates for appointment, have already been commenced.⁵⁴ We should therefore expect that the office itself should come into force in the near future.

⁴⁷ Ibid. See transfer of functions, paragraph 41(2).

⁴⁸ Ibid S.37 (Eg. The code should provide guidelines in relation to the grounds on which to decide to prosecute – application of the evidential and public interest tests etc. as recommended by the Review)

⁴⁹ Ibid, S.37(5).

⁵⁰ Ibid, S.43

⁵¹ Ibid. S.9, Part 1.

⁵² The office of lay magistrate, comes under the list of judicial offices in Schedule 1, Justice Act 2002.

⁵³ Ibid. S.11, Part 1 - renaming of lay panellists.

⁵⁴ Cf. N.6.

(v) Other Provisions (Part 1, Sections 18-19)

Criteria for Qualification for Appointment

S.18 amends the criteria for qualification for appointment as a judge of the High Court or Court of Appeal. An applicant with the “standing” of barrister or solicitor is sufficient. “Practice” is no longer a requirement. In most cases candidates will be accepted from the ranks of either barrister or solicitor.

This section is now fully in force by virtue of the Justice (NI) Act 2002 (Commencement No.1) Order 2002.

Judicial Oath of Affirmation

The Act provides for the taking of an affirmation rather than the traditional oath and extends the number of posts required to take either.⁵⁵

This section is also fully in force by the Commencement No.1 Order 2002.

Part 3 – New Institutions

Summary

Part 3 establishes two new institutions: a Chief Inspector of Criminal Justice and a Law Commission. By virtue of section 83 these institutions are classified as reserved matters and have been added to Schedule 3 of the Northern Ireland Act 1998.

(i) Chief Inspector of Criminal Justice (Part 3, Sections 45-49)⁵⁶

- S.45 creates the new office of Chief Inspector of Criminal Justice, with responsibility for ensuring the inspection of all aspects of the criminal justice system, *excluding the courts*, or where the organisation is deemed to be already subject to "*adequate inspection*".
- The Chief Inspector will report principally to the Secretary of State but also to the Attorney General for NI. The Secretary of State may not require the Chief Inspector to carry out an inspection or review of the Public Prosecution Service without the consent of the Attorney General for NI.⁵⁷
- The Secretary of State may furthermore change the list of organisations which may be subject to inspection⁵⁸. Since courts however are not within the remit of the Chief Inspector, they cannot (nor can tribunals) be added to the list.
- The Chief Inspector is responsible to the Secretary of State, to whom he or she must submit an annual report. In the public interest, the Secretary of State may preclude part of the report from being published.

⁵⁵ Ibid, S.19.

⁵⁶ Certain provisions in relation to the Chief Inspector have already entered into force by virtue of the Justice (NI) Act 2002 (Amendment of section 46(1)) Order 2002, 20th December 2002. Cf. n.13 and 14.

⁵⁷ Ibid. S.47(5).

⁵⁸ Ibid. S.46(6). This section has been invoked by the Justice (NI) Act 2002 (Amendment of section 46(1)) Order 2002, 20th December 2002.

(ii) Law Commission (Part 3, Sections 50-52)

- S. 50 provides for the establishment of a law reform commission for NI, tasked with reviewing the criminal and civil law, with a view to making recommendations to Government for the codification, simplification and consolidation of legislation.
- The Commission will consist of four members and a chairperson: a current High Court judge; a barrister; a solicitor; one legal academic; and one lay person, all selected by the Secretary of State.
- Membership should, as far as possible, be representative.

Part 4 – Youth Justice (Sections 53-65)

- Sections 53-66 of the Act introduce some elements of a restorative penal system.
- In line with international standards in the area, the provisions focus much more on the rights of the child. Eg; the “consent” and “agreement” of the child is crucial in many provisions, thus conferring a certain degree of autonomy on the children concerned.
- The community element of the penal/justice system is somewhat developed in this Act. There is an acknowledgement that this may provide a more appropriate solution than has been previously been offered by traditional remedies involving the court system and authorities.
- Courts are required to be more transparent in their dealings with children and must conduct their proceedings in a manner which is easily understood and accessible to all.⁵⁹
- The new sentence of “reparation orders” is introduced.⁶⁰ The child’s consent is required for the order to be valid.
- The Act also introduces “community responsibility orders”.⁶¹ This section includes a novel requirement that the offender will receive instruction in “citizenship” as part of the order.⁶²
- A new form of custodial sentence, termed “custody care orders”, is introduced for child offenders between the ages of 10 and 13.⁶³ This new order will be used only in cases where the offence committed was of a category which would be liable to a prison sentence if committed by an adult.
- “Youth conferences” and “youth conference plans”⁶⁴ have been introduced as a new means of dealing with child offenders who formerly would have been the subject of court proceedings. A youth conference plan will require the child to carry out specified actions in order to make reparation for the crime – reformative and reparative in nature.
- A child cannot be compelled to attend a youth conference – participation must be voluntary.

⁵⁹ See: S.55 (36F(5)), requirement to explain “..in ordinary language...”.

⁶⁰ Ibid. S.54

⁶¹ Ibid. S.55.

⁶² Ibid. S.55(2).

⁶³ Ibid. S.56.

⁶⁴ Ibid. Ss.57-60.

Part 5 – Miscellaneous

(i) Royal Arms and Flags (Part 5, Sections 66-67)

- S.66(1) provides that Royal Arms must not be displayed *in* any courtroom. Sub-section (2) however lists the excepted cases, to which (1) does not apply. These include the courtrooms in the Royal Courts of Justice and the other main regional courthouses where the Arms was displayed before the coming into force of this Act.
- S.66(3) provides that the Royal Arms must not be displayed *on the exterior* of an existing courthouse or on any other place *outside* a courthouse unless they were immediately displayed there before the coming into force of this section.

These exceptions greatly reduce the effect of this provision. Nonetheless, the provisions entered into force on 6th January 2003 by virtue of the Justice (NI) Act 2002 (Commencement No. 2) Order 2002, made 10th December 2002.

The flying of the Union flag outside a courthouse is permitted in accordance with the Flags (NI) Order 2000.⁶⁵

(ii) Victims of Crime (Part 5, Sections 68-70)

- S.68 provides for a victim information scheme. Information about the discharge and temporary release of prisoners shall be made available for those victims who wish to receive it.
- The definition of “victims” extends beyond actual victims to include those who are deemed to be significantly affected by the offence.
- The Secretary of State has a wide-ranging discretion to retain information in circumstances where he believes it would be judicious to do so.⁶⁶
- The provisions do not relate to offenders under the age of 18 or to prisoners transferred to NI to another part of the UK on an unrestricted transfer.⁶⁷

(iii) Community Safety Strategy (Part 5, Sections 71-72)

- The Act commits the Secretary of State to devise a strategy which will help enhance community safety (both actual and perceived) in NI.
- NI will be divided into areas where local community safety partnerships will be set up. These groups will conduct research (involving public consultation) on levels of community crime, will establish action plans, evaluate successes and report results in a published annual report.

Exceptional Legal Aid (Part 5, Sections 76-77)

⁶⁵ Ibid. S.67.

⁶⁶ Ibid. See S.68(8) for the grounds on which the Secretary of State may retain information.

⁶⁷ Ibid. S.70.

- The Lord Chancellor may grant legal aid in cases which do not fall within the general provisions (of the 1981 Order) for legal aid.⁶⁸
- A new power to grant exceptional legal aid will extend to proceedings before a coroner (there was formerly no aid awarded in this respect).⁶⁹

(v) Power to Abolish the Court Service (Part 5, Section 78)

- Section 78 provides the Lord Chancellor with the power to abolish the court service and transfer its powers to a “next steps agency” and potentially to a future NI Department of Justice (as recommended by the Review) in the event of devolution.
- No other information is given in this section, as to whether the court service will be radically reformed in the event of a transfer of powers. No mention of internal re-structuring or institutional reorganisation.

Conclusion

By the terms of the Justice Act itself, it is clear that it does not provide for devolution. It does however make provision for certain changes to the criminal justice system⁷⁰, which may only take effect once devolution has otherwise occurred. Whilst constitutionally, devolution is a prerequisite for these particular provisions to enter into force, nonetheless, their inclusion in the Justice Act demonstrates the Government’s commitment to devolve criminal justice issues at a subsequent date.

There are however many other provisions which do not require devolution to give them legal effect. Commencement of the Act’s provisions began in October 2002, but to date only a small number of these are presently in force. This process should be accelerated as a matter of priority, so that the remaining terms of the Act which are not subject to devolution can enter into force. This would signify the start of attempts to make a reality of the principles identified in the Criminal Justice Review.⁷¹

Limitations

One of the shortcomings of the Justice Act is that it makes no amendment to the list of “excepted” matters, stated in Schedule 2, Northern Ireland Act. These matters are therefore within the exclusive competence of Westminster with no prospect of being devolved in the near (or even far) future. Consequently, paragraph 9 of schedule 3, NI Act 1998, retains any aspect of: “(a) the criminal law; (b) the creation of offences and penalties; (c) the prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings” which have a bearing on national security, as an excepted matter. This raises obvious concerns that the hard edge of criminal justice, namely those areas infringing on national security/terrorism,

⁶⁸ Ibid. S.76.

⁶⁹ Ibid. S.77.

⁷⁰ See earlier discussions on appointment and removal to judicial offices, creation of the offices of Attorney General for Northern Ireland and Advocate General and reform of the prosecution service.

⁷¹ For example, transparency, representation and equality.

which have suffered from the most marked human rights violations in the past, has been left untouched.

The new arrangements therefore, in regard to the respective roles of the Attorney General for NI, Advocate General and DPP are as follows: the Attorney General for NI is bereft of power in relation to any criminal justice matter pertaining to national security (including consent to prosecutions) and has no authority to supervise the activities of the DPP; while⁷² the Advocate General assumes all responsibility for excepted matters.

⁷² Schedule 7, paragraphs 21-36, Justice Act 2002.