



RESEARCH PAPER 00/6
20 JANUARY 2000

Disqualification Bill

Bill 41 of 1999-2000

This short Bill is due to be debated on 24 January and to complete its remaining stages in the Commons on 25 January. Its main purpose is to remove the disqualification from membership of the House of Commons and the Northern Ireland Assembly of members of the legislature of Ireland. It also disqualifies from membership of ministerial office in Northern Ireland ministers of the Government of Ireland.

The paper also provides background to the recent devolution of power to the Northern Ireland Assembly and the creation of a power-sharing Executive. It does not deal with the question of facilities for Sinn Fein members at Westminster, which will be covered by a forthcoming Research Paper on the Parliamentary Oath.

Oonagh Gay

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Summary of main points

The disqualification bill is expected to pass all its Commons stages on 25 January 2000. It has two main purposes:

- To remove the disqualification from membership of the House of Commons and the Northern Ireland Assembly of members of the legislature of Ireland (both Seanad and Dail)
- To disqualify from membership of the Northern Ireland Executive ministers of the Government of Ireland. Members of the Northern Ireland Executive are able to become members of the Westminster Government

The Bill has aroused some opposition from unionist and other members who have argued that allowing members to serve in two different legislatures creates a conflict of interest. At present only members of Commonwealth legislatures may take seats in the Commons or in the Assembly, apart from members of the Seanad who are qualified to sit in the Assembly under s36(5) of the *Northern Ireland Act 1998*.

The second part of the paper sets out the scheme of devolution in Northern Ireland, setting out the Ministers appointed and the powers devolved. There are 10 ministers, in addition to the First Minister and the Deputy First Minister. There is a series of excepted powers which remain at Westminster, including

- The Crown
- Parliamentary elections, and Assembly elections including the franchise
- International relations
- Defence of the realm
- Honours
- Nationality
- National Taxation
- Appointment and removal of judges
- Registration of political parties
- Coinage etc
- National security
- Nuclear energy and installations
- Regulation of sea fishing outside Northern Ireland
- Provisions dealt with in the *Northern Ireland Constitution Act 1973*
- The subject matter of the *Northern Ireland Act* with specified exceptions

Other powers are 'reserved' to Westminster, but may be transferred to Northern Ireland at a later date if there is sufficient support in the Assembly and at Westminster. All powers not 'excepted' or 'reserved' are transferred to Northern Ireland. This follows the scheme in the *Northern Ireland Constitution Act 1973*.

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I Disqualification Bill

A. Introduction

The major legislation governing disqualification from the Commons is consolidated in the *House of Commons Disqualification Act 1975*. However other enactments and the common law also disqualify a range of people, from clergy, members of the Lords, minors and aliens, amongst other categories. This paper does not offer a comprehensive guide to all these categories of disqualification.¹

The main purpose of disqualification is to ensure that Members are fit and proper to sit in the House, and are able to carry out their duties and responsibilities free from undue pressures from other sources. These considerations may be called "House-based" and are the basis not only of disqualifications under the *House of Commons Disqualification Act 1975* but of the whole range of earlier disqualifications for the Commons. However, there is also another consideration which may be called "office based". This is the wish to ensure that an office held by an individual is not adversely affected by his membership of Parliament. This is of more recent origin.

There are two main "House-based" objectives. The first is that a Member should be free from possible conflicts of interest which might distort his behaviour as an independent member of the legislature and his freedom to represent the best interests of his constituents. These include financial or other dependence on Ministerial, Prime Ministerial or Crown Patronage; and also membership of a foreign (though not Commonwealth) legislature. Historically, this has been the basis of the great majority of disqualifications.

The second "House-based" objective is perhaps more concerned with the personal qualities and circumstances of a potential Member than with outside influences upon him. The concepts of 'fitness' and 'propriety' lie behind the restriction of minors, the mentally ill, the dishonest, criminals² and bankrupts. Corrupt practices at elections may also have the effect of disqualification from the House of Commons. A person may, at an election, be disqualified for being elected by reason of corrupt practices committed at a previous election. So also a person not disqualified before an election may, during the election, become disqualified by reason of corrupt practices being committed at the election; but the latter disqualification can only arise ex post facto upon an investigation into such election. This disqualification always

¹ See *The Electoral System in Britain* (1995) by Robert Blackburn pp 160-197 for a discussion on disqualification for the Commons

² *The Representation of the People Act 1981* provides (a) for the disqualification of any person who is detained anywhere in the British Islands or the Republic of Ireland (or who is unlawfully at large at any time when he would otherwise be detained) for more than a year for any offence, (b) that the election or nomination of such persons shall be void, and (c) that the seat of a Member who becomes so disqualified shall be vacated. This Act was passed as a result of a hunger-striker, Bobby Sands, who was elected MP in an April 1981 by-election in the Northern Ireland constituency of Fermanagh and South Tyrone while he was serving a long term of imprisonment

existed at common law, and the statutory provisions are intended only to give fuller effect to the common law of Parliament.

However, there has also been concern that, even though a Member may have other commitments, he must still be able to attend the House and have sufficient time to devote proper attention to his duties. Disqualification of judges and ambassadors first arose for example in times when the duties of such posts would have precluded normal attendance at Westminster.³

The way the 1975 Act has been applied for "office-based" reasons reflects a third, substantially different, objective. That is that, where a Member holds some other publicly funded position, his performance in that position should not be jeopardised by his role as a Member, either on conflict of interest grounds or because the position might require demonstrable political neutrality.

Disqualifications of certain office-holders from membership of the House of Commons have existed since the early seventeenth century. These were previously scattered through public and private Acts and the Journals of the House. By the 1940s, confusion about the actual and intended scope and effect of existing disqualifying provisions, together with fears about the effects on parliamentary democracy of special wartime appointments of Members, led to the appointment of a Select Committee (the Herbert Committee).⁴

The Herbert Committee looked particularly at the law and practice governing the disqualification of those holding "offices or places of profit under the Crown" and the report⁵ contained recommendations for legislation to replace earlier statutes. After the war and the reconstruction period, work began in 1949 on drafting a bill to put the Herbert Committee recommendations into effect. However, there were serious difficulties in arriving at a satisfactory legal expression of some of the concepts recommended by the Herbert Committee and it was not until 1955 that a bill finally went to the House.

Progress was difficult and a further Select Committee, the Spens Committee⁶, was set up in 1956 to reconsider the Bill. The Committee stated ' certain offices are incompatible with membership of the House of Commons, some as involving physical impossibilities of simultaneous attendance in two places, some because of possible patronage, and others because of a conflict of duties' (para 2). The Spens Committee examined the Bill after second reading and made several recommendations but the revised bill was not finally enacted until the 1956-7 session.⁷

³ This passage is based on a Cabinet Office memorandum in 1984 *House of Commons Disqualification Act 1975: A Factual Analysis* Dep (NS)820

⁴ see Chapter 11 of *Erskine May* (16th ed 1957) for a description of disqualification prior to the 1957 Act

⁵ HC 120, 14 October 1941

⁶ HC 349 Special Report from the Select Committee on the House of Commons Disqualification Bill session 1955/56

⁷ As background see *Public Law 1957* 'House of Commons Disqualification'

Legislation was finally enacted as the *House of Commons Disqualification Act 1957*. This was re-enacted, unchanged in substance and as a consolidating measure, in 1975 when offices disqualifying from the Northern Ireland Assembly were separated out and covered by the Northern Ireland Assembly Disqualification Act 1975.

B. Practicalities

The *House of Commons (Disqualification) Act 1975* disqualifies a large number of public office holders. It is the single most important legal measure affecting eligibility for parliamentary candidature. It lays down six classes of office holders who are disqualified, namely: (1) holders of certain judicial offices including High Court and Court of Appeal judges (Law Lords are disqualified already by virtue of being peers); (2) civil servants, whether established or not, and whether full or part time; (3) members of the regular armed forces; (4) full time police officers; (5) members of the legislature of any country outside the Commonwealth; and (6) holders of any of the offices listed in the Act. The Act also limits the number of ministers who sit in the Commons.

This list, laid out in schedules to the Act, is a very lengthy one. The Act enables the government to add to or vary the list from time to time by way of parliamentary resolution and an Order in Council.

Disqualification does not generally take place until after election.⁸ A sitting Member may also become disqualified. In these circumstances he is required to vacate his seat or to relinquish the office and seek relief under Section 6(2) of the Act.

C. The Bill

At present under s1(1)(e) of the *House of Commons Disqualification Act 1975* Act⁹ only members of other Commonwealth legislatures are qualified to sit in the House of Commons. Ireland left the Commonwealth in 1949¹⁰, and although there have been recent press reports that it is considering rejoining¹¹ no initiative in this direction is expected in the near future. The *Disqualification Bill* amends this section so that members of both Commonwealth

⁸ But see the drafting of s2(1) of the *Representation of the People Act 1981*, which is intended to prevent nomination of candidates who would be disqualified by its provisions on convicted prisoners

⁹ The 1975 Act was a consolidation of the *House of Commons Disqualification Act 1957*; the 1957 Act also disqualified members of non Commonwealth legislatures from the Commons. This was a new provision, not found in earlier enactments relating to disqualification from Westminster. It appeared in the original bill, as introduced to the Commons (Bill 25 of 1955-6), and the *Explanatory Memorandum* noted that this new provision had not been recommended by the Herbert Committee on disqualification. An attempt in committee to restrict qualification to members of UK legislatures only was defeated (HC349 1955-6 Minutes of Proceedings p xlvi). Until the 1957 Act, disqualifications from the Stormont Parliament had been identical to those for the Westminster Commons as a result of s18(2) of the *Government of Ireland Act 1920* which applied existing laws on disqualification to Westminster

¹⁰ See the interesting discussion of the circumstances in which Ireland can be said to have left the Commonwealth in *Northern Ireland Legal Quarterly* 1984 'The Armagh Election Petition'

legislatures and the legislature in Ireland are eligible to sit in the Commons. In practice members of legislatures outside the Commonwealth would also certainly be aliens, and therefore not eligible for membership of the Commons anyway. The Republic of Ireland is in an anomalous position in that its citizens are not ‘aliens’ for electoral purposes, and yet it is not a member of the Commonwealth. Irish citizens may stand for and vote in all types of UK elections as long as they fulfil the relevant residence requirements.¹² British citizens may vote in Irish elections, if resident there.

The *Northern Ireland Act 1998* also disqualified members of the Dail (the Irish lower house) from sitting in the Northern Ireland Assembly. Under s36(5) Members of the Seanad (upper house) were however made eligible. In 1982 Seamus Mallon had lost a case in the ECHR against his disqualification as member of the Northern Ireland Assembly, due to his membership of the Seanad.¹³ The *Disqualification Bill* repeals s36(5) as unnecessary following amendment to the 1975 Act and thus allows both members of the Dail and Seanad to be members of the Commons.

Clause 2 of the Bill prohibits ministers of the Government of Ireland from standing for election or being elected as First Minister, or Deputy First Minister, or other minister or junior minister in the Executive. A ministerial post in the Northern Ireland Executive is lost if the member of the Assembly becomes a minister in the Government of Ireland. The provision is achieved by adding a new section 19A to the *Northern Ireland Act 1998*.

There are similar provisions in the *Scotland Act 1998* to prohibit ministers from holding office in the Scottish Executive at the same time as holding Ministerial office at Westminster.¹⁴ No such prohibition applies in Wales. However there does not appear any precedent for prohibiting membership of a foreign executive. There is currently no prohibition on ministers of the Northern Ireland Executive from holding ministerial office in Westminster. Members of the Northern Ireland Executive, created under the *Government of Ireland Act 1920*, were disqualified from sitting in the House of Commons at Westminster.¹⁵

Under s41 of the *Irish Electoral Act 1992* only Irish citizens may stand for election to the Dail, but there is no specific disqualification for members of foreign legislatures or for the Northern Ireland Assembly. Citizens of Northern Ireland can claim Irish citizenship.¹⁶ The All Party Oireachtas Commission on the Constitution has been examining the possibility of allowing representatives from Northern Ireland Assembly some form of representation in the Oireachtas. Following the Belfast Agreement the Taoiseach, Bertie Ahern, wrote to the

¹¹ “Ireland in secret talks to end rift”, *Times* 24 December 1999

¹² See the Home Affairs Select Committee report *Electoral Law and Administration*, paras 117-8 HC 768 1997-8 for further details

¹³ *M v UK Appl* 10316/83 37 D& R 110,116. See *Northern Ireland Legal Quarterly* 1984 ‘The Armagh Petition’ for an account of the initial disqualification on election petition

¹⁴ s 44(3)

¹⁵ *House of Commons Disqualification Act 1957*, schedule 1, part III. See *Constitutional Law in Northern Ireland*, by Harry Calvert p 147-8

¹⁶ S6 and 7 of the *Irish Nationality and Citizenship Act 1956* allows people born in Northern Ireland to declare themselves to be Irish citizens

Commission recommending that it ‘consider the proposals that MPs elected in the North should be entitled to sit in the Dail and that Irish citizens living in the North should be entitled to vote in Presidential elections and referendums’. A report is expected in the first half of 2000.¹⁷ Sinn Fein contested seats at Stormont in the 1920s, and the future President of Ireland, Eamon de Valera, among other SF candidates, won seats in the first general election of 1921.¹⁸ SF members did not take their seats at Stormont and almost all held seats simultaneously in the second Dail Eireann.¹⁹ SF held two seats at Stormont in the 1925 election but did not take their seats.

73 Sinn Fein candidates were elected to the House of Commons at Westminster in 1918, but did not take their seats. A Nationalist, Cahir Healy, had been interned from June 1922 until February 1924, but had been elected for Fermanagh and Tyrone in the November 1922 election. He did not take the oath. Several Republican candidates were elected in 1935 and 1950 but did not take the oath.²⁰ Following the creation of Fianna Fail in 1926, Sinn Fein became a small abstentionist party until the late 1960s, when it split into provisional and official wings, the latter becoming the Democratic Left and the Workers Party in the Republic. However, two SF candidates won the Fermanagh and South Tyrone and Mid Ulster seats in 1955. Both were disqualified as they were serving sentences for treason.²¹ In 1986 Sinn Fein dropped its previous opposition to taking seats in the Dail and currently holds one seat at Cavan/Monaghan, gained in the Irish general election of 1997. According to press reports, it has hopes of another in Kerry North.²² General elections are not due until 2002, but local elections in June 1999 signalled a significant increase in Sinn Fein’s popularity, particularly in poorer areas and parts of Dublin.

SF has gained much of its recent support from the divided Fianna Fáil (FF) party which is in government. In the 1997 elections support for FF fell from its 1992 level of 45.6% to 40.4%, while support for the opposition Fine Gael (FG) rose by 6.2% to 36.6%. The *Irish Times* suggested that “the general view within the established political parties in the Republic is that Sinn Fein has the ability to return up to six TDs at the next election”.²³ The report also notes that:

A functioning Executive in the North, with Sinn Fein participating like any other party, will have implications for future government formation in the Republic. Put

¹⁷ *The Examiner* 22 December 1999 ‘Ahern under pressure to allow Northern politicians to contest elections in South’

¹⁸ De Valera and others also won seats in the 1925 election to Stormont, standing as Republicans

¹⁹ this Dail was formed of the SF members of the Southern Ireland House of Commons, who did not take their seats and instead came together with one abstentionist SF member of Stormont to form the second Dail. See *Parliamentary Election Results in Ireland 1918-92* ed Brian M Walker for further details

²⁰ See Memorandum from the Clerk to Privileges Committee Report *Rights of Honourable Members Detained in Prison* HC 185 1970-1 para 12, footnote, and *Parliamentary Election Results in Ireland* pp19-21

²¹ See *British Parliamentary Election Results* by FWS Craig p684-686 for references

²² *Irish Times* 10 January 2000 ‘SF aims to win in Kerry North’

²³ 28 December 1999

succinctly – Sinn Fein is likely to be a potential partner in a future coalition government in the Republic.

Political commentators suggest that at the next election FF might lose some of its ‘working class’ and nationalist support to SF, with SF holding the balance of power in Dublin.

In 1983 and 1987 Gerry Adams won the seat of Belfast West in the Westminster elections. Sinn Fein won no seats in the 1992 general election, but gained two in the 1997 elections- Belfast West and Mid Ulster

The Royal Commission on the Reform of the House of Lords²⁴ commented on dual mandates as follows:

6.19 While it would clearly be desirable to promote the development of links between the various legislatures across the United Kingdom, dual membership of the various devolved assemblies and the second chamber is not the right way to achieve it. It is for the members of the various Parliaments and Assemblies to decide what links they should establish, perhaps building on the experience of the British-Irish Inter-Parliamentary Body.

The *Belfast Agreement*²⁵ did not address the issue in the Bill, and did not make any comment at all on disqualification for legislatures. The Home Secretary, Jack Straw said on publication of the Bill:²⁶

"This Bill will remove one of the remaining significant differences between Ireland and Commonwealth countries in the field of electoral law. Irish nationals, other than TDs, have long been in the same position as Commonwealth citizens and have been able to stand for and vote in elections for the House of Commons or for the Northern Ireland Assembly. This step is being taken in the light of the implementation of the British Irish Agreement on 2 December."²⁷

D. Reactions to the Bill

Sinn Fein sources have stated that Gerry Adams has no plans to stand for the Dail.²⁸ There have been newspaper reports that the Ulster Unionist Party consider that the bill falls outside the Belfast Agreement.²⁹ UUP minister Michael McGimpsey said that the decision flew in the face of the constitutional settlement and the consent principle understood to have been resolved in the Belfast Agreement, and that there was a clear conflict of interest in sitting in

²⁴ A House for the Future January 2000 Cm 4534

²⁵ Cm 3883 April 1998

²⁶ *Home Office Press Notice* 21 December 1999 ‘Disqualification Bill published’

²⁷ This is a reference to the *Belfast Agreement*

²⁸ “Adams ‘will not run for the Dail’”, *Irish News* 27 December 1999

²⁹ “Adams will not run for the Dail”, *Irish News* 27 December 1999

two legislatures.³⁰ The Alliance party also expressed reservations. Gerry Adams, for Sinn Fein, said it wanted representatives from the Assembly to be given a voice in the Dail.³¹

The former Prime Minister, John Major has expressed opposition to suggestions that facilities might be available to Sinn Fein members³² but has indicated that he will not oppose the provisions in the Bill as he saw it primarily as a matter for the individual electorates.³³

II Devolution in Northern Ireland

Full background to the *Belfast (Good Friday) Agreement* is given in Research Papers 98/57 and 98/76. A summary of progress was given in Research Paper 99/49, produced in May 1999. Professor Brigid Hadfield's article in *Edinburgh Law Review*³⁴ analyses the *Northern Ireland Act* in some detail.

The *Agreement* of 10 April 1998 proposed an overall settlement of the constitutional and security position of Northern Ireland, to feature:

- new legislation by both the UK and Irish governments
- a new Northern Ireland Assembly
- a new North/South Ministerial Council
- a new British-Irish Council to bring together representatives from devolved administrations and the two governments, as well as the Isle of Man and Channel Isles
- a new British-Irish Agreement to replace the 1985 *Anglo-Irish Agreement*
- a process for decommissioning weapons held by paramilitary groups
- a programme for the accelerated release of paramilitary prisoners.
- the creation of a Northern Ireland Human Rights Commission and an Equality Commission
- an independent commission to make recommendations for future policing arrangements in Northern Ireland
- a review of criminal justice³⁵

The *Belfast Agreement* was endorsed by a referendum on 22 May 1998 in both Northern Ireland and the Republic. In Northern Ireland, 71 per cent of those voting, on an 81 per cent turnout, backed the agreement. In the Republic, 94 per cent, on a 56 per cent turnout, were in favour. Elections to the new Northern Ireland Assembly were held on 25 June 1998 under the *Northern Ireland (Elections) Act*, which completed its passage through Parliament on 7 May 1998. The SDLP gained the highest percentage of first preference votes (21.96%) for the first time in a Northern Ireland election, with the UUP following at 21.26%.

³⁰ UUP Press Notice 'Statement by Minister Michael McGimpsey'

³¹ "Bill will allow TDs to stand for Assembly", *Irish News* 22 December 1999

³² See forthcoming Research Paper on the parliamentary oath for further background

³³ "SF vows to fight on for the use of the Commons", *Irish News* 22 December 1999

³⁴ 1999 p 3-31

³⁵ See *Review of Criminal Justice in Northern Ireland: Progress Report* from www.nio.gov.uk/990415cz-cjp.htm

Election for the Northern Ireland Assembly, 25 June 1998:³⁶**Number of seats gained by each party**

Ulster Unionist Party (UUP)	28
Social Democratic and Labour Party (SDLP)	24
Democratic Unionist Party (DUP)	20
Sinn Fein	18
Alliance Party	6
UK Unionist Party	5
Independent Unionists (anti-agreement)	3
Progressive Unionist Party	2
Womens Coalition	2
Total	108

The Assembly had its first meeting on 1 July. David Trimble and Seamus Mallon were elected First and Deputy First Minister designate respectively.

The *Northern Ireland Act* provided for a new Northern Ireland power-sharing Executive, with a maximum of ten ministers (excluding the First and Deputy First Ministers) (s17(4)).

A. The Devolution Process

There were negotiations between the Northern Ireland parties represented in the Assembly as to the number of ministries which should exist in the Northern Ireland administration. Agreement on the number of ministries was reached on 18 December 1998 along with negotiations on the North South implementation bodies.³⁷ As a result-

- Ten ministries were to be set up under the terms of the *Departments (Northern Ireland) Order 1999*.³⁸: Department of Agriculture and Rural Development, Department of Culture, Arts and Leisure, Department of Education, Department of Enterprise, Trade and Investment, Department of the Environment, Department of Finance and Personnel, Department of Health, Social Services and Public Safety, Department of Higher and Further Education, Training and Employment, Department for Regional Development, Department for Social Development. These are in addition to the Office of the First Minister and deputy First Minister established under s21(3) of the *Northern Ireland Act 1998*.

³⁶ See below for current state of the parties in the Assembly

³⁷ The First and Deputy First ministers issued a statement on 18 December which formed a basis for their interim report to the Northern Ireland Assembly which was discussed and agreed on 18 January 1999. This was followed by a final report which was agreed by the Assembly on 15 February 1999

³⁸ SI 1999 no 283 (N.I.1)

- The *North/South Cooperation (Implementation Bodies (Northern Ireland)) Order 1999*.³⁹ made provision for six implementation bodies in domestic legislation. These were: inland waterways, food safety, trade and business development, special EU programmes, language (Irish and Ulster Scots) aquaculture and marine matters.
- Treaties were signed by the British and Irish governments on the British Irish Council, the new British Irish Intergovernmental Council, the Implementation Bodies and the North-South Ministerial Council.⁴⁰ All were necessary to implement the *Belfast Agreement*. Implementation of the treaties took place on 2 December, following establishment of the Northern Ireland Executive.

There had been attempts in mid 1999 to secure the implementation of the *Belfast Agreement* following the publication of *The Way Forward* on 2 July 1999 by Tony Blair and Bertie Ahern. This was an attempt to deal with decommissioning, which threatened to disrupt the devolution process. *The Way Forward*⁴¹ promised a new 'Failsafe Clause' as follows:

THE WAY FORWARD

A JOINT STATEMENT BY THE BRITISH AND IRISH GOVERNMENTS

After five days of discussion, the British and Irish Governments have put to all the parties a way forward to establish an inclusive Executive, and to decommission arms. These discussions have been difficult. But as they conclude, the peace process is very much alive, and on track. The Good Friday Agreement presents the best chance of peace and prosperity in decades. It is clear from our discussions that nobody wants to throw that opportunity away.

We believe that both unionist and nationalist opinion will see that our approach meets their concerns, and will support it accordingly.

The way forward is as follows:

1. All parties reaffirm the three principles agreed on 25 June
 - an inclusive Executive exercising devolved powers;
 - decommissioning of all paramilitary arms by May 2000;
 - decommissioning to be carried out in a manner determined by the International Commission on Decommissioning.
2. The d'Hondt procedure to nominate Ministers to be run on 15 July.
3. The Devolution Order to be laid before the British Parliament on 16 July to take effect on 18 July. Within the period specified by the de Chastelain Commission, the Commission will confirm a start to the process of decommissioning, that start to be defined as in their report of 2 July.
4. As described in their report today, the Commission will have urgent discussions with the groups' points of contact. The Commission will specify that actual

³⁹ See HC Deb 8 March 1999 vol 327 at c 120-140 for the Commons debate on the Order. The Order has subsequently been amended by the *North/South Cooperation (Implementation Bodies) (Amendment) (Northern Ireland) Order 1999*

⁴⁰ The Treaties were signed on 8 March 1999. The text of these Treaties can be found on the Northern Ireland Office website accessible from www.open.gov.uk

⁴¹ 2 July 1999

decommissioning is to start within a specified time. They will report progress in September and December 1999 and in May 2000.

5. A "failsafe" clause: the Governments undertake that, in accordance with the review provisions of the Agreement, if commitments under the Agreement are not met, either in relation to decommissioning or to devolution, they will automatically, and with immediate effect, suspend the operation of the institutions set up by the Agreement. In relation to decommissioning, this action will be taken on receipt of a report at any time that the commitments now being entered into or steps which are automatically laid down by the Commission, are not fulfilled, in accordance with the Good Friday Agreement. The British Government will legislate to this effect.

The *Northern Ireland Bill*⁴² was introduced into the Commons on 13 July. The *Explanatory Notes* stated that the bill was 'intended to give effect to the 'Failsafe clause' in the joint statement on political advance in Northern Ireland that was made on 2 July.'⁴³

The Bill provided for the suspension of the legislative and executive power of the Assembly and the executive in Clause 1 if the Decommissioning Commission reported to the Secretary of State that there had been a failure to meet a decommissioning obligation or to meet the requirements set out in paragraph 5 of the *Way Forward* (which is reproduced in the bill as Schedule 2 and renamed the Joint Statement). The North South Ministerial Council and the British Irish Council would also be suspended, as well as the British Irish Intergovernmental Conference and any functions exercised by the implementation bodies.

On 15 July an attempt to nominate the power-sharing executive failed as the UUP, DUP and the Alliance decided not to nominate any members.⁴⁴ Seamus Mallon offered his resignation as Deputy First Minister designate. The Bill was not enacted following this failure.

B. The Mitchell Review

The UK and Irish governments announced a formal review of the *Belfast Agreement* on July 20, as provided for in the *Agreement*, with the participation of Senator Mitchell.⁴⁵

The Review will take as its starting point the three principles that were agreed by all the pro-Agreement parties on the 25th of June, that is an inclusive Executive exercising devolved powers, decommissioning of all paramilitary weapons by May 2000 and decommissioning to be carried out in a manner determined by the International Commission on Decommissioning.

And the Review will then go on to determine how to overcome the difficulties which exist in the practical implementation of these principles, difficulties with which you will all be familiar. This will be its only focus: the Review is of limited focus, limited

⁴² Bill 136 of 1998-9

⁴³ A background note with further detail on the Bill is available from the Parliament and Constitution Centre

⁴⁴ The Alliance Party did not nominate due to the lack of political consensus on the establishment of the Executive

⁴⁵ *NIO Press Notice 20.7.99* 'The Prime Minister, the Taoiseach and Senator Mitchell'

to determining how those agreed principles, which everyone has accepted, are then carried forward.

The Review process, which has commenced with our meeting today, will be taken forward in discussions with parties by Senator Mitchell this week, we'll break for August, and we'll resume in early September with the aim of reaching a speedy conclusion.

On 22 November Peter Mandelson, the new Secretary of State for Northern Ireland, announced the results of the Mitchell review to the Commons:

The [Mitchell] review has not produced a single text like the Good Friday agreement. Instead, it has concentrated on building trust and confidence by means of a number of important steps forward rather than waiting for one giant leap that might never be made.

As a result, last week saw a series of statements by the Decommissioning Commission headed by General de Chastelain, by the parties, by the IRA, by the British and Irish Governments, and by the senator. None of these was in itself decisive. But cumulatively, I believe that these statements, together with the further steps that are planned, have created the conditions in which the agreement can now be fully implemented.

I draw the House's attention in particular to Mitchell's belief that

"a basis now exists for devolution to occur, for the institutions to be established and for decommissioning to take place as soon as possible";

to the assumption of a more active, assertive role by the Decommissioning Commission in circumstances which it recognises will be transformed by the full implementation of the agreement; to Sinn Fein's acceptance that decommissioning is an essential part of the peace process, to be brought about under the aegis of the Decommissioning Commission in accordance with the agreement, and to its acknowledgement that conflict must be a thing of the past; to the Ulster Unionist party's recognition of the legitimacy of the peaceful pursuit of nationalist aspirations, and its commitment to the principles of inclusivity, equality and mutual respect; and lastly, to the IRA's acknowledgement of the Sinn Fein leadership, and their willingness to appoint someone as an authorised representative to enter into discussions with the Decommissioning Commission.

Mr Mandelson said that he would call an Assembly meeting on 29 November to nominate ministers to the Executive.⁴⁶

⁴⁶ HC Deb vol 339 c 345-359

C. Devolution

Devolution took place as follows:

- Ministers were appointed by the d'Hondt procedure on 29 November 1999
- Parliament debated the draft Devolution order on 30 November.⁴⁷, appointing a day for the transfer of powers.
- On the appointed day, 2 December, powers were transferred to the Northern Ireland Ministers; the British-Irish Agreement (annexed to the *Belfast Agreement*) came into force; changes to Articles 2 and 3 of the Irish Constitution, and the British constitutional changes in sections 1 and 2 of the *Northern Ireland Act* took effect and the North-South Ministerial Council, the British Irish Council and the British Irish Intergovernmental Conference were established. The six implementation bodies, agreed on 18 December 1998, were established and the 1985 Anglo-Irish Agreement ceased to have effect.

Under the d'Hondt (mathematical) procedure, the parties were due to be represented in the power-sharing Executive as follows:

UUP 3 SDLP 3 DUP 2 SF 2

The D'Hondt procedure was run on 29 November and the ministries were allocated as follows:

Minister of Agriculture and Rural Development	Ms Brid Rodgers SDLP
Minister of Culture, Arts and Leisure	Mr Michael McGimpsey UUP
Minister of Education	Mr Martin McGuinness MP SF
Minister of Enterprise, Trade and Investment	Sir Reg Empey UUP
Minister of the Environment	Mr Sam Foster UUP
Minister of Finance and Personnel	Mr Mark Durkan SDLP
Minister of Health, Social Services and Public Safety	Ms Bairbre de Brún SF
Minister of Higher and Further Education, Training and Employment	Dr Sean Farren SDLP
Minister for Regional Development	Mr Peter Robinson MP DUP
Minister for Social Development	Mr Nigel Dodds DUP

These posts are in addition to the posts of First Minister, held by David Trimble(UUP), and Deputy First Minister held by Seamus Mallon (SDLP). Powers were formally devolved to Northern Ireland on 2 December 1999. Junior ministers have also been appointed. Mr Trimble has indicated his intention to resign if decommissioning has not begun by February 2000.⁴⁸

⁴⁷ HC Deb vol 340 c 253-276

⁴⁸ *Sunday Telegraph* 28 November 1999 'Trimble wins over his party-just'

Members were also nominated for the ten departmental committees which have an important scrutiny role. The chairmen of the committees at present come from a different party from that which holds the relevant ministerial office.⁴⁹

The current state of the parties in the Assembly is as follows:⁵⁰

	Party	Seats	
	UUP	Ulster Unionist Party	28
	SDLP	Social Democratic and Labour Party	24
	DUP	Democratic Unionist Party	20
	SF	Sinn Fein	18
	All.	The Alliance Party	6
*	NIUP	Northern Ireland Unionist Party	3
**	UUAP	United Unionist Assembly Party	3
	NIWC	Northern Ireland Women's Coalition	2
	PUP	Progressive Unionist Party	2
	UKUP	UK Unionist Party	1
+	Ind Unionist	Independent Unionist	1

* Elected as UK Unionist Party, resigned and formed Northern Ireland Unionist Party with effect from 15 January 1999.

** Elected as Independent Candidates, formed United Unionist Assembly Party with effect from 21 September 1998

+ Mr Roger Hutchinson was expelled from the Northern Ireland Unionist Party (NIUP) with effect from 2 December 1999.

New legislation had been passed in the Dail to extend the deadline for the removal of the claim to Northern Ireland embodied in the Irish Constitution. Legislation was passed in 1998 to remove the claim, which was to be activated once the Agreement came into force. The formal decision on removal of the claim would otherwise have lapsed on 3 June. The changes to the Constitution have now been made.⁵¹

⁴⁹ See s29(5)-(6)

⁵⁰ from <http://www.ni-assembly.gov.uk/parties.htm>

⁵¹ *Irish Times* 17 May 1999 'Delay in executive affects changes to Constitution' *Newsletter* 27 May 1999 'Dropping of Articles 2 and 3 is 'delayed' See *Northern Ireland Legal Quarterly* 1999 'Constitutional Background to and Aspects of the Good Friday Agreement- A Republic of Ireland Perspective' for background

D. Pledge of Office

As a condition of appointment under the 1998 Act, ministers must affirm the terms of a Pledge of Office and can be removed from office following a decision of the Assembly taken on a cross community basis if the responsibilities of the pledge are not met. The Pledge was set out in the *Belfast Agreement* and was incorporated unamended into the Act as follows:⁵²

To pledge

- (a) to discharge in good faith all the duties of office;
- (b) commitment to non-violence and exclusively peaceful and democratic means;
- (c) to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination;
- (d) to participate with colleagues in the preparation of a programme for government;
- (e) to operate within the framework of that programme when agreed within the Executive Committee and endorsed by the Assembly;
- (f) to support, and act in accordance with, all decisions of the Executive Committee and Assembly;

CODE OF CONDUCT

Ministers must at all times:

Observe the highest standards of propriety and regularity involving impartiality, integrity and objectivity in relationship to the stewardship of public funds;

be accountable to users of services, the community and, through the Assembly, for the activities within their responsibilities, their stewardship of public funds and the extent to which key performance targets and objectives have been met;

ensure all reasonable requests for information from the Assembly, users of services and individual citizens are complied with; and that Departments and their staff conduct their dealings with the public in an open and responsible way;

follow the seven principles of public life set out by the Committee on Standards in Public Life

comply with this code and with rules relating to the use of public funds

operate in a way conducive to promoting good community relations and equality of treatment

not use information gained in the course of their service for personal gain; nor seek to use the opportunity of public service to promote their private interests

ensure they comply with any rules on the acceptance of gifts and hospitality that might be offered

declare any personal or business interests which may conflict with their responsibilities. The Assembly will retain a Register of Interests. Individuals must ensure that any direct or indirect pecuniary interests which members of the public might reasonably think could influence their judgement are listed in the Register of Interests.

⁵² Schedule 4 Annex A to Strand One of Belfast Agreement Pledge of Office

In relation to the Pledge, the Prime Minister gave certain assurances to David Trimble in a letter of 10 April 1998⁵³ There is no specific linkage to decommissioning in the Pledge, although ministers are required to use exclusively peaceful and democratic means.

E. Exclusion from Office

S30 of the *Northern Ireland Act* currently governs exclusion of ministers from office. It is reproduced below:

- 30.** - (1) If the Assembly resolves that a Minister or junior Minister no longer enjoys the confidence of the Assembly-
- (a) because he is not committed to non-violence and exclusively peaceful and democratic means; or
 - (b) because of any failure of his to observe any other terms of the pledge of office, he shall be excluded from holding office as a Minister or junior Minister for a period of twelve months beginning with the date of the resolution.
- (2) If the Assembly resolves that a political party does not enjoy the confidence of the Assembly-
- (a) because it is not committed to non-violence and exclusively peaceful and democratic means; or
 - (b) because it is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office, members of that party shall be excluded from holding office as Ministers or junior Ministers for a period of twelve months beginning with the date of the resolution.
- (3) The Assembly may, before a period of exclusion comes to an end, resolve to extend it for twelve months beginning with the date of the resolution.
- (4) A period of exclusion shall come to an end if the Assembly-
- (a) is dissolved; or
 - (b) resolves to bring the exclusion to an end.
- (5) A motion for a resolution under this section shall not be moved unless-
- (a) it is supported by at least 30 members of the Assembly;
 - (b) it is moved by the First Minister and the deputy First Minister acting jointly; or
 - (c) it is moved by the Presiding Officer in pursuance of a notice under subsection
- (6) If the Secretary of State is of the opinion that the Assembly ought to consider-
- (a) a resolution under subsection (1)(a) in relation to a Minister or junior Minister; or
 - (b) a resolution under subsection (2)(a) in relation to a political party,
- he shall serve a notice on the Presiding Officer requiring him to move a motion for such a resolution.
- (7) In forming an opinion under subsection (6), the Secretary of State shall in particular take into account whether the Minister or junior Minister or the political party-
- (a) is committed to the use now and in the future of only democratic and peaceful means to achieve his or its objectives;

⁵³ Dep 98/282

- (b) has ceased to be involved in any acts of violence or of preparation for violence;
 - (c) is directing or promoting acts of violence by other persons;
 - (d) is co-operating fully with any Commission of the kind referred to in section 7 of the Northern Ireland Arms Decommissioning Act 1997 in implementing the Decommissioning section of the Belfast Agreement.
- (8) A resolution under this section shall not be passed without cross-community support.

This section was subject to some amendment during the passage of the Bill.⁵⁴ The fact that a motion is put forward by the Secretary of State under subsection 6 does not guarantee that the motion is passed. 30 members are required to move a motion.⁵⁵ In addition a motion needs to be passed with cross community support⁵⁶. The UUP had 28 members elected to the Assembly in May 1998, but not all were guaranteed to accept the view of David Trimble. The pro-Agreement PUP has 2 seats, but anti-Agreement Unionists hold 28 seats.⁵⁷

Under the Standing Orders of the Assembly members may designate their political identity⁵⁸ and redesignation is allowed on no more than one occasion during the life of an Assembly. For the cross community support mechanism to work, a majority of both designated Unionists and Nationalists need to vote in favour of the motion, or if there is the support of 60 per cent of the members voting, 40 per cent of the designated Unionists and Nationalists must vote in favour (s4(5)). The UUP, DUP, UKUP and other non-Agreement unionist groupings have designated themselves as Unionists, the SDLP and Sinn Fein have designated themselves as Nationalists. The Alliance and Women's Coalition parties have designated themselves as 'Other'. The Women's Coalition has indicated that it is prepared to change its designation if necessary to ensure the protection of the *Belfast Agreement*.

Subsection 7 follows the same phrasing as in s3(9) of the *Northern Ireland Sentences Act 1998* as to the criteria to be used for the Secretary of State to specify paramilitary organisations which qualify for early release. These criteria were those given by the Prime Minister in his Balmoral Showgrounds speech in Northern Ireland of 14 May 1998.

Under the terms of the *Northern Ireland Act 1998*, once a minister has been excluded, there is no requirement for the executive to be suspended; s18(1)(c) allows the d'Hondt formula to be rerun to fill the vacant office(s). The parties themselves may prompt a collapse of the executive, however. Because the First Minister and the Deputy First Minister exercise powers jointly, if one resigns so the other loses office (s16(7)). Should two thirds of all Assembly members pass a resolution that it be dissolved, then the Secretary of State is under a duty to

⁵⁴ It was clause 23 in the Bill as first introduced (Bill 229 of 1997-8)

⁵⁵ S30(5)

⁵⁶ S30(7) For the definition of cross community support see s4(5)

⁵⁷ There are 20 DUP members, 3 Northern Ireland Unionist Party members, 1 UK Unionist Party, 1 independent Unionist and 3 United Unionist Assembly Party members at present. See Assembly website for details at www.ni-assembly.gov.uk

⁵⁸ As provided for in s4(5) of the *Northern Ireland Act 1998*. See SO 3(8) as printed on 9 March 1999

set the date for the next election under s32. Moreover, he is required under that section to set a date for elections, should a First or Deputy First Minister fail to be elected under s16.

It is worth noting that the *Northern Ireland Act 1998*, when first introduced to the House, provided for an Order in Council procedure to be used to prorogue the Assembly, and to bring forward elections if the First and Deputy First Ministers resigned and no other person could be appointed to carry out their functions (Clauses 24(4) and 43).⁵⁹ Following debate the powers were removed, in order to plan for success rather than failure.

F. Powers devolved to Northern Ireland

The Assembly exercises full legislative authority for those areas within the responsibility of the Northern Ireland Government Departments. These subject areas broadly correspond with the areas devolved to Scotland and Wales, but are less extensive than those devolved to Stormont under the *Government of Ireland Act 1920*. The *Belfast Agreement* also stated that the British Government was ready in principle to devolve responsibility for policing and justice issues in the context of the full implementation of the *Agreement*(p 23).

As with the *Northern Ireland Constitution Act 1973* there are three categories of legislative powers; reserved, excepted and transferred. Excepted matters are subjects reserved to Westminster which will not be transferred. Schedule 2 specifies excepted matters as follows:

These include:

- The Crown
- Parliamentary elections, and Assembly elections including the franchise
- International relations
- Defence of the realm
- Honours
- Nationality
- National Taxation
- Appointment and removal of judges
- Registration of political parties
- Coinage etc
- National security
- Nuclear energy and installations
- Regulation of sea fishing outside Northern Ireland
- Provisions dealt with in the Northern Ireland Constitution Act 1973
- The subject matter of the *Northern Ireland Act* with specified exceptions

⁵⁹ See *Edinburgh Law Review* 1999 pp3-31 for a discussion of this issue

This list is similar to that which appeared in the *Northern Ireland Constitution Act 1973* for excepted matters, and is intended to reflect matters of UK importance as well as subjects which have proved contentious in the past, such as the appointment of judges and the franchise, as well as special powers for dealing with terrorism.

Schedule 3 set out reserved matters; these are subjects which could be transferred to the Assembly at a later date:

1. The conferral of functions in relation to Northern Ireland on any Minister of the Crown.
2. Property belonging to Her Majesty in right of the Crown or belonging to a department of the Government of the United Kingdom or held in trust for Her Majesty for the purposes of such a department (other than property used for the purposes of the armed forces of the Crown or the Ministry of Defence Police).
3. Navigation, including merchant shipping, but not harbours or inland waters.
4. Civil aviation but not aerodromes.
5. The foreshore and the sea bed and subsoil and their natural resources (except so far as affecting harbours); submarine pipe-lines; submarine cables, including any land line used solely for the purpose of connecting one submarine cable with another.
6. Domicile.
7. The Post Office, posts (including postage stamps, postal orders and postal packets) and the regulation of postal services.
8. Disqualification for membership of the Assembly; privileges, powers and immunities of the Assembly, its members and committees greater than those conferred by section 50.
9. The following matters-
 - (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;
 - (d) prosecutions;
 - (e) the treatment of offenders (including children and young persons, and mental health patients, involved in crime);
 - (f) the surrender of fugitive offenders between Northern Ireland and the Republic of Ireland;
 - (g) compensation out of public funds for victims of crime.Sub-paragraphs (a) to (c) do not include any matter within paragraph 17 of Schedule 2. Sub-paragraph (e) includes, in particular, prisons and other institutions for the treatment or detention of persons mentioned in that sub-paragraph.
10. The maintenance of public order, including the conferring of powers, authorities, privileges or immunities for that purpose on constables, members of the armed forces of the Crown and other persons (other than the Ministry of Defence Police), but not any matter within paragraph 17 of Schedule 2; the Parades Commission for Northern Ireland.
11. The establishment, organisation and control of the Royal Ulster Constabulary and of any other police force (other than the Ministry of Defence Police); the Police Authority for Northern Ireland; traffic wardens.
12. Firearms and explosives.
13. Civil defence.
14. The subject-matter of the Emergency Powers Act Northern Ireland) 1926.
15. All matters, other than those specified in paragraph 11 of Schedule 2, relating to the Supreme Court of Judicature of Northern Ireland, county courts, courts of summary

jurisdiction (including magistrates' courts and juvenile courts) and coroners, including procedure, evidence, appeals, juries, costs, legal aid and the registration, execution and enforcement of judgments and orders but not-

- (a) bankruptcy, insolvency, the winding up of corporate and unincorporated bodies or the making of arrangements or compositions with creditors;
 - (b) the regulation of the profession of solicitors.
16. The functions and procedures of the Civil Service Commissioners for Northern Ireland.
17. All matters (including procedure and appeals) relating to-
- (a) the Chief and other Social Security Commissioners for Northern Ireland; or
 - (b) the Chief and other Child Support Commissioners for Northern Ireland, but not any matter within paragraph 11 of Schedule 2.
18. The subject-matter of sections 149 to 151 of and Schedules 5 and 5A to the Social Security Administration (Northern Ireland) Act 1992 (Social Security Advisory Committee and Industrial Injuries Advisory Council)
19. The subject-matter of the Vaccine Damage Payment Scheme.
20. Import and export controls and trade with any place outside the United Kingdom but not-
- (a) the furtherance of the trade of Northern Ireland or the protection of traders in Northern Ireland against fraud;
 - (b) services in connection with, or the regulation of, the quality, insurance, transport, marketing or identification of agricultural or food products, including livestock;
 - (c) the prevention of disease or the control of weeds and pests;
 - (d) aerodromes and harbours;
 - (e) any matter within paragraph 4 of Schedule 2.
21. The subject-matter of the National Minimum Wage Act 1998.
22. The subject-matter of the following provisions of the Pension Schemes Act 1993-
- (a) section 6(1), (2)(a)(i), (iii) and (iv) and (b), (3), (4) and (8) (registration of occupational and personal pension schemes);
 - (b) section 145 (Pensions Ombudsman).
23. The following matters-
- (a) financial services, including investment business, banking and deposit-taking, collective investment schemes and insurance;
 - (b) financial markets, including listing and public offers of securities and investments, transfer of securities and insider dealing.
- This paragraph does not include the subject-matter of-
- (a) the Industrial and Provident Societies Act Northern Ireland) 1969;
 - (b) the Credit Unions (Northern Ireland) Order 1985;
 - (c) the Companies (Northern Ireland) Order 1986;
 - (d) the Insolvency (Northern Ireland) Order 1989;
 - (e) the Companies (Northern Ireland) Order 1990;
 - (f) the Companies (No.2) (Northern Ireland) Order 1990;
 - (g) the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations (Northern Ireland) 1997.
24. The subject-matter of-
- (a) the Building Societies Act 1986;
 - (b) the Friendly Societies Act 1992.
25. The subject-matter of the Money Laundering Regulations 1993, but in relation to any type of business.

26. Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers.
27. Intellectual property but not the subject-matter of Parts I and II of the Plant Varieties Act 1997 (plant varieties and the Plant Varieties and Seeds Tribunal).
28. Units of measurement and United Kingdom primary standards.
29. Telecommunications; wireless telegraphy; the provision of programme services (within the meaning of the Broadcasting Act 1990); internet services; electronic encryption; the subject matter of Part II of the Wireless Telegraphy Act 1949 (electromagnetic disturbance).
30. The National Lottery (except in so far as any matter within Schedule 2 is concerned).
31. Xenotransplantation.
32. Surrogacy arrangements, within the meaning of the Surrogacy Arrangements Act 1985, including the subject-matter of that Act.
33. The subject-matter of the Human Fertilisation and Embryology Act 1990.
34. Human genetics.
35. Research Councils within the meaning of the Science and Technology Act 1965.
36. Areas in which industry may qualify for assistance under Part III of the Industrial Development Act 1982.
37. Consumer safety in relation to goods.
38. Technical standards and requirements in relation to products in pursuance of an obligation under Community law but not standards and requirements in relation to food, agricultural or horticultural produce, fish or fish products, seeds, animal feeding stuffs, fertilisers or pesticides.
39. The subject-matter of section 3(5) to (7) of the Environmental Protection Act 1990 (emission limits); the environmental protection technology scheme for research and development in the United Kingdom.
40. The subject-matter of-
 - (a) the Data Protection Act 1984;
 - (b) the Data Protection Act 1998; and
 - (c) Council Directive 95/46/EC (protection of individuals with regard to the processing of personal data and free movement of such data).
41. Oaths and declarations (including all undertakings and affirmations, by whatever name) other than those within section 77(3).
42. Any matter with which a provision of this Act falling within the following sub-paragraphs solely or mainly deals-
 - (a) in Part III, sections 19, 20 and 28;
 - (b) in Part VII, sections 73, 74(3) and (4), 75 and 77(1), (2) and (4) to (8) and Schedules 8 and 9;
 - (c) in Part VIII, sections 90 to 93 and Schedule 11.This paragraph does not apply to-
 - (i) any matter in respect of which it is stated by this Act that provision may be made by Act of the Assembly; or
 - (ii) any matter to which a description specified in this Schedule or Schedule 2 is stated not to apply.

This list of reserved powers is more lengthy than in the 1973 Act, but covers similar areas, with the addition of new topics such as the National Lottery, data protection consumer safety and human genetics. The Parades Commission and the *Public Processions (Northern Ireland) Act 1998* are reserved matters. Current legislation dealing with abortion does not extend to Northern Ireland and abortion is a reserved matter under para 9 of Schedule 3

which covers criminal law. There is some potential for rolling devolution since reserved powers can be transferred to the Assembly in future, but such transfers are dependent on cross community support and the necessary Westminster approval. It is also possible to transfer subjects back. Section 4(2) enables the Secretary of State to lay orders making a reserved matter a transferred matter and vice versa provided that there is cross-community Assembly assent. There is a possibility therefore, presumably after a period of settled existence, for the Assembly to acquire new powers, for example over law and order. There is no provision for the Assembly to acquire powers over excepted matters.

Matters transferred to the Assembly are matters which are not excepted or reserved, thus following the design of the *Northern Ireland Constitution Act 1973*.

*The Northern Ireland Act 1998: A Summary Guide*⁶⁰ conveniently summarises the legal constraints within which the Assembly operates, and the role of the Secretary of State and Parliament in the Assembly's legislative process:

Assembly Acts

32. The Assembly may (section 5) legislate by Act: a Bill, once passed, becomes an Act on receiving Royal Assent.

33. Assembly Acts may modify Acts of Parliament, so far as forming part of the law of Northern Ireland, but Parliament's power to legislate for Northern Ireland is unaffected.

Legislative competence

34. The Assembly must, by section 6, remain within its legislative competence. A provision of an Act is outside competence if:

- it would (crudely) extend to any territory other than Northern Ireland (steps by the Assembly towards the establishment of cross-border bodies will be within competence, as section 53 makes clear; special provision will be made for fisheries by subordinate legislation under section 6(4));
- it deals with an excepted matter and is not ancillary to other provisions dealing with reserved or transferred matters;
- the definition of deals with in section 98(2) is important to the Assembly's powers. A provision 'deals with the matter, or each of the matters, which it affects otherwise than incidentally' – it is not necessary to identify any one predominant concern of the provision. So if it affects more than incidentally a reserved or excepted matter, even though it is mainly concerned with transferred matters, it will need the Secretary of State's consent;
- a provision is ancillary to other provisions, by section 6(3), if it provides for their enforcement, or is necessary or expedient to making them effective, or is incidental to or consequential on them;
- it is incompatible with rights under the European Convention or Community law;
- the devolved institutions may not contravene the European Convention, or European Community law. They are also under an obligation in the transferred

⁶⁰ Northern Ireland Office July 1999

field to take action as necessary to stay in conformity with it – failure to do so is open to adjudication in the courts as a devolution issue: see schedule 10;

- it discriminates on grounds of religious belief or political opinion;
- it modifies an ‘entrenched’ enactment, as set out in section 7 (which chiefly relates to the European Communities Act 1972 and the Human Rights Act 1998):
- a few provisions of the Northern Ireland Act itself are entrenched; most others are safeguarded against the Assembly changing them in substance by inclusion among excepted matters in schedule 2; some others figure in the ‘reserved’ schedule 3.

35. A Minister in charge of a Bill must indicate on or before introduction that he believes it would be within legislative competence (section 9).

36. A Bill cannot be introduced if the presiding officer decides that any provision of it would not be within legislative competence (section 10).

The courts and vires issues

37. Decisions on legislative competence once a Bill is through the Assembly are a matter for the courts. The competence framework, and the later provisions (section 24) on the validity of subordinate legislation, introduce features and concepts novel in Northern Ireland.

38. The Attorney-General for Northern Ireland (who, by the surviving section 10 of the 1973 Constitution Act, is the same person as the Attorney General for England and Wales – there is no Law Officer in the devolved administration) may under section 11 refer the question whether a provision of an Assembly Bill would be within legislative competence to the Judicial Committee of the Privy Council. The Judicial Committee is a long-established court constituted by senior judges, including in particular the Law Lords.

39. The Bill cannot proceed to Royal Assent if the Judicial Committee conclude it would not be, although the Assembly may reconsider it and put it forward again in amended form (and if the Judicial Committee refer it on to the European Court of Justice, which may entail delay, the Assembly can under section 12 call the Bill back for reconsideration).

40. Questions whether the Assembly, Ministers or departments have acted lawfully under the Act may also arise in litigation commenced by the Attorney General or private parties. Such questions are among the devolution issues for which a special procedure in the courts is set out in schedule 10 (with appeals ultimately to the Judicial Committee). The devolved authorities can defend such proceedings.

- The courts are also given certain powers to vary the retrospective effects of their decisions in this area, and the devolved authorities can again be present (section 81).
- The Secretary of State also has powers, with parliamentary approval, to deal with the consequences of legislation or other exercises of functions that are, or may be, ultra vires (section 80).
- The general principle of interpretation of Assembly and subordinate legislation is (section 83) that where different readings of a provision are possible, which would make a difference to whether it was valid or invalid, it should be read so as to be valid.

The Secretary of State and Parliament

41. By section 8, the Secretary of State's consent is needed to a Bill which:

- contains provision dealing with an excepted matter, which is ancillary to other provisions (if it were more than ancillary it would be outside legislative competence); or
- deals with a reserved matter.

42. When this consent is required varies:

- if the reserved or excepted provision is merely ancillary to transferred provision, it is not needed before the Bill has passed through the Assembly;
- if a Bill deals with a reserved matter in a way that is more than just ancillary, the presiding officer must refer it to the Secretary of State before the Assembly considers it, unless she has already indicated that she consents to them doing so. And he must refer it again before the Assembly embarks on the final stage of the Bill.

43. By section 15, the Secretary of State must lay before Parliament an Assembly Bill to which she has consented, unless the provisions dealing with reserved or excepted matters are simply ancillary to other provisions dealing with transferred matters. If within 20 days 20 members of either House so require, it must be voted on by that House (a special procedure is provided for urgent orders).

44. The Secretary of State submits Bills for Royal Assent under section 14. But where no question arises as to her consent being required, and no reference to the Judicial Committee (see above) is in prospect or outstanding, her powers under the section not to submit are limited. They arise where she considers the Bill contains a provision which would be incompatible with:

- international obligations (which does not include Convention or European Community obligations: they are part of the legislative competence framework);
- the interests of defence or national security,
- the protection of public safety or public order;
- or which would have an adverse effect on the operation of the single market in goods and services within the United Kingdom.

45. If the Secretary of State does not submit a Bill, it returns to the Assembly for reconsideration

Assembly Bill procedure

46. The Act lays down certain requirements of Assembly Bill procedure (section 13): standing orders must provide for

- stages corresponding to a 'second reading', a stage for consideration of detail and a 'third reading' (at which no amendments may be made). These stages may be modified for particular sorts of Bill – for example, private Bills;
- the establishment of an equality scrutiny committee, as set out in paragraph 11 of the Strand One section of the Agreement;
- the presiding officer to send copies of Assembly Bills after introduction to the Human Rights Commission; the Assembly may also ask for its opinion whether a Bill is compatible with human rights, and the Commission may in any event offer one.

G. Executive Devolution

Part III of the Act allows pre-existing statutory and prerogative functions of ministers and departments to continue in existence. The First Minister and Deputy First Minister have power to determine any number of junior ministers and the functions of those appointed. Further detail is provided in the *Northern Ireland Act 1998: A Summary Guide*⁶¹

61. Section 22 makes clear that functions may be conferred by Act of the Assembly on a Minister (but not a junior minister) or on a Northern Ireland department by name. Existing functions of departments continue, subject to such modification.

There is no transfer en bloc of statutory functions in the transferred field to the devolved authorities, as there is in Scotland, because the Northern Ireland statute book already generally confers functions in the transferred field on devolved institutions set up by earlier constitutional legislation. These functions pass to the new institutions by virtue of the 'translations' set out in schedule 12.

It has been the general practice in Northern Ireland to confer statutory functions on departments, in contrast with the Whitehall practice of conferring functions on ministers, and more recently the 'Secretary of State' (not a particular Secretary of State). This is of little importance in terms of ministerial responsibility: the new Departments Order, reflecting existing Northern Ireland legislation, makes clear that departments are subject to the direction and control of ministers, and that ministers may themselves exercise the functions of departments.

The 1973 Constitution Act terminology of 'head of department' is liable to cause confusion: it is sometimes taken to refer to the permanent, civil service, head of the department. It in fact refers to the ministerial head under devolution (during direct rule, his powers have been exercised by the department itself, subject to the direction and control of the Secretary of State). Schedule 12 provides that the references to a head of department are to be construed as references to the Northern Ireland Minister in charge of the department.

62. Section 23 deals with the 'prerogative and other executive powers of Her Majesty' in relation to Northern Ireland as respects transferred matters. They are generally exercisable by ministers and departments. These powers are of small significance compared with statutory functions, the main matter of substance in the transferred field now regulated under the prerogative being the management of the Civil Service; in respect of that, the powers are exercisable by, or as directed by, the First Minister and deputy First Minister acting jointly

Both the Assembly and Ministers have no power to take actions incompatible with the European Convention on Human Rights or Community law or which discriminates on grounds of religious belief or political opinion, or which modify an enactment entrenched by s7 of the *Northern Ireland Act 1998*.

⁶¹ Northern Ireland Office July 1999

The *Memorandum of Understanding and Supplementary Agreements* was published by the Lord Chancellor on 1 October 1999.⁶² This set out concordats⁶³ agreed between the UK government, Scottish Ministers and the Cabinet of the National Assembly for Wales. It provides for a Joint Ministerial Committee with representatives from each administration. The *Memorandum of Understanding* is expected to apply to Northern Ireland, subject to the agreement of the Executive. The Joint Ministerial Committee is expected to be the major coordinating body for devolved institutions

The British Irish Council (BIC) has been seen as important for issues with an Irish dimension, but it has bilateral as well as multilateral functions and may act as a mechanism for closer ties between Northern Ireland and Scotland or Wales.⁶⁴ A recent Parliamentary Answer set out a list of issues for discussion in the BIC.⁶⁵ Other institutions provided for in the *Belfast Agreement*⁶⁶ have now met as follows:

13 December 1999 First meeting of the North-South Ministerial Council held in Armagh.
 17 December 1999 First meetings of the British Irish Council and British Irish Intergovernmental Council in London.

Devolution for Northern Ireland is of course a return to the 'normal' arrangements before the advent of Direct Rule. Professor Vernon Bogdanor has noted that Northern Ireland's post-1920 experience of devolution is atypical for the rest of the UK, given the cross community conflict and the fact that a Parliament was in effect imposed on the province by the British government as a by-product of the attempt to resolve the Irish question.⁶⁷ One of the legacies of devolution in the province is the development of a completely separate party system and this characteristic, along with the earlier factors are likely to continue to influence the nature of Northern Irish devolution. The creation of a power-sharing Executive owes more to the attempts to resolve the dissatisfactions of national minorities in continental Europe than to the models evolved for relatively homogeneous cultures in Scotland and Wales. Devolution in Northern Ireland is a bargained compromise between two communities with conflicting aspirations; ultimately its success will depend on the degree of common purpose which their representatives can establish.

⁶² Research Paper 99/84 *Devolution and Concordats* provides background on concordats

⁶³ Concordats are intended to be ground rules for administrative cooperation and exchange of information

⁶⁴ See Robert Hazell and Bob Morris in *Constitutional Futures: A History of the Next Ten Years* ed Robert Hazell 1999 pp138-9. For Scottish links see *Scottish Affairs* Summer 1998 'Scotland, Ireland and Northern Ireland: Time for Lateral Thinking'

⁶⁵ HC Deb vol 342 12 January 2000 c 200W The next meeting is due in Dublin in June 2000

⁶⁶ For background see Research Papers 98/57 and 98/76

⁶⁷ *Devolution* (1979) by Vernon Bogdanor pp 42-43