RESEARCH PAPER 02/07
18 JANUARY 2002

The *Justice (Northern Ireland) Bill*

Bill 75 of 2001-02

The *Justice (Northern Ireland) Bill* implements recommendations of the Review of the Criminal Justice System in Northern Ireland, which was set up pursuant to the Good Friday Agreement.

It would amend the law relating to judicial appointments in Northern Ireland, transferring responsibilities from the Lord Chancellor to the First Minister and deputy First Minister and setting up a Judicial Appointments Commission with responsibilities for selection.

It would provide for the appointment of the Attorney General for Northern Ireland and establish a public prosecution service, a Chief Inspector of Criminal Justice and a Northern Ireland Law Commission.

It would also make amendments to the youth justice system and confer new rights on victims of crime to receive information and make representations.

The Bill is to be debated in the House of Commons on second reading on Monday 21 January 2001

Oonagh Gay & Pat Strickland

PARLIAMENT AND CONSTITUTION CENTRE

Sally Broadbridge

HOME AFFAIRS SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

List of 15 most recent RPs

01/110	The *Tax Credits Bill* [Bill 52 of 2001-02]	05.12.01
01/111	Mobile Phones and Mobile Phone Masts	11.12.01
01/112	The Campaign against International Terrorism: prospects after the fall of the Taliban	11.12.01
01/113	Unemployment by Constituency, November 2001	12.12.01
01/114	The *Northern Ireland Decommissioning (Amendment) Bill* [Bill 63 2001-02]	14.12.01
01/115	The *Commonhold and Leasehold Reform Bill [HL]* [Bill 51 of 2001-02]	14.12.01
01/116	The Parliamentary Oath	14.12.01
01/117	The Private Finance Initiative (PFI)	18.12.01
01/118	The *Pension Annuities (Amendment) Bill* [Bill 12 of 2001-02]	21.12.01
02/01	Social Indicators	08.01.02
02/02	House of Lords Reform: the 2001 white paper	08.01.02
02/03	The *Office of Communications Bill* [Bill 73 of 2001-02]	14.01.02
02/04	The *State Pension Credit Bill [HL]* [Bill 30 of 2001-02]	15.01.02
02/05	The *Employee Share Schemes Bill* [Bill 13 of 2001-02]	16.01.02
02/06	Unemployment by Constituency, December 2001	16.01.02

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site, URL:* ***http://www.parliament.uk***
- *within Parliament to users of the Parliamentary Intranet, URL:* ***http://hcl1.hclibrary.parliament.u****k*

Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public. Any comments on Research Papers should be sent to the Research Publications Officer, Room 407, 1 Derby Gate, London, SW1A 2DG or e-mailed to PAPERS@parliament.uk

ISSN 1368-8456

Summary of main points

The Good Friday Agreement (the Belfast Agreement) committed participants to a wide ranging criminal justice review. A Review Group was set up in June 1998, and reported with nearly 300 recommendations in March 2000. The majority have been accepted by the Government. Many of them relate to the proposal to devolve responsibility for justice matters to the Northern Ireland Assembly, or are dependent on responsibility having been devolved. A significant proportion, which require primary legislation, are addressed in this Bill, and are expected to take effect after May 2003 which is when the Government aims to devolve policing and justice matters.

The main provisions of the Bill are:

- to amend the law relating to the judiciary and courts in Northern Ireland, including provision for the creation of a Judicial Appointments Commission and for the removal of judges, changes to eligibility criteria, a new oath and provisions to make the Lord Chief Justice head of the judiciary in Northern Ireland;

- to provide for the appointment of the Attorney General for Northern Ireland after devolution and to establish a public prosecution service;

- to establish a Chief Inspector of Criminal Justice and a Northern Ireland Law Commission;

- to set out the aims of the youth justice system and to make other provisions dealing with the youth justice system, including extending that system to 17 year olds;

- to provide for the disclosure of information about the release of offenders in Northern Ireland to victims of crime and to confer on victims the right to make representations in relation to the temporary release of offenders; and

- to provide for measures in relation to community safety.

The Explanatory Notes to the Bill provide the clause-by-clause analysis. This paper explains the background to the Bill and further explores those provisions which may be seen as making the most radical changes in responsibility for and operation of the criminal justice system in Northern Ireland.

CONTENTS

I Background

A. The Good Friday (Belfast Agreement) 1998

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

- 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[2]
- a review of criminal justice

The main constitutional and political developments following the Agreement are set out in a series of Research Papers.[3] The current operation of devolution in Northern Ireland is also covered in a standard note.[4]

The Belfast Agreement set out the aims of the criminal justice system and committed participants to a wide-ranging criminal justice review:

> 3. An independent Commission will be established to make recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread community support for these arrangements within the agreed

---

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

2 This Patten Commission reported in September 1999

3 Research Paper 98/57, *Political Developments in Northern Ireland since 1972*, Research Paper 98/76 *the Northern Ireland Bill*, Research Paper 00/6 *the Disqualification Bill*, Research Paper 00/13 *The Northern Ireland Bill*, Research Paper 01/114 *The Northern Ireland Decommissioning (Amendment) Bill*

4 *Northern Ireland – Political Developments since May 2000* 9 January 2002, on the intranet at http://hcl1.hclibrary.parliament.uk/notes/pcc/NorthernIrelandDevelopments2001.pdf

> framework of principles reflected in the paragraphs above and in accordance with the terms of
> reference at Annex A. The Commission will be broadly representative with expert and international representation among its membership and will be asked to consult widely and to report no later than Summer 1999.
> 4. The participants believe that the aims of the criminal justice system are to:
> • deliver a fair and impartial system of justice to the community;
> • be responsive to the community's concerns, and encouraging community involvement where appropriate;
> • have the confidence of all parts of the community; and
> • deliver justice efficiently and effectively.
> 5. There will be a parallel wide-ranging review of criminal justice (other than policing and those aspects of the system relating to the emergency legislation) to be carried out by the British Government through a mechanism with an independent element, in consultation with the political parties and others. The review will commence as soon as possible, will include wide consultation, and a report will be made to the Secretary of State no later than Autumn 1999. Terms of Reference are attached at Annex B.
> 6. Implementation of the recommendations arising from both reviews will be discussed with the political parties and with the Irish Government.
> 7. The participants also note that the British Government remains ready in principle, with the broad support of the political parties, and after consultation, as appropriate, with the Irish Government, in the context of ongoing implementation of the relevant recommendations, to devolve responsibility for policing and justice issues.[5]

Thus the Review was to be carried out by the British Government through a mechanism with an independent element, in consultation with the political parties and others. It was to commence as soon as possible, to include wide consultation, and a report was to be made to the Secretary of State no later than Autumn 1999.

Its terms of reference were[6]

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

---

5 Cm 3883

6 Ibid, Annex B

- the arrangements for the organisation and supervision of the prosecution process, and for safeguarding its independence;
- measures to improve the responsiveness and accountability of, and any lay participation in the criminal justice system;
- mechanisms for addressing law reform;
- the scope for structured co-operation between the criminal justice agencies on both parts of the island; and
- the structure and organisation of criminal justice functions that might be devolved to an Assembly, including the possibility of establishing a Department of Justice, while safeguarding the essential independence of many of the key functions in this area.

The proposals of the Review are one of the last-remaining aspects of the Agreement to be implemented, apart from paramilitary decommissioning.[7]

B. The scheme of devolution in 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*.[8]

As with the earlier devolution proposals contained in 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 apart from by primary legislation. Schedule 2 of the *Northern Ireland Act 1998* specifies excepted matters. 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

---

7 See Research Paper 01/114 *The Northern Ireland Decommissioning (Amendment) Bill* for background

8 Cm 3883 (p 23).

- 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 1998* with specified exceptions

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. See Part III for a discussion of the proposals to transfer judicial appointments to the reserved matters category.

Schedule 3 set out reserved matters; these are subjects which could be transferred to the Assembly at a later date. Criminal law and the justice system are included in the list, as follows:

> (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.
>
> 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.

Also included in Schedule 3 are the maintenance of public order and of the police forces in Northern Ireland, but not the operation of the Parades Commission. For such reserved powers to be transferred to the Assembly, it is necessary to obtain cross-community

consent. It is also possible to transfer powers back to Westminster. Section 4(2) of the *Northern Ireland Act 1998* enables the Secretary of State to lay orders making a reserved matter and transferred matter as follows:

> 4(2) If at any time after the appointed day it appears to the Secretary of State-
> (a) that any reserved matter should become a transferred matter; or
> (b) that any transferred matter should become a reserved matter,
> he may, subject to subsection (3), lay before Parliament the draft of an Order in Council amending Schedule 3 so that the matter ceases to be or, as the case may be, becomes a reserved matter with effect from such date as may be specified in the Order.
> (3) The Secretary of State shall not lay the draft of an Order before Parliament under subsection (2) unless the Assembly has passed with cross-community support a resolution praying that the matter concerned should cease to be or, as the case may be, should become a reserved matter.
> (4) If the draft of an Order laid before Parliament under subsection (2) is approved by resolution of each House of Parliament, the Secretary of State shall submit it to Her Majesty in Council and Her Majesty in Council may make the Order.

Cross-community support was defined in Strand One, para 5 of the Agreement as:

> (i) either parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting;
> (ii) or a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.

This wording was replicated in s4(5) of the *Northern Ireland Act 1998*. Key decisions requiring cross-community support are designated in advance and either of the two levels of support will generally suffice, unless Standing Orders of the Assembly state otherwise.[9]

The *Explanatory Notes* to the Bill note that a transfer of justice matters to the Assembly is planned after the next Assembly elections in May 2003:

> 6. A number of the Review recommendations relate to the proposal to devolve responsibility for justice matters to the Northern Ireland Assembly, or are dependent on responsibility having been devolved. Once the devolved institutions are working effectively, the Government intend to devolve responsibility for policing and justice functions, as set out in the Belfast Agreement. We need first to take some major steps to implement the Criminal Justice Review and to make some more progress on detailed implementation of the Patten report. A final decision to devolve these functions can only be taken at the time taking account

[9] Available from http://www.niassembly.gov.uk/sopdf/So1.pdf

> of security and other relevant considerations. But the Government's target is to devolve policing and justice after the Assembly elections scheduled for May 2003.

C. The Criminal Justice Review

1. The Review Group

The Criminal Justice Review Group was established on 27 June 1998. Its membership of 9 comprised:

1. four civil servants representing the Secretary of State for Northern Ireland, the Lord Chancellor and the Attorney General, and

2. five independent assessors who were

> **Professor Joanna Shapland**, Professor of Criminal Justice at Sheffield University and Director of the Institute for the Study of the Legal Profession;
> **Professor John Jackson**, Professor of Public Law and Head of the School of Law at Queen' s University, Belfast;
> **Eugene Grant QC**, a barrister in criminal practice in Northern Ireland;
> **Dr Bill Lockhart**, Director of the Extern Organisation in Northern Ireland, and Director of the Centre for Independent Research and Analysis of Crime;
> **His Honour John Gower QC**, a retired English circuit judge.

2. The work of the Review Group

On 27 August 1998 the Review Group published a short consultation paper[10] whose purpose was:

> to stimulate discussion with and between political parties, the criminal justice agencies, the wider public sector, the community and voluntary sectors, and individual members of the public.

Views and comments were sought on a range of issues in response to broadly expressed questions. For example, the questions asked in the two page chapter about appointments to the judiciary and magistracy were:

- What principles should underpin judicial appointments?

---

[10] *Review of the Criminal Justice System in Northern Ireland: A Consultation Paper*: August 1998

- What safeguards should be adopted to ensure that appointments procedures are free from any opportunity for bias?
- Who should have a role in the appointments process and where should responsibility for appointments lie?
- What future arrangements should there be for the training and development of the judiciary?
- Should there be a clear career structure for the judiciary at all levels? What should the role and responsibilities of part-time judicial appointments be?
- To what extent is lay involvement in the adjudication process appropriate? What are the options for increasing lay involvement?
- What should the role of the Juvenile Court Lay Panel Members be?
- What should the role of Justices of the Peace be? How should they be appointed?
- Should panel of lay justices hear minor adult cases?
- Should lay justices sit with resident magistrates in more serious adult cases?
- How should lay justices be appointed and by whom?[11]

The Group issued a progress report in April 1999[12], saying that it was more than half way through its work, and in April 2000 it published its final Review[13], with 294 detailed recommendations under the headings

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

This followed receipt of over 90 written submissions, a series of meetings and seminars, and a commissioned programme of comparative research, the results of which were published[14] in 18 separate reports at the same time as the Review.

---

[11] Ibid

[12] *Review of the Criminal Justice System in Northern Ireland: A Progress Report:* April 1999

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

3. The Government's response

On 12 November the Parliamentary Secretary at the Northern Ireland Office, Desmond Browne, announced publication of the Government's response in the form of an implementation plan and a draft Bill.

> A draft Justice (Northern Ireland) Bill and implementation plan were published today and copies have been placed in the Library. Copies of both documents are also available on the Northern Ireland Office website, along with the outcome of an equality screening exercise. Many of the recommendations will be implemented through the legislation. The implementation plan sets out the programme of work required to implement the criminal justice review, the time scale for this and who will be responsible for taking it forward. It also states that the Government's target is to devolve policing and justice after the Assembly elections scheduled for May 2003.
>
> There will now be a period of consultation before the legislation is introduced in Parliament. Subject to the outcome of consultation, it is expected that the legislation will be introduced in this Session[15].

In a press notice of the same day, he said:

> Today marks another key step in implementing the Good Friday Agreement. As one of the cornerstones of the Agreement, the review of criminal justice will deliver a modern, progressive and forward-looking system of justice for the people of Northern Ireland.
>
> We welcomed the Review Group's report when it was published in March last year. Our response shows that we intend to implement the vast bulk of its recommendations in full.
>
> I am confident that the Review will put human rights, respect for victims and other fundamental principles - such as fairness, impartiality, transparency and accountability – at the heart of the new criminal justice system.

The Implementation Plan considers each of the 294 recommendations and provides the Northern Ireland Office response, indicating which body will be responsible for implementation. Most of the recommendations were accepted, some in principle or subject to reservations, and some are under further consideration.

---

14 Also available on the website http://www.nio.gov.uk/issues/justice.htm

15 12 Nov 2001 : Column: 517W

4. Reactions to the Review and Government response

Reports of mixed reactions soon appeared in the press. The *Belfast News Letter* reported

> The Bill received a welcome from the UUP and the SDLP but was attacked by the DUP whose opposition to the review includes the plans to remove all symbols of the Crown from courtrooms.
>
> Symbols on the outside of existing buildings may remain but they will not be placed on new courts.
>
> Acknowledging that the Bill was hugely complex, UUP spokeswoman Sylvia Hermon said that the principle of devolving powers to the Assembly was to be welcomed for the benefit of society as a whole.
>
> "We view this as crucial to the development of strategies to eradicate the mafia sub-culture that exists in our society," the MP said. On the issue of symbols, she added that the proposals were not as offensive as the Patten report. "We are opposed to the proposal to remove any Royal insignia inside the courtrooms and will challenge this in Parliament."
>
> The UUP has set up a group to analyse the draft Bill.
>
> SDLP spokesman Alex Attwood agreed that it would need careful consideration.
>
> For the DUP, Ian Paisley jnr accused the Government of setting out to "decimate" the criminal justice system.
>
> As well as the removal of the oath and symbols, he said, the system would be politicised as never before and claimed that a new layer of unaccountable bureaucracy would be introduced.
>
> "The Government not only seeks to repeat the mistakes made in England and Wales but to undermine the very basis of the legal system."
>
> The litmus test, he said, would be whether the Bill represented a sufficient transformation of the of the system that would "gain republican and nationalist support and allegiance".
>
> The Bill also contains proposals for a restorative justice system, an issue that has also raised concerns over who would administer it.[16]

According to the *Irish News* -

---

[16] *Plan to put law and order in Ulster hands; Assembly may control police and justice by 2003*: Belfast News Letter, November 13, 2001.

> Politicians on both sides of the border have given a guarded welcome to the British government's plans to hand over policing and justice powers to the Stormont executive in May 2003.
> […]
> Speaking from Dublin, the Republic's minister for foreign affairs, Brian Cowen said that, taken along with recent policing reforms, the draft legislation promised to provide "a fair and impartial criminal justice system, which can command the confidence of all parts of the community, and which is consistent with the other aims set out in the Good Friday agreement".
> […]
> Sinn Féin justice spokesman Mitchel McLaughlin said that the party will be "scrutinising the British response" closely: "The litmus test of the British government response and draft legislation will be whether it represents a transformation of the criminal justice system that will gain republican and nationalist support and allegiance."
> […]
> Alliance party justice spokesman Stephen Farry said: "My hope is that the criminal justice review can proceed in a less controversial manner than the policing reforms."[17]

On 12 November 2001, the *Committee on the Administration of Justice,* the human rights organisation, issued a press notice describing the draft Bill and plan as

> disappointing and unlikely to deliver the level of change envisaged by the Criminal Justice Review.
> There is no independent oversight of the recommendations of the Review nor are there timescales within which changes will occur" said Paul Mageean, CAJ's Legal Officer. "Once again we see the process of promised change occurring at the discretion of the very institutions subject to the change," he added.
>
> CAJ also criticised the four weeks consultation period as "woefully inadequate". Mr Mageean claimed that this period failed to comply with the NIO's own Equality Scheme which promised a consultation period of "at least eight weeks" for such legislation and plans[18].

a. The time allowed for consultation

The Implementation Plan asked for comments by 12 December 2001, allowing just over four working weeks for consultation. When asked why an eight week consultation period had not been set, the Parliamentary Secretary, Desmond Browne, replied:

---

17 Irish News: November 13, 2001: *Guarded welcome for draft; Criminal Justice Review*

18 CAJ Press release:12th November 2001:*CAJ* concerned at government's response to the criminal justice review

> This is not a new issue. There has already been extensive consultation on the review recommendations, both before and after the report was published in March last year. There was widespread support for the review's conclusions, and we made no secret of the fact that we intended to implement them more or less in full. This period of consultation will be focused and proactive, and we will continue to take on board the comments we receive on our proposals as we take forward the implementation process[19].

In November 2000 the Cabinet Office published a Code of Practice on Written Consultation. The press notice announcing the publication, said

> The new code of practice on written consultation sets new standards for consultation documents issued by the government. It aims to increase the involvement of people and groups in public consultations, minimising the burden it imposes on them, and giving them a proper time - a standard minimum period of twelve weeks - to respond.[20]

b. Ad Hoc Committee of the Northern Ireland Assembly

On 19 November 2001, the Northern Ireland Assembly established an Ad hoc Committee to consider the *draft Justice (Northern Ireland) Bill* and the accompanying implementation plan for the Criminal Justice Review. The members were :–

> Mrs Eileen Bell (Alliance)
> Mr Gregory Campbell (Democratic Unionist Party)
> Mr Ian Paisley Jnr (Democratic Unionist Party)
> Mr David Ervine (Progressive Unionist Party)
> Mr Mitchel McLaughlin (Sinn Féin)
> Mrs Mary Nelis (Sinn Féin)
> Mr Alex Attwood (Social Democratic and Labour Party)
> Mr Alban Maginness (Social Democratic and Labour Party)
> Mr Duncan Shipley Dalton (Ulster Unionist Party)
> Sir John Gorman (Ulster Unionist Party)

Members of the Committee immediately expressed indignation about the shortness of the consultation period.

> **Mr McLaughlin**: Go raibh maith agat. Our party has no difficulty with the formation of an Ad Hoc Committee. However, we have problems with the way in which this is being advanced. A very short time is available for public consultation, and that runs contrary to the guidelines, custom and practice that have developed in the requirements of equality legislation. Having put down that marker, we will work with the Ad Hoc Committee to ensure that there is the

---

19 HC Deb 19 Nov 2001 c29w

20 CAB 377/00: 27 November 2000: *new approach to public consultation will give people bigger say in government - Mowlam*

> fullest possible public consultation on this. The Assembly needs to debate the ramifications. We support the motion.
>
> **Mr A Maginness:** My party is concerned about the short time that this Ad Hoc Committee will have to consider issues that are important and which go to the heart of the legal system.
>
> It is not good enough that we should have such a short time. That is the way in which several issues presented to the House have been managed — perhaps deliberately — by the Government at Westminster. It is unfair to force us to rush through our consideration of far-reaching reforms of the legal system. I reiterate the point made by Mr McLaughlin: it is wrong, in principle, for the Government to put the Assembly in that position. They have done so before, and they have now done so again on an issue of fundamental importance to the community. On behalf of SDLP Members, I express deep regret at the manner in which the matter has been put to the Assembly.[21]

c. Extension of the consultation period

On 29 November 2001 the Parliamentary Secretary, Desmond Browne, announced in a written answer:

> In the light of representations made by the political parties and those involved in delivering criminal justice services, I have decided to extend the period of consultation on the Government's response to the criminal justice review by a further four weeks to 7 January 2002.[22]

Following the announcement, he said;

> "In allowing more time for consultation we are responding to calls from a range of groups and individuals, including the political parties and those who deliver criminal justice services on the ground. I want to ensure that everyone interested in the future of criminal justice in Northern Ireland has an adequate opportunity to have their say and to contribute to the effectiveness of our proposals".
>
> "I have already received a number of useful comments and I am confident that extending the consultation process will allow even more constructive responses to be made. Early submissions would still be very welcome so that we can give these our fullest consideration before the draft legislation is introduced."[23]

On 3 December 2001, the Chairperson of the Ad Hoc Committee on the *Draft Justice (Northern Ireland) Bill* (Mr Dalton), reported to the Assembly

---

21 http://www.ni-assembly.gov.uk/record/020114.htm pp 389-398,419-428

22 29 November 2001 c1071w

23 Northern Ireland Office press release, "Government Extends Consultation Period On Criminal Justice Review," 29 November, 2001

> Following the resolution of the Assembly on 19 November 2001, the Ad Hoc Committee held its first meeting, and I was elected as its Chairperson.
>
> At that meeting, the Committee discussed its terms of reference and came to the unanimous conclusion that, as a Committee, we could not properly discharge our responsibilities to the Assembly — and to our constituents — if we were to consider such crucial and detailed proposals and report within the timescale that was set down. Mr Des Browne, the Parliamentary Under-Secretary of State, has extended the consultation date to 7 January; that timescale is still unworkable.
>
> The Committee is not oblivious to the bigger picture. It has considered that it can best make its input if it is given the opportunity to make its report by 14 January 2002. I believe that we can make our proposals and report by 14 January. That will give time for the views of the Committee and the views of this House to be taken into consideration in time for any necessary amendments to the Bill at Westminster.
>
> The Secretary of State gave the House an extremely limited period in which to consider crucial reforms to the system of criminal proceedings in Northern Ireland. The reforms will be of enormous significance for many years. It was absurd to bounce the House into dealing with the matter in three to four weeks. Rightly, the Committee felt that the Government should be told that the House would not be bounced in that way. We will take the time that we feel is necessary to deal appropriately with such matters[24].

It was resolved:

> That this Assembly agrees that the date for the report of the Ad Hoc Committee set up to consider —
>
> (a) the proposal for a draft Justice (Northern Ireland) Bill; and
>
> (b) the criminal justice review implementation plan be changed from 11 December 2001 to 14 January 2002.

The committee took evidence[25] from:-

- The Commission on the Administration of Justice
- The Criminal Bar Association

---

[24] http://www.ni-assembly.gov.uk/record/020114.htm pp 389-398,419-428

[25] Written submissions are annexed to the Committee's Report, which is available at http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm and also on the House of Commons Library website

- The Law Society of Northern Ireland
- The Northern Ireland Court Service
- The Northern Ireland Human Rights Commission
- The Northern Ireland Office
- The Probation Board for Northern Ireland
- Include Youth and the Children's Law Centre

5. The Report of the Ad Hoc Committee

The Ad Hoc Committee completed its Report on 8 January 2002. In it, the Committee made 17 recommendations, the majority of which related to aspects of implementation other than *the Justice (Northern Ireland) Bill*:

> 1: That the Northern Ireland Office should observe and comply with the Cabinet Office Code of Practice on written consultations, when planning future written consultations.
>
> 2: That a new clause be inserted which acknowledges and safeguards the continuing independence and impartiality of the legal profession.
>
> 3: That the Secretary of State gives consideration to the appointment of a commissioner with a remit to oversee the implementation of the reform of the criminal justice system, having regard to the resources available to him.
>
> 4: That this Assembly considers the establishment of a Standing Committee, at the earliest opportunity, to be known as the Committee on Criminal Justice, with a remit to: –
>
> > (a) make recommendations to the Assembly on the ongoing implementation of the Criminal Justice Review; and
> >
> > (b) report to the Assembly on criminal justice matters which have been referred to it for consideration.
>
> 5: That the Secretary of State gives consideration to the revision of the clauses of the draft Bill to include references to the accepted human rights standards which would acknowledge the principle that human rights are central to the criminal justice system.
>
> 6: That the proposed Standing Committee on Criminal Justice make recommendations to the Assembly — to be considered by the Northern Ireland Office and the Northern Ireland Executive — on the form that a Department of Justice may take, following devolution.
>
> 7: That the Committee on Procedures examine and make recommendations to the Assembly on the extent to which the Attorney General may participate in the proceedings of the Assembly having due regard to best practice in other jurisdictions.

8: That, post devolution, the appropriate steps are taken to define the future role and extent of the Attorney General's responsibilities.

9: That adequate resources be guaranteed to enable the Prosecution Service to carry out its functions.

10: That greater transparency should be a feature of the decision-making process of the new Public Prosecution Service.

11: That the Probation Board of Northern Ireland should remain independent and impartial.

12: That clause 21(3) of the draft Bill be amended to provide authority for the Assembly to convene a tribunal[26] following a resolution of the Assembly that is passed with the support of a number of members of the Assembly which equals or exceeds two thirds of the total number of seats in the Assembly.

13: That young people are granted access to legal representation in advance of a youth conference.

14: That the Northern Ireland Court Service clearly define the role and responsibilities of the Probation Board for Northern Ireland in the youth conferencing process.

15: That the Northern Ireland Office carry out additional research into the practical outworking of the Restorative Justice proposals.

16: That the Northern Ireland Office consider setting up pilot projects which will lead to a restorative justice programme in which the whole community will have confidence.

17: That the proposed Standing Committee on Criminal Justice examines, in greater detail, the whole area of restorative justice.

It concluded:

The Committee recognised that the reform of criminal justice has been both difficult and time-consuming. Nevertheless, they adjudged that providing a short period for consultation, having accepted the tight legislative timetable, was not appropriate. The draft Bill and proposed implementation plan will require ongoing scrutiny, continued development and further refinement. The Committee recognised the need for continued liaison with the Northern Ireland Office and

[26] i.e. to remove the Attorney General for Northern Ireland from office, see Part IV of this paper

> the criminal justice agencies in the lead up to the devolution of justice matters to the Northern Ireland Assembly[27].

The Committee's Report, which includes a compact summary of the Bill's provisions is available at http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm and also on the Library's intranet pages at http://hcl1.hclibrary.parliament.uk/sections/justicesystem.htm.. As there were some areas on which the Committee was unable to reach consensus, it accepted position papers from the political parties which were represented on the Committee. These were annexed to the Report and are also available separately on the Library website.

6. Debate in the Northern Ireland Assembly

On 14 January, the Assembly debated[28] the Committee's Report. Most of the Committee's 17 recommendations related to implementation outside the Justice (Northern Ireland) Bill and are not examined in this paper. It is, however, worth noting that the consensus was strongly against the Review's recommendation that the Probation Service should be reconstituted as a Next Steps Agency. (The Government response had been that the decision was best left to the Northern Ireland Executive to consider after devolution of criminal justice matters[29]).

Members again expressed criticism of the short period which had been allowed for consultation. Eileen Bell, for the Alliance, was also pessimistic about the weight which would be given to the views expressed by the Committee:

> We must make it clear to Westminster and the NIO that the Northern Ireland Assembly must be allowed to play its proper consultative role in the drafting of any legislation on reserved matters, especially when - as in this case - that legislation will directly affect everyone in Northern Ireland. Sometimes I wonder how much of the Committee's considerable work on its report, and the views therein, will even be looked at. That situation must change and due recognition should be given to our agreed reports. I hope, therefore, that Members will agree with the first recommendation.

Ian Paisley Jnr (DUP) thought that the Committee should have had a part in developing the draft Bill:

> Anyone in the Assembly can see that the Bill has been poorly thought out, and that it is cluttered and vague. That is because there was such a lack of time, prior to the review of criminal justice, to allow the Committee to be properly consulted as the Bill was put together, and to help to develop it. The establishment of a

---

27 Report and proceedings of the Committee p 15

28 http://www.ni-assembly.gov.uk/record/020114.htm pp 389-398,419-428

> standing committee might allow us to deal at length with the issue of criminal justice. Every Member has touched on issues that affect us all.

Points made in the debate about the recommendations which related to the contents of the (draft) Bill are referred to in the following sections of this paper.

7. Introduction of the Bill

The Justice (Northern Ireland) Bill was introduced on 18 December 2001[30] and published on 19 December. Explanatory Notes have been prepared by the Northern Ireland Office[31] There are some changes from the draft published the month before including, in particular, the addition of provisions imposing duties on the both the Attorney General and the Director of Public Prosecutions to act independently in the exercise of their duties. As the Bill was introduced before the (extended) consultation period had ended, as well as before the Ad Hoc Committee had reported to the Assembly, any further changes to reflect the results of the consultation would have to be made by amendment during the parliamentary passage of the Bill.

The Government's target is to devolve responsibility for policing and justice functions to Northern Ireland some time after the Assembly elections scheduled for May 2003. In the Government's Implementation Plan many of the Bill's provisions are shown as being subject to that devolution. None of the provisions of the Bill would come into force until a day or days appointed by the Secretary of State.

On 19 December the Northern Ireland Office issued a press notice announcing the publication of a Statement of Purpose and Aims for the criminal justice system in Northern Ireland. The Parliamentary Secretary, Desmond Browne, said:

> The Review recommended the publication of a set of aims for the criminal justice system. The purpose and aims contained in this document have been developed and agreed by the six statutory organisations which comprise that system and they will be reflected in each organisation's individual aims and objectives.
> They set out the shared goals and values for the system and give examples of some of the initiatives which will be taken forward over the next few years[32].

This paper does not give a commentary on all the provisions of the Bill, nor does it examine the proposals for implementation of those recommendations which do not

---

29 implementation plan p114

30 the Bill was introduced without a press notice and before the expiry of the extended consultation period.it is available at http://pubs1.tso.parliament.uk/pa/cm200102/cmbills/075/2002075.pdf

31 They are available at http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/075/en/02075x--.htm

32 *Purpose and aims of criminal justice system published*; Northern Ireland Information Service 19 December 2001.The notes for editors say that the document can be found on the NIO website, but it does not appear to be available yet.

depend on primary legislation. It focuses on those areas in which the Bill would significantly change the face of the criminal justice system in Northern Ireland:

> **Symbols and oaths** – restricting the display of the Royal Arms at court buildings and introducing a politically neutral judicial oath
>
> **Judiciary** – devolving responsibility for judicial appointments, with a Judicial Appointments Commission being established to take an active role in the selection process
>
> **Law Officers** – dividing the present functions of the Attorney General in relation to Northern Ireland affairs between the newly created non-political office of Attorney General for Northern Ireland, and the combined office of Attorney General for England and Wales and Advocate General for Northern Ireland, which will continue to have responsibility for excepted matters.
>
> **Prosecution** – establishing a new, independent Public Prosecution Service for Northern Ireland, to be responsible for undertaking all prosecutions in Northern Ireland including those currently undertaken by the Police Service of Northern Ireland, to be headed by the Director of Public Prosecutions for Northern Ireland and to subsume his existing department
>
> **Inspection** – creation of an independent Criminal Justice Inspectorate with responsibility for the inspection of the work of most agencies operating within the criminal justice system, except the courts.

II Symbols and oaths[33]

A. The Royal Coat of Arms

The Good Friday Agreement contains the following statement on the subject of symbols used for public purposes:

> 5. All participants acknowledge the sensitivity of the use of symbols and emblems for public purposes, and the need in particular in creating the new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division. Arrangements will be made to monitor this issue and consider what action might be required. [34]

---

[33] By Pat Strickland

[34] *The Belfast Agreement: An Agreement reached at the Multi-Party Talks on Northern Ireland*, "Rights Safeguards and Equality of Opportunity: Economic, Social and Cultural Issues", paragraph 5, Cm 3883 April 1998, available at http://www2.nio.gov.uk/agreement.htm

The Criminal Justice Review Group examined the impact of symbols displayed in court. Evidence collected during consultation varied:

> Mixed views were expressed about the flying of flags, the proclamation of "God Save The Queen" as the judiciary enter some courts and about symbols and emblems. In one group it was felt that flags and proclamations were alienating but that the presence of a Royal Coat of Arms often went unnoticed and was not an issue. Views at seminars were not entirely polarised and there was often agreement that while flags and emblems could be provocative, removing symbols could be just as provocative. We heard the plea that any recommendation in this area should be guided by the need for sensible modernisation, making the system more transparent and intelligible.[35]

The Review Group considered the question of the display of the Royal Arms both inside and outside courts. It recommended that there should be no change in the arrangements for displaying the Royal Coat of Arms on the exterior of existing courthouses (around 50% do not display this), but it should no longer be displayed inside the court. It recommended no change in the flying of flags which are currently in line with flag flying practices in other government buildings. This is a matter for the Secretary of State for Northern Ireland.[36] The report explained its conclusions as follows:

> 8.60 The courts in England and Wales and Northern Ireland have traditionally been identified with the symbols of the head of state. The traditional conceptualisation has been of the monarch as the source and fountain of justice, with the Sovereign's Majesty deemed always to be present in court. It was perhaps in recognition of this that the practice of displaying a Royal Coat of Arms behind the judge's chair evolved. In Northern Ireland, as in England and Wales, practice varies on displaying the Royal Coat of Arms on the outside of courthouses. In Northern Ireland some 50% of courthouses do not display the Royal Coat of Arms on the outside of the building. It is also practice for the Union flag to be flown at courthouses on days when the flag is flown on Government properties that are the responsibility of the Secretary of State for Northern Ireland.
>
> 8.61 The Belfast Agreement makes a firm commitment to partnership, equality and mutual respect and makes securing the confidence of all parts of the community an aim of the criminal justice system. All parties to the Agreement acknowledged the sensitivity of the use of symbols and emblems for public purposes and the need to ensure that they are used in a manner that promotes mutual respect. One possibility would be to match the Royal Coat of Arms with an Irish symbol; but this would, in our view, risk introducing a political element into the court environment. We also considered the removal of all symbols, but felt that this could be misinterpreted as being inconsistent with Northern Ireland' s constitutional position.

---

35 Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland*, March 2000, available at http://www.nio.gov.uk/pdf/mainreport.pdf

36 *The Flags (Northern Ireland) Order* SI 2000/1347.

> On the other hand, we are conscious that the presence of the Royal Coat of Arms in a prominent position in the courtroom could be regarded by some as off-putting and inconsistent with the need for court proceedings to take place in a neutral environment.
> 8.62 It is with these considerations in mind that we make the following recommendations. **We recommend that there should be no change in the arrangements for displaying the Royal Coat of Arms on the exterior of existing courthouses. However, in order to create an environment in which all those attending court can feel comfortable we recommend that the interior of courtrooms should be free of any symbols. We recommend that the flying of the Union flag at courthouses should continue to be in line with flag flying practice at other government buildings which are the responsibility of the Secretary of State for Northern Ireland.** These practices would become subject to any decision of the Assembly on devolution of responsibility for courts administration. We look to a future when these issues can be addressed on an agreed basis to the satisfaction of all parts of the community. In time it may be more fitting to move towards symbols that emphasise the separation of the courts from the executive.[37]

The Government accepted the Review Group's recommendations.

> The Government endorses recommendation 141 on symbols. The Bill will include provision to implement this. The Government also accepts that the flying of flags at courthouses should continue to be in line with flag flying at other government buildings.
> In regard to recommendation 142, it is Northern Ireland Court Service policy that there should be no declaration of "God Save the Queen" on entry of the judiciary to court. A notice will, however, be issued to court staff reminding them of this policy.[38]

Clause 66 of the *Justice (Northern Ireland) Bill* accordingly provides for the removal of the Royal Coat of Arms from within courtrooms, and prohibits its display outside new court buildings. The Explanatory Notes state that "Royal Arms will continue to be displayed on the exterior of existing courthouses where they are already displayed."[39]

B. Judicial Oath

Clause 20 would replace the Judicial Oath and Oath of Allegiance with a single Judicial Oath intended to be politically neutral. The Criminal Justice Review Group report gave the following background on the oaths:

---

37 Ibid

38 Northern Ireland Office, *Draft Criminal Justice Review Implementation Plan*, November 2001 available at http://www.nio.gov.uk/pdf/implancj.pdf

39 *Justice Northern Ireland Bill Explanatory Notes* at paragraph 133 at http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/075/en/02075x--.htm

> On appointment, judges and magistrates (and JPs and lay panellists) are required by legislation to take the Oath of Allegiance and the Judicial Oath. The Oath of Allegiance takes the following form:
> "I, [ ], do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth The Second, her heirs and successors, according to law. So help me God."
> The Judicial Oath is intended to bind the appointee to perform his or her functions under the law independently and impartially in respect of all citizens. Section 4 of the *Promissory Oaths Act* 1868 prescribes the form of the Judicial Oath as follows:
> "I, [ ], do swear that I will well and truly serve our Sovereign Lady Queen Elizabeth The Second in the office of [ ], and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or illwill. So help me God."
> For those who do not wish to swear an Oath, there is also the option of making solemn affirmations in similar terms.[40]

The Review Group had received evidence from people who said that the Judicial Oath as it is currently worded could prevent people from applying for judicial appointments. The Group therefore proposed changes to the wording:[41]

> 6.124 We have already referred to one of the tasks of a Judicial Appointments Commission as having to identify and, where possible deal with, any blockages which might inhibit people from applying for judicial appointments. It has been represented to us by some that the Judicial Oath and Oath of Allegiance (or equivalent affirmation) required to be taken by judges, magistrates, JPs and lay panellists on appointment, could constitute such a blockage.
> 6.125 We recognise that a substantial element of the community in Northern Ireland aspires to the unification of Ireland. That they should do so has no bearing on their suitability or otherwise for judicial office and we can envisage circumstances where members of the Nationalist community would feel uncomfortable with being required to swear allegiance to or to serve Her Majesty The Queen. We also note the recognition in the preamble to the Belfast Agreement of the equal legitimacy of differing political aspirations. On the other hand we realise that such oaths, sworn elsewhere in the United Kingdom, are of significance and importance to others.
> 6.126 We do not believe that maintaining the status quo in this area would show sufficient regard to the position of the Nationalist community. At the same time there should be recognition of the fact of the constitutional position. We considered a number of options:
>
> - no longer requiring the Oath of Allegiance, but retaining the Judicial Oath;

---

[40] Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland*, March 2000, available at http://www.nio.gov.uk/pdf/mainreport.pdf

[41] Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland*, March 2000, available at http://www.nio.gov.uk/pdf/mainreport.pdf

- replacing both Oaths with a new oath which focuses on the judicial function, while including a reference to the fact of the Crown' s constitutional position; and
- replacing both Oaths with a politically neutral judicial oath in modern language with no reference to Her Majesty The Queen.

6.127 We have taken advice on the constitutional implications of this and understand that there is no legal or constitutional impediment to any of the options outlined above. We note in particular that the constitutional status of the judiciary is underpinned by its origins in the Royal Prerogative with members of the judiciary being deemed to be doing justice on behalf of Her Majesty. However modern constitutional doctrine now focuses on the impartiality of the judiciary and its independence from the executive.

6.128 In all the circumstances we favour the third option outlined above. We recommend that, on appointment, members of the judiciary be required to swear on oath along the following lines:

I, [ ], do swear [or do solemnly and sincerely and truly affirm and declare] that I will well and faithfully serve in the office of [ ], and that I will do right to all manner of people without fear or favour, affection or illwill according to the laws and usages of this realm.

Accordingly, *clause 20* provides for a judicial oath or affirmation with the wording suggested by the Review Group.

As set out above, the Review Group stated that the advice it had received was that there was no constitutional impediment to these changes. In the Review Group's view, the modern constitutional doctrine which emphasised the impartiality of the judiciary and its independence from the Executive outweighed the historical origins of the judiciary in the Royal Prerogative.[42]

A discussion of the concept of 'separation of powers', and how it applies to the judiciary can be found on pages 30-33 of Library Research Paper 96/82, *The Constitution: Principles and Development*.[43] The UK constitution is not based on a strict separation of powers. It is often described as *mixed* or *balanced*, in that there is some degree of overlap of functions – the fact, for example that almost the whole political executive are members of the legislature. However, the concept is still an important one for analysing the relationships between the executive, the legislature and the judiciary.

Views on the constitutional implications of attenuating the symbolic link between courts and the Crown, through the changes to the oath and to the display of the Royal Arms, may vary. They will be influenced by the importance commentators attach to the fact that the judiciary owes its origins the Crown and courts are the Queen's courts, as compared to the importance placed on the independence of the judiciary from the executive. The

---

42 Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland*, March 2000, paragraph 6.127, available at http://www.nio.gov.uk/pdf/mainreport.pdf

43 For a recent discussion see O Hood Phillips and Jackson, *Constitutional and Administrative Law*, 2001, pp 26-28

doctrine of the separation of powers is clearly not perfectly exercised in relation to the judiciary. Law officers, for example, are members of the executive. However, it is arguably more fully recognised in this area than, for example, in the relationship between the executive and the legislature. Turpin notes that "the idea of the separation of powers finds its fullest expression in the constitutional role of the courts in keeping the executive within the limits of its lawful authority and in upholding the rights of the individual against misuse of executive power."[44]

Bradley and Ewing emphasise that, while the judiciary, like Parliament, owes its origin to the monarchy, and its functions are performed in the name of the Crown, it is important in a mature democracy that judges are independent of Parliament and the Executive:

> Within a system of government based on law, there are legislative, executive and judicial functions to be performed; and the primary organs for discharging these functions are respectively the legislature, the executive and the courts. A legal historian has remarked:
>
> > This threefold division of labour, between a legislator, an administrative official, and an independent judge, is a necessary condition for the rule of law in modern society and therefore for democratic government itself.
>
> Admittedly there is no clear-cut demarcation between some aspects of these functions, nor is there always a neat correspondence between the functions and the institutions of government. As a matter of history, Parliament, the courts and central government in Britain owe their origin to the monarchy; before these institutions developed as distinct entities, the King governed through his Council, with a mixture of legislative, executive and judicial work. Today these tasks are all performed in the name of the Crown, but in a mature democracy it is important that judges are independent both of Parliament and government, and that Parliament is not merely a rubber stamp for the Cabinet. Indeed it may be argued that essential values of law, liberty and democracy are best protected if the three primary functions of a law-based government are discharged by distinct institutions. Robson described the separation of powers as ''that antique and rickety chariot …, so long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas'. But this does not do justice to the contribution which the doctrine has made to the maintenance of liberty and the continuing need by constitutional means to restrain abuse of governmental power. [45]

C. The Ad Hoc Committee

---

[44] Colin Turpin, *British Government and the Constitution,* 1999 p 46

[45] A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 1997, p 89. The legal historian cited was E.G. Henderson, *Foundations of English Administrative Law*, 1963. Also cited is W. A. Robson, *Justice and Administrative Law*, 1951

The Northern Ireland Assembly's Ad Hoc Committee on the draft Bill was unable to reach a consensus on the issue:[46]

> The Committee considered the issues of symbols and declarations in the wider context of court buildings and proceedings but was unable to reach a consensus. Members noted that these issues were likely to be addressed in papers submitted by those political parties of the Assembly which were represented on the Committee.

In its submission to the Committee, the Northern Ireland Human Rights Commission endorsed the prohibition of the display of the Royal Arms, and the changes to the Judicial Oath. However, it disagreed with the decision to allow the Royal Arms and the Union flag to remain on display outside courthouses:[47]

> 44. It appears from clause 62(1) (prohibiting display of the Royal Arms inside the courtroom) that the intention is to "neutralise" the appearance of the courts. This would be in keeping with the removal of references to the monarch in the judicial oath or affirmation (clause 16) and with recommendation no. 142 of the Criminal Justice Review (and current Court Service policy) in relation to the declaration of "God Save The Queen". It is also consistent with the commitment to parity of esteem in the Belfast (Good Friday) Agreement and with the general principle that workspaces should be free of partisan displays.
>
> More particularly, these changes are consistent with international standards:
>
> The Universal Declaration of Human Rights asserts the rights to "equality before the law" and a hearing before an "independent and impartial tribunal". It ought to follow that court premises are so designed as to express the concepts of equality, independence and impartiality.
>
> Those rights are restated in the UN's International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. They are reaffirmed in substantially identical terms in the European Convention on Human Rights and in other major regional and national instruments.
>
> The UN Basic Principles on the Independence of the Judiciary (1985) affirm that "the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality".
>
> The Principles further state that "The judiciary shall decide matters before them impartially…without any …improper influences…or interferences, direct or

---

[46] Ad Hoc Committee's *Report on the Draft Justice (NI) Bill*, Session 2001/02, Second Report at: http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm, paragraph 59

[47] Northern Ireland Human Rights Commission, *Submission to the Northern Ireland Assembly Ad Hoc Committee*, 7 January 2002, Reproduced in Ad Hoc Committee's *Report on the Draft Justice (NI) Bill*, Session 2001/02, Second Report at: http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm

> indirect, from any quarter or for any reason" and that "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected." The latter passage is especially important in this context because it establishes that judicial independence is not merely a matter of the relationship between judges and the executive but also requires the business of the courts to be conducted in ways that ensure the equal treatment of, and demonstrate equal respect for, all persons before the law.
> In this context, it is difficult to understand why recommendation no. 141 of the Criminal Justice Review and the subsequent sub-clauses of clause 62 should permit the display of controversial symbols (the Royal Arms and the Union flag) on or outside court-houses.
>
> Recommendation no. 124 of the Criminal Justice Review included the statement that the courts should operate in a way that promotes confidence in the criminal justice system. It is clearly desirable that justice should be administered in circumstances which proclaim parity of esteem and inspire public confidence in equality of treatment. The system of civil and criminal justice in Northern Ireland must, in order to be effective, avoid endorsement of either of the main political identities. Courts are public buildings, and should be accessible to, and welcoming of, all members of the public.
>
> At present the Commission is inclined to the view that it would be preferable that clause 62 should require, or as a minimum permit, the removal of all symbols which are not regarded as neutral. At the very least, the clause should explicitly permit the removal of signage that is not physically part of the fabric of the building, e.g. free-standing signs or detachable plaques rather than carved representations of the Arms.

D. Debate in the Northern Ireland Assembly

The Northern Ireland Assembly discussed the proposals for the Judicial Oath and the Royal Coat of Arms when it debated a motion to take note of the Report of the Ad Hoc Committee on Criminal Justice Reform on 14 January 2002.[48]

Alban Maginness, for the SDLP, argued that providing there was parity of esteem for the two main political traditions, various solutions were possible:

> The issue of symbols has been raised, and that is important to many of us in the political arena. In a personal capacity, the Chairperson has quite rightly expressed concern about symbols being destroyed.

[48] Northern Ireland Assembly Official Report, 14 January 2002 pp 389-399, available at http://www.ni-assembly.gov.uk/record/020114.htm

> We in the SDLP believe that there are three ways to approach the problem of symbolism. In no order of preference they are: parity of symbolism, which means having symbolism representative of the Irish Nationalist political tradition and the British Unionist political tradition; complete neutrality, which the present proposals prefer for courtrooms, is worth considering, and it is something that the SDLP believes has the potential to create a unified approach in the community; there could be new and agreed symbolism, which, again, the SDLP says is worth exploring.
>
> The SDLP does not prefer any one approach above the others. We ask political parties to look at the proposals and decide which is best in relation to symbolism. The agreement has created a new political dispensation in which parity of esteem is regarded as a fundamental principle - parity of esteem between the two major political traditions in this society. Therefore, one has to have an approach that meets the principle of parity of esteem. The Government's proposals on flying the flag over courthouses, for example, is wrong because again we are dealing with one symbol representative of one political tradition. The continuance of symbolism on the exterior of buildings is wrong.[49]

Peter Weir, for the Ulster Unionists, took issue with Mr Maginnis over his characterisation of the options:

> Finally, I want to talk about the erosion of Britishness that is contained in a number of aspects of the report, which have already been mentioned. Mr Maginness gave us three options. He seems to have studiously ignored the fourth, which is that the courts acknowledge that we are part of the United Kingdom. On issues such as the oath of allegiance to the Queen, the flying of flags and the continuance of the display of royal arms in courtrooms, we must acknowledge that we are part of the United Kingdom.
>
> It seems that the solution that has been offered - whereby royal arms are left on existing buildings, but no new buildings will have them - is an indication, not of our Britishness, but that we are moving into some sort of neutral state with a gesture to the past from the Government. The Secretary of State was concerned that "a cold house for Unionists" would be created; to allow these recommendations to go through would create arctic conditions for Unionists.[50]

Gregory Campbell, for the DUP, pointed to the contrast with Scotland:

> The issue of removing symbols arose several times during Committee evidence sessions, including the meeting with the Northern Ireland Court Service on 4 December. I asked Mr Lavery of the Northern Ireland Court Service the following question:

---

49 ibid
50 Ibid

> "Whatever the political developments within Nationalism in Scotland, they have not yet led to the removal - simple or otherwise - of the current symbols of justice."

He replied:

> "The Scottish court system has its own distinctive characteristics, but they have existed for longer. As far as the principal thrust of your question is concerned, there has been no change in symbols."

When the nettle is finally grasped, we shall have to analyse the fact that a cold house exists in Northern Ireland. When, four weeks ago, the Secretary of State said that he wanted to avoid the creation of a cold house, he used the wrong tense. It is not a possibility; it is a fact, and one that must be rectified. A cold house exists for the Unionist community. Despite the emergence of Nationalism in court systems in other parts of the United Kingdom, such as Scotland, and although the political manifestations of Nationalism have fluctuated and changed from year to year, there has been no demand for the removal of the royal emblems there.

That should alone have sufficient weight to warn against proceeding towards the removal of symbols from existing courts.[51]

Mitchel McLaughlin, for Sinn Féin, emphasised the importance of a "neutral environment" within the court system.

Reference has been made to emblems and symbols. Sinn Féin has serious concerns about the approach that has been taken. The Good Friday Agreement provides very clear direction on the matter - and we agreed that. Notwithstanding the DUP's arguments about whether everyone agreed with it, three out of four voters agreed with it. While it is a very healthy practice in democratic discussion and decision-making for people to have a contrary view, when a decision is made by such an overwhelming majority we are entitled to see all parties accept that decision if we are going to institutionalise the process of conflict resolution. If people constantly undermine it, challenge it, deride it and deny it the legitimacy that it is entitled to, they will contribute only to undermining people's confidence in politics as a means of resolving the conflict and the division in our society.

The issue of a neutral environment within the court system is critical. The royal crest adds nothing to the administration or the experience of justice. Almost half of the community who live in the North are alienated from that promotion of one aspect of political opinion in the Six Counties, and we have to take account of that. It is not beyond us to create a neutral environment. We can achieve it without removing anyone's rights, and we can do it in a manner that reflects the rights of everyone.

The issues of the Royal Courts of Justice, the Crown Court, Queen's Counsel and the use of the British royal crest need to be addressed. They need to be taken out of the criminal justice system, which is meant to be in common ownership. It is

---

[51] ibid

> meant to be a shared experience for everyone in the community whether you are Republican, Nationalist, Unionist or however you describe yourself. We need to be prepared to face the issue and to develop systems that will allow everyone to become part of the criminal justice process and to give equal allegiance, support and authority to it.[52]

III The Judiciary and judicial appointments[53]

A. Excepted and Reserved Matters: Judicial Office Holders

Under *the Northern Ireland Act 1998*, the appointment and removal of judges, magistrates and other holders of judicial office in Northern Ireland are classified as "excepted", which means that the Lord Chancellor's responsibility for judicial appointments in Northern Ireland could not be devolved to the Assembly other than by primary legislation at Westminster. This contrasts with most other justice functions, including courts administration, which are in the "reserved" category; they can be devolved by an Order in Council laid before Parliament in accordance with section 4(2) of the Northern Ireland Act 1998.

Part VI of the Bill allows the appointment and removal of specified judicial office holders to become a reserved rather than an excepted matter, under *clause 81*. This will enable such appointments to be eventually transferred to the Assembly, provided there is sufficient cross-community support, as defined in s4(5) of the *Northern Ireland Act 1998*. During the passage of the *Northern Ireland Act 1998* the junior minister, Lord Dubs said:[54]

> We have accordingly taken as our starting point the divisions between excepted and reserved matters set out in the Northern Ireland Constitution Act 1973.
>
> As your Lordships will recall, we have had to bring some of the descriptions in the schedules up to date for one reason or another. Putting matters in Schedule 2--the excepted field--is a big step, a once and for all move. *Clause 4* of the Bill allows for movement between the reserved and the transferred fields by Order in Council. On the other hand, excepted matters cannot be moved out of that category other than by way of a Westminster Bill. The Assembly will not be able to legislate on any excepted matter except where it is ancillary to other provisions. This differs from the Scotland Bill where there is no such inflexibility. It therefore follows that we should only put matters in the excepted

---

52 ibid

53 by Sally Broadbridge and Oonagh Gay

54 HL Deb 11 November 1008 c775, at http://www.publications.parliament.uk/pa/ld199798/ldhansrd/vo981111/text/81111-07.htm#81111-07_spnew2

> category where, in all the circumstances, it would be wrong for the Assembly to have any power at all to legislate on any aspect of them, even a peripheral one, and where we see no likelihood of the situation ever changing. We have therefore sought to retain flexibility by preferring the reserved category. The result is the list of matters in Schedule 3. That list includes a number of matters which the agreement envisages as being suitable for transfer such as criminal justice and policing. Some of these matters may be transferred sooner rather than later, but only when the time is right and there is a general agreement required by the Bill.

B. The present system

The present judicial appointment processes and rules for eligibility in Northern Ireland are broadly similar to those in England and Wales, particularly at the more senior levels. Differences at the less senior levels reflect the different court systems in the two jurisdictions. The Lord Chancellor has been responsible for making or advising on all judicial appointments since 1973, and has had responsibility for the unified courts administration since 1978. The Review Group commented:

> We understand that the transfer of these responsibilities to the Lord Chancellor was driven mainly by a desire to secure and demonstrate the independence of judicial matters and courts administration from any political office that was closely associated with political and security developments in Northern Ireland.[55]

They recommended that on devolution, political responsibility and accountability for the judicial appointments process should lie with the First Minister and the deputy First Minister[56], who would take over responsibility for making recommendations to Her Majesty The Queen for appointments to offices down to the level of resident magistrate [57] and for making appointments below that level. They also recommended that legislation enabling responsibility for judicial appointments to be devolved should include provision for the establishment of a Judicial Appointments Commission which would be responsible for organising and overseeing, and for making recommendations on, judicial appointments from the level of High Court judge downwards[58]. All the recommendations were accepted, and have been generally welcomed, although there has been some disagreement as to who should serve on the commission and whether the proposals go far enough[59].

---

55 Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland*, March 2000, available at http://www.nio.gov.uk/pdf/mainreport.pdf, Para 6.16

56 Ibid, recommendation 74

57 Ibid, recommendation 75, 84

58 Ibid, recommendations 77, 81

59 see below

C. The effect of the changes to appointments and eligibility

The current arrangements for appointment to judicial posts relevant to the criminal courts are set out in Table A below, taken from the Review's Report[60]. Table B show the arrangements proposed by the Bill. As well as the new responsibilities for the First Minister and deputy First Minister, Table B shows changes in eligibility. This is in accordance with the Review recommendations 70 and 71, endorsing the view that extensive experience of advocacy should not be regarded as a prerequisite of success in a judicial capacity and that consideration be given to consolidating and amending the legislation relating to eligibility criteria for judicial appointments with a view to shifting the emphasis to standing (i.e. period since being called to the Bar or admitted as a solicitor) rather than practice.

Table A

Office	**Eligibility**	**Present complement**	**Procedure**
Lord Chief Justice	A Lord Justice of Appeal [or qualified for appointment as] or a Lord of Appeal in Ordinary having practised for not less than 10 years at the Bar in Northern Ireland.	1	Appointment by The Queen on the recommendation of the Prime Minister following advice from the Lord Chancellor.
Lord Justice of Appeal	A judge of the High Court or any person who has practised for not less than 15 years at the Bar of Northern Ireland.	3	Appointment by The Queen on the recommendation of the Prime Minister following advice from the Lord Chancellor.
High Court Judge	Not less than 10 years' practice at the Bar of Northern Ireland County Court	7	Appointment by The Queen on the recommendation of the Lord Chancellor following advice from the Lord Chief Justice on applicants who respond to an advertisement in the journal of the Law Society and in the Bar Library or persons whom he considers most suitable whether they have submitted an application form or not.
County Court Judge	Not less than 10 years' practice as a barrister or solicitor or not less than 3 years as a deputy count court judge	14	Appointment by The Queen on the recommendation of the Lord Chancellor following advice from the Lord Chief Justice on applicants who respond to an advertisement in the journal of the Law Society and in the Bar Library and are successful at interview.
Resident Magistrate	Not less than 7 years' practice as a barrister or solicitor	17	Appointment by The Queen on the recommendation of the Lord Chancellor on applicants who respond

[60] Op cit, p112

			to an advertisement in the journal of the Law Society and in the Bar Library and are successful at interview.
Deputy Resident Magistrate (part-time)	Not less than 7 years' practice as a barrister or solicitor.	20	Applicants who respond to an advertisement in the journal of the Law Society and in the Bar Library and are successful at interview are appointed by the Lord Chancellor.

Table B

Office	**Eligibility**	**New Procedure**
Lord Chief Justice	A Lord Justice of Appeal [or qualified for appointment as] or a Lord of Appeal in Ordinary having *standing* of not less than 10 years as a member of the Bar in Northern Ireland *or a solicitor.* *(clause 19)*	Appointment by The Queen on the recommendation of the Prime Minister following consultation with the First Minister and deputy First Minister (who will have the advice of the Judicial Appointments Commission as to the procedure to adopt) and the Lord Chief Justice (or in his absence, the senior Lord Justice of Appeal) *(clause 4)*
Lord Justice of Appeal	A judge of the High Court or any person who has *standing* of not less than 15 years as a member of the Bar of Northern Ireland *or a solicitor.* *(clause 19*)	Appointment by The Queen on the recommendation of the Prime Minister following consultation with the First Minister and deputy First Minister (who will have the advice of the Judicial Appointments Commission as to the procedure to adopt) and the Lord Chief Justice (or in his absence, the senior Lord Justice of Appeal) *(clause 4)*
High Court Judge	Not less than 10 years' *standing* as a member of the Bar of Northern Ireland. County Court *or a solicitor* *(clause 19)*	Appointment by The Queen on the recommendation of the First Minister and deputy First Minister following selection by the Commission *(clauses 4 & 5 and schedule 1*)
County Court Judge	Not less than 10 years' *standing* as a barrister or solicitor or not less than 3 years as a deputy count court judge *(clause 19)*	Appointment by The Queen on the recommendation of the First Minister and deputy First Minister following selection by the Commission *(clause 5 and schedule 1)*
District Judge (Magistrates' Courts) in Northern Ireland (new name for Resident Magistrate (clause 9)	Not less than 7 years' *standing* as a barrister or solicitor *(clause 19)*	Appointment by The Queen on the recommendation of the First Minister and deputy First Minister following selection by the Commission *(clause 5 and schedule 1)*
Deputy District Judge (Magistrates' Courts) in Northern Ireland	Not less than 7 years' *standing* as a barrister or solicitor *(clause 19)*	Appointment by First Minister and deputy First Minister following selection by the Commission *(clause 5 and schedule 1)*

The Review Group's recommendation[61] that primary Westminster legislation should make explicit reference to the requirement for an independent judiciary and place a duty on the organs of government to uphold and protect that independence is reflected in *clause 1*, which provides that those with responsibility for the administration of justice [whoever they are] must uphold the continued independence of the judiciary. Their recommendation[62] that the Lord Chief Justice should have a clearly defined position as head of the whole judiciary (including the lay magistracy) in Northern Ireland is implemented by *clause 13*[63], *The role of the Lord Chief Justice*, which constitutes him president of the Court of Appeal, the High Court, the Crown Court, the county courts and magistrates' courts as well as head of the judges and magistrates who sit in them. Schedule 5 transfers some of the specific functions of the Lord Chancellor to him.

D. Membership of the Judicial Appointments Commission

1. Recommendations

The Review Group recommended:

> **Recommendation 78**
> As for membership of the Commission, we envisage a strong judicial representation drawn from all tiers of the judiciary (including a representative of the lay magistracy - see Chapter 7) and nominated for appointment by the Lord Chief Justice after consultation with each of those tiers. The Lord Chief Justice or his nominee would chair the Commission. In line with practice elsewhere, there would be one representative nominated by the Law Society and one by the Bar Council. In total the Commission might consist of around five judicial members, two from the professions and four or five lay members.
>
> **Recommendation 79**
> The lay members of the Commission should be drawn from both sides of the community, including both men and women. This could be achieved through a legislative provision along the lines of section 68(3) of the Northern Ireland Act 1998 which provides that the Secretary of State should, so far as practicable, secure that the Northern Ireland Human Rights Commission is representative of the community in Northern Ireland.
>
> **Recommendation 80**
> The First Minister and Deputy First Minister would appoint the nominees of the Lord Chief Justice and the professions and would secure the appointment of lay members through procedures in accordance with the guidelines for public appointments (the Nolan procedures).

---

61 No 67
62 No 109
63 This provision has been added since publication of the draft Bill for consultation

2. Implementation

Clause 3 accordingly provides for the creation of a Judicial Appointments Commission whose members will be:

- The chairman, who will be the Lord Chief Justice (or in his absence the senior Lord Justice of Appeal)
- Five judicial members nominated by the Lord Chief Justice (one from each layer)
- Two legal profession members (a barrister nominated by the Bar Council and a solicitor nominated by the Law Society) and
- Five lay members who have never held protected judicial office or been barristers or solicitors.

They are to be appointed by the First Minister and deputy First Minister who must, in appointing the lay members -

> so far as possible secure that the lay members (taken together) are representative of the community in Northern Ireland.

3. Debate in the Northern Ireland Assembly

Duncan Shipley Dalton, the Chairperson of the Ad Hoc Committee, described its concerns and lack of agreement on the issue :

> The judicial appointments commission gave the Committee some concerns. In particular, its level of judicial representation led some members of the Committee to consider that the lay element might not be effective. The Committee explored the possibility of introducing a political element but could not agree the precise outworking of the proposal. Instead, the Committee has suggested that the Secretary of State explore that matter further.[64]

Alban Maginness for the SDP argued that the proposal did not go far enough, and that the Commission should not be chaired by a judicial person:

> There are several pertinent issues in relation to the criminal justice review. I shall deal with one in particular - the judicial appointments commission. It is an important innovation because there has been a serious lack of transparency in the appointment of judges at all levels. Indeed, the entire appointments' system has been shrouded in secrecy, and that must be considered unsatisfactory by anybody who desires openness in Government. Therefore, the establishment of a judicial appointments commission is to be welcomed, but although the SDLP welcomes

---

[64] Northern Ireland Assembly Official Report, 14 January 2002, available at http://www.ni-assembly.gov.uk/record/020114.htm

> that, it does not believe that it goes far enough. However, it is a good step forward, and it is progress, given the present opaque system.
>
> The SDLP's submission says that the judicial appointments commission should not be chaired by the Lord Chief Justice. It should have an independent chairperson, or at least a lay chairperson, rather than a judicial figure. We also believe that there should be greater lay membership on the commission, or, at the very least, equality between the judicial or lawyer members and the lay members. The SDLP would prefer to see more lay members than judicial members because the danger in the system that we are reconstructing is that the judiciary will have too much influence, power and control in the appointment of judges. As politicians, we in the SDLP believe that that is too much power to give to that body.
>
> One must welcome the establishment of the commission. However, we can constructively criticise the Government's proposals and hope that those criticisms will be taken on board. We want a judiciary that fully reflects or represents the community. That should be the basic criterion upon which the judicial appointments system should work, and that point should be firmly written into the legislation.

Mitchel McLaughlin for Sinn Féin shared that concern:

> People generally welcomed the introduction of a judicial appointments commission. However, concerns have been raised, with a degree of unanimity, that the Lord Chief Justice will chair that body and have the power to appoint five of the 11 positions. One can reasonably anticipate a corporate approach to the appointments process. There is a very real possibility of little or no change and another lost opportunity.

But Peter Weir (UUP) disagreed:

> I raise a concern about the independence of the judiciary and the legal profession. It is welcome that the report highlights the importance of the legal profession's independence. Any follow-through as to what that means in practice is sadly lacking. Here I diverge from Alban Maginness, who indicated that he wanted greater lay involvement in the judicial appointments commission. Among the Unionist community, concerns were raised during the period of the Anglo-Irish Agreement that judicial appointments were susceptible to pressure and influence from the Government of the Republic of Ireland. Whatever the truth of that perception, it existed. In moving away from that subtle pressure to a more open and transparent pressure by the appointment of a large percentage of lay people, there is a danger of perpetuating a political pattern. If growing cronyism is to be reinforced, with the First Minister and the Deputy First Minister having responsibility for almost half of the appointees to a judicial appointments commission, or even through representation of political parties, the independence of the judiciary will be threatened.

> One Member said earlier that his key concern was to see a judiciary that was reflective of society, a viewpoint with which I disagree. It is not that I do not want a judiciary that is reflective of society, but the key test of any judiciary must be that people are appointed on merit.
>
> Leaving appointments largely in the hands of the judiciary and the two legal professions provides greater opportunity for ensuring that the key test is merit, rather than some form of political balance or political correctness.

Professor Monica McWilliams (Northern Ireland Women's Coalition) raised other concerns about representation of minorities:

> I welcome the criminal justice review's recommendations on judicial appointments. Indeed, they are long overdue in Northern Ireland. I have also looked at the Northern Ireland Court Service's screening policies, and I am concerned that some of the recommendations seem to be taken more seriously than others. Needless to say, the law profession is more concerned that both barristers and solicitors should be considered for future appointments.
> However, the numbers of ethnic minorities and women in senior judicial positions have not been dealt with in the debate so far. The Northern Ireland Court Service's screening policies on the issue of equity flag up the issues of religion and ethnic minorities, but they do not pay the same attention to disability or gender. I am concerned that they say that these recommendations will positively contribute to fairer participation in future but that no impact assessment is required on the eligibility criteria or equity monitoring, and yet on the issues of the oath of allegiance and symbols in courts, they call for a full impact assessment.
>
> […]
>
> My concern comes from those who have been before the courts in the past. Concern is expressed outside Northern Ireland. If we are to broaden eligibility and introduce some element so that the composition of the judiciary truly reflects the composition of society, that should be based not just on religion, which has been the focus of the debate to date, but also on gender.
>
> […]
>
> With regard to appointments and training, if we in Northern Ireland do not open up the judiciary, move it out, make it representative of the community and make it more understanding of the problems that are faced in our society, then we truly have missed an opportunity. If it is said of the police, then equally it should have been said about the judiciary. As I have said, the judiciary have gotten off lightly in the public debate on this subject.

.

Alex Attwood (SDLP)thought that the Commission should be responsible for making the appointments:

> […] the British Government's responses do not follow the recommendations of the review. Consistent with some of the Ad Hoc Committee's statements, we must ensure that the draft law is changed so that the judiciary reflects the community and all judges are subjected to training in human rights. All appointments must be the responsibility of a commission for judicial appointments, which must not just advise on appointments but make them. The judicial and legal membership of the commission must not have undue influence, power or number. Consistent with some of the recommendations of the Ad Hoc Committee and with the review of the criminal justice system, we hope that the British Government will hear these arguments.

Ian Paisley Jnr (DUP) was concerned to prevent politicisation of the judiciary:

> Various parties wanted to exercise political influence over the area of criminal justice and the appointment of senior judges. However, there was strong disagreement about who should have that influence. I can understand why the Ulster Unionist Party and the SDLP would be relaxed about political control over senior appointments at the moment. However, that approach applies in the short term only, because after the next election those parties may not be in the Office of the First Minister and the Deputy First Minister. They should think long and hard about whether the control of justice by them, as politicians, is in the long-term interests of Northern Ireland. They must think about whether the criminal justice system should be handed to politicians, especially if one of the positions in that Office happened to be filled by Sinn Féin/IRA. It is important that people reflect on that and recognise exactly what they are doing.
>
> The politicisation of the judiciary must be rejected at all costs. Witnesses put that view to the Committee, time and time again. The Law Society of Northern Ireland came before the Committee to talk about the politicisation of the legal profession. It said:
>
> > "We are making this point because we see that there is a potential risk. We are not in a position to say that the proposals answer our fears and concerns."
>
> The Law Society further added that
>
> > "where a department of justice is being created and where the role of the Lord Chancellor is being removed - as seems to be contemplated from the constitutional arrangements that are part of these proposals - important questions must be asked as to who makes decisions about the legal profession. Under the present constitutional arrangement, solicitors are officers of the court. For that reason, when it comes to matters arising within the Law Society that require to be appealed, the supervisory function is not carried out by a politician. It is in the hands of the Lord Chief Justice; and we would want to be clear that this is going to be preserved, or indeed, enhanced and reinforced."
>
> That is not my position; it is the position of the Law Society, the body that speaks for practitioners from a variety of backgrounds in Northern Ireland.

> The Law Society took the same position in minutes of evidence from a Committee session on 29 November 2001:
>
> > "We need to ensure that the new constitutional arrangements do not impinge on the independence of the legal profession. It is a question of preserving the independence, rather than creating it."

In summing up, Mr Dalton said:

> I am surprised by Mr Paisley Jnr's comments about this matter when the DUP's submission recommended that the judicial appointments commission could consider having members appointed using the d'Hondt formula. Perhaps he was saying not so much that he is opposed to any concept of political involvement in the appointments but rather that the political involvement should be widespread and reflect all aspects of the community.

There have been suggestions that a Judicial Appointments Commission should be set up before devolution of justice functions. For example, the Alliance Party position paper states:

> We do not believe that this change to appointments to the Judiciary by Commission should take place only when justice functions and legislative capacity has been devolved to the Northern Ireland Assembly and Executive. The recommendation of the creation of a commission goes a long way in ensuring a more transparent appointment process. Such a commission should not then await further developments of the political process but should be put in place now[65].

That could not be achieved by earlier commencement alone, since the provisions are drafted on the basis that the Commission would work alongside the First Minister and deputy First Minister.

E. How the Judicial Appointments Commission would operate

1. Recommendations

The Review Group recommended:

> **Recommendation 82**
> Working through an Appointments Unit, the Commission would organise its selection panels which, for appointments at deputy resident magistrate and above, would always include at least one member of the judiciary at the tier to which the appointment was to be made and a lay person. The selection panel would shortlist, take account of the available information on the candidates, and conduct interviews with a view to making recommendations to the Commission.

---

[65] para 4.4

> **Recommendation 83**
> We recommend that for all judicial appointments, from lay magistrate to High Court judge, and all tribunal appointments, the Commission should submit a report of the selection process to the First Minister and Deputy First Minister together with a clear recommendation. [para. 6.106]

> **Recommendation 68**
> Merit, including the ability to do the job, thus providing the best possible quality of justice, must in our view continue to be the key criterion in determining appointments.[66]

2. Implementation

Clause 5 (2) provides that

> (2) Only a person selected by the Commission may be appointed, or recommended for appointment to a listed judicial office

The offices which are listed judicial offices are set out in *Schedule 1* (which may be amended by order) presently ranging from High Court judge to lay magistrate and covering coroners, various tribunal offices, and membership of various panels, as well as judicial offices relevant the criminal courts.

Clause 5(7) provides that selection must be made solely on the basis of merit. The Commission is obliged in each instance to make a report of its process of selection indicating the basis of its decision. The First Minister and deputy may require the Commission to reconsider its decision, with reasons, in which case the Commission must reconsider and then either reaffirm its decision or select a different person, again with a report indicating the basis of the decision. There does not appear to be any provision for the eventuality of the First Minister and deputy continuing to be unwilling to appoint a person selected by the Commission.

3. Consistency of criteria

The Review Group recommended that

> It should be a stated objective of whoever is responsible for appointments to engage in a programme of action to secure the development of a judiciary that is as reflective of Northern Ireland society, in particular by community background and gender, as can be achieved consistent with the overriding requirement of merit. [67]

---

[66] Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland*, March 2000, available at http://www.nio.gov.uk/pdf/mainreport.pdf

[67] Ibid, recommendation 69

When the Northern Ireland Grand Committee considered the matter of the Review, in July 1999[68], David Trimble commented that the merit principle produced a pattern of appointments:

> The hon. and learned Gentlemen will correct me if I am wrong in saying that the pattern for several years has been alternate--a Protestant judge is appointed, then a Catholic judge is appointed, then a Protestant judge is appointed, with remarkable regularity. It is remarkable that the merit principle should produce such a pattern, and--I choose my words carefully--the Minister might want to remind the Lord Chancellor that the fair employment legislation applies to him and to the judicial appointments that he makes in Northern Ireland. It would be wrong for him to take into account in any way the religious or political beliefs of an appointee. However, I doubt whether anyone in the Bar believes that they are not taken into account.

Further comments have been made in the Parties' position papers. For example, Sinn Féin's says:

> It is the position of Sinn Féin that the draft Justice Bill must address the following areas:
>
> It is unreasonable to expect that those who facilitated the distortion of the criminal justice system should be allowed to remain in place in the absence of clear and demonstrable evidence of a change in attitude in relation to the framework of repressive powers available to the judiciary, and in the absence of an acknowledgement that the courts operated as an adjunct to the British state's criminalisation strategies. Future judicial figures should also be drawn from a wider pool of qualified candidates in order to eradicate the corrosive and unaccountable system of patronage currently in operation.
>
> […]
>
> The under-representation of nationalists and women amongst the judiciary must be dealt with as a matter of urgency. The relevant areas to address also include the issues of class background, ethnic origin and political allegiance. A judicial structure should be fully representative of the society it serves and a monitoring mechanism should ensure that this occurs and is maintained within a specified time frame. The methodology of judicial appointments should be re-framed to ensure it is administered in a demonstrably transparent and fair manner[69].

while the SDLP's queried the use of "representativeness in the Review. They noted:

---

[68] NIGC Debate 8 July 1999 col 15

[69] Report and Proceedings of the Ad Hoc Committee of the Assembly, 8.1.02, p114, available at http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm

> the concern of the Review to achieve the objective of "Representativeness" in the community composition of the Judiciary. The SDLP does not accept that the term "representativeness" is an inappropriate term to use in this regard. What is required is an open recognition of the imbalanced nature of the present senior Judiciary and a frank and sustained attempt to remedy the community imbalance. The Party is puzzled by the decision of the Review not to follow the logic of the commitment to "representativeness" by proposing that as with religious monitoring, there would also be no political or community monitoring of the Judiciary. Surely in an institution as sensitive and as important as the Judiciary every effort should be made to achieve a community/political balance and an important method of achieving this objective is to require both religious and political/community monitoring. The SDLP find this a very curious distinction made by the Review. In addition, candidates for office should be asked about community and ethnic backgrounds and opinion[70].

When asked to give clarification, the director of the Northern Ireland Court Service explained to the Ad Hoc Committee of the Northern Ireland Assembly:

> The judiciary is not intended to be representative of any sector of the community. That is why the review report uses a different term. It speaks of an aspiration or expectation that the judiciary be more fully reflective of the community. There are international examples of attempts to explicitly make appointments that are acknowledged to be representative of different groups in the community. However, such attempts gave rise to difficulties. The explanation is that, although it is appropriate that it be a statutory requirement to make every effort to select lay members of the JAC who fully represent of the community, it is not appropriate to use that same method to select members of the judiciary. I do not know whether you find that argument convincing.
>
> The involvement of the judiciary in the JAC would be different from that of the lay members. The six judges are deliberately chosen from each rung of the judicial ladder, from the lay magistrate to the Lord Chief Justice. Whether the lay magistrate should be considered as a member of the judiciary or as a lay person is an interesting question. The position of lay magistrate is in a different category from the rest of the judiciary because the person who holds that position is not a professional lawyer, but a lay person appointed to the lay magistracy[71].

---

70 Ibid, p132

71 Minutes of Evidence, 4 December 2001, para 286, available at: http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm

F. Complaints about judges

1. Recommendations

The Review Group recommended that a complaints procedure be devised and published. This would make clear that complaints about the exercise of judicial discretion could only be addressed through the judicial (i.e. the appeal) process, which the Group believed to be essential if judicial independence was to be maintained. Complaints about conduct or behaviour would be the ultimate responsibility of the judiciary, although, as now, officials in the Court Service could be tasked with dealing with the administration of such matters[72]

They also recommended that for the most serious complaints which appeared to have substance, including those which might merit some form of public rebuke or even instigation of the procedure for removal from office, the Lord Chief Justice should have the option of establishing a judicial tribunal to inquire into the circumstances and make recommendations[73].

2. Implementation

Clause 17 will oblige the Lord Chief Justice to prepare a code of practice relating to the handling of complaints against any person who holds a protected judicial office (ie Lord Chief Justice, Lord Justice of Appeal, and the offices listed in Schedule 1).

G. Removal from office

1. Recommendations

The Review Group endorsed the current arrangements that give full-time judges and magistrates tenure during good behaviour until a statutory retirement age and recommended that removal from office of a judge or lay magistrate should only be possible on the basis of the finding of a judicial tribunal constituted under statutory authority and convened by the First Minister and Deputy First Minister or the Lord Chief Justice, that a magistrate or judge was unfit for office by reason of incapacity or misbehaviour[74].

2. Implementation

Accordingly *clause 6* makes provision for removal from the most senior judicial offices and *clause 7* makes provision for removal from listed judicial offices, while *clause 8*

---

72 Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland*, March 2000, recommendation 105, available at http://www.nio.gov.uk/pdf/mainreport.pdf

73 Ibid, recommendation 106

74 Ibid, recommendations 103 and 104

governs the convening of tribunals without whose recommendations holders of judicial office may not be removed.

H. Judicial Appointments Commissioner

Care should be taken to distinguish between the role of a Judicial Appointments *Commissioner*, appointed to oversee the current arrangements, and the Judicial Appointments *Commission* which would ultimately have an active and major role in the appointment process. The review body recommended:

> the early appointment of a person or persons of standing to oversee and monitor the fairness of all aspects of the existing appointments system and audit the implementation of those measures that can be introduced before devolution. Such a person or persons should not be a practising member of the legal profession, should be independent of the judicial system and government, and should have the confidence of all parts of the community. They should have access to all parts of the appointments process and report annually to the Lord Chancellor. That report should be published. [para. 6.123][75]

A *Commission* for Judicial Appointments in England and Wales was set up in 2001 following a recommendation made to the Lord Chancellor by Sir Leonard Peach, the former Commissioner for Public Appointments. Sir Colin Campbell was appointed First Commissioner in March 2001. The Lord Chancellor has said that following the publication of the First Commissioner's Report, he will decide whether it is time to go out to consultation on the possibility of an independent judicial appointments commission [for England and Wales] with a more than supervisory role. When he announced Sir Colin's appointment, the Lord Chancellor said

> Sir Colin and the Commission will exercise a fully independent role, advising me on any aspect of the appointment process it chooses. The First Commissioner and the Deputy Commissioners will be able to investigate every appointment, every piece of paper, every assessment, every opinion and they will also have the right to attend interviews for judicial appointments and meetings at which the most senior appointments are discussed[76].

Seven new commissioners were appointed in December 2001 to assist the First Commissioner in the independent auditing of the appointments of Judges and Queen's Counsels. One of them, John Simpson, will also be Commissioner for Judicial Appointments in Northern Ireland[77].

---

75 Ibid, recommendation 95

76 Lord Chancellor's Department: *Judicial Appointments: Annual Report* 2001

77 LCD Press notice 433/01 12 December 2001:*Commissioners for judicial appointments appointed*

IV Law Officers[78]

A. The present offices in the United Kingdom

The Attorney General for England and Wales has sat in the Westminster Parliament, as a minister in Her Majesty's Government, by long-standing custom. Under section 10 of the *Northern Ireland Constitution Act 1973*, the Attorney General for England and Wales is by virtue of that office the Attorney General for Northern Ireland also. He and the Solicitor General have in Northern Ireland the same rights of audience as members of the bar of Northern Ireland, by virtue of their membership of the bar of England and Wales. Since 1997[79] any function of the Attorney General or the Attorney General for Northern Ireland has been exercisable by the Solicitor General for England and Wales.

The long-standing practice of separate Law Officers for Scotland pre-dates devolution. The Lord Advocate and the Solicitor General in Scotland are appointed as ministers in the Scottish Executive, but currently do not sit in the Scottish Parliament. They must resign as members of the Executive if the Parliament passes a vote of no confidence in the Executive, but there is provision for the Lord Advocate to remain in office, exercising limited functions, until the appointment of a new administration.[80] Under s 27(1) of the *Scotland Act 1998* they may participate in proceedings to the extent permitted by standing orders, but not vote. The intention was to allow some accountability to the Parliament in respect of their decisions, including those related to individual cases, but the Officers may refuse to answer questions or produce documents if they consider that this might prejudice criminal proceedings or be contrary to the public interest, under s27(3) of the *Scotland Act*.

The Scottish Law Officers are required to register their interests in the register of members' interests in the Scottish Parliament, under s39(8) of the Scotland Act. Similar arrangements are made for the Attorney General for Northern Ireland in *clause 26* of the Bill. The Scottish Law Officers are appointed by the Queen on the recommendation of the First Minister and with the agreement of the Parliament.[81] They may only be removed by the Queen on the recommendation of the First Minister and with the approval of Parliament. Furthermore, the Parliament cannot remove the Lord Advocate from his position as head of the criminal prosecution and investigation of deaths in Scotland.[82]

---

78 by Sally Broadbridge and Oonagh Gay
79 *Law Officers Act 1997* sections 1(1) and 2(1)
80 Section 48(3) of the *Scotland Act 1998*
81 Section 48(1)
82 Section 29(2)(e)

B. The Review Group's recommendations

The Group recommended that political responsibility for the prosecution system should be devolved to local institutions along with other criminal justice functions, or as soon as possible after devolution of such functions[83], and that consideration be given to establishing a locally sponsored post of Attorney General who, inter alia, would have oversight of the prosecution service. They saw the Attorney General as a non-political figure drawn from the ranks of senior lawyers and appointed by the First Minister and Deputy First Minister. They suggested a fixed term appointment, with security of tenure, for five years, which would not be affected by the timing of Assembly terms.

On accountability, they recommended[84] that the formulation in section 27 of *the Scotland Act 1998* be adopted in that, although not a member of the Assembly, the Attorney should be enabled by Standing Orders to participate in Assembly business, for example through answering questions or making statements, but without voting rights, and that it be made clear on the face of legislation, as in section 27 of the Scotland Act 1998, that the Attorney could decline to answer questions on individual cases where to do so might prejudice criminal proceedings or would be contrary to the public interest.

C. Attorney General for Northern Ireland

1. Appointment, functions and accountability

Clause 23 provides for the appointment of an Attorney General for Northern Ireland, to be appointed by the First Minister and deputy First Minister acting jointly, after consulting the Advocate General for Northern Ireland.[85] He must be either a member of the Northern Ireland Bar or a solicitor, of at least 10 years standing[86].

Subsection (3), which has been added since publication of the draft Bill, specifies that

> The functions of the Attorney General for Northern Ireland shall be exercised by him independently of any other person.

Clause 24 provides for the terms of appointment of the Attorney General, including that a person may not be appointed for more than five years at a time and may not be appointed for a period which would mean that he would still be in office after reaching the age of 70. There is provision for resignation, salary, and pension, and disqualification from being a member of the House of Commons, the Northern Ireland Assembly or a Northern Ireland local authority. This non-political post may be contrasted with the Lord Advocate in Scotland and the Attorney General for England and Wales.

---

83 Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland*, March 2000, recommendation 42, available at http://www.nio.gov.uk/pdf/mainreport.pdf

84 recommendation 43

85 i.e. the Attorney General for England and Wales, see Schedule 7

86 the same qualification as for a High Court Judge, *clause* 19

Clause 26 is broadly similar to Section 27 of *the Scotland Act* , taking into account that the Lord Advocate or the Solicitor General for Scotland may or may not be a member of the Parliament, while the Attorney-General for Northern Ireland is disqualified from being a member of the Northern Ireland Assembly. The intention is to make him accountable before the Assembly for the operation of the Prosecution Service. He will be able to answer questions and make statements, but not to vote (*subsection (1)*), and will have the right to refuse to answer questions or produce documents on public interest grounds or where that might prejudice criminal proceedings (*subsection (3)*).

Clause 27 requires the Attorney General for Northern Ireland to write an annual report on how he has exercised his functions. Annual reports are to be laid before the Assembly by the First Minister and deputy, and published. They may exclude from the laid or published versions parts whose laying or publication would in their opinion be against the public interest or might jeopardise the safety of any person.

2. Removal from office

Clause 25 provides that the Attorney General for Northern Ireland may be removed from office by the First Minister and deputy on the recommendation of a special tribunal, on the ground of misbehaviour, or inability to perform the functions of the office. The members of the tribunal would be judges in England, Wales or Scotland (who have not held Northern Ireland judicial office), appointed by the Lord Chancellor. This provision is more stringent than the provisions for removal of the Scottish Law Officers, but is in line with the other provisions in the Bill which prevent the removal of judicial and other office holders otherwise than on the recommendation of a specially convened independent tribunal.

D. Advocate General for Northern Ireland

The office of Advocate General for Scotland was created by s87 of the *Scotland Act 1998* to give continuing constitutional and legal advice to the United Kingdom Government on Scottish affairs after devolution. In particular, the Advocate General can refer devolution disputes to the courts. The duties of the Lord Advocate in relation to reserved matters were transferred to the Advocate General, currently Lynda Clark, the member for Edinburgh Pentlands. The office forms part of the UK Government. *Clause 28* of the Bill combines the office of Attorney General for England and Wales with a new office of Advocate General for Northern Ireland. This new post would take responsibility for excepted matters, over which the Assembly has no jurisdiction. The *Explanatory Notes* give further detail:

> 53. There are certain functions of the present Attorney General for Northern Ireland that cannot be given to the Attorney General for Northern Ireland appointed by the First Minister and deputy First Minister. These relate to matters

> over which the Northern Ireland Assembly has no jurisdiction. These 'excepted matters' are set out in Schedule 2 to the Northern Ireland Act 1998 and include, for example, international relations (including treaties and the European Union), the defence of the realm, taxation and national security. Accordingly, this clause establishes a new post of Advocate General for Northern Ireland to take responsibility for Northern Ireland interests in these issues. *Subsection (1)* of this clause makes the Attorney General for England and Wales the holder of this post. The amendments set out in *subsection (2)* allow the Solicitor General (as the Attorney General for England and Wales's deputy) to also carry out the functions of the post of Advocate General for Northern Ireland. This is done by amending the provisions of the Law Officers Act 1997. The office and functions of the Advocate General are made an excepted matter by means of *subsection (4)*, which adds them to the list of excepted matters in Schedule 2 to the Northern Ireland Act 1998[87].

The current Attorney General is Lord Goldsmith and the Solicitor General is Harriet Harman. The functions of the Advocate General for Northern Ireland are set out in *clause 28* and *Schedule 7*. He will take over the responsibilities of the Attorney General for Northern Ireland for instituting devolution proceedings in the courts under Schedule 10 of the *Northern Ireland Act 1998.* He also takes over responsibility for referring the question of whether a bill would be within the legislative competence of the Northern Ireland Assembly to the Judicial Committee of the Privy Council. In Scotland, responsibilities for referral of bills are shared between the Lord Advocate, the Advocate General and the Attorney General.[88]

In the Northern Ireland Assembly debate[89], Duncan Shipley-Dalton stated that the functions would be exercised by the Solicitor General under the guise of the new post of Advocate General. It is the Attorney General who would hold the office of Advocate General, although by virtue of *the Law Officers Act 1997* as it will be amended, the Solicitor General would also have power to exercise the functions of the Advocate General (*clause 28(2)).*

The Office of the Advocate General in Scotland has played a major role in scrutinising legislative proposals from Westminster and Holyrood in an attempt to identify clashes of competence.[90] The different legal system in Scotland presumably made it impractical to create a single office of Advocate General for Scotland and Northern Ireland, as lead law officer for devolution issues. The office of the Attorney General for England and Wales has been used to acting in this area for Northern Ireland. The new office of Advocate General for Northern Ireland will also take over a number of consent to prosecution duties set out in Schedule 7.

---

87 http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/075/en/02075x--.htm para 53

88 s33(1) of the *Scotland Act 1998*

89 http://www.ni-assembly.gov.uk/record/011203.htm, p222

90 For background, see *The State of the Nations 2001* , Constitution Unit, pp182-3

E. The Ad Hoc Committee recommendation

The Committee recommended[91] that clause [25(3) of the Bill][92] be amended to provide authority for the Assembly to convene a tribunal following a resolution of the Assembly that is passed with the support of a number of members of the Assembly which equals or exceeds two thirds of the total number of seats in the Assembly. They

> noted that the First Minister and deputy First Minister had the power to convene a tribunal to remove the Attorney General from office. The Committee agreed that this unilateral power would not reflect the primacy that the Assembly will have, following the devolution of justice matters, and that the draft Bill should be amended to provide scope for the Assembly to have an input in this area. The Committee agreed that the power to convene a tribunal to consider removing the Attorney General from office should be given to the Assembly.

V Prosecution

A. Views expressed to the Review Group

Under current arrangements the Director of Public Prosecutions and his staff prosecute the more serious cases in the magistrates' courts as well as virtually all cases in the Crown Court, but the large majority of prosecutions are still undertaken by police officers. The Review Group stated that there was widespread support from a broad range of political parties, NGOs representing human rights interests, some practitioners and other individuals and organisations for the establishment of an independent prosecuting authority with responsibility for initiating and undertaking all prosecutions.[93] They also found that while many of those consulted did not express a view on the performance of the Director of Public Prosecutions, some had commented favourably, but some were critical:

> 4.65 Some concerns were expressed about the handling of particular types of case. Organisations representing the Nationalist perspective and some human rights groups said that the DPP's Department had not demonstrated the necessary objectivity, independence and rigour in pursuing cases where Nationalists had been the victims, especially where the security forces were implicated. A number of cases were quoted in some detail, giving rise to allegations of partiality and/or political influence on the prosecution process. There was concern that no public explanation was ever offered about why prosecutions had not taken place or

---

91 Report and Proceedings of the Ad Hoc Committee of the Assembly, 8.1.02, recommendation 12, available at http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm

92 21(3) of the draft Bill

93 Review of the Criminal Justice System in Northern Ireland, March 2000, para 4.56, available at http://www.nio.gov.uk/pdf/mainreport.pdf

> charges were withdrawn in such cases and that private enquiries of the DPP were invariably met with the response that it was not policy to give reasons.
>
> 4.66 On the same theme, comment was made by these groups about the very small number of successful prosecutions resulting from deaths caused by security force actions. There were similar concerns about what they felt was lack of action following allegations of police misconduct. It was said that the DPP gave the appearance of being in business in order to secure convictions on behalf of the RUC. Those expressing these views felt that there was not the constructive tension between the RUC and the DPP that was so crucial if the public were to have confidence in the prosecution system.[94]

They also recorded that:

> a number of people stressed the importance of learning from the experiences associated with the early years of the Crown Prosecution Service (CPS) in England and Wales. Under-funding at the start, over-centralisation and bureaucratic procedures, together with lawyers appearing in court insufficiently briefed, were mentioned in that context as pitfalls to be avoided[95].

B. Detailed recommendations

The Review Group made a number of detailed recommendations about the creation and duties of a new public prosecution service. Since this is an area in which the implementation has attracted some criticism, we reproduce some of the recommendations on detail as well as principal ones below.

> **Recommendation 17**
> We recommend that in all criminal cases, currently prosecuted by the DPP and the police, responsibility for determining whether to prosecute and for undertaking prosecutions should be vested in a single independent prosecuting authority.
>
> **Recommendation 19**
> We recommend that the powers contained in Article 6(3) of the Prosecution of Offences (Northern Ireland) Order 1972 be retained and that the head of the prosecution service should make clear publicly the service's ability and determination to prompt an investigation by the police of facts that come into its possession, if these appear to constitute allegations of the commission of a criminal offence, and to request further information from the police to assist it in coming to a decision on whether or not to prosecute.

---

94 Ibid
95 Ibid, Para 4.68

Recommendation 20
We recommend that Article 6(3) of the 1972 Order be supplemented with a provision enabling the prosecutor to refer a case to the Police Ombudsman for investigation where he or she is not satisfied with an Article 6(3) response.

Recommendation 21
We recommend that a duty be placed on the prosecutor to ensure that any allegations of malpractice by the police are fully investigated.

Recommendation 58
We recommend that the Department of the Director of Public Prosecutions be renamed the Public Prosecution Service for Northern Ireland.

Recommendation 22
We recommend that it be a clearly stated objective of the prosecution service to be available at the invitation of the police to provide advice on prosecutorial issues at any stage in the investigative process.

Recommendation 27
We recommend that consideration be given to amending the Police and Criminal Evidence (Northern Ireland) Order 1989 to enable a prosecutor, on reviewing the case, to withdraw the charges before the court appearance.

Recommendation 28
We recommend that (if the law is changed in the way we suggest), until the prosecutor has determined whether to proceed with the remand application, the fact of the arrest and the name of the person detained should not be publicised.

Recommendation 41
We recommend that outreach to the community and inter-agency working be a stated objective of the prosecution service.

Recommendation 45
There should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters.

Recommendation 46
We recommend that legislation should:
- confirm the independence of the prosecutor;
- make it an offence for anyone without a legitimate interest in a case to seek to influence the prosecutor not to pursue it; but
- make provision for statutory consultation between the head of the prosecution service and the Attorney General, at the request of either.

Recommendation 50
We recommend that the head of the prosecution service be required by statute to publish the following:
- an annual report.

- a code of practice outlining the factors to be taken into account in applying the evidential and public interest tests on whether to prosecute; and
- a code of ethics, based in part on the standards set out in UN Guidelines.

Recommendation 53
We recommend that the Criminal Justice Inspectorate be under a statutory duty to arrange for the inspection of the prosecution service, report to the Attorney General on any matter to do with the service which the Attorney refers to it and also report the outcome of inspections to the Attorney General.

Recommendation 55
Details of complaints procedures for the prosecution service should be publicly available and included in the service's annual report, along with an account of the handling of complaints throughout the year.

Recommendation 59
We recommend that the appointment process for the head of the Public Prosecution Service and deputy be through open competition, with a selection panel, in accordance with procedures established by the Civil Service Commissioners for Northern Ireland. These appointments would be made by the Attorney General for Northern Ireland. Appointments would be for a fixed term, or until a statutory retirement date. There should be statutory safeguards to ensure that removal from office by reason of misconduct or incapacity would be possible only after a recommendation to that effect coming from an independent tribunal.[96]

C. Implementation

1. The new public prosecution service

Clause 30 sets out the composition of the new Public Prosecution Service, which will consist of the Director of Public Prosecutions for Northern Ireland, the Deputy Director, and their staff. Staff to be designated Public Prosecutors must be members of the Bar of Northern Ireland or solicitors (and will not need to be instructed by solicitors).

2. Appointment of Director of Public Prosecutions

Clause 31 sets out the appointments criteria for the Director (and the Deputy), requiring legal qualification of 10 (and 7) years. They will be appointed by the Attorney General for Northern Ireland (after consulting the Advocate General), to hold office until the age of 65, or such later time as specified. Until devolution of criminal justice matters, the Director and Deputy are subject to the supervision of and may be removed by the Attorney General (of England and Wales) on the ground of misbehaviour or inability to

[96] Ibid

perform the office (*clause 40*). Thereafter removal will be only by the Attorney General on the recommendation of a tribunal (*clause 43*).

3. Conduct of prosecutions

Clause 32 sets out the core functions of the new Public Prosecution Service. Subsection (1) will require the Director to take over all prosecutions instituted by or on behalf of the police, while subsection (2) gives him power to institute and have the conduct of criminal proceedings in any other case. It will still be open to him to take over privately instituted prosecutions, except proceedings instituted by the Serious Fraud Office (subsection (3)). Under subsection (5) the Director must give to police forces such advice as appears to him appropriate on matters relating to the prosecution of offences.

4. Consent to prosecutions

Clause 34 has the effect of converting requirements that the consent of the Director of Public Prosecutions or of the Attorney General be obtained before prosecution for particular offences, so that it will always be the consent of the Director which must be obtained. It also provides the machinery for seeking consent.

5. Malpractice

One point made in the review was that the early involvement of the prosecutor in a case raised the question of the prosecutor's role where there was suspicion of malpractice on the part of the police investigators. Article 6(3) of *the Prosecution of Offences (Northern Ireland) Order 1972* places a duty on the Chief Constable to respond to a request from the Director of Public Prosecutions for information on any matter requiring investigation on the ground that it may involve a criminal offence . Under *the Police (Northern Ireland) Act 1998*, the Secretary of State and the Police Authority of Northern Ireland may refer a case to the Police Ombudsman where it is desirable to do so in the public interest. *Clause 35* extends that power to the Director. The Explanatory Notes say:

> The amendments … are intended to allow the Director to refer any allegations made to him of criminal conduct by police officers to the Police Ombudsman. The Ombudsman would then report the outcome of any investigation it was felt should be undertaken into those allegations to the Director. This builds on the Director's powers in clause 36[97].

Clause 33[98] bypasses the requirement under Article 47 of the Police and Criminal Evidence (Northern Ireland) Order 1989 that once a person has been charged, he must be brought before the magistrates court within the required timescale: it will enable the prosecutor to withdraw charges before there has been a court appearance.

---

[97] http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/075/en/02075x--.htm, para 67

[98] added since publication of the draft Bill for consultation

Recommendation 28 was accepted with qualifications:

> It is agreed that the name of the person arrested should not be publicised until the prosecutor has determined whether to proceed with the remand application. However, the Government considers that the presumption should be that the fact that an (unnamed) individual has been arrested is a legitimate matter for public knowledge.

The Explanatory Notes suggest:

> When combined with a direction that the name of the accused not be released before that first court appearance it will help to address the potential for damage to reputation if someone has been wrongly charged.[99]

6. Code of practice

Clause 38 provides that the Director must publish a Code of Practice for Public Prosecutors and barristers and solicitors conducting cases for him, to include a code of ethics laying down standards of conduct and practice. Its provisions must be set out in the annual report which the Director is required by *clause 39* to prepare as soon as possible after the end of each financial year.

Part 3 of the Bill (Other new institutions) and Schedule 8 would set up a new office of Inspector of Criminal Justice with responsibility for inspecting inter alia the Public Prosecution Service. See part VI of this paper.

7. Timing

On planning, the Review Group suggested that the timing of commencement of legislation that would flow from their recommendations should be planned so as to ensure that all necessary resources, preparation and training would be in place and completed before procedural changes were introduced,[100] and that those who considered the resource implications and the organisational issues arising from the proposals in respect of the prosecution function should examine the Glidewell Report,[101] with a view to seeing whether there are lessons to be learnt from the experience of England and Wales.[102]

---

99 http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/075/en/02075x--.htm, para 64

100 Review of the Criminal Justice System in Northern Ireland, March 2000, recommendation 30, available at http://www.nio.gov.uk/pdf/mainreport.pdf

101 *The Review of the Crown Prosecution Service*, Cm3960: a summary is available at http://www.archive.official-documents.co.uk/document/cm39/3972/3972.htm

102 Review of the Criminal Justice System in Northern Ireland, op cit, recommendation 66

D. Debate in the Northern Ireland Assembly

Recommendations 9 and 10 of the Ad Hoc Committee's Report related to the public prosecution service.[103] In the Northern Ireland Assembly's debate on the report, on 14 January 2002, Duncan Shipley-Dalton explained the Committee's concerns:

> The Committee devoted quite a bit of time to considering the proposed new public prosecution service. A number of poignant concerns were expressed. This is not the first time that the Government have sought to bring the elements of prosecution together in a central body. In Great Britain, that goal gave rise to the creation of the Crown Prosecution Service. Those Members who have read the conclusions of Sir Iain Glidewell's review of that particular body will understand that it was not a simple process by any means.
>
> A key element in that process was the issue of resources. The Committee's recommendation seeks an assurance from Government that proper resources will be made available to create a public prosecution service in Northern Ireland. The Committee also looked at the issues surrounding disclosure of reasons for not bringing prosecutions. While the Committee notes that there are sometimes clear and legitimate reasons why it is not always possible to provide reasons for not bringing a prosecution, the Committee recommends that greater transparency should be a key feature of the decision- making process.[104]

Alban Maginnis (SDP) did not believe that the proposals had gone far enough:

> The separation of the prosecution service from the office of Attorney-General is important, and the creation of an independent prosecution service is of great importance to this society. The proposals in the criminal justice review do not go far enough, but at least we are going in the right direction.[105]

Mitchel McLaughlin (Sinn Féin) also thought that the proposals were inadequate:

> The broad areas of concern are the prosecution service, the judiciary and issues of human rights and equality. Parties will bring their own analyses to bear, and I hope that their sum total will allow us to proceed. The outcome will be a much more representative, transparent and accountable criminal justice system. Despite party differences that is certainly a common goal.
>
> The fact that the review group, with some outside contributions, essentially consisted of the people who had previous responsibility for criminal justice meant that its remit was seriously damaged from the beginning. Though it is possible to

---

[103] Report and Proceedings of the Ad Hoc Committee of the Assembly, 8.1.02, available at http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm

[104] www.niassembly.gov.uk/record/020114.htm

[105] Ibid

> welcome aspects of the report, the problems that remain could well propel us into the sort of acrimonious debate that we had over policing.
>
> People have quite properly argued for proper resourcing of the prosecution service. We can agree to that. However, the question of transparency was effectively ducked by the review group and the NIO in their response, and this is reflected in the draft legislation and the implementation plan. In essence, we have very little more than a simple name change. Serious issues arise from decisions by the prosecution service not to prosecute in circumstances that go to the heart of confidence in the justice system. The NIO indicated that it had accepted a recommendation from its own review group of greater transparency and more explanation of decisions not to prosecute, yet it is now being seen to be doing precisely the opposite. Is this not an example of total arrogance? Does it not care? Does it think that people will not read this documentation, and even if they do, will the NIO simply steamroller ahead?
>
> Clear problems of accountability and transparency arise from that attitude. The Finucane case alone shows the type of issues that can subvert the creation of an independent criminal justice system which has integrity and is able to serve the entire community.[106]

Monica McWilliams (NIWC) was also concerned about future transparency:

> Future transparency has been a major issue, and I have had difficulty in understanding the decisions made by the Department of Public Prosecutions. I have on occasions written to the DPP - and herein lies the issue of independence - after I received requests from victims for information on why the DPP decided not to prosecute. I have been alarmed at its conclusions on those occasions.
>
> In turn, the DPP has reviewed its decisions not to prosecute. In future, that procedure to write on behalf of constituents should not be left simply to Assembly Members whose constituents are concerned that there have been no prosecutions. Little information is published, and it is difficult for anyone to understand at the end of the year which cases have been prosecuted. I have often had to request statistics from the DPP asking whether the charges had been downgraded. Of course, the DPP denies the existence of such a word. It has had to trace the statistics manually in order to follow through on prosecutions from start to finish. There are real concerns, and the situation has not increased victims' confidence. If the criminal justice system is to make itself more understandable, accountable and transparent, it must have victims' confidence.
>
> It is to be welcomed that reports will be published and that there will be a code of practice, which at present is simply downloaded from the Crown Prosecution Service. I am not aware whether the Department of Public Prosecutions has had many codes of practice of its own. I hope that that will now change.

---

[106] Ibid

> I would be concerned if, in future, the DPP claimed security as a reason for not prosecuting. We know that in the past that has not increased confidence. There may be a valid case for not publishing reasons, but if the DPP is to be as open and transparent as it now promises to be, that information should be available.[107]

Alex Attwood (SDLP) shared those reservations:

> while the main concerns about the administration of justice in the North have revolved around the activities of the Police Service, many people are concerned that it has been the further efforts of the judiciary at times, and the prosecution service at other times, that have created an environment in which those who are entrusted with upholding the law have broken it, occasionally abused human rights and not been held properly to account by those whose responsibility it is to ensure that they are. In the first instance, that means prosecution when appropriate and, secondly, conviction when the evidence leads, beyond a reasonable doubt, to that conclusion.
>
> While we may not have agreed on how to come to that situation, people are beginning to conclude that we have reached it. That was seen in the reaction to the collapse of the prosecution of the late William Stobie. Nonetheless, the proposals in the criminal justice review that are to some degree endorsed in the Ad Hoc Committee's report mean that the proposals in the draft Justice (Northern Ireland) Bill and the implementation plan do not lead to an accountable prosecution service. That is reflected in recommendation 10 of the Ad Hoc Committee's report that states that
>
> > "greater transparency should be a feature of the decision-making process of the new Public Prosecution Service."
>
> That does not mean that reasons should always be disclosed when cases do not result in a prosecution. It means that there should be a presumption that the reasons will be disclosed, even though in some circumstances with just cause they will not be disclosed, not least to protect the victims. The presumption should be disclosure, whereas, at the moment, it is non-disclosure. Given the hint that that reflects the Assembly's consensus view, the British Government should amend the legislation.[108]

Ian Paisley jnr (DUP) expressed strong doubt as to the wisdom of following the model of the Crown Prosecution Service:

> it is important that we do not ignore what is at the heart of the draft Bill - the creation of a single prosecution service. That procedure is, however, old, and it should not be inflicted upon Northern Ireland. We heard much evidence to demonstrate that when it was inflicted upon England and Wales it became an

---

[107] www.niassembly.gov.uk/record/020114.htm
[108] Ibid

unmitigated disaster. Members should look at the evidence presented by the Glidewell report, which the Committee referred to.

In my party's submission we indicated that we were extremely concerned that we were about to repeat the fundamental mistakes that were made in England and Wales in relation to the working of the Crown Prosecution Service. Do not take my word for it - take what Glidewell said in his report. He said that, overall, the Crown Prosecution Service discontinues prosecutions on an average of 12% more now than it ever did. The likelihood of getting successful prosecutions under the Crown Prosecution Service system actually goes down, which is not in anyone's interest when we see the rising crime wave in Northern Ireland - increasing motor vehicle crime, and violent crime against the person. It is not in anyone's interest to see a mechanism put in place that reduces the ability of the prosecution to get a successful result.

The Glidewell report states:

> "The overall conclusion from this study of the available statistics is that in various respects there has not been the improvement in the effectiveness and efficiency of the prosecution process which was expected to result from the setting up of the CPS in 1986."

We would be very foolish if we did not learn from the experience of England and Wales. It is clear that, in the Bill, the resources are not placed at Northern Ireland's disposal to ensure that we have a single prosecution service that will actually work. That would result in a Crown Prosecution Service that would be a disaster.

Mr Alban Maginness said that it would be a renewal of the prosecution service - I think that it would be a wrecking of the Crown Prosecution Service. He said that it would be a revival of the system - I believe that it would be a requiem for the system. It would be wrong to impose something on Northern Ireland that was tried and tested elsewhere and which proved to be an unmitigated disaster. I hope that others will recognise that these problems are real. If we go down the road of implementing major change by introducing a single prosecution service, and by implementing major change to the prosecution service as it currently stands, we stand to be indicted later on by a failure of that system to actually achieve results - results that bring about justice and integrity in the criminal justice system.[109]

E. Other reactions to the proposals

1. Northern Ireland Human Rights Commission

The Northern Ireland Human Rights Commission made a number of preliminary criticisms of the draft Bill, highlighting several apparent omissions:

---

[109] www.niassembly.gov.uk/record/020114.htm

> 15. As regards the proposed new prosecution system, the Bill again omits to state the objectives of the system. Recommendation 41 of the Review, for example, said that outreach to the community should be a stated objective of the Prosecution Service, but this is not mentioned in the Bill.
>
> 16. The Review recommended (No. 28) that limits should be placed on the publication of the fact of an arrest and of the name of the arrested person. The Implementation Plan, probably rightly in the Commission's view, rejects the imposition of limits on the publication of the fact of an arrest. But the Bill does not seem to place limits on the publication of the name of the arrested person.
>
> 17. The Review recommended (No. 40) that the Prosecution Service should engage with the community about diversionary schemes. The Bill does not seem to address this (see *clause 54*).
>
> 18. The Review recommended (No. 45) that there should be no power in the attorney General to direct the DPP. It is not clear from clause 37 that this recommendation is being entirely implemented.[110]
>
> 19. The Review recommended (No. 46) that it should be an offence to seek to influence the prosecutor not to pursue a case. This does not seem to be implemented in the Bill.
>
> 20. The Review recommended (No. 49) that in certain situations the prosecutor should seek to give as full an explanation as possible as to why there has been no prosecution. This does not seem to be implemented in the Bill.
>
> 21. Clause 34 provides for a code of practice for prosecutors, and this must include a code of ethics laying down standards of conduct and practice. The Commission would like to see a requirement inserted in the legislation to the effect that the code of ethics must be based on the UN's Guidelines on the Role of Prosecutors (1990).[111]

2. Committee on the Administration of Justice

In their preliminary comments, the civil liberties organisation *Committee on the Administration of Justice* used the prosecution provisions as an example of what in their opinion was wrong with the Bill:

> The Review's recommendations in relation to the Director of Public Prosecution were among the most far-reaching they made. While they did indicate that the work of the new office would build on the work of the existing office they also

---

[110] but see now *clause 42 (1)* which provides that the functions of the Director shall be exercised by him independently of any other person

[111] Reproduced in the Report and Proceedings of the Ad Hoc Committee of the Assembly, 8.1.02, available at http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm

said their recommendations entailed "taking on new work, a different approach to aspects of its existing work and substantial organisational change". At the press conference to launch their report the Review's experts refused to deny that their proposals meant the abolition of the DPP. The Review said they envisaged:

> "major changes in the prosecutorial arrangements in Northern Ireland, which we believe will enhance the system and public confidence in it."

However, what the Implementation Plan suggests is essentially a new name for the office but very little substantive change. Indeed the Plan recommends the same title for the professional head of the office.

In this recommendation the Plan clearly seeks to undermine the process of change in this key area completely. Indeed the Review recommended the importance of change in relation to the description of the professional head of the office, when they said that

> "[A] new title for the head of the organisation would help to demonstrate to those outside it, as well as those inside, that the remit and responsibilities of the organisation have changed considerably."

The Director who made much questioned decisions in relation to a number of controversial cases including the Finucane murder investigation will have "overall responsibility for creating the new service." How will new mechanisms for accountability, outreach and recruitment function without clear signals that this most unaccountable of organisations has finally been brought to account?

The unaccountability of the DPP is reinforced by the response of the government to the recommendation of the Review in relation to the giving of reasons for a failure to prosecute in certain cases. The practice of the DPP in NI to refuse to give reasons in controversial cases has been one of the key factors in undermining public confidence in the criminal justice system. We provided the Review with detailed case studies in the Finucane murder, the Hamill murder, the murder of Nora McCabe and others which clearly demonstrated that the reluctance of the DPP to give reasons had little to do with concerns about possible injustice to an individual suspect but was primarily designed to protect the interests and reputation of the agencies of the state. The recommendation of the Review in this specific area was balanced and positive. They argued that the balance should shift towards the giving of reasons but unfortunately accepted that there may be instances where this was not possible because it could conflict with the interests of justice. Essentially the government response is a refusal to accept this recommendation. Nothing is proposed to implement the shift towards giving reasons which the Review recommended.

The government position not only goes against the recommendations of the Review but it also potentially violates the Human Rights Act. As a result of the

> ECHR decision in Kelly et al v United Kingdom (4th May 2001) the prosecution service will be obliged to give reasons in cases which involve suspicious or controversial deaths.[112]

VI Criminal Justice Inspectorate

A. Who carries out inspections now

Current arrangements for inspection were described in the report of the Review Group:

> In Northern Ireland the RUC and Prison Service are subject to scrutiny by the HM Inspector of Constabulary (on a statutory basis) and HM Inspector of Prisons (by agreement) respectively. The Probation Service and juvenile justice centres are inspected by criminal justice specialists within the Social Services Inspectorate of the Department of Health and Social Services. The Forensic Science Agency for Northern Ireland is subject to inspection by the United Kingdom Accreditation Service, the body responsible for assessment and accreditation of organisations performing calibration, testing or sampling. Other agencies, such as the Northern Ireland Court Service and the Department of the Director of Public Prosecutions for Northern Ireland, are not subject to functional inspections at present, although they are subject to parliamentary scrutiny and financial audit [113]
>
> We heard a range of views in relation to the arrangements for the inspection of the criminal justice system. Most of those who commented on this issue believed that there was merit in a single criminal justice inspectorate. Those who supported the creation of a single inspectorate did so for a variety of reasons. One reason put forward most commonly was that such an inspectorate would allow thematic inspections across a number of agencies to be carried out. One submission noted that "... the various parts of the system are so dependent on each other and changes to one have such implications for others that a single properly managed and resourced inspectorate would be preferable". Most of those who favoured a single inspectorate also recommended that it should be independent of government and of the agencies that it was responsible for inspecting. One submission also suggested that it should be responsible for considering equality policy and "Targeting Social Need" analyses "of the working practice of the criminal justice system".
>
> Not everyone favoured a single criminal justice inspectorate. Some felt that the existing inspection arrangements were adequate. Others felt that a single inspectorate could not hope to cover the very different and diverse range of

---

[112] Reproduced in the Report and Proceedings of the Ad Hoc Committee of the Assembly, 8.1.02, available at http://www.niassembly.gov.uk/Flags/adhoc1-01_reform.htm

[113] Review of the Criminal Justice System in Northern Ireland, March 2000, para 15.18, available at http://www.nio.gov.uk/pdf/mainreport.pdf

> services provided by criminal justice agencies and that specialist knowledge would be diluted or lost. Others felt that inspection was not an appropriate tool for some parts of the criminal justice system, such as the work of the judiciary or the courts, where it was feared that an inspectorate would compromise judicial independence. In addition, some criminal justice agencies believed that they were already subject to sufficiently rigorous third-party inspection covering all aspects of their work and that any additional layer of inspections was unnecessary. This was particularly the case in respect of the Forensic Science Agency of Northern Ireland, who argued that United Kingdom Accreditation Service scrutiny (which sets standards for the organisation and management of work), coupled with moves to develop a Council for the Registration of Forensic Practitioners in the United Kingdom (which would provide a degree of reassurance about the competence and ethical standards of forensic practitioners), obviated the need for additional inspection. Similar arguments applied to the State Pathology Department, whose staff would also become subject to scrutiny by the Council for the Registration of Forensic Practitioners.[114]

B. Recommendation

The Review Group concluded that the balance of argument favoured the creation of a statute-based, independent Criminal Justice Inspectorate which should be responsible for ensuring the inspection of all aspects of the criminal justice system other than the courts.[115] It should be funded by the Ministry of Justice and the Chief Criminal Justice Inspector should be appointed by that Minister.

C. Implementation

Clause 45 provides for the Secretary of State[116] to appoint a Chief Inspector of Criminal Justice in Northern Ireland, on whom *clause 46* imposes the obligation to carry out inspections of

> (a) the Police Service of Northern Ireland and the Police Service of Northern Ireland Reserve,
> (b) Forensic Science Northern Ireland,
> (c) the State Pathologist's Department,
> (d) the Public Prosecution Service for Northern Ireland,
> (e) the Probation Board for Northern Ireland,
> (f) the Northern Ireland Prison Service,
> (g) the Juvenile Justice Board,
> (h) any body or person (other than the Juvenile Justice Board) with whom the Secretary of State has made arrangements for the provision of juvenile justice centres or attendance centres,

---

[114] Ibid, paras 15.34-5

[115] Ibid, para 15.72

[116] the implementation plan states that on devolution of justice matters the functions of the Secretary of State in relation to the Chief Inspector will transfer to the relevant Minister in the Executive

> (i) Health and Social Services Boards and Health and Social Services trusts, and
> (j) the Compensation Agency

subject to the proviso that he must not carry out inspections of an organisation if he is satisfied that it is subject to adequate inspection by someone other than him. The example of such other person suggested in the Explanatory Notes[117] is Her Majesty's Inspector of Constabulary.

D. Debate in the Northern Ireland Assembly

The Police Ombudsman, Nuala O'Loan, has been criticised over her handling of the Omagh Report. The Belfast Telegraph reported on 17 December 2001:

> The Police Federation today revealed the contents of a letter in which it calls for Nuala O'Loan to be sacked. In a blistering communique to the Secretary of State, Dr John Reid, the federation told of its 'concern and anger' at the Police Ombudsman's 'clumsy and insensitive' handling of the Omagh Report […] Mr Spratt told the Belfast Telegraph that his organisation, which represents rank-and-file officers, had lost faith in the Ombudsman.

Several members of the Assembly, during the debate of 14 January, suggested that the Police Ombudsman should have been included in the list of organisations subject to inspection by the Criminal Justice Inspectorate. Duncan Shipley Dalton said ("wearing his party hat"):

> It is appropriate that the criminal justice inspectorate will cover almost every criminal justice agency in Northern Ireland, from the Police Service for Northern Ireland to the Forensic Science Agency. The one glaring exception is the Police Ombudsman's office. There would seem to be a strong argument in favour of including that in the list of bodies that will be subject to inspection by the criminal justice inspectorate. The Police Ombudsman's office has nothing to fear; its operational independence will in no way be affected. It is unreasonable to accept that every other criminal justice organisation will be subject to independent and rigorous scrutiny from an outside body, while, for some reason, the Police Ombudsman's office is left out of the loop. I strongly urge the Government to consider amending the legislation to include the Police Ombudsman's office.[118]

Peter Weir (Ulster Unionist) said:

---

[117] http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/075/en/02075x--.htm, para 83
[118] www.niassembly.gov.uk/record/020114.htm

> I agree with the comments regarding the chief inspector of criminal justice. It is a mistake not to include the Police Ombudsman's role. Hopefully the chief inspector of criminal justice will perform the duties in a way that commands greater public confidence and support than the Police Ombudsman has been receiving recently.[119]

[119] Ibid.