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The *Justice and Security (Northern Ireland) Bill*

Bill 10 of 2006-07

This paper discusses the *Justice and Security (Northern Ireland) Bill* which is due to be debated on second reading in the House of Commons on Wednesday 13 December 2006.

A key part of the normalisation programme in Northern Ireland, following the paramilitary ceasefires and subsequent improvements in the security situation, is the expiry by July 2007 of counter-terrorist legislation specific to Northern Ireland, currently set out in Part 7 of the *Terrorism Act 2000.* Part 7 includes provisions currently enabling non-jury "Diplock courts" to try "scheduled offences".

The *Justice and Security (Northern Ireland) Bill* contains measures designed to re-introduce a presumption in favour of jury trial for offences triable on indictment, subject to a fall-back arrangement for a small number of exceptional cases for which the Director of Public Prosecutions will be able to issue a certificate stating that a trial is to take place without a jury. Amongst other things the Bill also seeks to reform the jury system in Northern Ireland, extend the powers of the Northern Ireland Human Rights Commission, provide additional statutory powers for the police and armed forces and create a permanent regulatory framework for the private security industry in Northern Ireland.

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Summary of main points

Part 7 of the *Terrorism Act 2000* sets out anti-terrorist measures originally introduced in the 1970s, such as the use of non-jury "Diplock courts" to try "scheduled" offences. These measures, which extend only to Northern Ireland, have always been controversial. A key part of the normalisation programme in Northern Ireland, following the paramilitary ceasefires and subsequent improvements in the security situation, is the expiry of Part 7 of the 2000 Act on 31 July 2007.

Northern Ireland is in a process of security normalisation and the Government intends that there should be a presumption in favour of jury trial in Northern Ireland. Both the Government and the independent reviewer of counter-terrorist legislation Lord Carlile of Berriew QC consider, however, that arrangements need to be in place to enable a small number of exceptional cases to be dealt with by non-jury trial. The *Justice and Security (Northern Ireland) Bill* is designed to give the Director of Public Prosecutions for Northern Ireland a discretionary power to issue a certificate stating that a trial is to be conducted without a jury if he suspects that a number of specified conditions are met and that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. The Government and the independent reviewer have also concluded that there is still a risk of juror intimidation in Northern Ireland and that measures are therefore needed to reform the jury system there. The Bill therefore also seeks to introduce provisions intended to reduce the risk of intimidation by increasing the level of randomness in jury selection and providing greater anonymity for jurors.

The Bill also seeks to extend the powers of the Northern Ireland Human Rights Commission (NIHRC), which was created by the Northern Ireland Act 1998 with the task of reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights. The Bill seeks to give the Commission new powers to require the provision of information, documents or oral evidence; access places of detention, and institute legal proceedings in its own right.

These new powers will be subject to a number of provisions intended to protect the interests of national security and the intelligence services. NIHRC will be required to report to the Secretary of State on the effectiveness of the new powers within two years of their implementation.

The Bill also seeks to provide the police and armed forces with additional statutory powers, including powers of entry, search and seizure. The Secretary of State will be able to repeal these powers at a later date by making an order which will be subject to approval by both Houses of Parliament under the affirmative procedure.

Arrangements for the permanent regulation of the security industry in Northern Ireland are also provided for in the Bill.

The Bill also seeks to bring the Northern Ireland Court Service, the Northern Ireland Legal Services Commission and the Life Sentence Review Commissioners within the remit of the Chief Inspector of Criminal Justice in Northern Ireland. It will also enable the magistrates' court to make a legal aid certificates that are restricted to specified proceedings or aspects of proceedings and enable resident magistrates to be restyled as "district judges (magistrates courts)".

The Bill was introduced in the House of Commons on 27 November 2006 and is due to be debated on second reading on 13 December 2006.

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I Anti-terrorist legislation in Northern Ireland

A. Overview

The *Northern Ireland (Emergency Provisions) Act* [EPA] was introduced in 1973 in response to the prevailing threat from terrorism in Northern Ireland. It supplemented the ordinary criminal law, giving additional powers to the police and security forces in Northern Ireland to deal with terrorism. It included arrangements for trials for "scheduled" offences listed in a Schedule to the Act to be conducted by judges sitting alone without juries in "Diplock courts" so named after the chairman of the Commission whose 1972 report recommended their introduction.[1] The 1973 Act was subject to annual renewal by Parliament, following the publication of a report on its operation during the previous year. It was also of limited duration. Between 1973 and 2000 the EPA legislation was reviewed, renewed and re-enacted on several occasions. The 1996 EPA, which was the fifth in the series, was amended by the *Northern Ireland (Emergency Provisions) Act 1998*, the sixth and last.

The *Prevention of Terrorism (Temporary Provisions) Act* [PTA] was introduced in 1974 as a temporary measure in response to a series of IRA attacks in Great Britain, including the Birmingham pub bombings. It completed almost all of its passage through Parliament in a single day.[2] It was re-enacted on several occasions after 1974, with the final version being that of 1989. Several of its provisions applied to international terrorism as well as terrorism connected with the affairs of Northern Ireland. The Act, like the EPA, supplemented the ordinary criminal law by conferring exceptional powers on the police. It was also subject to annual renewal by Parliament, following the publication of a report on its operation during the previous year.

Full details of anti-terrorism legislation prior to 2000 are contained in the report by Lord Lloyd of Berwick of his *Inquiry into Legislation against Terrorism*, published in October 1996.[3] Lord Lloyd of Berwick's inquiry was undertaken as a review of the future need for specific counter-terrorism in the UK against a background of paramilitary ceasefires. His report and a subsequent Government consultation paper *Legislation Against Terrorism,*[4] published in 1998, were followed by the enactment of the *Terrorism Act 2000*. The 2000 Act, which came into force on 19 February 2001, consolidated and amended previous anti-terrorist legislation across the UK and introduced a number of new measures. It repealed the EPAs of 1996 and 1998 and the PTA 1989. The Library Research Paper on the Bill that became the 2000 Act is available on the intranet and the internet.[5] The *Terrorism Act 2006* amended and extended some of the UK-wide provisions of the 2000 Act. Library Research Paper 05/66 on that Bill is available on the internet.[6]

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1 *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* Cmnd 5185 December 1972

2 HC Deb 28 November 1974 vol 882 c 634-943; HL Deb 28 November 1974 vol 354 c 1500-1570; HL Deb 29 November 1974 vol 354 c 1573-1574

3 *Inquiry into Legislation against Terrorism* Cm 3420 2 Vols. October 1996

4 *Legislation Against Terrorism* CM 4178 Home Office December 1998

5 Library Research Paper 99/101 *The Terrorism Bill [Bill 10 of 1999/2000]* at http://www.parliament.uk/commons/lib/research/rp99/rp99-101.pdf

6 http://www.parliament.uk/commons/lib/research/rp2005/rp05-066.pdf

The *Terrorism Act 2000* implemented Lord Lloyd of Berwick's recommendation that the previous, "temporary", anti-terrorist legislation, much of which applied only to Northern Ireland, be replaced with permanent measures extending across the whole of the UK.

A number of "temporary" measures for Northern Ireland set out in the EPA had been due to expire on 24 August 2000. The 1998 consultation paper had expressed the Government's hope that these measures might not be needed after they expired, an objective which depended on developments in the security situation. In December 1999, at the time of the introduction of the Bill that became the 2000 Act, the Government took the view that the time was not right to remove all of the "temporary" measures. Some of the measures were therefore retained, in Part 7 of the *Terrorism Act 2000.*

The measures in Part 7 of the 2000 Act include the following:

- Provisions requiring that "scheduled offences" (those listed in Schedule 9 of the Act) be tried in non-jury "Diplock courts". Most of the offences set out in Schedule 9 of the Act are capable in any particular case of being "certified out" by the Attorney-General for Northern Ireland and tried by jury.

- Provisions concerning the remission of sentences of imprisonment and the release of prisoners. These had been affected by changes introduced by the *Northern Ireland (Remission of Sentences) Act 1995*.

- Provisions added to the EPA by *Criminal Justice (Terrorism and Conspiracy) Act 1998* concerning:

    a) the admissibility of oral evidence from senior police officers as evidence of a person's membership of a specified proscribed organisation and
    b) inferences to be drawn from a person's silence in the context of the offence of membership of a proscribed organisation.

The provisions in Part 7 of the 2000 Act are subject to annual renewal by orders made under the affirmative procedure and originally had a time limit of five years. They were due to expire at the end of 18 February 2006 but in 2005 the Government concluded that most of the provisions of Part 7 that were then in force would remain necessary until the end of the normalisation programme in Northern Ireland. The *Terrorism (Northern Ireland) Act 2006* therefore extended these provisions until 31 July 2007, with the possibility of a further extension to 1 August 2008. The 2006 Act also added a number of offences relating to control orders, which were created by the controversial *Prevention of Terrorism Act 2005,* to the list of scheduled offences. Information on the legislation that became the 2006 Act can be found in Library Research Paper 05/70 *The Terrorism (Northern Ireland) Bill 2005-06.*

B. The "Scheduled Offences"

"Scheduled offences" are offences which are subject to special procedures and measures set out in sections 66-80 of the *Terrorism Act 2000*, such as trial by a court

without a jury (a "Diplock court"). They are defined in section 65 and Schedule 9 of the 2000 Act. The *Explanatory Notes* to the *Terrorism (Northern Ireland) Bill 2005-06* comment that the offences qualify for such procedures because they are commonly committed by paramilitaries and terrorist organisations or are otherwise related to the situation in Northern Ireland.[7]

Some of the offences listed in Schedule 9 may occur in circumstances unrelated to the situation in Northern Ireland. These include the offences of murder, manslaughter, kidnapping, wounding and other serious offences under the general criminal law. The Attorney General for Northern Ireland has therefore been given powers under Note 1 to Part 1 of Schedule 9 to certify that, in particular cases, certain offences listed in that Part should not be treated as scheduled offences and may, for example, be tried by a jury. This discretion to "de-schedule" an offence is available only where the offence is listed in Schedule 9 of the 2000 Act as being subject to Note 1. Following changes introduced by the *Terrorism (Northern Ireland) Act 2006* all scheduled offences are now subject to note 1 and may therefore be de-scheduled by the Attorney General for Northern Ireland. The Explanatory Notes to the current *Justice and Security (Northern Ireland) Bill 2006-07* include the following comment about he Attorney-General's use of his discretion to de-schedule a case so that it can be tried by a jury:

> In exercising his discretion, the Attorney General applies a non-statutory test: that he will not de-schedule a case unless he is satisfied that it is not connected with the emergency.

The use of non-jury "Diplock courts" in Northern Ireland has always been controversial and the general issue of scheduling particular offences for special treatment has been much criticised. The Northern Ireland civil liberties group Committee on the Administration of Justice (CAJ) has called for the repeal of Part 7 and Schedule 9 of the *Terrorism Act 2000,*[8] as has the Northern Ireland Human Rights Commission (NIHRC). In a letter to the Secretary of State for Northern Ireland following the renewal of Part 7 of the 2000 Act in 2002 the NIHRC said:

> We are at present unconvinced that the danger of intimidation of those called for jury service justifies the continuing scheduling of offences. At the time of the last review of the Diplock Courts in May 2000 the government refused to supply the Commission with evidence of intimidation in specified cases and we have since seen no evidence to suggest that the risks of intimidation – or the difficulties which would be encountered in protecting jurors – are any higher in February 2002 that they were 21 months ago. There is nothing in Lord Carlile's report to suggest that he has seen evidence of the potential for intimidation of jurors. This Commission therefore repeats its advice given to your predecessor in February 2000, namely that the provisions dealing with scheduled offences should be repealed.[9]

Like the rest of the *Terrorism Act 2000,* Part 7 is reviewed annually by an independent reviewer, currently Lord Carlile of Berriew QC. His latest *Report on the Operation in 2005*

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7 *Explanatory Notes* para.31

8 The Committee's views are summarised on its website at http://www.caj.org.uk/criminal.html

9 http://www.nihrc.org/documents/landp/75.doc

of Part VII of the Terrorism Act 2000 was published on 15 February 2006, during the passage through Parliament of the Bill that became the *Terrorism (Northern Ireland) Act 2006*. In his report Lord Carlile discussed scheduling and the use of non-jury courts and concluded reluctantly that, in view of the security situation, scheduling was still justified in Northern Ireland:

> 37. I have as before continued to enquire of police, military and security officials as to terrorist activity. I remain aware of the very strong reservations expressed by many about the whole process of scheduling and the use of non-jury courts, especially at the sunset of *Part VII*. I have once again taken full note of the views of the Human Rights Commission, the Committee on the Administration of Justice and others including Sinn Fein (who expressed especially forceful views) on this subject.
>
> 38. From the evidence provided to me it appears that again in 2005 there were several incidents involving acts connected with terrorism that demonstrated a continuing danger from sophisticated terrorist crime.
>
> 39. I have absolutely no doubt that there were also numerous and in some cases extremely serious criminal offences of a non-terrorist nature in which there appears to have been or may well have been a strong terrorist link. Syndicated crime with a paramilitary connection is a clear, potentially permanent and wholly unacceptable part of the criminal intelligence picture of Northern Ireland. The welcome reduction in cross-sectarian attacks has continued, though a level of intimidation remains and is of serious concern. There continues inter-necine violence within some loyalist paramilitary groups, and intimidation within parts of the republican community.
>
> 40. Decommissioning of terrorist arms has continued, but the suspension of the Northern Ireland Assembly still leaves limited room for confidence. Realistically one must recognise that there remains a significant if diminished supply of weaponry to paramilitaries of all persuasions. All who value peace will hope that the political parties will reach a constructive conclusion of continuing negotiations to restore the democratic process fully.
>
> 41. As last year, I have made journeys into urban areas – in Belfast, Portadown, South Tyrone and elsewhere. I sense increasing abatement in the social and economic influence of paramilitaries over communities. As (for example) an interesting and energetic discussion with Mrs Bernadette McAliskey demonstrated to me, social policy and community activity in Northern Ireland is moving on, with emphasis being given in some places at least to issues of ethnicity, gender and equality on a broader front than the traditional sectarian divide.
>
> 42. Nevertheless I regret that there continues a clear danger of intimidation within living and working neighbourhoods. Armed robberies remain at a high level, and the raising of money for paramilitaries by various intimidatory methods is still part of the picture. There remain continuing allegations of intimidation of individuals who have agreed to participate in community structures designed to broaden public acceptance of the Police Service of Northern Ireland as a service functioning in the interests of all sectors of the community whatever their religious origins. However, my sense is that this diminished in 2005, though inevitably the evidence is anecdotal.

> 43. As each year, I discussed with as many people as possible the issue of the scheduling of offences. An analogous system exists in the Republic of Ireland. There the rate of conviction after scheduled trials is noticeably higher than in Northern Ireland: I draw no conclusion from that observation, but mention it for completeness.
>
> 44. On the evidence I have seen and heard, I believe that the security situation in Northern Ireland, and the continuing danger of intimidation of those called for jury service, justifies the continuing scheduling of offences. I regret this very much. It is an important part of the march towards normalisation that juries should be unmoved by sectarian considerations or fear in reaching their verdicts. As I have said before, the aim must be that scheduling should wither on the vine, given a continuing improvement in the political situation. I hope that it will no longer be necessary after 2007, as is the inherent hope in the *Terrorism (Northern Ireland) Bill.*
>
> 45. I have looked for a fourth time at *TA2000 Schedule 9* very carefully, with a possible view to recommending a reduction in the range of scheduled offences. It is not the criminal label that justifies the trial of an offence under the schedule, but rather the underlying facts and atmosphere of the case. I have concluded that nothing useful would be gained by tinkering with the list. This repeats my conclusion last year and previously. The arrangements proposed in *Clause 3* of the Bill make all scheduled offences subject to the Attorney General's discretion. The test he applies when considering whether to deschedule is whether or not the offence is connected with the emergency in Northern Ireland. There are some anomalies in the present system that the change will iron out. For example, the change would ensure that a person charged with terrorism unconnected with Northern Ireland would be tried by a jury there. The change has the potential to ensure further consistency and to reduce the number of cases tried under special arrangements for judge only courts.
>
> 46. In the past I have carried out extensive consultation on the question of whether scheduling out should be replaced by scheduling in. The rationale for this suggestion is that 'normality' does not include scheduling and that if cases to be tried in the special way were the exceptions to a general rule of law there would be a greater appearance of normality. However, there has been little in the way of representations on this narrow issue in 2005. There is no real drive to change that part of the system, which works fairly and efficiently. The scheduling system as amended by the Bill should continue until what is now the foreseeable end of scheduling.[10]

There are several relevant tables in Lord Carlisle's report for 2005 which list instances of the use of the provisions in Part 7. Annex A, which notes instances in which offences have been "certified out" of the scheduled mode of trial, enabling them to be tried in courts other than Diplock courts, is reproduced below:

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[10] *Report on the Operation in 2005 of Part VII of the Terrorism Act 2000* paras 37-46: http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/part-7-report?view=Binary

A

Number of instances in Northern Ireland for which offences are certified out of the scheduled mode of trial by the Attorney General (Section 65, Schedule 9).

Year	Total number of offences for which applications made[1]	Number of persons involved	Number of offences for which applications	
			1. Granted	2. Refused
2002				
Jan-Mar	221	141	207	14
Apr-Jun	299	200	267	32
Jul-Sept	361	277	323	38
Oct-Dec	484	315	419	65
2002 Total	**1,365**	**933**	**1,216**	**149**
2003				
Jan-Mar	525	314	418	107
Apr-Jun	314	229	282	32
Jul-Sept	403	272	348	55
Oct-Dec	325	219	283	42
2003 Total	**1,567**	**1,034**	**1,331**	**236**
2004				
Jan-Mar	228	160	195	33
Apr-Jun	251	188	214	37
Jul-Sept	159	122	126	33
Oct-Dec	102	88	94	8
2004 Total	**740**	**558**	**629**	**111**
2005				
Jan-Mar	189	130	145	44
Apr-Jun	346	185	273	73
Jul-Sept	195	131	192	3
2005 Total to date	**730**	**446**	**610**	**120**

Note: 1. An application may relate to one person charged with one offence, or one person charged with a number of offences, or a number of persons with the same offence.

Source:The Public Prosecution Service for Northern Ireland.

NB: Quarterly statistics may be subject to minor revision

In its August 2006 consultation paper on *Replacement Arrangements for the Diplock Court System* the Government said that at present 85-90% of cases relating to scheduled offences are de-scheduled by the Attorney General.[11]

[11] *Replacement Arrangements for the Diplock Court System,* Northern Ireland Office August 2006 para. 4.4

C. Non-jury trial on indictment

The Northern Ireland Office consultation paper *Replacement Arrangements for the Diplock Court Syste*m, published in August 2006, summarised the current arrangements for trying people charged with offences listed in Schedule 9 of the *Terrorism Act 2000* ("scheduled offences") as follows:

> 2.2 The provisions underpinning the system are now contained in Part VII of the Terrorism Act 2000. The system operates on a defined list of offences contained in Schedule 9 to that Act (known as 'scheduled offences'). In broad terms, if a person is charged with a scheduled offence, they will automatically be tried before a Diplock Court unless the Attorney General directs that the case be tried before a jury (known as 'descheduling'). In making his decisions whether or not to deschedule a case, the Attorney applies a non-statutory test: he will not deschedule a case unless he is satisfied that it is not connected with the emergency in Northern Ireland. In certain circumstances, scheduled offences can be tried summarily (before a magistrate). In these cases the DPP issues a certificate of suitability for summary trial.
>
> 2.3 The Diplock Court consists of a judge sitting on his own. He hears all the evidence and reaches the verdict as well as running the trial and pronouncing sentence if the defendant is found guilty. In order to ensure confidence in the process, the judge must give a reasoned verdict if he convicts a person (and often provides a reasoned verdict for an acquittal too). There are unfettered rights of appeal from convictions in Diplock courts.
>
> 2.4 Special bail arrangements also apply to persons charged with scheduled offences. Subject to limited exceptions, magistrates are unable to consider the issue of bail and instead the defendant must apply to the High Court for bail. This was introduced to protect Resident Magistrates from the risk of intimidation: they were considered to be more vulnerable than other judicial tiers and the smaller pool of High Court judges was considered easier to protect.[12]

The independent reviewer of anti-terrorist legislation, Lord Carlile of Berriew QC, made detailed comments about the origins and use of Diplock courts in his *Report on the Operation in 2005 of Part VII of the Terrorism Act 2000.* He concluded that whilst Diplock courts were operating fairly, he would prefer a return to jury trial in all cases, although a three-judge court would be an acceptable compromise*:*

> 65. The establishment of non-jury trials in Northern Ireland resulted from Lord Diplock's 1972 Commission to "consider what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations." The nature of this requirement has evolved over time. Today we aim to have an effective and fair system of trial, robust enough to deal with the special challenges of terrorism without diluting in any way the quality of justice achieved. The prime aim is to ensure that

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[12] *Replacement Arrangements for the Diplock Court System – A Consultation Paper* Northern Ireland Office August 2006 paras. 2.2-2.4: http://www.nio.gov.uk/replacement_arrangements_for_the_diplock_court_system__a_consultation_paper.pdf

prosecution and defence alike receive a fair trial, even in a context of perceived intimidation of parties and witnesses.

66. The central recommendation of the 1972 Commission was that trials of terrorist related crimes, defined as "scheduled offences", should be heard by a judge of the High Court or County Court sitting without a jury. This was first given effect by the *Northern Ireland (Emergency Provisions) Act 1973*. Lord Diplock's rationale for this recommendation was that the jury system as a means for trying such crime was under strain and that there existed no safeguard against the danger of perverse verdicts – a danger which could arise either because of intimidation or partisan juries.

67. In 1999 the Home Secretary announced the establishment of a Review Group comprising representatives of the Northern Ireland Office, the Home Office, the Northern Ireland Court Service, the Attorney-General's Office, the Director of Public Prosecutions (Northern Ireland) and the then Royal Ulster Constabulary. Wide consultations ensued.

68. Underlying the work of the Review Group was the general consensus that normalisation should occur as soon as possible; and that the restoration of jury trial would be seen as a normalising event. The Review reported to the Secretary of State for Northern Ireland in May 2000. It shared the view that there should be a return to jury trial as soon as possible, and carried out a brief but full examination of relevant issues. The Review concluded that the time was not yet right for an immediate return to jury trial. The principal reason for this was the conclusion that the risk of intimidation of jurors remained very significant. Attention was drawn to a number of recent cases where there was persuasive evidence of such intimidation.

69. In both 2001 and 2002 I undertook to make an independent assessment of the continuing debate about Diplock Courts. A very forceful case had been made and continues to be made by the Northern Ireland Human Rights Commission for the immediate return to jury trial in all cases. In 2004 in particular I made what I hope was a robust assessment of the issue. Again in 2005 I have discussed the issue of non-jury courts with a wide range of people and organisations. In most instances I have been the instigator of such discussions. It is not a subject that has led to any unpredicted spontaneous representations.

70. As in previous years, I have studied many documents and publications on the issue. I am aware that from time to time government at a senior level has considered two aspects of the Diplock courts – (i) should they continue? (ii) if so, should they be changed from single to multiple judge courts?

71. One needs to separate from each other issues of the legal merits and the politics. On the former, an important factor in discussion is evidence of the quality of Diplock Courts. Nobody said to me during 2005 that they have any reservations about the standards applied by Northern Ireland judges in non-jury trial. The innocent are at least as likely to be acquitted before a Diplock judge as before a jury. I regard this as more of an endorsement of judicial quality in Northern Ireland in particular, rather than as a general endorsement of judge-only courts. The provision of detailed reasons by judges in non-jury cases enables defendants and their lawyers to know why they have been convicted, and facilitates decisions on appeals in a way not available in jury cases. Whilst there is absolutely no doubt that there is broader acceptability by the public at large of

> the results of jury trials, there is no qualitative evidence of unfairness to defendants in non-jury cases.
>
> 72. On the political aspect of judge-only courts, I am in no doubt that, whilst many people would like to return to universal jury trial for serious cases as a mark of normalisation, the real problem is one of history rather than merits. The term 'Diplock Court' remains steeped in pejorative history. However much one would like to lose that label (despite the undoubted distinction and good faith of the late Lord Diplock) it will not go away until the courts system he recommended comes to an end. The political problem is outside my terms of reference. The courts work well. Politicians and Parliament will have to determine the balance between the risk of a justice shortfall and the advantage of total normalisation of the trials system.
>
> 73. The absence of women from the High Court Bench remains a proper concern. Gender is a legitimate issue for those deciding on the appointment of judges at all levels.
>
> 74. I have concluded again this year that the use of non-jury trials in those cases that are not scheduled out is working adequately. On the merits there is no reason for differing from the conclusions reached by the Diplock Review in May 2000.The security situation is not yet such as to reassure me that jury trial would be fair trial in all cases. However, I know that the government is continually examining the necessity and operation for special judicial arrangements within the context of an enabling environment. The issue of whether a three judge court may be more appropriate at that time will certainly be an area of examination. In my view the preferable conclusion in 2007 would be a return to jury trial in all cases. However, that depends to a great extent on political leadership. If all political parties and sectarian organisations make it clear and really mean that jury intimidation is unacceptable to the point of being universally regarded as a very serious crime in itself, it may well be possible in 2007 to abandon judge-only courts. Compromises being the stuff in which political outcomes are made if not measured, I suspect that the introduction of a three-judge system may be the more achievable outcome. Certainly, subject to increased judicial resources, a three-judge system could be operated, especially if the number of cases falling within the system was reduced by increasing scheduling out.
>
> 75. A three judge court would certainly command greater confidence in one part of the community, without diminishing confidence rationally elsewhere. Sinn Fein could not have expressed their views on this matter to me more forcefully than they did.[13]

Lord Justice Auld commented approvingly on the requirement for reasoned judgments in Diplock courts in the 2001 report of his *Review of the Criminal Courts in England and Wales*, published in October 2001:

> The Diplock Courts in Northern Ireland and their counterparts south of the border are nearby examples of how trial by judge alone can work and earn a fair degree

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[13] *Report on the Operation in 2005 of Part VII of the Terrorism Act 2000* paras 65-75: http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/part-7-report?view=Binary

> of public acceptance, albeit as a necessary measure to overcome the threat of intimidation of juries in the trial of terrorists. The Diplock Courts stem from the recommendations of the "Commission on Legal Procedures to Deal with Terrorist Activities" under the chairmanship of Lord Diplock which, in 1972, recommended the abandonment of trial by judge and jury for serious terrorist crimes. The Northern Ireland (Emergency Provisions) Act 1973 introduced a system of 'scheduled' - terrorist - offences in respect of which the court may direct trial by judge without jury. With some amendments the system has operated now for nearly 30 years and, despite the public commitment to return to trial by judge and jury in all cases, looks likely to continue at least until the emergency is lifted. I say 'at least' because Professors John Jackson and Sean Doran, in their seminal study in 1995, Judge without Jury, have presented a strong case for optional trial without jury to become a permanent part of the criminal justice system, not just a temporary and necessary response to terrorist intimidation.
>
> I am not concerned with the reason for suspension of jury trial in certain cases in Northern Ireland, but as to how the system operates with a judge alone. There are two important ways in which it provides safeguards not found in the unreasoned, and, therefore, not readily appealable, verdict of the jury. The first is that the trial judge, if he convicts, is required, to give a reasoned judgment identifying the principles of law that he has applied and his findings on the evidence leading to conviction. If he acquits he also normally provides such a judgment. The second is that the person convicted has an absolute right of appeal to the Northern Ireland Court of Appeal against both conviction and sentence. There is a further important feature, namely that the trial process, so far as it can, follows the normal rules of procedure and evidence in a jury trial.
>
> Whilst the quality of justice dispensed by the Diplock judges has not been without criticism, Doran and Jackson, have noted that its non-partisan focus has been more on their handling of the law than on their findings on the evidence. There is also the phenomenon similar to that noted in North American jurisdictions that judges tend to be more rigorous in the exclusion of alleged confession statements than when trying cases with a jury and in the rejection of evidence of purported identification than juries seem to be from what some gather from their verdicts.[14]

Lord Justice Auld observed that it could be argued that trial by a single judge or by several judges sitting was more compatible with the right to a fair trial under Article 6 of the European Convention on Human Rights than trial by jury because judges gave reasoned judgements while a jury was not required to provide reasons for its verdict.[15]

As far as non-jury trials in Diplock courts for scheduled offences are concerned the Government noted in its August 2006 consultation paper on *Replacement Arrangements for the Diplock Court System* that:

> The use of Diplock Courts has declined substantially. This reflects the improvements in the security situation. The Attorney General deschedules around 85-90% of the cases put before him. This means that the number of cases actually returned for trial without a jury is around 60 each year (twenty years ago

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14 *Review of the Criminal Courts in England and Wales - Report* October 2001 p.178-9 paras. 113-115

15 ibid. p.138 para. 8 & p.168-173 paras 88-98

> Diplock courts dealt with 329 cases). These cases cover terrorist offences as well as other offences arising from public order situations and serious sectarianism.[16]

D. Non-jury trial on indictment for fraud and jury-tampering in England and Wales and Northern Ireland

The Government's 2002 White Paper *Justice for All*[17] included proposals to permit trials on indictment at the Crown Court in England and Wales to be held by a judge sitting alone without a jury in three types of case:

- at the election of the defendant;
- in cases involving serious or complex fraud;
- in cases involving jury tampering.

The proposals, which were based on recommendations in Lord Justice Auld's 2001 report of his *Review of the Criminal Courts of England and Wales,*[18] proved highly controversial. The civil liberties organisation Justice referred to Diplock courts in its response to the White Paper:

> 69. The Diplock Courts in Northern Ireland provide an illustration of the potential for injustice caused by the restriction of jury trial. Jackson and Doran's study of the Diplock trials in Northern Ireland is instructive. They concluded that there are a number of ways that judge alone trials differ from jury trials:
>
> (i) judges tend to make their views known to counsel before making a final decision;
> (ii) judges are less inhibited about questioning witnesses;
> (iii) there is less scope for counsel to put forward broad, sympathy-based arguments;
> (iv) counsel tend to agree on more of the evidence, thus paring the evidence down more than in jury trials;
> (v) the pervasive influence of the professional judge;
> (vi) the absence of the 'community' element.

The Bill that became the *Criminal Justice Act 2003* originally provided for trials on indictment to take place without a jury in the three circumstances envisaged in the White Paper. The proposal to allow a defendant facing trial on indictment to choose to be tried by a judge sitting without a jury proved particularly controversial and was dropped by the Government in order to ensure the passage of the legislation through Parliament.

Section 43 of the *Criminal Justice Act 2003* is intended to enable the prosecution dealing with a case of serious or complex fraud being tried on indictment at the Crown Court to apply to a judge of the Crown Court for the trial to be conducted without a jury. Section 44 of the *Criminal Justice Act 2003* makes similar provision for a trial to be held without a jury where there is a danger of jury tampering. Sections 43 and 44 of the 2003 Act

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16 *Replacement Arrangements for the Diplock Court System – A Consultation Paper* August 2006 para 2.5
17 CM 5563 July 2002
18 *Review of the Criminal Courts in England and Wales - Report* October 2001

extend to Northern Ireland, but do not apply to trials held without juries for certain offences under section 75 of the *Terrorism Act 2000* ("Diplock courts").[19]

The provisions of section 43 of the 2003 Act can only come into force if they are approved by both Houses of Parliament under the affirmative procedure. In introducing the *Fraud (Trials without a Jury) Bill 2006-07*, which had its second reading in the House of Commons on 29 November 2006, the Government is seeking to remove the requirement for affirmative resolutions of both Houses so that it can proceed with the implementation of section 43 in England and Wales and Northern Ireland. More information about the 2006-07 Bill is available in Library Research Paper 06/57 on the *Fraud (Trials without a Jury) Bill 2006-07*. Information on the background to the introduction of the provisions that became sections 43 and 44 of the 2003 Act can be found in Library Research Paper 02/73 on *The Criminal Justice Bill: Juries and Mode of Trial*.

[19] *Criminal Justice Act 2003* s.50

II The *Justice and Security (Northern Ireland) Bill 2006-07*

A. Background

This Bill forms part of the arrangements aimed at normalising politics and the security situation in Northern Ireland following the paramilitary ceasefires in the mid 1990s and the *Belfast Agreement* of April 1998. In the Belfast Agreement the Government made a commitment to make as early a return as possible to normal security arrangements in Northern Ireland that would be consistent with the level of threat. Annex 1 to the Joint Declaration by the British and Irish Governments in April 2003[20] set out a series of measures intended to normalise the security arrangements within Northern Ireland consistent with the level of threat. These measures included the repeal of Part 7 of the *Terrorism Act 2000*, which applies only to Northern Ireland.

On 28 July 2005 the Provisional IRA announced that it had ordered an end to its armed campaign. In response, on 1 August 2005, the Secretary of State for Northern Ireland, Peter Hain, issued a written statement setting out a two year plan for de-militarisation, contingent on the security situation.[21] Formally, this triggered moves to implement the measures set out in Annex 1 of the Joint Declaration. On 26 September 2005 the Independent Commission on Decommissioning issued a report announcing that the IRA had completed its decommissioning.

The Independent Monitoring Commission included a comparison of paramilitary activities in 2003 and 2006 in its most recent report, published in October 2006.[22] The comparison concluded with the following analysis of paramilitary activity:

> 5.18 Drawing the threads together, and looking at things from the point of view of the groups rather than thematically, we think the following points stand out:
>
> - PIRA [the Provisional IRA] has undergone the largest and most substantial change. It is not the same organisation that it was three years ago. Three years ago it was the most sophisticated and potentially the most dangerous of the groups, possessed of the largest arsenal of guns and other material. It is now firmly set on a political strategy, eschewing terrorism and other forms of crime. In this process there has been a loss of paramilitary capability. The leadership has taken a firm stance against the involvement of members in criminality, both through public statements and internal directions. No other group has yet undergone this transformation. The issue of policing remains to be resolved;
>
> - The dissident republican groups are the least changed. The commitment of the leaders to terrorism and their aspirations are as unswerving now as they were before. Although the groups are unable to fulfil all these ambitions in a sustained way, partly because they have suffered attrition from law enforcement agencies

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20 http://www.nio.gov.uk/joint_declaration_between_the_british_and_irish_governments.pdf
21 http://www.nio.gov.uk/media-detail.htm?newsID=11919
22 *Twelfth Report of the Independent Monitoring Commission* HMSO October 2006 Chapter 5: http://www.nio.gov.uk/twelfth_report_of_independent_monitoring_commission.pdf.pdf

> North and South, they remain dangerous and ruthless, willing to commit extreme terrorist violence. In all the essentials the groups are as they were three years ago, and they show no signs of considering a change of strategy, let alone carrying one out;
>
> - Amongst the loyalist groups the picture is more mixed. Their level of violence is now very much less than it was, but they remain involved in the same range of crimes, though it differs from group to group. They show no signs of decommissioning weapons, although there is now less activity to sustain paramilitary capacity than there was. In contrast to three years ago, there are some encouraging signs of leadership now developing plans to bring an end to paramilitary and criminal activity and to direct efforts towards community work. So far this has had only a limited but worthwhile impact on the ground.

B. Replacing the Diplock Court System

The current provisions governing the use of Diplock courts to try scheduled offences will be repealed in July 2007 along with the other measures in Part 7 of the *Terrorism Act 2000*. Clauses 1 to 8 of the *Justice and Security (Northern Ireland) Bill 2006-07* are designed to implement the Government's proposals for a new system of non-jury trial for what it envisages will be a small number of exceptional cases requiring special arrangements after July 2007.[23] The new system will apply in relation to offences committed before as well as after the coming into force of the provisions in this part of the Bill.[24]

1. Background

In August 2006 the Government published a consultation paper *Replacement Arrangements for the Diplock Court System.*[25] The paper referred to the Provisional IRA's statement of July 2005 announcing an end to its armed campaign and to significant improvements in the security situation. Noting the Government's commitment to repeal all counter-terrorist legislation particular to Northern Ireland by 31 July 2007, subject to an enabling environment, the paper set out the Government's plan to abolish Diplock courts and the scheduling of offences and move to a system in which there was a presumption in favour of jury trial, with a fall-back arrangement permitting non-jury trial in certain exceptional cases. The consultation paper said:

> 2.7 There is a continuing legacy of terrorism that Government must take account of when considering future arrangements. There is a residual risk from dissident republican and loyalist paramilitaries who are still engaged in planning acts of terrorism and continue to raise funds for their organisations.
>
> 2.8 People in Northern Ireland also live in close-knit communities and in some cases these are dominated by members of paramilitary organisations. This

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23 *Explanatory Notes* para.7

24 Clause 8(3)

25 *Replacement Arrangements for the Diplock Court System – A Consultation Paper* August 2006 http://www.nio.gov.uk/replacement_arrangements_for_the_diplock_court_system_a_consultation_paper.pdf

> increases the risk of intimidation. It also creates a fear of intimidation that can be just as damaging.
>
> 2.9 Government's primary duty is to ensure the safety and security of the people of Northern Ireland. Any new structures put in place must be capable of operating fairly and effectively within that context and provide the maximum amount of protection to the public.
>
> **The Proposals**
>
> 2.10 In light of this Ministers have decided that there is a continuing risk of perverse verdicts in some cases because of paramilitary and community-based pressures on a jury. They have considered a number of reforms to the jury system which will help to reduce the risks of jury intimidation and partisan juries (and these are discussed in detail below). These are not, however, likely to completely eliminate the identified risks. Ministers have concluded, therefore, that some form of non-jury trial will be necessary for Northern Ireland for exceptional cases.

The consultation paper summarised the Government's proposals for a new system of non-jury trial:

> The proposed new system has the following elements:
>
> - the presumption will be for jury trial for all offences;
> - the DPP will be able to certify cases into non-jury trial at any point up to arraignment, making his decision against a defined statutory test;
> - as with other administrative decisions the DPP's decision will be judicially reviewable;
> - bail will be heard by magistrates in all cases;
> - trials will be heard by one judge sitting without a jury who will give reasoned verdicts when someone is convicted; and
> - this system will work in parallel with the jury-tampering provisions of the Criminal Justice Act 2003.[26]

The Government had asked Lord Carlile of Berriew, the Government's independent review of anti-terrorist legislation, for his opinion on reform of the Diplock courts and a return to jury trial and his views are set out in an Annex to the consultation paper. The Government commented that the system it was proposing essentially followed the reforms Lord Carlile had proposed.[27]

The consultation paper noted that moving to a presumption for jury trial would minimise the administrative impact on the police and prosecution service of retaining a form of non-jury trial, adding:

> At the moment, 85-90% of cases are descheduled by the Attorney General and a detailed application has to be prepared for each case. Shifting the presumption to jury trial will mean that these arguments will only have to be prepared in those cases that may meet the statutory test, not in all cases where a person has been charged with one or more of a defined list of offences.[28]

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[26] ibid. para 4.2
[27] ibid. para 4.17-4.18
[28] ibid. para.4.4

The paper sought views on the proposed statutory test for determining whether or not a case should be tried without a jury, suggesting that the test should be based on specified circumstances of the offence, or the connections of the defendant, along with the risk of interference with the administration of justice, rather than on the particular offence committed:

> 4.7 Under the proposed new system, the DPP will make a decision as to whether or not a case should be tried without a jury against a defined statutory test. The Attorney General's decision in Diplock is currently made against a non-statutory test, but putting the test on the face of legislation in the new system will make the process more transparent and give the DPP clear guidance about his decision-making.
>
> 4.8 Ministers want to move away from the current position where certain, specified offences are tried without a jury unless they are unconnected to the emergency in Northern Ireland. They would like a test that is a two part one and will be based on the circumstances of the offence or connections of the defendant, not the offence committed. This will build both flexibility and rigour into the system and enable it to ensure that non-jury trial can be provided where a risk of a perverse verdict or jury intimidation occurs, regardless of the offence that the person has been charged with. This is considered particularly important given the diversification of members and former members of paramilitaries into other forms of crime as well as offences that are traditionally seen as terrorist. Intimidation tactics can be used in any trial, not just trials for terrorist offences.
>
> 4.9 Ministers are also keen that the test should only enable a case to be certified for non-jury trial where the DPP is satisfied that there is a risk of interference with or perversion of the administration of justice. In Diplock, a case will receive non-jury trial if it cannot be demonstrated that it is not connected to the emergency in Northern Ireland. No formal assessment of the risks to the administration of justice is undertaken. The new test would require such an assessment to be made and non-jury trial would not be possible under this system unless the DPP were satisfied a risk existed, regardless of the other circumstances of the offence.
>
> 4.10 A second element of the test would then set out the circumstances in which a certificate can be made. In order to ensure that this system of non-jury trial is only available in exceptional cases Ministers think the list should be exhaustive, with no ability to alter or add to the test at a later date (for example, by adding extra circumstances) except by making further primary legislation.
>
> 4.11 Ministers have not, however, made a final decision about what the list of circumstances should be. They are clear that the list should include individuals or incidents connected with paramilitary organisations, as this is where the greatest risk of perverse verdicts or jury intimidation is likely to arise. They are also considering whether the list should go wider than that; for example, including offences arising out of serious public order incidents, or offences that have a sectarian motive. These types of incidents are currently capable of being tried without a jury under the Diplock system. Many such offences might not be caught in a statutory test limited to paramilitary organisations, even though both

> categories could give rise to the risk of jurors being intimidated or juries reaching perverse verdicts. Ministers are therefore keen to hear views on these matters.[29]

The consultation paper also commented on the parallel provisions for non-jury trial in the *Criminal Justice Act 2003,* which are not intended to replace Diplock courts:

> There are provisions in the Criminal Justice Act 2003 that create a system of non-jury trial that will extend to Northern Ireland. Section 44 of that Act enables the prosecution to apply for non-jury trial where there is a clear and present danger of jury tampering in any case. Although these provisions extend to Northern Ireland (and it is intended to bring them into force here later in the year) they were never intended to replace the Diplock system. Section 50 of the 2003 Act provides that these non-jury arrangements do not apply in relation to trials for scheduled offences.
>
> In the future, it is intended that the arrangements in the 2003 Act and the system of non-jury trial that this consultation paper proposes will work in parallel. However, the system proposed in this paper will take precedence over the 2003 Act.[30]

2. Comment on the proposals for replacing the Diplock court system

In its response to the Government's August 2006 consultation paper the Northern Ireland Human Rights Commission (NIHRC) made the following comments about the proposals for a new system of non-jury trial:

> We are concerned that the proposed system falls short of returning to one criminal justice model that allows only non-jury trial in *exceptional* cases, in that the proposed measures will run in parallel to the provision for non-jury trials in the Criminal Justice Act 2003. It is our view that provisions of section 44 of the 2003 Act should provide the sole basis for non-jury proceedings in criminal cases, with possible necessary modifications in relation to jury protection measures to take account of the particular circumstances of Northern Ireland.
>
> In relation to the process of deciding on whether a case should be tried without a jury, the Commission favours the system envisaged by the 2003 Act to that proposed in the consultation of certification by the Director of Public Prosecutions. If the aim of the reform of the Diplock courts is to bring the administration of justice as close as possible to having one single system for all offences, then the decision-making procedure should follow the Criminal Justice Act model, particularly since the end result – that of conducting trial without a jury in certain limited circumstances – is exactly the same.
>
> Accordingly, the Director of Public Prosecutions should be required to apply to a judge of the Crown Court for the trial to be conducted without a jury. The DPP should be required to give reasons for the application, setting out evidence of a real and present danger of jury tampering or intimidation, and evidence that this danger remains regardless of steps that can reasonably be taken to prevent it. Reasons for the application should be made available to the defence to enable it

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29 ibid. paras 4.7-4.11
30 ibid. paras 4.20-4.21

> to challenge the application in front of a judge who is not the trial judge in the case.[31]

The Commission added:

> The Commission favours a system where the decision to move to a non-jury trial in a specific case depends on a clear risk of interference with or perversion of the administration of justice. Such instances, and the ensuing trials, should represent a very small minority of criminal cases. Particular circumstances that would justify non-jury trial in Northern Ireland could be included in the legislation as examples of cases where there may be evidence of a real and present danger that jury tampering would take place (similar to section 44(6) of the Criminal Justice Act 2003)

The civil rights organisation Committee on the Administration of Justice (CAJ) took the view that trial by jury should be restored in all cases in Northern Ireland. In expressing concern about the Government's proposals the CAJ said:

> No mention is made of whether the decision of the DPP [sic] to issue certificates must be accompanied by reasons for that decision. Such an omission is a serious flaw in the proposed system, as it places undue discretion in this office. Moreover, the historically problematic and restrictive policy of the DPP/PPS in the giving of reasons for non-prosecution falls far short of that required by the Criminal Justice Review and international standards, so must not be adopted in relation to decisions on the issuing of certificates. In addition, while judicial review is offered as a means of challenge of these decisions, this is also available for decisions not to prosecute. However, there have been several attempts to secure this remedy, all without success, which does not bode well for its use in relation to other prosecutorial decisions.[32]

3. The Bill

a. Issuing certificates for non-jury trial

The Government intends that under the new system, the presumption should be that a person facing trial on indictment is to be tried by jury. Clause 1 of the Bill is, however, designed to enable the Director of Public Prosecutions for Northern Ireland (DPP(NI)) to issue a certificate stating that the trial of a person who has been charged with one or more indictable offences should take place without a jury if:

- the DPP(NI) suspects that any of a number of specified conditions are met, and
- he is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

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31 *Replacement Arrangements for the Diplock Court System: Response of the Northern Ireland Human Rights Commission to the Consultation by the Northern Ireland Office* NIHRC October 2006: http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/73/Replacement_Arrangements_for_the_Diplock_Court_System.doc

32 Letter from the CAJ to the Diplock Replacement Arrangements Consultation: http://www.caj.org.uk/Diplock%20response.doc

The specified conditions are:

1. That the defendant is or has been a member of a proscribed organisation or is an associate (defined as the current or former spouse, partner or civil partner, friend or relative) of a person who is or has been a member of such an organisation;

2. That the offences involved were committed on behalf of a proscribed organisation or that a proscribed organisation was otherwise involved with, or assisted in, carrying them out;

3. That an attempt has been made to prejudice the investigation or prosecution of any of the offences and the attempt has been made on behalf, or with the involvement or assistance of, a proscribed organisation;

4. That any of the offences were committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one group of persons towards another person or group of persons.

Where any of these conditions are met the trial of the defendant concerned will not automatically be conducted without a jury as the DPP(NI) will also need to be satisfied that there is a risk that the administration of justice might be impaired by a jury trial.

As far as condition 4 is concerned, clause 1(7) seeks to clarify what is meant by "religious or political hostility" by stating that it includes hostility based on religious belief or political opinion, any assumptions made about religious beliefs or political opinions and the absence of any such beliefs or opinions. Clause 1(8) adds that references to persons and groups of persons need not include a reference to the defendant or victim.

For the purposes of the Bill a "proscribed organisation" is an organisation which is or was proscribed under section 11(4) of the *Terrorism Act 2000* at any time during the person's membership of it and whose activities are (or were at the time of his membership) connected with the affairs of Northern Ireland. Under section 11(4) of the 2000 Act "proscribed" means proscribed both for the purposes of the *Terrorism Act 2000* and for the purposes of the *Northern Ireland (Emergency Provisions) Acts 1973-96* and the *Prevention of Terrorism Acts 1974-1989* which preceded the 2000 Act.

The list of currently proscribed organisations is set out in Schedule 2 of the *Terrorism Act 2000*. It includes the following organisations whose activities are connected with the affairs of Northern Ireland:

The Irish Republican Army.
Cumann na mBan.
Fianna na hEireann.
The Red Hand Commando.
Saor Eire.
The Ulster Freedom Fighters.
The Ulster Volunteer Force.
The Irish National Liberation Army.
The Irish People's Liberation Organisation.
The Ulster Defence Association.

The Loyalist Volunteer Force.
The Continuity Army Council.
The Orange Volunteers.
The Red Hand Defenders.

The Irish Republican Army (IRA) and Irish National Liberation Army (INLA) were previously proscribed in the UK as a whole under the *Prevention of Terrorism (Temporary Provisions) Act 1989* and in Northern Ireland under Schedule 2 of the *Northern Ireland (Emergency Provisions) Act 1996.* The other organisations in the list were proscribed in Northern Ireland only under the 1996 Act. Information about proscription under anti-terrorist legislation and the list of proscribed organisations is available in Library standard note SN/HA/815 *The Terrorism Act 2000: Proscribed Organisations* which is available on the intranet.

b. Court procedure in cases where certificates for non-jury trial have been issued.

In order for a trial to take place without a jury, the DPP(NI) will have to lodge a certificate issued under Clause 1 with the court before the arraignment of the defendant or any person committed for trial with the defendant. This will mean that a certificate will have to be lodged before the stage at which the defendant would plead guilty or not guilty to the charges.

Where there is an issue of the defendant's fitness to be tried this will still have to be decided by a jury, as required by Article 49 of the *Mental Health (Northern Ireland) Order 1986*, even if the trial in relation to the offences with which the defendant is charged is to be conducted without one.[33]

Where a certificate had been issued under clause 1 the prosecution would have the power under clause 3 to request that preliminary proceedings in the magistrates' court be conducted using preliminary inquiry, a paper-based procedure provided for by the *Magistrates Courts (Northern Ireland) Order 1981*[34] which does not require witnesses to be called. The court would be required to grant any such request. The Government hopes that the use of this procedure in such cases will help to protect witnesses from intimidation.[35]

A trial on indictment in relation to which a certificate has been issued under clause 1 will be held at the Crown Court in Belfast, unless the Lord Chief Justice of Northern Ireland issues a direction under clause 4 requiring that the trial, a part of the trial, or a class of trials within which the trial falls, be held at the Crown Court sitting elsewhere.

Where a certificate has been issued under clause 1 the trial on indictment of the person to whom the certificate relates and any person committed for trial with that person will be conducted, without a jury, following procedures set out in clause 5. The court trying the case will have all the powers it would have had if the trial had been conducted with a

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33 Clause 8(1)
34 SI 1981/1675 (N.I.26)
35 *Explanatory Notes* para. 25

jury. Clause 5(4) expressly provides that no inference should be drawn by the court from the fact that a certificate has been issued in respect of the trial. Clause 5(6) provides that, as is the case with the current Diplock court system, a court which convicts a defendant after a non-jury trial will be required to provide a judgment stating the reasons for the conviction. The reasoned judgment will have to be given at the time of the conviction or as soon as is reasonably practicable after it. There is no equivalent requirement for the court to provide reasons for an acquittal.

Defendants convicted of offences after non-jury trials will have unrestricted rights to appeal to the Court of Appeal against their convictions and against any sentences imposed on them unless the sentence is fixed by law. The prosecution will also be able to appeal directly to the Court of Appeal against the sentence imposed in a particular case.

Additional provisions relating to trials on indictment without a jury are set out in Schedule 1 of the Bill. These include amendments to section 14A of the *Criminal Procedure and Investigations Act* which seek to extend to the new system the procedures currently available in trials in Diplock courts which enable a defendant to apply to the court for a review of a decision not to disclose information on public interest grounds.

c. Challenges to the issue of certificates for non-jury trial

The Government's independent reviewer of anti-terrorist legislation, Lord Carlile of Berriew QC, suggested the following limitations on the issuing of certificates in his response to the Government's review of Diplock courts, which is set out as an annex to the Government's August 2006 consultation paper:

> The history and sectarian background in Northern Ireland leave distinctive and particular concerns. These lead me to the conclusion that non-jury trial should occur –
>
> (a) on certification by the prosecution authority, giving reasons to the extent that they can be given without endangering sensitive sources or national security, and
>
> (b) after that authority has obtained the opinion of an independent advocate to be drawn from a security cleared panel (a special advocate), who may be an advocate in any UK jurisdiction, and
>
> (c) subject to a right of review without the need to obtain permission of the court.[36]

He added that court challenges should allow sensitive evidence to be heard in special procedures:

> I suggest that such certification should be subject to review on the application of any defendant in the case. The review should be before a judge of the High Court of Northern Ireland, who should not be the trial judge. The special advocate should be available for the hearing, and rules of procedure should be made

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[36] *Replacement Arrangements for the Diplock Court System* Northern Ireland Office August 2006 p.21 para.20

> similar to those used by the Special Immigration Appeals Commission. These would ensure that in such cases in the public interest the most sensitive material was protected from disclosure to the defendant and his own legal representatives, and that his/her interests and the broader interests of justice were properly protected. No concealment of information should occur if there would be prejudice to the defendant in presenting the defence case. I believe that, subject to appropriate rules of court, a system of law along these lines would be compatible with the ECHR and the Human Rights Act, as with SIAC.[37]

In the consultation paper itself the Government said:

> As is the case with all administrative decisions, the DPP's decision will be challengeable by means of judicial review. This will enable defendants to be sure that the decision has been taken properly. The decision is merely one of mode of trial (with non-jury trial capable of providing the same quality of justice as a jury trial) so there does not seem to be a need for a separate appeal mechanism. Some of the information that the decision may be based on could be sensitive intelligence material and national security interests must be taken into account.[38]

In commenting on Lord Carlile's views the paper added:

> The system described above follows the essence of the system Lord Carlile proposes in his letter, in that the decision is an administrative one taken by the DPP and reviewable by the courts. Ministers considered that it was not necessary to involve special advocates in the decision making process itself – if the DPP felt that he needed advice from counsel before making a decision in any case there would be nothing to stop him seeking it.[39]

The Government appears to have changed its view of this issue, as Clause 7 of the Bill seeks to restrict the grounds on which court proceedings challenging the issue of certificates by the DPP(NI) might be brought, whether by judicial review or otherwise. Clause 7(1) is intended to prevent any court from entertaining proceeds for questioning any decision by the DPP(NI) in relation to the issue of certificates under clause 1 and clause 7(2) particularly seeks to prevent proceedings being brought in such a case to overturn a decision by the DPP(NI) on the grounds that the DPP(NI) erred in law or had no power to make the decision. Clause 7(3) seeks to restrict the circumstances in which a person may bring proceedings against a public authority for a breach of the European Convention on Human Rights where the claim relates to the issue of a certificate under clause 1 of the Bill.

The *Explanatory Notes* comment that challenge to the issue of a certificate will still be possible where it is alleged that there has been, for example, dishonesty or bad faith. They go on to say of the restriction on court challenges:

> This reflects the current caselaw in *In Re Shuker and Others* [2004 NI 367] which confirmed that the procedure for determining mode of trial of the accused, as applies in Diplock cases, is not a process suitable for the full panoply of judicial

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37 ibid. p.22 para. 23
38 ibid. p.13 para.4.12
39 ibid. para.4.18

> review. Judicial review of the Attorney General's decision not to deschedule a Diplock case would be reviewable, however, on grounds such as bad faith or dishonesty.

In the *Shuker* case,[40] which concerned an application for judicial review of the Attorney-General's exercise of his discretionary power to "de-schedule" cases the Lord Chief Justice of Northern Ireland, Kerr LCJ noted a number of cases in which the courts had declined to review the exercise by the Director of Public Prosecutions and the Attorney General of their powers in relation to prosecutions. He went on to say:

> The exercise involved in deciding whether offences should be de-scheduled is in some respects akin to the decision whether to prosecute. It involves the evaluation of material that will frequently be of a sensitive nature and the assessment of recommendations made by or on behalf of the Director of Public Prosecutions based on his appraisal of matters that may not be admissible in evidence or whose disclosure would be against the public interest. This is *par excellence* a procedure on which the courts should be reluctant to intrude. It is, moreover, a task that has been entrusted by Parliament to the Attorney General and while this will not in all circumstances render judicial review impermissible, it signifies a further reason for reticence.
>
> It must be made clear that while we have concluded that judicial review is not available to challenge the decision of the Attorney in the present cases, we do not consider that this will be excluded in every circumstance. As Mr Morgan has said, such a decision would be reviewable on the ground of bad faith. Depending on the circumstances of other cases that may arise, further grounds of judicial review challenge may be deemed appropriate but we do not consider that it would be helpful, or even possible, to predict what those grounds might be.[41]

C. Protecting Juries

1. Background

In his response to Government's review of Diplock courts, Lord Carlile of Berriew QC made the following comments about the need to protect juries if there were to be a substantial return to jury trial in Northern Ireland:

> I consider that there is a particular need in Northern Ireland to protect juries. In England and Wales there remains a right for the defence to request from the court details of the names, addresses and occupations of the jury panel for a Crown Court sitting. Enquiry has revealed that this right is exercised extremely rarely (I know of no instance in recent years). All the defence know of jurors is their names when called to the jury box. There are no peremptory challenges available to the defence. The prosecution retains the right of stand by, subject to restrictive guidelines maintained by the Attorney General since 1988.

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40 *Shuker & Ors, Re Applications for Judicial Review* [2004] NIQB 20 (31 March 2004): http://alpha.bailii.org/nie/cases/NIHC/QB/2004/20.html

41 ibid. at paras. 26-27

> In Northern Ireland defence solicitors routinely inspect jury panel lists, and are able to obtain the names, addresses and occupations of those summoned for jury service. Each defendant has a right to 12 peremptory challenges, and the prosecution has the right to stand jurors by without giving reasons.
>
> I am strongly of the view that a principle of anonymity for jurors in Northern Ireland would give considerable reassurance, and would be proportionate to risk. In addition, there should be some courts where more serious cases could be tried with the jury entirely unseen from the public seating areas. If jurors could attend court, knowing that their names, addresses and occupations were unknown to the defence and their connections, and that in serious cases their faces were not observable from the public seating, that would provide considerable reassurance. I see no difficulty about this. Each juror could simply be referred to by number when they came to take their jury oath.
>
> I believe that the anonymisation of jurors and associated steps for their protection would diminish the risk of perverse verdicts.
>
> The pool of jurors should be as wide as possible, representative of the community as a whole. Even judges now serve on juries in England and Wales, including in at least one instance a member of the Court of Appeal. The same principles should be applied in Northern Ireland: it should become difficult to be excused from service.
>
> In order to ensure that disqualified persons do not sit on juries, I suggest that the Court Service be given the authority and responsibility to obtain checks on the criminal records of all selected for jury service. If anything of concern were to appear, it should be given to the judge and presented to the parties as anonymised information for discussion in court. In addition, judges and advocates in each case, as is common already, would be able to prepare short case specific questionnaires for jurors when appropriate. Peremptory challenges, prosecution stand by, and access by the parties to the details of persons on the jury panel would no longer be necessary and should be removed. The ending of defence peremptory challenges in the courts of England and Wales has not diminished the integrity of the jury system.[42]

The Government's August 2006 consultation paper identified a number of reforms which the Government considered would help address issues of juror intimidation and partisan jurors. The reforms included:

- the introduction of routine criminal record checks to identify disqualified jurors;
- restrictions on access to personal juror information and the introduction of guidelines on jury checks;
- the abolition of peremptory challenge, a right (abolished in England and Wales by the Criminal Justice Act 1988) which permits a defendant to challenge up to twelve jurors without showing cause;
- restrictions on the exercise by the Crown of its broadly comparable right to order jurors to stand-by, and

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[42] *Replacement Arrangements for the Diplock Court System: A consultation paper* Northern Ireland Office August 2006 p.23-24 paras.28-33

- a range of other measures intended to protect jurors and help reduce intimidation and fear of intimidation.[43]

2. Comment on the proposed jury reforms

In its response to the Government's proposals the Northern Ireland Human Rights Commission said:

> We welcome the proposals on restriction of access to personal juror information in certain cases. However, the withdrawal of information from the defence only raises questions around equality in jury selection processes. The Commission supports the view of Lord Carlile that in cases where there is a possibility of jury tampering, the right of both the defence and the prosecution to access personal details should be restricted**.**
>
> Consideration should also be given to devising systems of raising challenges by both the defence and the prosecution without either of them discovering the identity of the juror. These methods of raising challenges should be available to either side of the trial to secure equality in jury selection processes. The proposed guidelines on circumstances in which additional jury checks may be carried out by the PSNI do not, on the face of it, secure such equality.
>
> The Commission previously stated,[44] and continues to be of the view, that both the right of defence to "peremptory challenge" and that of prosecution to "stand-by" should be abolished. Jurors should only be prevented from being empanelled if good cause can be shown to the satisfaction of the judge.
>
> The Commission restates its position expressed in our response to the Diplock Review (2000) that examples of what might amount to good cause (such as acquaintance with the defendant, or friendship with a victim of the crime in question) should be given in the legislation governing the matter.[45]

The Committee on the Administration of Justice had concerns about the details of the proposals to restrict access to information on jurors and abolish peremptory challenge:

> ***Restricting access to personal information and jury checks(para 3.7 etc)***
>
> If access to personal information on jurors is to be restricted, this should apply to both the prosecution and the defence. To restrict information to the former only is unacceptable in that it gives a significantly unfair disadvantage to the latter, particularly in light of the proposals further on in relation to peremptory challenge. Moreover, there is an implication that those acting for the defence are more unreliable than their colleagues working for the prosecution – an invidious and improper suggestion, which is all the more objectionable in Northern Ireland, where defence lawyers have been killed for their supposed sympathies. In addition, the provision of this information to the police places the defence at a further disadvantage. In its submission to the Diplock Review in 2000, CAJ

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[43] ibid. p.6
[44] ibid.
[45] http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/73/Replacement_Arrangements_for_the_Diplock_Court_System.doc

proposed that the names, addresses and occupations of jurors should not be disclosed to either defence or prosecution lawyers or the police, and we would reiterate that proposal here. If additional checks are required, these should be carried out by a body independent of the process.

Abolition of peremptory challenge and restriction of rights of stand-by

CAJ is concerned that the proposals in this paper (para 3.14 on) are unfairly weighted against the defence and thus place the prosecution at a significant advantage. If these proposals stand, the prosecution will not only have information on jurors that the defence will not, but it will also retain the right to request that the Court order members of the jury to stand-by while the defence will have no right of challenge whatsoever. These proposals seem to run counter entirely to the principle of equality of arms before the law. CAJ believes that either the right of the defence to challenge a juror and the use of stand-by by the prosecution should both be removed altogether, or both should be retained with clear and strict guidelines as to their use.[46]

3. The Bill

Clauses 9 to 12 and Schedule 2 of the Bill are designed to implement the Government's proposals for jury reform. Clause 9 adds new Articles 26A, 26B and 26C to the *Juries (Northern Ireland) Order 1996*.[47] New Article 26A would make it an offence punishable by up to two years' imprisonment and a fine for certain individuals and public officials to disclose juror information without lawful authority, unless they can show that they reasonably believed the disclosure to be lawful. The individuals and public official for whom this would be an offence are listed in the *Explanatory Notes* as follows:

- an electoral officer;
- a court official;
- a person providing services to the Northern Ireland Court Service;
- a member of the police;
- a person provided with juror information in accordance with jury check guidelines;
- a juror or person summoned as a juror; or
- any other person who knows (or ought to know) that relevant juror information has previously been unlawfully disclosed.

New Article 26B specifies circumstances in which juror information may lawfully be disclosed. The *Explanatory Notes* summarise these circumstances by noting that they include disclosure:

- by an electoral officer to another electoral officer or for the purpose of preparing the annual list of potential jurors in accordance with Article 4 of the 1996 Order;
- by a court official to another court official, to a judge, or to a juror or person summoned as a juror;

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46 http://www.caj.org.uk/Diplock%20response.doc

47 SI 1996/1141 (N.I.6)

- to a person or his employee in connection with the provision of services to the Northern Ireland Court Service;
- by a person or his employee providing services to the Northern Ireland Court Service if required by an officer of the court in connection with the provision of those services;
- for the purposes of carrying out additional jury checks as authorised by jury check guidelines;
- for the purposes of criminal proceedings, other than those in relation to which the juror in question has been called to serve as a juror; and
- made with leave of a court.

The offence in new Article 26A of the *Juries (Northern Ireland) Order 1996* will not apply to juror information that relates to service on a jury before the date on which the new provisions come into force or to information made available in jurors lists prepared before that date.[48]

The Chief Electoral Officer currently provides the Juries Officer with details of the names and addresses of individuals listed in the jurors' lists prepared under Article 4 of the *Juries (Northern Ireland) Order 1996*. Clause 10 seeks to add to the information provided by requiring the Chief Electoral Officer to submit the date of birth and national insurance number of each person on the list. This is intended to enable the Northern Ireland Court Service to conduct routine criminal record checks to prevent disqualified people from serving as jurors. Clause 11 amends Article 8 of the *Juries (Northern Ireland) Order* by providing that the Juries Officer should not summon a juror included in a panel if he is satisfied, as a result of a check carried out by a member of the Northern Ireland Court Service, that the juror is disqualified or not qualified for jury service.

Clause 12 of the Bill seeks to abolish the right of a person arraigned on indictment in Northern Ireland to challenge up to twelve jurors without the need to show cause. This right of "peremptory challenge" was abolished in England and Wales by the *Criminal Justice Act 1988.* The Government also intends to restrict its broadly comparable right to order jurors to "stand by" but this does not appear on the fact of the Bill. Where a challenge is made "for cause" clause 12(4) provides that it may be heard by the judge in chambers rather than in open court.

Further restrictions in the disclosure of information about juries are set out in Schedule 2 of the Bill. These include:

- removal of the right to inspect and obtain copies of jurors lists and panels;
- restrictions on those who may be present while the attendance of jurors is being ascertained; and
- balloting of jurors by assigned number rather than by name.

[48] New Article 26C subsection (3)

III The Northern Ireland Human Rights Commission

The Northern Ireland Human Rights Commission was created by section 68 of the *Northern Ireland Act 1998* following a commitment made by the UK Government in the Belfast Agreement of 10 April 1998 (the Good Friday Agreement). It came into existence on 1 March 1999. The Commission has a full-time Chief Commissioner (currently Professor Monica McWilliams) and a variable number of part-time Commissioners (currently nine).

Section 69 of the 1998 Act set out the Committee's functions. Section 69(1) states that:

> The Commission shall keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights.

The Commission's role is to promote awareness of the importance of human rights in Northern Ireland, to review existing law and practice and to advise the Secretary of State and the Executive Committee of the Northern Ireland Assembly (when it is functioning) on what legislative or other measures ought to be taken to protect human rights in Northern Ireland. The Commission is specifically charged with drafting a Bill of Rights for Northern Ireland to supplement the European Convention on Human Rights. The Commission also has powers under sections 69(5), (6) and (8) of the 1998 Act which state that it may:

- assist individuals when they are bringing court proceedings;
- bring court proceedings involving law or practice relating to the protection of human rights;
- undertake, commission or provide financial or other assistance for research and educational activities; and
- conduct investigations.

In 2002 the House of Lords held that the Commission also had the power to intervene as a third party in court proceedings and act as *amicus curiae* (friend of the court).[49]

Clauses 13 to 18 of the *Justice and Security (Northern Ireland) Bill 2006-07* are intended to amend the *Northern Ireland Act 1998* to give the Commission new powers and to enable the Commission to rely on the European Convention on Human Rights in exercising these new powers. The background to the introduction of these additional powers, including the recommendations the Commission itself was required to make regarding its effectiveness,[50] is set out in a consultation paper *The Powers of the Northern Ireland Human Rights Commission*, published by the Northern Ireland Office on 16 November 2005.[51] A press notice issued by the Northern Ireland Office on the day of the paper's publication quoted the Northern Ireland minister, David Hanson, as saying:

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49 *In re: Northern Ireland Human Rights Commission* [2002] UKHL 25

50 under s. 69(2) of the *Northern Ireland Act 1998*

51 *The Powers of the Northern Ireland Human Rights Commission* Northern Ireland Office November 2005 http://www.nio.gov.uk/the_powers_of_the_northern_ireland_human_rights_commission.pdf

> The Government believes strongly in the importance of human rights and is committed to ensuring that the Commission has the right powers to enable it to carry out its duties effectively.
>
> The Government has assessed recommendations put forward by the Commission and is satisfied that it already broadly possesses the right powers to carry out its duties efficiently. However in two important areas, the right of access to places of detention and the power to compel evidence and witnesses, we agree that it is right to amend the Northern Ireland Act 1998 to make sure that the Commission can fulfil its existing functions properly.[52]

The Commission published its response to this consultation paper on 7 February 2006.[53] The Government published its response to the consultation exercise on 24 November 2006.[54] A Northern Ireland Office press notice announcing the publication of the Government's response quoted David Hanson as saying:

> As announced at St Andrews, it is the Government's intention to bring forward legislation in the present Parliamentary session that will see significant new powers extended to the Northern Ireland Human Rights Commission.
>
> In response to the consultation process which was launched in November last year, we have received a number of valuable responses on the powers of the Commission. Following careful consideration, it is our intention that the Commission be extended the statutory power to access places of detention and to compel information as part of its investigations. We also now intend that it should have the power to rely upon the European Convention on Human Rights when bringing judicial proceedings in its own name.[55]

Clause 13 of the Bill, which would amend section 71 of the *Northern Ireland Act 1998*, seeks to enable the Northern Ireland Human Rights Commission to institute legal proceedings in relation to human rights issues in its own right, without itself having to be a victim or potential victim of the unlawful act to which the proceedings relate. The Commission will only be able to institute proceedings if there are one or more actual or potential victims of the unlawful act. It will not be possible for awards of damages to be made to the Commission in respect of the unlawful act to which the proceedings relate.

Clause 14 inserts new sections 69A and 69B into the 1998 Act allowing the Commission by notice to require a person to provide it with documents or information in his possession or to give oral evidence to the Commission for the purpose of an investigation. Before issuing a notice the Commission will have to have concluded that

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52 "Consultation on powers of the Northern Ireland Human Rights Commission: Hanson" – Northern Ireland Office 16 November 2005
http://www.nio.gov.uk/media-detail.htm?newsID=12504&keywords=powers+human+rights+commission+

53 "Consultation Paper on the Powers of the Northern Ireland Human Rights Commission: Response of the Commission " Northern Ireland Human Rights Commission 7 February 2006
http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/73/169.doc

54 *Response to consultation: The Powers of the Northern Ireland Human Rights Commission* http://www.nio.gov.uk/response_to_the_consultation_on_the_powers_of_the_northern_ireland_human_rights_commission.pdf

55 "Government response to consultation on powers of the Northern Ireland Human Rights Commission: Hanson", Northern Ireland Office 24 November 2006

the matter which it is proposing to investigate has not already been sufficiently investigated by another person. The recipient of a notice will be able to apply to the county court to have the notice cancelled and the grounds on which this may be done are set out in subsection (5) of new section 69A. The Commission will be able to apply to the county court for an order requiring a person who has failed, or is likely to fail, without reasonable excuse, to comply with a notice to produce evidence under this provision. It will be a summary offence punishable by a fine of up to £5,000 for a person to

- fail to comply with a notice to produce evidence
- fail to comply with a court order enforcing a notice to produce evidence
- falsify anything provided or produced in accordance with a notice or order, or
- make a false statement in giving oral evidence in accordance with a notice

It will not be possible for the Commission to use notices issued under this provision to require the Public Prosecution Service for Northern Ireland to produce documents or evidence about decisions whether or not to institute or continue criminal proceedings. New section 69B of the 1998 Act, which will also be inserted by Clause 14, also creates an exemption from the obligation to provide documents or evidence to the Commission for certain material relating to national security and the intelligence services.

Subsection (5) of new section 69B also provides that an investigation by the Northern Ireland Human Rights Commission may not consider whether an intelligence service has acted (or is acting) in a way which is incompatible with a person's human rights, or other matters concerning human rights in relation to an intelligence service.

Clause 15 would insert into the 1998 Act a new section 69C into the 1998 Act giving the Commission the power to authorise a person to access a place of detention in Northern Ireland. As with the power to require a person to produce evidence the Commission will have to have concluded that the matter it wishes to investigate with regard to a particular place of detention has not already been sufficiently been investigated by another person. The new section also includes a procedure for applications to be made to the county court to resolve issues relating to such access. Paragraphs (a) to (h) of new section 69C list the places of detention to which the power to authorise access relates. The Secretary of State will have the power to amend this list by order and any such order will be subject to the approval of both Houses of Parliament under the affirmative procedure. [56]

The Commission will have to write and distribute terms of reference for any investigation during which it wishes to exercise its proposed new powers to require production of information or evidence to seek access to places of detention. It will also be required to publish reports of the findings of its investigations.

Clause 19 is designed to restrict the Commission's use of the new powers provided under Clauses 14 and 15 to investigations into matters arising, and situations existing, on or after 1 January 2008.

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[56] Clause 15(2) amending section 96(2) of the *Northern Ireland Act 1998*

IV Powers for the Police and Armed Forces

A. Introduction

Part 7 of the *Terrorism Act 2000,* which is due to expire, contains a number of powers which apply both to the police and armed forces. These cover matters such as stopping and questioning people, search, arrest and seizure, and closing roads.

The missions and tasks appointed to the Armed Forces are determined by the Defence Council and are reviewed and amended by the Council when it is considered necessary and in line with the prevailing or expected strategic priorities of the UK. Military Aid to the Civil Power in Northern Ireland has been a designated Standing Home Commitment of the Armed Forces since the deployment of the British Army there in 1969.

The updated Security Annex to the Joint Declaration which was published in August 2005 envisaged the establishment of a permanent peacetime presence for the British Army in Northern Ireland of no more than 5,000 troops, based at no more than 14 core sites by 31 July 2007. A structured plan for the phased reduction of troops in Northern Ireland to this peacetime level was announced by the MOD on 28 March 2006.[57]

The remit of the Army in Northern Ireland is to support the police in the defeat of terrorism and in the maintenance of public order, in order to assist HM Government's objective of returning to normality. In order to fulfil this role Armed Forces personnel in Northern Ireland require statutory powers of entry, search and seizure above those already conferred on the Service Police and certain persons subject to Service law in relation to Service offences committed by persons subject to Service law. These general powers are set out in Part 3 of the *Armed Forces Act 2006*, while the definition of who is subject to Service law is set out in Part 19 of that Act. Those additional statutory powers were initially established in the *Northern Ireland (Emergency Powers) Acts* and subsequently in the *Terrorism Act 2000*.

B. The Bill

1. Overview

This Bill contains powers for the police and armed forces which rework rather than simply replicate the provisions in Part 7 of the 2000 Act. In most cases, new distinctions have been drawn between the powers of the police and the powers of the armed forces, because the police have additional powers under other legislation.

The Government is also in the process of introducing new provisions containing police powers. For example, during 2006, the Northern Ireland Office conducted a major review of the PACE codes under the *Police and Criminal Evidence (Northern Ireland)*

[57] A copy of the normalisation plan is available in the Library (ref: MGP06/841)

Order 1989 (NI 12).[58] PACE provisions cover a whole range of police powers including stop and search, seizure, and the detention and questioning of suspects. One key change was a broadening of the power of arrest. The draft *Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007*, under which the new Codes of Practice were issued, was laid before Parliament on 4 December 2006.

The Government is currently consulting on the draft *Policing (Miscellaneous Provisions) (Northern Ireland) Order*, which would extend the "police family" to include Police Community Support Officers and other designated civilians with limited powers, in line with similar developments in England and Wales.[59] These draft regulations would also contain police powers, for example to close or divert roads, or to examine documents and electronic records for evidence of crime. The armed forces, by contrast, would have no equivalent statutory powers once Part 7 ceases to have effect. As a result, it is left to this Bill to provide such corresponding powers for the armed forces as the Government considers necessary.

As with the current powers, the Secretary of State will be able to make codes of practice covering the exercise of these powers by police and by the armed forces.[60] There is also a compensation scheme under Schedule 4 of the Bill to cover situations where, for example, people have an interest in property which is taken or damaged. This is almost identical to schedule 10 of the 2000 Act. Clause 32 makes it clear that powers under clauses 20 to 29 are additional to any common law powers and do not affect the Royal Prerogative. It also provides for the use of reasonable force in relation to those clauses.

2. Stop and Question

The current power to stop and question is the same for both police constables and members of the armed forces under section 89 in Part 7 of the *Terrorism Act 2000*. Both can stop a person to question him about his identity and movements, what he knows about a recent explosion or another recent incident endangering life, or a person killed or injured in such an explosion or incident. Clause 20 would broadly reproduce the current power for the armed forces. The police would have only the more limited power to stop and question for identification purposes. However, there are extensive provisions governing stop and search in the draft PACE Codes.

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58 The results of the consultation are available in a report, Northern Ireland Office, *Draft Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2006 and associated Codes of Practice Summary of responses to public consultation*, 2006 at http://www.nio.gov.uk/consulatation_on_amendments_to_the_draft_police_and_criminal_evidence_(amendment)_(northern_ireland)_order_2006_revised_draft_codes_of_practice_and_section_75_screening_of_proposals.pdf

59 Northern Ireland Office, *Consultation Document for draft Policing (Miscellaneous Provisions) (Northern Ireland) Order 2007* http://www.nio.gov.uk/draft_policing_(miscellaneous_provisions)_(northern_ireland)_order_2007_consultation_document.pdf

60 clauses 33-4

3. Arrest

Clause 21 largely reproduces the current power of the armed forces to arrest and detain for up to four hours a person whom they reasonably suspect of an offence.[61] For the arrest to be lawful, the member of the armed forces will, as now, have to state that he is making the arrest "as a member of Her Majesty's forces". This is subject to any overarching requirement of the *Human Rights Act 1998*. This is because it would be unreasonable to expect them to know the law in as much detail as the police. The Explanatory Notes also state that "it is envisaged that members of the armed forces will be deployed increasingly rarely" and that therefore they will not be required to provide the detailed legal ground for arrest as a police officer would.[62]

Part 7 of the 2000 Act contained a power of arrest for the police (section 82) which is no longer necessary as a result of the PACE changes.

4. Entry

Section 90 of the 2000 Act contains a very broad power for members of the armed forces or the police to enter any premises "if he considers it necessary in the course of operations for the preservation of the peace or the maintenance of order". This is reproduced for the armed forces in clause 22(1), but the equivalent power for the police in the rest of that clause, contains detailed requirements to obtain authorisation where practicable, and to keep records for at least 12 months. For the purposes of this clause, premises are defined to include vehicles.[63]

5. Search for munitions and transmitters

Clause 23 and schedule 3 largely reproduce existing provisions giving police officers and members of the armed forces powers to enter or search premises to search for illegal munitions or transmitters.[64] The main change is that, whereas in the current provisions either kind of officer "may be accompanied by other persons", under the Bill this would only apply to police officers. The explanatory notes state that this power would allow "civilian members of the police force and those supporting the police (for example, Scenes of Crime Officers) to enter premises with constables."[65] Under clause 25, premises include vehicles, and there is a power to stop these and if necessary take them away for searching.

6. Search for unlawfully detained persons

Clause 24 broadly replicates for members of the armed forces the current power to enter premises to search for unlawfully detained persons. Once again, vehicles are included. The existing power, under section 86 of the *Terrorism Act 2000*, currently applies to

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61 Section 83 *Terrorism Act 2000*
62 paragraph 61
63 clause 41
64 section 84 and schedule 10 *Terrorism Act 2000*
65 p20

police officers as well. However, police powers to enter and search premises are covered by the draft PACE codes, and there are also common law powers.[66]

7. Examination of documents

Currently the power to examine documents and the procedures for doing so apply both to the police and the armed forces.[67] The draft *Policing (Miscellaneous Provisions) (Northern Ireland) Order* contains police powers to examine documents and electronic records for evidence of crime. [68] Therefore, under the Bill, equivalent provisions would only apply to the armed forces.

8. Road closures

Similarly, powers to close roads currently apply both to the police and armed forces.[69] The draft *Policing (Miscellaneous Provisions) (Northern Ireland) Order* would provide for police powers to close or divert roads or restrict the use of a road or waterway if this is considered necessary for the preservation of peace of the maintenance of public order. Consequently the powers in the Bill, which are similar to those in the 2000 Act, would apply only to the armed forces or "a person authorised for the purposes of this section by the Secretary of State", which could cover situations where a contractor was used.[70]

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66 *Draft Codes of Practice 2006 Edition,* Code B, http://www.nio.gov.uk/police_and_criminal_evidence_(northern_ireland)_order_1989_draft_codes_of_practice__2006_edition.pdf

67 sections 87 and 88 *Terrorism Act 2000*

68 Northern Ireland Office, *Consultation Document for draft Policing (Miscellaneous Provisions) (Northern Ireland) Order 2007* http://www.nio.gov.uk/draft_policing_(miscellaneous_provisions)_(northern_ireland)_order_2007_consultation_document.pdf

69 sections 94, *Terrorism Act 2000*

70 clause 29

V Private security industry

Though it sometimes eludes definition, the private security industry nevertheless impinges increasingly on everyday life throughout the United Kingdom. Bruce George MP and Mark Button have attempted to reach a definition of private security in their book on the subject:

> The term 'private security industry' is a generic term used to describe an amalgam of distinct industries and professions bound together by a number of functions, including crime prevention, order maintenance, loss reduction and protection; but these functions are neither common nor exclusive to all the activities of the private security industry, though the more that apply to a particular activity the more clearly it can be considered as private security.[71]

Some indication of the industry's scope might be found in the following "taxonomy" offered in George and Button: manned security services (static guarding, cash-in-transit, door supervisors/stewards, close protection); detention services; security storage/ shredding; professional security services (security consultants, professional investigators); security products (intruder alarms, CCTV, access control, EAS equipment,[72] detection equipment, locks, safes/ vaults/ security storage, barriers/ shutters, fences, security glass/ windows, armoured vehicles). The first category, manned security services, has attracted specific attention not only in the special circumstances of Northern Ireland, but in the UK more generally.

A. Great Britain

Originally the main provisions of the *Private Security Act 2001* applied to England and Wales. Central to the Act was the establishment of the Security Industry Authority (SIA), a non-departmental public body, as the regulating authority with responsibility for the issuing of licences. The SIA was formally established on 1 April 2003.[73]

In March 2003 the Scottish Executive approved proposals to regulate the Scottish private security industry and to invite the SIA to extend its remit to cover Scotland. Statutory provision for such an extension came through Section 171 and Schedule 15 of the *Serious Organised Crime and Police Act 2005*. The SIA will launch licensing in Scotland in February 2007 and, from November 2007, it will become an offence to operate in the designated sectors without an SIA licence.[74]

Before the *Private Security Industry Act 2001*, with a few exceptions such as private prisoner custody officers, the private security industry sector was largely subject to no or little specific regulation. The perceived powers of security operatives, the opportunities for abuse, and evidence of criminality among a minority led to calls for statutory

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71 Bruce George and Mark Button, *Private Security*, 2000, p 15

72 Electronic Article Surveillance equipment, such as the retail tags which trigger an alarm if goods are taken from a shop.

73 http://www.the-sia.org.uk

74 SIA press release, *ACS - Early Launch for Scotland*, 24 November 2006 http://www.the-sia.org.uk/home/about_sia/news/nr_061124_acs.htm

regulation. In 1995, a Home Affairs Select Committee report recommended that a licensing system should be applied, in the first instance to the manned guarding sector.[75]

The Security Industry Authority website notes the range of activities currently licensed in England and Wales:

> The current designated sectors or activities that must be covered by a licence are as follows:
>
> - Door supervisors, both in-house and supplied under a contract for services;
> - Vehicle immobilisers on private land, both in-house and supplied under a contract for services;
> - Security guards supplied under a contract for services;
> - Key holders supplied under a contract for services;
> - Close protection operatives supplied under a contract for services;
> - Cash and valuables in transit operatives supplied under a contract for services;
> - Public Space Surveillance CCTV operatives supplied under a contract for services.
>
> The Private Security Industry Act 2001 allows for SIA licensing of private investigators and security consultants. However, we do not currently regulate these sectors.[76]

B. Northern Ireland

In Northern Ireland, manned guarding is currently the only licensed sector. Provision for the regulation of security guard companies originally came about through the *Northern Ireland (Emergency Provisions) Act 1987*. Speaking during the second reading debate of the presaging Bill, the then Secretary of State, Tom King, said:

> Part III is a new provision, which sets out a scheme to prevent persons or companies from operating to the benefit of paramilitary organisations under the guise of offering private security guard services. As many hon. Members know, some so-called security firms are no more than a front for paramilitary extortion rackets, and that can provide a significant source of funds for certain paramilitary organisations. To prevent that, I propose a simple certification scheme. Every security firm will need to possess a certificate to be able to trade lawfully, and such certificates will be issued only to bona fide companies.[77]

The provisions of the 1987 Act regulating security guards were continued, with amendments, by the *Northern Ireland (Emergency Provisions) Act 1991* and the *Northern Ireland (Emergency Provisions) Act 1996*. Schedule 13 to the *Terrorism Act 2000* represents the present system, which is based on licences and is of similar scope

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75 *The Private Security Industry* Home Affairs Committee First Report Session 1994-95, HC 17, 10 May 1995

76 http://www.the-sia.org.uk/home/licensing/

77 HC Deb 16 December 1986 cc1085-6

to the earlier legislation. The following background to the legislation appeared in a recent government consultation paper, *Regulating the Private Security Industry in Northern Ireland*:

> 6. The private security industry in Northern Ireland is currently regulated under the provisions of Schedule 13 to the Terrorism Act 2000. Part VII of the Act contains the temporary provisions relating to Northern Ireland; these are due to be repealed by 31 July 2007 as part of the security normalisation programme announced last year. Schedule 13 is one of those temporary provisions.
>
> 7. A firm wishing to provide a "security service" must make application to the Northern Ireland Office for a licence. The Schedule defines "security services" as the services of one or more individuals as security guards (whether or not provided together with other services relating to the protection of property or persons). The grant of the licence is contingent upon the directors, partners or the sole trader satisfying the Secretary of State that a proscribed organisation, or an organisation closely associated with a proscribed organisation, would not benefit from the granting of a licence, whether directly or indirectly, financially or otherwise.
>
> 8. When an application is made to the NIO, a counter-terrorist check is carried out on the directors, partners or controllers of the firm. No check is carried out on employees. This method initially worked well but has recently proven less satisfactory in preventing the exploitation of the industry.
>
> 9. The arrangements in Schedule 13 are designed to stop paramilitary organisations exploiting and financially benefiting from the private security industry either directly or indirectly, financially or otherwise. The industry is particularly vulnerable to penetration by paramilitaries because of low barriers of entry to those wishing to provide a private security service. There have been examples in Northern Ireland of private security services being subverted to act as a cover for criminality, for example, the provision of security guards to provide cover for running a 'protection racket'.[78]

The existence of ongoing paramilitary activity was acknowledged in the *Fifth Report of the Independent Monitoring Commission*, published in May 2005. The Commission looked at paramilitary use of licensed premises and at their involvement in security firms and taxis, making the following general observations:

> These areas have characteristics appealing to paramilitaries. They provide opportunities to move significant quantities of cash, including in parallel with but outside the normal accounts; they have their roots in local communities, thus securing a measure of protection; they are susceptible to the use of intimidation; licensed premises provide opportunities for the retailing of smuggled goods, and taxis for distributing them at community level.[79]

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[78] Northern Ireland Office, *Regulating the Private Security Industry in Northern Ireland: A Consultation Paper*, August 2006

[79] *Fifth Report of the Independent Monitoring Commission*, HC 46 2005-06

In the specific context of private security, the report went on to cite examples of paramilitary involvement and suggested the existence of shortcomings in the current regulatory regime:

> 6.11 It is widely and correctly believed that paramilitary groups play some part in the security business. We have received direct evidence of building firms which have been subjected to pressure by so-called security firms, and have suffered extortion as a result. We know too of other examples of paramilitary involvement, such as in providing doormen and event security. Every such instance exposes legitimate operations to pressure. It is the use of paramilitary muscle which enables them to raise substantial sums of apparently clean money. The relationship between a security firm and a paramilitary group may be indirect, and indeed on the surface it has to be in order to circumvent the licensing regime which has long existed. Symbiotic relationships between criminals and apparently legitimate operators are however notoriously difficult to investigate and control.
>
> 6.12 The control regime in Northern Ireland is on the face of it less stringent than that in England and Wales, which the Scottish Executive has decided should be applied in Scotland as well. The Northern Ireland regulations ensure that the owners or directors are not themselves unsuitable, and it allows action to be taken if it comes to light that they are. But there is no inspection process as there is in England and Wales and no one authority which has an overview of all the means of detecting illegality and a responsibility for following information up - tax or other aspects of a company's finance; the social security position of employees; criminal intelligence on staff, directors and their associates, including powers to prevent companies being passed on to associates who are ostensibly clean and to prevent the disclosure of sensitive material. In short, there is a licensing regime but not an authority charged with the prevention of paramilitary infiltration by all means available. Yet we believe such infiltration is the key danger and that there should be a means of tackling it as one aspect of addressing the problem of paramilitary involvement in organised crime in the round.
>
> 6.13 We note the view of Lord Carlile in his review of the operation during 2004 of the Terrorism Act 2000 that continuing consideration should be given to extending the licensing system for England and Wales to Northern Ireland; he mentions that there may be difficulties in doing so exactly. We know that the Northern Ireland Office is reviewing the existing arrangements, taking account of both the system in England and Wales and that in the South, as is necessary because some paramilitary organisations operate on an all-Ireland basis. We welcome this and will wish to return to the issue in a later report.

The potential difficulties mentioned in the preceding paragraph, which relate to access to police intelligence, were outlined by Lord Carlile in these terms:

> I remain satisfied that there are problems about changing Northern Ireland law to correspond with the new situation in England and Wales. These arise principally from difficulties one can envisage from the use of Enhanced Criminal Records Checks as provided for under the new [Private Security Industry] Act: these include police intelligence as well as criminal records, and the applicant is entitled

> to see the product. This could have a significant effect on intelligence gathering in respect of suspected terrorists.[80]

On 24 May 2005 the Secretary of State issued a written statement on the Independent Monitoring Commission's report. His statement included a passage on private security:

> The report recommends that the review of the licensing regime for the security industry should take account of the need to ensure it bears down to the maximum extent possible on paramilitary involvement, in conjunction with other control regimes and other aspects of law enforcement. A review of security licensing arrangements in Northern Ireland is underway and IMC's views will be fully taken into account as part of those deliberations.[81]

In Northern Ireland, it is only security guards that are covered by the provisions of the *Terrorism Act 2000*. Door supervisors at nightclubs will usually not be captured by the legislation, though some local authorities operate a licensing system. This situation was looked at by the Northern Ireland Affairs Committee in a wide-ranging inquiry into organised crime. On the subject of door supervisors, the Committee's report, published in July 2006, stated:

> 201. Northern Ireland does not come within the remit of the Security Industry Agency [sic], and it is therefore up to local councils in Northern Ireland to regulate door supervisors through the entertainments licence. The Federation of the Retail Licensed Trade noted that licensees could come under pressure to employ particular individuals with paramilitary or other organised criminal links. In the absence of any equivalent of the Security Industry Agency, it was argued that this pressure was often very difficult to resist.
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> 202. Mrs Nicola Carruthers, Chief Executive of the Federation of the Retail Licensed Trade, reported that North Down Borough Council had set up a local committee of licensees, the council and the police to vet door supervisors, check their references and decide on registration of individuals. However, she reported that the majority of local councils operated no form of registration. The system in Belfast required police checks to be made of door supervisors, but it was then up to the licensee to determine whether the result of the police check should be a bar to employing that individual. It was argued that this system still left the licensee liable to pressure as the judgment on the suitability of an individual was left to their discretion. Other local councils operated no form of registration. Mrs Carruthers said that there was merit in taking the decision as to whether an individual door supervisor was suitable for employment away from the licensee and referring it to a third party. The Federation called for compulsory training and compulsory registration of door supervisors. In its Annual Report for 2006, the Northern Ireland Office notes that it is currently reviewing existing legislation governing the private security industry (door supervisors and security guards). It intends to introduce legislation within the next two years.
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> 203. **We recommend the establishment of a system for training and registration of door supervisors. We note that the Northern Ireland Office is**

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[80] Lord Carlile of Berriew QC, *Report on the Operation in 2004 of Part VII of the Terrorism Act 2000*, p42

[81] HC Deb 24 May 2005 c12WS

> **currently reviewing legislative provisions governing the private security industry, including door supervisors, in Northern Ireland. The Policing and Security Minister acknowledged that Northern Ireland did not have a properly licensed, well regulated, private security industry. We urge the Government to ensure that this review is carried out as a matter of priority.[82]**

In his response of 4 September 2006, the Parliamentary Under-Secretary of State for Northern Ireland, Paul Goggins, wrote:

> On Tuesday 29 August 2006, I launched an eight-week public consultation which proposed that the remit of the UK regulatory body, the SIA be extended to cover Northern Ireland. The Government is committed to improving standards within the industry by providing a permanent regulatory scheme. I believe that extending the remit of the Security Industry Authority is the best way of achieving this objective.
>
> Proposals contained in the consultation paper include the licensing of all individuals working in the industry, including door supervisors, security guards, cash-in-transit operatives, key holders, vehicle immobilisers, close protection operatives and CCTV operatives. It is intended that priority sectors be licensed first, that is, manned guards and door supervisors. Other sectors for licensing will be phased over time.
>
> I hope that introducing a robust regulatory framework, such as that provided by the SIA, will help to tackle the issue of organised crime in Northern Ireland. The SIA set strict barriers of entry into the industry to ensure that those seeking employment in the private security sector are appropriately trained and meet the relevant 'fit and proper' criteria.
>
> It is unlikely that SIA regulation will commence by July 2007, when the current, temporary arrangements contained in Schedule 13 are repealed. I do not wish to leave the industry unregulated in the period between then and the commencement of SIA licensing. I have therefore made transitional arrangements for this limited period which provide for the extension of Schedule 13.
>
> For this period, I have also made arrangements to improve the existing legislation. In addition to the current provisions, a licence will be granted unless the Secretary of State is satisfied that the applicant is involved in criminal activity. I hope that this will help to temporarily bear down on the problem of organised crime in the industry before the SIA commence licensing and the issue will be addressed permanently.[83]

The government consultation process referred to above closed on 24 October 2006.[84] The latter had identified alternative options for regulation while coming down in favour of SIA regulation as outlined above. On 17 November, the Government announced that

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82 Northern Ireland Affairs Committee, *Organised Crime in Northern Ireland*, 5 July 2006, HC 886 2005-06.

83 Northern Ireland Affairs Committee, *Organised Crime in Northern Ireland: Government Response to the Committee's Third Report of Session 2005-06*, 23 October 2006, HC 1642 2005-06

84 Northern Ireland Office, *Regulating the Private Security Industry in Northern Ireland: A Consultation Paper*, August 2006

legislation would be introduced to bring regulation of the private security industry in line with the rest of the United Kingdom.[85]

C. The Bill

The private security industry is covered by **clauses 45-6** and **Schedule 5** to the Bill. Clause 45 establishes interim arrangements for the continued regulation of security guards in Northern Ireland following the expiry of the relevant provisions of the *Terrorism Act 2000*. These provisions are all contained in Schedule 13 to the Act, which is given effect by section 106.

Clause 45(2) gives effect to **Schedule 5** which provides for interim regulation of security guards. It is intended that Schedule 5 will come into force on 1 August 2007. Schedule 5 to the Bill continues the existing regulation of security guards by reproducing, in effect, Schedule 13 to the *Terrorism Act 2000*. Though not initially part of the presaging Bill, the Schedule was inserted during the Commons Committee Stage[86] and attracted little debate subsequently. According to the Explanatory Notes on the current Bill:

> 134. Paragraphs 4 to 7 detail the offences of providing or using unlicensed private security services. Security services are defined in paragraph 1 as the services of one or more individuals as security guards, which may or may not be provided together with services relating to the protection of property or persons. It is an offence if a person provides or offers to provide security services for reward unless he holds a licence or acts on behalf of someone who holds a licence. A person also commits an offence if he pays money in respect of the provision of security services to a person who does not hold a licence or is not acting on behalf of someone who holds a licence.[87]

The Northern Ireland Office will, for the time being, retain its existing responsibility for the licensing of security guards. There is an important addition, however: in addition to proscribed organisations or their close associates, those suspected of engagement in criminal activity would now be refused a licence. Paragraph 9(3) reads:

> Condition 2 for the refusal of a licence is that there are reasonable grounds to suspect that any of the following is engaged in criminal activity—
>
> (a) a business involving the provision for reward of security services which is, was or is proposed to be carried on by the applicant,
>
> (b) a person whom the applicant employs or proposes to employ as a security guard,
>
> (c) a partner or proposed partner of the applicant (where the applicant is an individual),

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85 Northern Ireland Office News Release, *Private security industry to be regulated – Goggins*, 17 November 2006

86 SC Deb (D) 8 February 2000 cc329-33

87 Bill 10 EN 06-07

> (d) a member or proposed member of the applicant (where the applicant is a partnership), and
>
> (e) an officer or proposed officer of the applicant (where the applicant is a body corporate).

As is currently the case, licences can be revoked by the Secretary of State. Grounds for doing so would now include engagement in criminal activity.[88] They would also continue to capture proscribed organisations and their associates and to include persistent failure to comply with the requirements of the Schedule or with conditions imposed when the licence was granted.

Paragraphs 14 and 15 cover appeals by a person who is refused a licence or has one revoked:

> 142. Paragraph 14 states that upon the refusal or revocation of a licence, or in the event of having conditions imposed on it, the applicant may appeal to the High Court. Where an appeal is brought to the High Court, the Secretary of State may issue a certificate to show that his decision was made in order to prevent a proscribed organisation, an organisation closely associated with a proscribed organisation or a person engaged in criminal activity, from benefiting from that licence; and can be justified by these reasons. The appellant shall be notified of the Secretary of State's decision to issue a certificate, and may appeal against the certificate to the Tribunal established by the Northern Ireland Act 1998.[89]

The appeals process outlined in these two paragraphs is essentially the same as that specified in Schedule 13 to the *Terrorism Act 2000* (though the Secretary of State's certificate could now include a reference to criminal activity). This allows the identification of a minor typographical error in Paragraph 15 (5) (b) which should refer to sub-paragraph (4) (b) and not (3) (b).

Clause 45 also provides for the eventual regulation of the wider private security industry under the *Private Security Industry Act 2001*. Clause 45(3) extends the 2001 Act to Northern Ireland. However, private security activities will not in practice be subject to the 2001 Act until they become designated by an order made under section 3(3) of that Act. Clause 3(4) of the Bill provides for the repeal of the interim arrangements in Schedule 5 by an order designating private security activities in Northern Ireland.

Clause 46 makes technical amendments to the 2001 Act, allowing for differences between Great Britain and Northern Ireland. For example, references to the Crown Court will be taken, in Northern Ireland, to mean a county court. Clause 46(6) amends section 25 (interpretation) of the 2001 Act so that equivalent, or nearest equivalent, legislation is referred to in cases where an Act does not apply to Northern Ireland. For example, the 2001 Act refers to company directors which are defined by reference to the *Companies Act 1985*. This does not extend to Northern Ireland so an equivalent definition is taken from applicable legislation[90] instead. Clause 46(7) is designed to

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88 Schedule 5, Paragraph 13 (1) (b)
89 Bill 10 EN 06-07
90 *Company Directors Disqualification (Northern Ireland) Order 2002*.

ensure that legal professionals in Northern Ireland, like their counterparts in Great Britain, would not be captured by the same controls that will, when in force, apply to private investigators.[91] The Explanatory Notes to the Bill provide elaboration:

> 110. Paragraph 4(1) of Schedule 2 to the 2001 Act defines the activities covered as surveillance, inquiries or investigations carried out for the purpose of obtaining information about a person or about a person's activities or whereabouts. *Subsection (7)* amends that Schedule by inserting new *paragraph 4B* which exempts the activities of a barrister-at-law or a solicitor in Northern Ireland which are carried out for the purposes of the provision of legal services. This is to ensure that the activities of solicitors and barristers in Northern Ireland are not caught as designated, licensable activities.[92]

[91] Private investigators are not yet licensable under the 2001 Act, though the latter contains provisions allowing this

[92] Bill 10 EN 06-07

VI Current political developments

The Northern Ireland Assembly was first elected in July 1998, but devolution was suspended on 14 October 2002, under the terms of the *Northern Ireland Act 2000.* The UK Government, working with the Irish Government and the Northern Ireland parties, has made a number of attempts to restore devolution since that date. The most recent Assembly elections took place on 26 November 2003, but the Assembly did not convene, since it remained suspended. Assembly Members continue to receive roughly 70 per cent of their pay and receive allowances.

The *Northern Ireland Act 2006* gave the Secretary of State for Northern Ireland powers to dissolve the Assembly if a First and Deputy First Minister were not elected by 25 November 2006. On 13 October 2006 the British and Irish Governments published the *St Andrews Agreement,* which set out a series of adjustments to the *Belfast Agreement* 1998, as well as other proposals. The *Agreement* is available on the Northern Ireland Office website and has been placed in the Commons Library.[93]

On 21 and 22 November 2006 both Houses considered and passed the *Northern Ireland (St Andrews Agreement) Act 2006*. This Act gave effect to those elements of the *St Andrews Agreement* that required primary legislation in relation to the operation of the institutions of the *Belfast Agreement*, providing for a statutory Ministerial Code, amendments to the pledge of office and changes to the procedure for appointing First and Deputy First Ministers. There were no amendments during the passage of the legislation, but continuing concerns were expressed as to the likelihood of devolution being restored in March 2007 and the timing of any Sinn Fein statement of support for policing.

Other aspects of the *St Andrews Agreement* also require legislation, and the *Justice and Security (Northern Ireland) Bill* gives effect to commitments on the Northern Ireland Human Rights Commission which were set out in Annex B of the *St Andrews Agreement:*

> We will bring forward in the next parliamentary session legislation to give the Northern Ireland Human Rights Commission additional powers. These will include the power to compel evidence, access places of detention and rely on the Human Rights Act when bringing judicial proceedings in its own name. We will publish the Government's response to the consultation carried out on these matters last year, before 24 November.

There is a new target date for restoration of devolution of 26 March 2007. However on 24 November 2006 the Northern Ireland Parties are due to meet in the Assembly to indicate their nominations for First and Deputy First Ministers. At oral questions on 22 November, the Secretary of State for Northern Ireland said:

> **Sir Patrick Cormack (South Staffordshire) (Con):** Just to clarify this, is the Secretary of State saying that what he is looking for on Friday is an indication rather than a nomination?

[93] http://www.nio.gov.uk/st_andrews_agreement.pdf

> **Mr. Hain:** I am happy to clarify that for the hon. Gentleman, particularly given his key position as Chairman of the Northern Ireland Affairs Committee. It was always the case that nobody will be taking ministerial office on Friday. Ministerial office is taken on 26 March when the pledge is taken. On Friday, it is an absolutely key and indispensable part of the St. Andrews process—let the House be in no doubt about that—that the parties make an indication to nominate for 26 March, when the pledge will be taken. Everybody knows that when they give that indication on Friday, they accept the process whereby they will be taking the pledge when they assume full ministerial office, because it will be the law of the land, assuming that the legislation receives Royal Assent. That is what should proceed on Friday; if it does not, I do not think that people will have any confidence at all in the rest of the process.[94]

When the Assembly met on Friday 24 November, there were some confused outcomes, especially as the sitting was disrupted by an attempted attack on the Sinn Fein leaders by Michael Stone, the loyalist paramilitary released following the *Belfast Agreement* who had been responsible for the Milltown Cemetery massacre in 1988.[95] The Assembly re-convened on 27 November 2006.

On 24 November Sinn Fein nominated Martin McGuinness as Deputy First Minister and he accepted the nomination. However Ian Paisley was quoted in the Chamber as stating that circumstances had not been reached where there could be a nomination or designation by his party. He stated: "If and when commitments are delivered the DUP will enter Government. At that time it will fall to me to make a judgement consistent with delivery on the ground as a basis for moving forward."[96] He was interrupted by Robert McCarthy (UKUP) and Dermott Nesbit (UUP) who claimed that his words had not been clear enough. Then the Chamber was cleared as part of the security alert.

Ian Paisley issued a statement later that afternoon which indicated that he was prepared to accept nomination. However BBC News reported that 12 DUP Assembly Members had issued their own statement indicating that they had played no role in the designation. The statement continued:

> Given the total lack of movement on behalf of Sinn Fein on the issue of support for the rule of law, the courts and the Police Service of Northern Ireland, nothing that we have said or done today can be taken by the Government as an indication that they can imply shadow, designate or any other status to anyone in relation to the Office of First and Deputy First Minister.

The statement was signed by four DUP MPs, Nigel Dodds, the Rev William McCrea, Gregory Campbell and David Simpson.[97]

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94 HC Deb 22 November 2006 c530
95 "Stone Bomb Chaos" 24 November 2006 *Belfast Telegraph*
96 "Paisley knocks at the door of power" 24 November 2006 *Belfast Telegraph*
97 "Paisley 'will accept nomination" 24 November 2006 *BBC News*