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Northern Ireland (Miscellaneous Provisions) Bill

Bill No 9 of 2013-14

RESEARCH PAPER 13/38 17 June 2013

This Bill was introduced to the Commons on 9 May 2013. This Paper provides background for the second reading debate on this Bill expected on 24 June 2013. The Bill creates a new method for appointing the Justice Minister in the Northern Ireland Executive, and allows for transparency in donations and loans to political parties, as well as ending dual mandates between the Assembly and the UK House of Commons. There are also some electoral administration reforms and miscellaneous changes to Northern Ireland law. Most of the provisions were subject to pre-legislative scrutiny by the Northern Ireland Affairs Committee which published a report in March 2013.

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Summary

This Paper sets out the main provisions of the *Northern Ireland (Miscellaneous Provisions) Bill* which was introduced to the Commons on 9 May 2013. A draft bill was given pre-legislative scrutiny by the Northern Ireland Affairs Committee, in the previous session and the report was published on 25 March 2013. The bill as introduced to the Commons on 9 May contains some extra clauses.

The main provisions of the Bill are to:

- Give the Secretary of State power to make transparent the declaration of donations and non-commercial loans to political parties in Northern Ireland from September 2014;

- Abolish the practice of double-jobbing, whereby Assembly Members also sit in the House of Commons; and disqualify Dail Members from becoming Assembly Members;

- Modify the way in which the Justice and Policing Department is allocated to a minister under the d'Hondt process;

- Set a five year term for the Assembly, so that the next election would be in 2016;

- Enable the Assembly to reduce its own size with the consent of the Secretary of State and the UK Parliament;

- Improve electoral administration and registration procedures, including the canvass form; and introducing the power to set performance standards

- Amend the Secretary of State's power to designate bodies in respect of equalities legislation.

The Bill does not alter the number of seats in the Assembly. The parliamentary boundary review for the UK under the *Electoral Registration and Administration Act 2013* was postponed until 2018. The review was expected to reduce the number of Assembly seats, as well as Westminster seats, since the boundaries are co-terminous.

The Bill also does not address the particular make-up of the Northern Ireland Executive, whereby ministries and chairs of committees are allocated by the d'Hondt formula and there is no government or opposition in the usual Westminster sense. The Assembly Executive Review Committee of the Assembly is currently conducting an inquiry into this issue.

General background on political developments in Northern Ireland is set out in Standard Note 6518 *Political Developments in Northern Ireland January to December 2012.*

1 Introduction

1.1 The Bill and pre-legislative scrutiny

The Bill, which has been the subject of pre-legislative scrutiny by the Northern Ireland Affairs Committee, is the first Northern Ireland legislation since 1998 to be introduced at Westminster "not to be introduced in an atmosphere of political crisis"[1] Northern Ireland legislation at Westminster has often been dealt with under urgency procedures and forms a large proportion of the subject matter of such bills since 1998.[2]

The Bill was introduced to the Commons on 9 May 2013. No date has yet been set for second reading. It included extra clauses from the pre-legislative version, on

- disqualifying members of the Dail from sitting in the Assembly;
- powers to transfer responsibility for reducing the size of the Assembly;
- introducing five year terms, beginning with the current Assembly;.
- Performance standards to be applicable to the Chief Electoral Officer;
- Requiring the Chief Electoral Officer to improve canvassing procedures
- Powers to transfer responsibility for local government boundaries;

These additions are all discussed below, under the relevant subject section. The Bill extends to Northern Ireland only.

The Northern Ireland Affairs Select Committee announced its intention to conduct pre-legislative scrutiny on 13 February. It heard oral evidence in Stormont and Westminster and published its report on 25 March 2013.

Raymond McCartney, a Sinn Fein MLA gave oral evidence on 26 February 2013 at Stormont, together with Sean Oliver. The Committee noted that this appeared to be the first evidence from Sinn Fein to a Westminster Committee given in public.[3] In response to a question from Lady Hermon, Mr McCartney said that he did not see any reason why Sinn Fein would not respond to an invitation to give evidence at Westminster, dependent on the context.[4] Mr Oliver noted that SF MPs were engaged in activities which did not require them to take part in parliamentary proceedings. They also had party and constituency work.[5]

Much of the Committee report dealt with matters not dealt with in the draft Bill. It took oral and written evidence which covered the Assembly size, length of term and future election dates.

The Lords Delegated Powers and Regulatory Reform Committee is due to report on the Bill. The Government prepared a memorandum on the Bill for the Committee.[6]

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1 Publication of draft legislation Northern Ireland (Miscellaneous Provisions), Cm 8563, February 2013, p8

2 See Lords Constitution Committee *Fast Track Legislation- Constitutional Implications and Safeguards* HL 116 2008-09

3 Northern Ireland Affairs Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13, Q348

4 Ibid Q349

5 Ibid Q360

6 *Delegated Powers and Regulatory Reform Committee Northern Ireland (Miscellaneous Provisions) Bill Memorandum by the Northern Ireland Office* May 2013

1.2 Devolution in Northern Ireland

The *Belfast (Good Friday) Agreement* of 1998, followed by a referendum in both Northern Ireland and the Republic of Ireland and a subsequent *Northern Ireland Act 1998* created a devolved Assembly and Executive in Northern Ireland. This resumption of devolution replaced nearly three decades of direct rule from Whitehall and Westminster.

The *Northern Ireland Act 1998* created three types of legislative and executive functions. Powers exercised in Northern Ireland are transferred; powers exercised at Westminster and Whitehall are excepted, and there is an intermediate set of reserved powers which can be transferred to Northern Ireland at some stage in the future, with the consent of the Secretary of State and Westminster, using an Order in Council procedure.

There were some initial suspensions of the Assembly as elements of the Agreement and the legislation came under strain. Further legislation followed in the *Northern Ireland (St Andrews Agreement) Act 2006* and the *Justice and Security (Northern Ireland) Act 2007*. The latter enabled the reserved powers of justice and security to be devolved to Northern Ireland under a new policing and justice department. Devolution was restored on 8 May 2007, after elections to the Assembly in March 2007. Power over policing and justice was transferred in April 2010 and the Alliance party leader, David Ford, became the relevant minister. There were elections to the Assembly in May 2011.

In the Northern Ireland Assembly, Chairs and Deputy Chairs of committees and Executive Ministers are assigned using the d'Hondt formula. This means that membership of the Executive is an automatic entitlement of electoral strength, determined by the application of the D'Hondt divisor which allocates seats on the basis of the highest average (the number of seats each party wins at an Assembly election is divided initially by one and thereafter by one more than the number of seats won, until all seats are allocated). This system resulted from the need to ensure that all major parties in Northern Ireland took part in power-sharing. The consequence is that there is no concept of an Assembly Opposition and that parties and MLAs are locked into a designation of nationalist, unionist or other.

1.3 Size and term of the Assembly

The fact that the *Fixed-Term Parliaments Act 2011* fixed the date of the next general election in May 2015 led to a change in the date of elections to the Scottish Parliament and the National Assembly for Wales from 2015 to 2016. However the position in Northern Ireland was left open, as negotiations were continuing within the Assembly about the appropriate electoral cycle.

The issue of the size of the Assembly has been under discussion for some years. There is pressure to reduce the numbers of Members of the Legislative Assembly (MLAs) and also the number of Executive departments, given the population of Northern Ireland which is under two million.

Section 33 of the *Northern Ireland Act 1998* provided that each Westminster constituency in Northern Ireland returns 6 members, creating an Assembly of 108 MLAs, elected under the Single Transferable Vote. The proposal in the *Parliamentary Voting System and Constituencies Act 2011* to reduce the size of the UK House of Commons to 600 by a parliamentary boundary review, would have resulted in a reduction in the size of the Northern Ireland Assembly, since it did not decouple the Northern Ireland Assembly constituencies from those for Westminster. In the event, opposition from the Liberal Democrat party has

prevented the Coalition Government from bringing forward orders to put the boundary review into effect in time for the 2015 general election.[7]

The Boundary Commission for Northern Ireland had announced at the commencement of the 2013 review that Northern Ireland would have 16 constituencies, a reduction of two.[8] This would have meant a consequential reduction in the number of seats in the Assembly from 108 to 96. However the first review of Parliamentary constituency boundaries under the PVSC Act which would reduce the number of constituencies to 600 has been postponed from 2013 to 2018.

There were no provisions in the draft Bill to reduce the size of the Assembly but the Government stated in the accompanying February 2013 Command Paper that:

> The consultation responses indicate that there is a general desire to reduce the number of seats to improve the efficiency of the Assembly and provide better value for money to taxpayers. We will continue to engage with the Northern Ireland political parties to seek an outcome on this matter which commands broadly based support and which could therefore be included in the Bill.[9]

The Assembly and Executive Review Committee of the Assembly was established as part of the St Andrews Agreement. It is required to review and report on the operation of Parts III and IV of the *Northern Ireland Act 1998*. Part III deals with Executive Authorities and Part IV deals with a range of areas including Assembly Elections and Assembly Proceedings. The Committee has published reports reviewing the number and allocation of departments among other topics. In 2012 it published reports on reducing the number of Northern Ireland departments and on the number of Assembly seats.[10]

The Committee's current inquiry is into the operation of government and opposition. A research paper from the Assembly research *service Opposition, Community Designation and D'hondt* published in December 2012 sets out some useful background on the current issues.[11]

1.4 Northern Ireland Office Consultation Paper August 2012

In August 2012 the then Secretary of State for Northern Ireland, Owen Patterson, issued a consultation paper on measures to improve the operation of the Northern Ireland Assembly. The main topics discussed were:

- Reducing the number and distribution of constituencies in Northern Ireland to 96;
- Extending the term of the Northern Ireland Assembly to five years, beginning with the current term;
- Phasing out dual mandates;
- Moving to a more traditional model, with a Government and Opposition[12]

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[7] Standard Note 6225, Constituency boundaries: the Sixth General Review in Northern Ireland
[8] Library Standard Note 6225 gives further details of the boundary review in Northern Ireland
[9] *Publication of draft legislation Northern Ireland (Miscellaneous Provisions)*, Cm8563, February 2013, p8
[10] See Committee page at http://www.niassembly.gov.uk/Assembly-Business/Committees/Assembly-and-Executive-Review/Reports/ for details
[11] Research and Information Service Briefing Paper 189
[12] Consultation on measures to improve the Northern Ireland Assembly August 2012 Northern Ireland Office

Teresa Villiers was appointed Secretary of State for Northern Ireland in September 2012, following the August 2012 Government reshuffle.

The NIO consultation closed on 23 October 2012 and consultation responses are available from the NIO website.[13] The summary of responses published in February 2013 concluded that there was broad support for a reduction in size and for phasing out dual mandates, with more variety of opinion expressed on the date of the Assembly election and length of the term, and moving to a Government and Opposition model. No Sinn Fein response was made public.

1.5 Command Paper and draft Bill

The Command Paper introducing the draft Bill in February 2013 set out a series of issues which might also be included in the Bill, when brought forward in the next session. These included topics already outlined in the August 2012 Northern Ireland Office consultation paper:

- Size of the Assembly;
- Length of the Assembly term and future election dates;
- Length of current Assembly term;
- Government and opposition;
- Devolution of responsibility for arms length bodies.

The Command Paper acknowledged support for and expressed interest in a reduction in the size of the Assembly. It concluded that at present there was insufficient support for an extension in the length of the Assembly term from four to five years. (In Scotland and Wales five year terms are only planned for 2016, to avoid a clash with a UK general election in 2015. Thereafter the terms revert to four years).[14] However, some action to avert a potential clash in 2020, should the next election be postponed to 2016, was considered sensible. The Paper did not note the point, but there is some sensitivity about potential elections in 2016- a date which marks the 100th anniversary of the Easter Rising and the battle of the Somme- both events resonant in a Northern Ireland context.

The Paper did not expect legislative change in respect of government and opposition but noted:

> 22. While the Government would welcome moves towards a system of government and opposition, we remain clear that such changes could only come about with the agreement of parties in the Assembly. In addition, such moves must be consistent with the principles of inclusivity and of power-sharing that are central to the Belfast Agreement. We do not believe that there is sufficient consensus for statutory change at present which is why the draft Bill includes no provision on this issue.
>
> 23. However, the consultation document also drew attention to the possibility of procedural change within the Assembly aimed at providing for a more effective opposition. The Government notes that the Assembly & Executive Review Committee is examining these questions, amongst other institutional issues. The Assembly Research and Information Service produced a Briefing Paper1 entitled 'Opposition,

13 *Summary of responses to consultation on measures designed to improve the effectiveness of Northern Ireland Assembly* Northern Ireland Office February 2013

14 *Fixed-Term Parliaments Act 2011,* sections 4 and 5

> Community Designation and d'Hondt' in November 2012. Procedural developments are of course matters for the Assembly itself and not for the Government to seek to impose.[15]

Forthcoming legislation was announced in the Queen's Speech and the Bill was published on 10 May 2013. The following sections examine the main provisions, setting out the background and the draft Bill proposals, followed by a brief description of the clauses as introduced to Parliament.

2 Transparency in donations to political parties in Northern Ireland

The Bill as published follows closely the proposals of the draft bill, explained below.

2.1 Background

In October 1998, the Committee on Standards in Public Life (the Neill Committee) published a report into *The Funding of Political Parties in the United Kingdom.*[16] It made a variety of recommendations on the transparency and reporting of donations received by political parties; it recommended that "Political parties should in principle be banned from receiving foreign donations".[17] However, it accepted that a different situation applied in Northern Ireland, including the rights of citizens of the Republic of Ireland not to be considered aliens, the Belfast Agreement provisions for joint North/South institutions and the structure of some political parties which operated across both jurisdictions. It then recommended:

> In relation to donations to political parties in Northern Ireland, the definition of a 'permissible source' should also include a citizen of the Republic of Ireland resident in the Republic subject to compliance with the Republic's Electoral Act 1997.[18]

In July 1999 the Government accepted the Committee's proposals for a different approach in Northern Ireland.[19] The *Political Parties Elections and Referendums Act 2000* (PPERA) created statutory controls on campaign donations and national election expenditure, regulated by a new Electoral Commission. Political parties in Great Britain were required to report donations received by the central party, as well as donations received by an accounting unit of the party, to the Electoral Commission, The Secretary of State was given power to exempt parties registered in Northern Ireland from the disclosure provisions.

There were extensions of this exemption and then new legislation in the *Northern Ireland (Miscellaneous Provisions) Act 2006.* The Act ensured that although the Northern Ireland parties are still required to report donations and loans to the Electoral Commission, the Commission is under a strict obligation not to release details of these transactions publicly. These new arrangements have been in place in Northern Ireland since 1 November 2007 for donations and 1 July 2008 for loans.

The 2006 Act therefore created a transitional period after which the reports submitted by Northern Ireland recipients became fully disclosable. The Secretary of State was given power to extend the transitional period for not more than two years at a time, by an order subject to

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15 *Publication of draft legislation Northern Ireland (Miscellaneous Provisions)*, Cm 8563, February 2013, p8

16 Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, October 1998, Cm 4057, http://www.archive.official-documents.co.uk/document/cm40/4057/volume-1/volume-1.pdf

17 Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, October 1998, Cm 4057, recommendation 24, p71

18 Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, October 1998, Cm 4057, recommendation 29, p77

19 Home Office, *The Funding of Political Parties in the United Kingdom – The Government's proposals for legislation in response to the Fifth Report of the Committee on Standards in Public Life*, July 1999, Cm 4413, para 4.16, http://www.archive.official-documents.co.uk/document/cm44/4413/4413-00.htm

the affirmative resolution procedure. This power has been used twice, and the period is currently due to expire on 30 September 2014.[20]

The *Political Parties and Elections Act 2009* increased the thresholds on disclosure of donations and loans to the Electoral Commission for central parties and local accounting units of parties to £7500 and £1500 respectively.

In August 2010, the Northern Ireland Office consultation paper *Donations and Loans to Northern Ireland Political Parties – The confidentiality arrangements* [21] asked whether the time was right to end the transitional period, and if so, whether the 2006 provision required modification, bearing in mind continued concerns about intimidation or boycotts, should the identity of donors be revealed.[22]

The Government response to the consultation was published in January 2011.[23] It noted that there were a number of responses which expressed concerned about moving directly to the PPERA regime in 2011, although there was majority support for transparency.

2.2 Draft Bill

The draft Bill proposed amendments to the 2006 Act to:

- Enable the Secretary of State to apply transparency provisions in a gradual manner, enabling him to amend or modify the current donations regime to increase (but not decrease) transparency.

- Ensure that information about donations and loans made during the 'prescribed period' is not subject to the same transparency provisions. In particular the identity of donors will not be released for donations or loans made before 2014, unless the Electoral Commission has reasonable ground to believe that the donor has consented.

The *Explanatory Notes* gave more detail. The Northern Ireland Affairs Committee report summarised the current rules and the proposals in the draft bill:

> 9. The Electoral Commission told us that the prescribed period had been extended as a result of concerns over the security situation in Northern Ireland and to maintain the anonymity of those who have made donations since 1 November 2009. The Electoral Commission would be obliged to release retrospectively the details of donations and loans made since 1 November 2009 as soon as the prescribed period ends. Many respondents to the NIO's 2010 consultation on *Donations and loans to Northern Ireland Politics Parties*, including most political parties and the Electoral Commission, argued that retrospective disclosure of this information would be contrary to the expectations of donors at the time they donated and, for that reason, might undermine confidence in the regulatory regime. Following its 2010 consultation, the Government committed to increasing transparency whilst, at the same time, ensuring that the anonymity of donations made during the prescribed period would be maintained.

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[20] *Control of Donations and Regulations of Loans Etc. (Extension of the Prescribed Period) (Northern Ireland) Order 2010* and *Control of Donations and Regulations of Loans Etc. (Extension of the Prescribed Period) (Northern Ireland) Order 2013*

[21] *Government response to consultation on political donations and loans in Northern Ireland Northern Ireland Office,* January 2011

[22] *Donations and loans to political parties in Northern Ireland: the confidentiality requirements* NIO August 2010

[23] *Government response to consultation on political donations and loans in Northern Ireland Northern Ireland Office,* January 2011

PROSPECTIVE CHANGES MADE BY THE DRAFT BILL

10. Clause 1 of the draft Bill makes amendments to the Northern Ireland (Miscellaneous Provisions) Act 2006 ('NIMPA') and to the Political Parties, Elections and Referendums Act 2000 ('PPERA'). Clause 2 makes provisions for loans equivalent to those for donations. The draft Bill provides the Secretary of State with order-making powers to modify the political donations and loans regime during the prescribed period and afterwards.[11] For example, the Electoral Commission could be required to publish a list of donations and loans made to parties since 1 November 2007 which excluded the names and addresses of donors. Significantly, the Secretary of State is granted power only to *increase* transparency; there is no equivalent power to *reduce* the level of transparency from its current level. A reduction in transparency could only be achieved through a repeal of the provisions introduced by the draft Bill. The draft Bill also provides retrospective anonymity for donors who made, or make, donations between 1 November 2007 and 30 September 2014, unless the Electoral Commission has "reasonable grounds" for believing that the donor has given consent for their identity to become public.[12] It is important that the rules on donor anonymity are consistent with the expectations of those who made donations or loans at that time. [24]

Evidence was presented to the Committee from the range of Northern Ireland parties, as well as from individuals. In oral evidence, representatives from major political parties indicated that there were very few donations or loans over £7500. There were suggestions from the NI Green Party that donations were perceived as influential when local councils considered planning applications.[25] This was not accepted by the major political parties.

2.3 Transparency concerns

The Committee commented on the conflict of evidence about the risks of transparency:

15. While all witnesses supported transparency *in principle*, we heard very different views on the most appropriate timetable for transparency and witnesses provided conflicting accounts of the security risk faced by donors.

16. Some witnesses argued that the draft Bill did not go far enough and that political parties in Northern Ireland should be immediately required to publish donor information on the same terms as Great Britain.] These witnesses expressed concern that the draft Bill would "establish a lack of donor transparency as the norm in Northern Ireland rather than as an exception".

17. David Ford MLA, leader of the Alliance Party and NI Justice Minister, also told us that his party already voluntarily published information about its donors on its website and had:

Taken the view that Northern Ireland should operate on exactly the same basis as England, Wales and Scotland and we believe that the time for holding off has long passed.

18. The Green Party and Friends of the Earth argued that the confidentiality arrangements in Northern Ireland were unwarranted. They made comparisons between the threat of violence in Northern Ireland and the threat of international terrorism in the rest of the UK to argue that donors in Northern Ireland did not face a distinct threat. The Alliance Party argued that donor risk in Northern Ireland should not be treated as a special case and suggested that anybody who was concerned about

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[24] *Northern Ireland Select Committee* *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13 Q51

[25] Ibid Evidence from NI Green Party Q43

democracy should stand up to intimidation. Sinn Fin noted that an element of risk remained but that the security threat to donors must not be exaggerated. In its written evidence, the Electoral Commission told us that:

Given the clear benefits of moving to full transparency as soon as possible, we think the prescribed period should end in September 2014... unless there is clear evidence that the security situation makes this untenable.

19. Other witnesses however, for example, the Democratic Unionist Party, David McClarty MLA (Independent), the Social Democratic and Labour Party, UKIP and the Ulster Unionist Party, urged that the Secretary of State should exercise caution in making modifications to the current confidentiality arrangements surrounding political loans and donations in Northern Ireland. They argued that the security situation in Northern Ireland presented a barrier to implementing the same transparency regime as Great Britain because donors remained at risk of violence and intimidation as a result of an ongoing terrorist threat in Northern Ireland.

20. Dr Alasdair McDonnell MP MLA, leader of the Social Democratic and Labour Party (SDLP), encapsulated this concern when he told us that:

Our difficulty is that we feel that we were particularly vulnerable in the past, in that some of our donors felt vulnerable and threatened... Sometimes, the threat is not even direct, but people are put under pressure and told, "You gave the SDLP £1,000 this week; we think that we are entitled to £2,000 this week". The threat is at that level. In a situation in which there are still a handful of people moving about with guns, that threat is there.

21. In addition to the potential threat of violence and intimidation that individual donors may face, we also heard evidence specifically pertaining to commercial donors. Mike Nesbitt MLA, leader of the UUP, expressed concern that commercial donors in Northern Ireland may face recriminations in the form of a boycott of their businesses or violence. His party colleague, Tom Elliott MLA, told us that "a number of businesses" were being boycotted because of their affiliation to particular political parties. He stated that two of the UUP's commercial donors had recently contacted the party asking it not to send further correspondence to the company's business premises in case the employee responsible for opening the post made public the fact that the company had donated to UUP.

22. Peter Robinson MLA, the Leader of the DUP and First Minister of Northern Ireland, shared the UUP's concerns, noting that:

In the past, businesses and businesses were attacked because of their association either with security forces or with one section of the community. You cannot be cavalier about these issues because they are real. Even if it did not happen, there would certainly be the perception among those who might be willing to donate that it could.

23. Mr Robinson, Mr Nesbitt and Mr Elliott all argued that security and commercial risk to donors were intrinsically intertwined and, once the security risk disappeared, then a move to transparency for all political donations above the stipulated thresholds would be vital.

24. Other witnesses, however, found this evidence unconvincing: Stewart Dickson MLA, of the Alliance Party, advised us that risk to businesspeople in Northern Ireland was no different from businesses or individuals who made large donations in the rest of the United Kingdom. He told us that:

I am not sure that threat is any more real than it is to any businessperson or any other who wants to make a substantial donation to a political party anywhere in the United Kingdom. I do not think that Northern Ireland should be carved out as a special case any longer.

25. The point was also made that people who stand as candidates for election to Parliament, the Assembly or councils take what they see as an acceptable risk in doing so, as do people who endorse their candidature by signing their nomination papers, displaying posters or by otherwise supporting those candidates. Some witnesses asked why these risks were acceptable whereas risks associated with donating money to political parties were not.

26. Contrary to the evidence we heard from DUP and UUP representatives, Sir Christopher Kelly suggested that concerns about business boycotts and threats of violence made to businesses ought to be separated out and treated as different concerns. He suggested that the concerns we heard about donations and loans from the commercial sector stemmed from a fear that:

if it became apparent who was donating then either there would be intimidation or a boycott in a way that would have the effect of damaging the finances of Northern Ireland political parties.

27. Sir Christopher stressed that the argument that publishing donor information in Northern Ireland would have a detrimental effect on the finances of political parties in Northern Ireland does not "self-evidently trump" public interest arguments for transparency of political donations.

28. It should be noted against this, however, that none of the parties we spoke to believed that they often received donations of more than £7,500 so not much might change anyway. It is, however, the principle of transparency with which we are concerned.

29. Full transparency of donations and loans should be regarded as the norm and in principle, therefore, we would like to see political donations and loans in Northern Ireland subjected to the same regime that operates in Great Britain as soon as possible. Given the apparent insignificant level of donations over the £7,500 threshold, and the overall improvement in the security situation, we are not convinced that there is sufficient evidence to justify continuing the current position and we therefore recommend that from October 2014 all donations over £7,500 in Northern Ireland should be made public as in Great Britain.

2.4 Donations via the Republic of Ireland

The rules on the source of donations to Northern Ireland political parties reflect the rules for parties in the Irish Republic, as set out in section 71B of PPERA (amended)

71B Extension of categories of permissible donors in relation to Northern Ireland recipients

(1) In relation to a donation to a Northern Ireland recipient, section 54(2) has effect as if the following were also permissible donors—

(a) An Irish citizen in relation to whom any prescribed conditions are met;

(b) A body which is of a prescribed description or category and in relation to which any prescribed conditions are met.

(2) A description or category of body must not be prescribed for the purposes of subsection (1)(b) unless the Secretary of State is satisfied that a body of that description or category would be entitled under Irish law to donate to an Irish political party.

(3) In relation to a donation in the form of a bequest subsection (1)(a) is to be read as referring to an individual—

(a) Who at any time within the period of five years ending with the date of his death was an Irish citizen, and

(b) In relation to whom, at the time of his death, any prescribed conditions were met.[26]

Under Irish law, donations are permitted from citizens of the Irish Republic living overseas. The law on party funding has recently been amended in the Republic, and new guidelines from the Standards in Public Office Commission (which regulates donations) set out the position:

> A political party or any of its sub-units may not accept a donation, of any value, from an individual (other than an Irish citizen) who resides outside the island of Ireland. Similarly no donation, of any value, may be accepted from a body corporate or an unincorporated body of persons which does not keep an office in the island of Ireland from which at least one of its principal activities is directed.[27]

There is a certification procedure, explained in Electoral Commission guidance:

> Please note that in respect of each donor who is an Irish citizen, a certified copy of one of the following documents must be attached to the return:
>
> the donor's Irish passport
>
> the donor's Irish certificate of nationality
>
> the donor's Irish certificate of naturalisation[28]

2.5 Northern Ireland Affairs Committee recommendations

The select committee had some concerns about the approach in the draft Bill and suggested some modifications:

- All donations over £7,500 in Northern Ireland should be made public as in Great Britain from October 2014.
- The Electoral Commission should disclose donor identity only where there is express consent from the donor, for donations made before October 2014
- There should be a statutory duty on the Secretary of State to consult with the appropriate security authorities, rather than the Electoral Commission before modifying the confidentiality arrangements;

[26] As amended by the *Northern Ireland (Miscellaneous Provisions) Act 2006*

[27] *Donations: Guidelines for Political Parties on donations and prohibited donations from the Standards in Public Office Commission* Republic of Ireland p 14 January 2013

[28] Quarterly donation return by a registered political party in Northern Ireland (Revised version January 2010) Electoral Commission

- The Electoral Commission should published anonymised details of all individual donations and loans since 2007, indicating whether multiple donations have been made by a single donor;

- The Bill should close the loophole allowing overseas donations made to political parties operating in Northern Ireland via the Republic of Ireland, while not banning donations from individuals and bodies resident in the Republic of Ireland**.**

2.6 The Bill

Clauses 1 and 2 (donations and loan respectively) are almost identical to that of the draft bill. **Clause 26** makes some technical changes, ensuring that the amendments made under clauses 1 and 2 will be treated as made under section 63 of the *Electoral Administration Act 2006.* This would allow amendments in the future to be made under the 2006 Act, rather than under this bill.

3 Dual mandates

The Bill as introduced follows the draft Bill closely. There is an extra clause (4) disqualifying members of the Dail from taking a seat as an Assembly Member, presumably resulting from the pre-legislative scrutiny process. This is discussed in detail below.

3.1 Background

Dual mandates have been the "source of some criticism, particularly in the wake of the Westminster expenses scandal".[29] In its 2009 review of MP's expenses and allowances, the Committee on Standards in Public Life concluded that the practice of holding dual mandates in the House of Commons and devolved legislatures should be brought to an end as soon as possible:

> The Committee's view is that the practice of holding dual mandates in both the House of Commons and the devolved legislatures should be brought to an end as soon as possible. Ideally that would happen by the time of the scheduled elections to the three devolved legislatures in May 2011, or failing that by 2015 at the very latest.[30]

The Labour Government introduced the *Northern Ireland (Assembly Members) Bill 2009-10* to allow the Northern Ireland Assembly to establish an independent remuneration body. However, during its passage through the House of Lords, the Bill was amended by the Government, following pressure from opposition parties on dual mandates, to prevent MLAs who were also MPs (who had taken their seats) from receiving any of their salary as an MLA. The legislation was passed and since 5 July 2010, MLAs who are also MPs have not drawn any salary as an MLA.[31] The *Northern Ireland (Assembly Members) Act 2010* amended section 47 of the *Northern Ireland Act 1998*.

In its August 2012 consultation paper, the Government noted that it had "consistently made clear that it would like to see multiple mandates between the Northern Ireland Assembly and the House of Commons ended".[32] It also noted that the Northern Ireland Executive had agreed to bring forward legislation to prevent MLAs from being district councillors.

[29] Cm 8563, Explanatory Notes, para 17

[30] Committee on Standards in Public Life, *MPS' expenses and allowances: Supporting Parliament, safeguarding the taxpayer*, Cm 7724, November 2009, para 12.22

[31] *Northern Ireland (Assembly Members) Act 2010* (chapter 16), section 1(50; *Northern Ireland (Assembly Members) Act 2010 (Commencement) Order 2010*, SI 2010/1726

[32] Northern Ireland Office, *Consultation on measures to improve the operation of the Northern Ireland Assembly*, August 2012, para 3.1

Following the general election in 2010, the number of MPs who were also MLAs had reduced to 11. After the 2011 Assembly elections, the number reduced further to six; and following the resignations, as MPs, of Gerry Adams and Martin McGuinness in January 2011 and January 2013, respectively, three MPs hold dual mandates as MLAs:

Members who held dual mandates

Following the 2010 General Election	**14 May 2013**
Gerry Adams (SF)	
Gregory Campbell (DUP)	Gregory Campbell (DUP)
Nigel Dodds (DUP)	
Pat Doherty (SF)	
Mark Durkan (SDLP)	
Michelle Gildernew (SF)	
Alasdair McDonnell (SDLP)	Alasdair McDonnell (SDLP)
Martin McGuinness (SF)	
Conor Murphy (SF)	
Margaret Ritchie (SDLP)	
Sammy Wilson (DUP)	Sammy Wilson (DUP)

3.2 Other MPs with dual mandates

The Committee on Standards in Public Life noted that in 2009:

> The only other current example of dual mandates in both Westminster and a devolved legislature is that the First Minister in the Scottish Parliament is also a Westminster MP. He has indicated that he will not be standing for election to Westminster at the next election. There are currently no Welsh MPs who are also AMs [33]

The First Minister, Alex Salmond, stood down from Westminster at the 2010 General Election.

A small number of MSPs and AMs were elected to the House of Commons in 2010. None of them contested seats in Scotland or Wales in the elections to the devolved legislatures in 2011.

Sitting MSPs elected as MPs in 2010	**Sitting AMs elected as MPs in 2010**
Margaret Curran (Lab)	Alun Cairns (Con)
Cathy Jamieson (Lab)	

In a written ministerial statement on 12 March 2013, the Secretary of State for Wales, David Jones, announced that dual mandates would also be banned in Wales, so that AMs would no longer be able to be Members of the Commons.[34] AMs would continue to be able to sit in the Lords. Further details are contained in Standard Note 6641 *Electoral arrangements in Wales.*

Currently the only peer who sits in the Assembly and the Lords is Lord Morrow (DUP).

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[33] Committee on Standards in Public Life, *MPS' expenses and allowances: Supporting Parliament, safeguarding the taxpayer*, Cm 7724, November 2009, para 12.16

[34] "Secretary of State announces next steps in review of future electoral arrangements for the National Assembly for Wales" 12 March 2013 *Wales Office Press Release*

In 1984 the SDLP politician, Seamus Mallon, complained that the then provisions disqualifying members of the Assembly from membership of the Irish lower house,(the Dail) were in contravention of Article 3, Protocol 1 of the European Convention on Human Rights (right to vote and right to stand in free elections. In *M v UK*, the Commission (Plenary) dismissed the claim on the basis that a condition that one was a member of another legislature was a requirement reconcilable with the Article and Protocol.[35]

The *Disqualifications Act 2000* removed the bar on members of the Dail from sitting in the Northern Ireland Assembly, through amendment of section 1 of the *Northern Ireland Assembly Disqualification Act 1975.* The Act also removed the bar on Dail members sitting in the UK House of Commons. However, its members (TDs) cannot serve as ministers in the Northern Ireland Executive. The Oireachtas (Irish Parliament) does not prohibit its members from being members of the Assembly.[36]

3.3 The draft Bill

The draft Bill added a section to the *Northern Ireland Assembly Disqualification Act 1975* to disqualify MPs from becoming Members of the Assembly (MLAs) It also provided for a short period (of eight) days to allow an MP who is elected to the Assembly to resign from the House of Commons before being disqualified from the Assembly. Alternatively the MP can resign from the Assembly.

It is common for there to be a period of over a week before the first meeting of the Assembly after the election. The *Explanatory Notes* make clear that this facility applies only to elected members of the Assembly and not those filled by substitution.[37] The legislation applies only to MLAs with dual mandates as MPs at Westminster. MLAs who are members of the House of Lords, of the European Parliament or of the Daíl were not affected. Currently members of the Dail may also sit in the Commons in the same way as members of Commonwealth legislatures.[38]

3.4 Northern Ireland Affairs Committee report recommendations

Committee members raised the question of the possible human rights implications of banning dual mandates in respect of one devolved assembly and not others. It was also concerned that informal relationships between Stormont and Westminster might be adversely affected.

Other issues it explored included extending the ban to prevent members of the Oireachtas in the Republic of Ireland being Assembly members. There were no current examples of this form of double jobbing and Sinn Fein pointed to the voluntary resignation of Gerry Adams in 2011 to stand for the Dail as evidence of their support for the change.

Overall, the report supported the ending of dual mandates, but with certain modifications:

- Dual mandates should also be banned in respect of membership of the House of Lords;

- There was broad political support for disqualifying members of the Oireachtas from membership of the Northern Ireland Assembly;

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35 Application no. 10316/83, 7 March 1984, Commission (Plenary)

36 See Northern Ireland Affairs Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13, paras 67 -68 for background

37 Cm 8563 Explanatory Notes para 24

38 *Disqualifications Act 2000*

- Members of Commonwealth legislatures should also be banned from sitting in the Assembly;

- There should be legislation to make individuals ineligible for Assembly membership if they are already MEPs;

- Dual mandates should be prohibited between the Scottish Parliament and Westminster, to maintain consistency of approach.

The Bill does ban dual mandates between the Dail and the Assembly, but otherwise does not take up the Committee recommendations. The *Explanatory Notes* address the point in respect of compatibility with the European Convention on Human Rights, noting:

> The Convention provisions do not prevent, in principle, contracting states from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention.[39]

3.5 The Bill

Clauses 3 and 5 make the same policy proposal as in the draft Bill, but with some slight differences in drafting. **Clause 4** is new and disqualifies Members of the Dail from membership of the Assembly. Otherwise, the clauses do not provide for any more extensive review of dual mandates, or an extension of the prohibition to the Lords. The provision in **clause 5** is to allow for candidates for both the Assembly and the House of Commons to make a choice should rarely be in use, if elections are not to be simultaneous, under **clause 7.**

The *Explanatory Notes* comment on compatibility of the bill with the European Convention on Human Rights with respect to the ban on dual mandates not extending to members of Commonwealth legislatures:

> 139. Article 14 is potentially engaged through the prohibition on members of the Assembly from holding a dual mandate with the House of Commons or with the Dáil.
>
> This is because, via the application of the ban, members of the House of Commons and the Dáil are treated differently from members of other Commonwealth legislatures. Members of these other legislatures are not similarly disqualified from seeking dual membership of the Assembly. In M v. UK, the Commission (Plenary) observed that there was a difference in treatment under the Northern Ireland Assembly Disqualification Act 1975 between members of a legislature outside of the Commonwealth, who are disqualified from membership of the Assembly, and members of a legislature inside the Commonwealth, who are not disqualified. The Commission accepted that this could amount to a difference in treatment on the basis of “national origin”, but concluded that the distinction found “a reasonable and objective justification in the special historical tradition and special ties that are shared by members of the British Commonwealth of which Ireland does not form a part”.[40]

[39] *Northern Ireland (Miscellaneous Provisions) Bill 9 2012-13 Explanatory Notes*

[40] *Northern Ireland (Miscellaneous Provisions) Bill 9 2012-13 Explanatory Notes*, para 139

4 Size and term of Assembly

4.1 Size

The Bill enables the Assembly to reduce its size, with the consent of the Secretary of State and the approval of an Order in Council at both Houses in Westminster. This provision did not appear in the draft Bill. The Bill also extends the term of the current Assembly to 2016 and creates a five year term for future Assembly. This provision did not appear in the draft Bill.

Background

The Northern Ireland Select Committee report took evidence on this point, summarised as follows:

> **SIZE OF THE ASSEMBLY**
>
> 119. The current size of the Assembly is determined by provisions contained within Strand One of the Belfast (Good Friday) Agreement, which provides that "a 108 member Assembly will be elected by PR-STV from existing Westminster constituencies". Section 33 of the Northern Ireland Act 1998 stipulates that Assembly constituencies are coterminous with Westminster constituencies and that each constituency shall return six members. Consequently, legislation would have to be introduced in Westminster in order to bring about changes to the size of the Assembly.
>
> 120. Had the number of Westminster UK constituencies been reduced from 650 to 600, as was anticipated when the Parliamentary Voting System and Constituencies Act 2011 was introduced, then the number of Parliamentary constituencies in Northern Ireland would have been reduced from 18 to 16 before the next UK Parliamentary Election as long as the Assembly and Westminster boundaries remained coterminous. As a result, and as a direct consequence of section 33 of the Northern Ireland Act 1998, the number of MLAs would have been reduced from 108 to 96.
>
> 121. The size of the Northern Ireland Assembly was identified by the Secretary of State as a "measure still under consideration for potential inclusion in the Bill". She told us that:
>
> A number of political parties...indicated they were content to see the Assembly reduced in size, but we are yet to have a joint position from the Executive. In light of that, we felt unable to put it in the draft Bill, but there is still time for it to go in the substantive version of the Bill if consensus can be built. I would be interested to hear what NIAC concludes is the best option. There seems to be quite a considerable degree of public support for a slightly smaller Assembly, given the comparison, for example, with the Welsh Assembly, the Scottish Parliament or indeed the London Assembly.[41]

[41] Northern Ireland Affairs Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13

The Committee published a table illustrating the comparative size of UK legislatures:

Table1. Number of electors per Member for Northern Ireland, Scotland and Wales[42]

Country	Population (millions)[112]	Size of Electorate[113]	Size of Legislature	Electors per Member
Northern Ireland	1.8	1, 230, 200	108 MLAs	11, 390
Wales	3.1	2, 301, 100	60 Assembly Members	38, 352
Scotland	5.3	3, 985, 300	129 Members of the Scottish Parliament	30, 894

The Committee concluded:

> 129. Compared with the Scottish Parliament and with the National Assembly for Wales, the size of the Northern Ireland Assembly is disproportionately high, and there is clearly scope to reduce the number of MLAs. We understand that formula for the number of MLAs is determined in part by the number of Departments in the Northern Ireland Executive and we look forward to the AERC's findings. Any decision on this matter should be taken only with broad support from political parties in Northern Ireland and so we urge the Government to continue to engage with the parties and take appropriate steps to facilitate the emergence of a consensus position on the optimum size of the Assembly. [43]

The Bill

Clause 6 of the Bill makes the size of the Assembly a reserved matter and therefore can be determined by the Assembly in Northern Ireland .Under the *Northern Ireland Act 1998* a matter which is reserved can be transferred to the Assembly with the consent of Westminster. The *Explanatory Notes* to the Bill give background:

> The provisions in Clause 6 make the reduction in size of the Assembly a reserved matter, meaning that the Assembly could legislate to reduce the number of members returned to it for each Westminster constituency. Clause 6 also ensures that any Assembly legislation that reduced the size of the Assembly could not make provision for different numbers of members to be returned for different constituencies. As a reserved matter, any legislative provision put forward by the Assembly in this regard would require the consent of the Secretary of State. Should that consent be given, the Government would need to put an Order in Council before Parliament amending section 33(2) to give effect to the Assembly's decision.

4.2 Length of term

The select committee considered the matter, arguing that there was no consensus for the change to a longer five year term:

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[42] Northern Ireland Affairs Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13, para 124

[43] Northern Ireland Affairs Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13, para 129

LENGTH OF CURRENT ASSEMBLY TERM

131. The Command Paper accompanying the draft Bill notes that "any move to extend the current term could only be made if there was a clearly demonstrable public benefit and a very large measure of agreement in Northern Ireland".[121] However, "only a small number of consultation responses addressed the issues" and, while the "option remains open in principle", the Government noted that "a compelling case for the extension of the Assembly term has yet to be made". In its 2013 summary of consultation responses, NIO revealed that:

Responses from individual correspondents were, in the main, against extending the current term. There were 27 responses to this question: 23 of which were against the proposal. There appears to be a good deal of frustration with the perceived inertia of the Assembly and the opinion frequently voiced was that extending the term would only add to this.[122]

132. We did not explore this issue in great detail during our inquiry, in part due to the compressed timetable for pre-legislative scrutiny. However, Peter Robinson briefly touched on this subject and told us that:

Three of the political parties that represent a significant majority in the Assembly have said that... the Assembly election should be in 2016.[123]

133. Nevertheless, we did not hear any compelling evidence to support this proposition. We note that extensions to mandates for the Scottish Parliament and the Welsh Assembly had been agreed prior to the last election and the commencement of the current term so that the electorate were aware that they were returning politicians for a five year term, rather than for the usual four years.[124] We are concerned that extending the current term to 2016 would be contrary to the expectations of the electorate at the last Assembly election in 2011 and recommend, therefore, that the current Assembly term should end, as planned, in 2015.

The *Fixed-term Parliaments Act 2011* had moved the term of the elections in Scotland and Wales to five years on a one-off basis only to avoid simultaneous elections in 2015. However the Secretary of State for Wales had announced that the Government would move the Assembly to five year terms to avoid frequent concurrences of elections.[44] The select committee made the point that it would be of more permanent benefit to reconsider the length of term of all UK devolved legislatures, bearing in mind the repeated argument from the Electoral Commission that there should be some comprehensive research on voter understanding of combined polls.[45]

The Committee was also concerned at the practical difficulties faced by the Chief Electoral Officer in Northern Ireland in running concurrent polls during the Alternative Vote referendum, the Northern Ireland local elections and the Assembly elections on 5 May 2011. The Electoral Commission evidence to the Committee was that concurrence could be well run, but that advance planning was key.

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[44] HC Deb 12 March 2013 c9WMS

[45] Northern Ireland Affairs Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13, paras 138 and 139

The Bill

Clause 7 extends the term of the current Assembly to May 2016 and fixes the term as five years, through amendment of the *Northern Ireland Act 1998.* The *Explanatory Notes* add some context:

> On 12 June 2012 Northern Ireland's First Minister Peter Robinson, deputy First Minister Martin McGuinness and Justice Minister David Ford wrote to then-Secretary of State Owen Paterson making clear their view that they wished to see the current term of the Northern Ireland Assembly extended until May 2016, in common with the Scottish Parliament and Welsh Assembly elections. That position was confirmed in a letter to the current Secretary of State dated 15 April 2013 from the First Minister and deputy First Minister.[46]

5 Allocation of post of Minister of Justice

The Bill introduces a new method of allocating the post, bringing the method closer to that used to allocate other posts within the Executive.

5.1 Background

The policy initiative behind the clause is neatly summarised in the *Explanatory Notes* to the Bill:

> 32. These clauses give effect to an agreement between the Northern Ireland political parties to amend the Northern Ireland Act 1998 (the "1998 Act") to change the means by which the Minister of Justice for Northern Ireland (the "Justice Minister") is appointed, and to remove the anomaly whereby the party of which the Justice Minister is a member has one extra seat in the Northern Ireland Assembly (the "Assembly") than that which it would have pursuant to the d'Hondt formula.

The drafting of **clauses 8 and 9** is identical to that of the draft bill, discussed below.

The *Northern Ireland (St Andrews Agreement) Act 2006* required the Assembly to report to the Secretary of State for Northern Ireland by 27 March 2008 on their readiness for transfer of policing and justice functions. Schedule 5 of the *Justice and Security (Northern Ireland) Act 2007* inserted section 16A of the *Northern Ireland Act 1998*. This set out a new procedure for appointing the First and Deputy First Ministers and Northern Ireland Ministers following an Assembly election. Section 21A of the 1998 Act set out a number of possible appointment mechanisms for the Justice Minister, one of which would be selected and provided for by an Act of the Assembly. Once again, this new section was added to the 1998 Act by the *Justice and Security (Northern Ireland) Act 2007*. Section 22C to the 1998 Act set out a time limit by which final arrangements had to be agreed for the appointment of a Justice Minister.

Further intervention at Westminster took place in 2009, with the *Northern Ireland Act 2009*, which had an expedited passage through Parliament. The Act offered a new option for the appointment of the Justice Minister to be added to the menu of options already in the *Northern Ireland Act 1998.*

Schedule 1 provided for a model whereby a single Minister is nominated by a Member of the Northern Ireland Assembly and elected on a cross-community vote. This appointment would not be subject to the d'Hondt procedure used for filling the other posts in the Northern Ireland Executive and would take place before the d'Hondt process is used to nominate the other

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[46] *Northern Ireland (Miscellaneous Provisions) Bill 9 2012-13 Explanatory Notes*, para 43

Ministers. This initial department would be dissolved on 1 May 2012 unless the Assembly had either passed a resolution on a cross-community basis to continue with the arrangements provided for in the Act, or put in place alternative future arrangements for the ministerial oversight of that department by legislation at Stormont.[47] Devolution of policing and justice then took place in 2010. The legislation facilitated some complex negotiations between the Assembly parties, resulting in the Alliance Party leader, David Ford, taking the post.

The Assembly enacted the *Department of Justice Act (Northern Ireland) 2010* which opted for the mechanism set out in section 21A(3A) of the 1998 Act. Part 1A of Schedule 4A to the 1998 Act applies to this appointment, creating differences between this appointment and the appointment of other Northern Ireland Ministers. As the Command Paper on the draft Bill noted, this does not give the Minister the same security of tenure as other ministers in the Executive:

> The NI Justice Minister is not appointed by the d'Hondt procedure which is used for all other Ministerial offices in the NI Executive. Instead he is appointed through nomination by one or more members of the Assembly and approval by cross community vote. Currently, the incumbent can be removed if a motion is raised to that effect by either the First and deputy First Ministers acting together, or 30 or more Assembly members, followed by a majority cross community vote.
>
> 8. There were discussions among political parties in Belfast in 2012 prior to the Assembly reaching a conclusion, in accordance with its legal obligations, on the permanent method of appointing a Justice Minister. In light of those discussions the First Minister and deputy First Minister asked my predecessor to bring forward provision to give the Justice Minister the same security of tenure as other ministers. He agreed to do so and the draft Bill gives effect to this.
>
> 9. The draft clauses also remedy the current anomaly created by the appointment of the Justice Minister outside the d'Hondt procedure which currently gives the party from which the Justice Minister is appointed an 'extra' Ministerial post to those which it would be entitled under the normal procedure for Ministerial appointments.[48]

Schedule 1, Part 3, paragraph 8 of the *Northern Ireland Act 2009* made provision for the dissolution of the Department of Justice by 1 May 2012 unless either:

- The Assembly resolved, through cross community support, that the Department is to continue operating from 1 May 2012, or
- A 'second Act' of the Assembly provided that the Department is to continue operating from 1 May 2012.

The Department was due to be automatically dissolved on 1 May 2012. In the event, a cross community vote was carried on 28 February 2012 in the Assembly. Sinn Fein attempted an amendment which would have required an Assembly Act making the appointment through d'Hondt, but this failed to achieve a majority.[49]

In August 2012 the then Northern Ireland Secretary, Owen Paterson, said that he would bring forward legislation that would include providing the same security of tenure for Northern Ireland Justice Ministers as all other Executive Ministers enjoy. In response, the DUP Deputy

[47] See Library Research Paper 09/18 *The Northern Ireland Bill 2008-09*
[48] Publication of Draft Legislation Northern Ireland (Miscellaneous Provisions) Cm 8563 February 2013
[49] Northern Ireland Assembly 28 February 2012 Minutes of Proceedings

Leader Nigel Dodds commented that "the Westminster government should work with local parties rather than launch criticisms at a distance."[50] SF was quoted as saying "Sinn Féin will not tolerate any attempts by Mr Paterson or anyone else to undermine the power-sharing and equality provisions which lie at the heart of the successful operation of the political institutions."

As noted above in the Introduction to this Paper, there have been discussions in Stormont about reducing the number of ministries in the Northern Ireland Executive. Currently, the Executive Review Committee is considering the matter. This may have longer term implications for the d'Hondt allocation procedure overall.

5.2 The draft Bill

Clause 5 amended Part 1A of Schedule 4A to the *Northern Ireland Act 1998* to bring the Justice Minister within the d'Hondt allocation process, although the post is still treated distinctly. The new form would come into effect by a commencement order laid by the Secretary of State. It is not the intention to modify the allocation in the current Assembly.

The Justice Minister would be appointed immediately after the First Minister and Deputy First Minister posts are decided upon. The formula for working out the number of Ministerial offices to which each party is entitled may then be amended to take into account the position of Justice Minister.

It is worth noting that the consent of the nominating officer of the relevant party is required for the candidate to put themselves forward for the post of Justice Minister. This concept of prior consent first appeared in the *Northern Ireland (St Andrews Agreement) Act 2006, as a* way of choreographing the appointment of First and Deputy First Ministers. The nominating officer is a position defined under PPERA for the purpose of party registration. Where the Justice Minister is a member of a political party, the relevant nominating officer of that party can remove the Minister. Where the Minister is not a member of a party, removal is through an Assembly motion.

Clause 6 dealt with the reappointment of other Ministers where the post of Justice Minister becomes vacant. If a new Minister is appointed, and there is a change in the total number of ministerial offices held by one party, then all Ministers cease to hold office and the d'Hondt procedure would be re-run. This would ensure that any potential anomalies in the number of seats held by a party is dealt with.

5.3 Northern Ireland Affairs Committee report recommendations

The Committee took evidence from several witnesses critical of the current position, with some wanting the bill to move the Justice portfolio into the full d'Hondt procedure for allocation. The Secretary of State, Teresa Villiers, argued in her evidence that a cross-community vote continued to be appropriate, given the sensitivity of the post:

> **Q543** Chair: This is probably a good point to move on to changes made to the Justice Minister. You stopped short of putting it into the d'Hondt system. Would it not be wise at this point to take that opportunity? Have we not moved on sufficiently in terms of relationships to move in that direction?
>
> ***Mrs Villiers***: The post remains very sensitive, so I believe there is still a case for a cross-community vote. Given the huge effort that went into building the confidence needed to enable the devolution of policing and justice powers to go ahead, I think we have not moved on sufficiently to move to a system where this is one post among

50 "Paterson launches Assembly consultation" 14 August 2012 *UTV news*

> others that gets allocated according to the d'Hondt system. I think a crosscommunity vote continues to be a sensible way to deal with this. If there is further normalisation in the future, and the sensitivities and the tensions around the portfolio lessen over time, then we can come back and look at that.
>
> If we were to move to a straight d'Hondt system, that would be perceived as destabilising the devolution settlement of policing and justice. I have not seen a broad-based push for that. Most people seem to think that the changes in relation to the Justice Minister's security of tenure are fairly sensible and necessary. I have not had representations telling me that we should do something different and move to a simple d'Hondt process.[51]

The Committee was concerned about the lack of alternative procedures, should there be a failure by the political parties to agree on a candidate. It recommended that there should be a mechanism to provide for an appointment in the absence of political agreement. The Bill does not contain such a mechanism.

5.4 The Bill

The Bill is identical to the draft bill in its wording. **Clauses 8 and 9** reproduce the wording of Clauses 5 and 6 on bringing the Justice Minister within the d'Hondt allocation process, and the reappointment of other Ministers where the post of Justice Minister becomes vacant.

6 Electoral registration and administration in Northern Ireland

The Bill sets out a number of changes to electoral law, designed to improve electoral registration and administration, bringing Northern Ireland more closely into line with developments in Great Britain. A number of new provisions appear in the Bill which were not in the draft Bill.. These include:

- Bringing the Chief Electoral Officer within the framework of performance standards in Great Britain;
- Making local government boundaries a reserved matter, so that the Assembly can legislate with the consent of the Secretary of State.

The Chief Electoral Officer administers the electoral system in Northern Ireland and is an independent statutory office holder appointed by the Secretary of State for Northern Ireland. The Chief Electoral Officer acts as the Electoral Registration Officer for all constituencies in Northern Ireland and as Returning Officer for all elections and referendums..

The Chief Electoral Officer is required to submit an annual report to the Secretary of State on how he has discharged his functions.[52]

Commitments were made by the then Labour Government following a public consultation in 2009 on improving electoral registration procedures in Northern Ireland.[53] The consultation sought views on a number of proposals relating to electoral registration and to the application procedures for absent voters. The Government published its response to this consultation on 24 November 2009.

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51 Northern Ireland Select Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC1003 2012-13, Q543

52 *Report of the Chief Electoral Officer for Northern Ireland 2011-12*, HC 548, 2012

53 *Improving Electoral Registration Procedures in Northern Ireland*, Northern Ireland Office, July 2009

In November 2012 the Electoral Commission published a report, *Continuous electoral registration in Northern Ireland.* The Commission found that there had been 'a significant and worrying decline in both the accuracy and completeness of Northern Ireland's electoral register' since 2008.[54] There had been 'a considerable deterioration in both the accuracy and completeness of the electoral register in Northern Ireland' since 2008 and the Commission estimated that approximately 400,000 people were not registered at their correct address.[55]

The Coalition Government announced that it would implement recommendations made by the Electoral Commission.[56] These recommendations were not included in the draft Bill, but are included in the Bill as presented to Parliament in May 2013.

6.1 Northern Ireland Affairs Committee report recommendations

The Committee evidence looked at the relationship between the Chief Electoral Officer (CEO) and the Electoral Commission in Northern Ireland in respect of introducing performance standards on electoral administration in Northern Ireland. It suggested that once the pilot on standards had been assessed, an additional clause could be added to the Bill extend the standards to the CEO. It also recommended an additional clause to allow the Registrar General and staff of the Northern Ireland Statistical Research Agency (NISRA) to make use of electoral registration data for work connected to the census. Otherwise, the proposed electoral administration changes were accepted.

6.2 The draft Bill

The draft Bill contained 4 clauses on electoral registration and administration, which also appear in the Bill. These are discussed below.

3 month residency requirement

The draft Bill removed the requirement to have been resident in Northern Ireland for three months before being entitled to register to vote. The 2009 consultation paper on registration procedures suggested that there was a case for removing the three month residence requirement. This had been introduced by the *Ireland Act 1949.* The Northern Ireland Office noted that the requirement may dissuade certain groups of potential voters from registering, in particular young people who are less likely to have a permanent residence and the necessary documentation to prove it.[57]

The Electoral Commission supported the removal of the three month requirement in its response to the consultation paper. The Government's response to the consultation in 2009 noted that there were no objections to the proposal in the responses to the consultation paper and that:

> respondents also emphasised that this requirement had an adverse effect on those who move to Northern Ireland within three months of an election because it prevents them from registering and therefore voting at the election. The provision was also considered to be now largely obsolete as an anti-fraud measure due to other robust requirements introduced over the last few years.[58]

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[54] *Continuous electoral registration in Northern Ireland,* Electoral Commission, November 2012, p1

[55] *Urgent action required to improve Northern Ireland's electoral register*, Electoral Commission news release, 27 November 2012

[56] *Continuous electoral registration in Northern Ireland,* Electoral Commission, November 2012

[57] ibid, p6

[58] Government response to the consultation Improving Electoral Registration Procedures in Northern Ireland, November 2009

Clause 14 abolishes the 3 month residency requirement.

Overseas voters

The draft Bill made provision to allow people from Northern Ireland who are living overseas and who wish to be registered as overseas voters to declare themselves as either a British or an Irish citizen on the declaration accompanying their application to be registered. The policy impetus is to respect the declaration in the *Belfast (Good Friday) Agreement* that citizens of Northern Ireland should be able to articulate their Irish heritage. [59]

The draft Bill did not remove the requirement in section 1 of the *Representation of the People Act 198*5 that persons born in Northern Ireland must have the legal status of British citizens in order to register as overseas electors.[60] There are currently 19 registered overseas voters in Northern Ireland.[61]

Library Standard Note 5923 *Overseas voters,* gives further information about the relevant legislation. Most respondents to the consultation also agreed that changing the requirement would ensure greater consistency with the spirit of the *Belfast (Good Friday) Agreement* and that it might encourage more people to register as overseas electors.[62]

Clause 15 of the Bill deals with overseas voting.

Absent voting

The existing bar on those who apply to be registered during the late registration period (between the last day for nominations and the 11th calendar day before the poll) in Northern Ireland from also applying for an absent vote is removed. This restriction had the effect of disenfranchising a small number of people who registered during this period, but who were unable to attend a polling station to vote in person. Voters who register during the late registration period will be able to apply for an absent vote on the same basis as those voters who were already on the electoral register. The Electoral Commission had recommended this change in its report on the Northern Ireland Assembly elections in 2011.[63]

Clause 16 of the Bill deals with absent voting.

Electoral offences

Providing false information in relation to an electoral ID card application becomes an offence. Section 13D of the *Representation of the People Act 1983* provides that a person who, for any purpose connected with the registration of electors, provides to a registration officer any false information, is guilty of an offence but it was not clear as to whether this provision would cover the provision of false information in an application for an electoral identity card. **Clause 17** in the Bill closes this loophole.

6.3 Improving the canvass in Northern Ireland

The following provisions did not appear in the draft Bill but are in the Bill as presented to Parliament.

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[59] Cm 8563p12

[60] *Publication of draft legislation Northern Ireland (Miscellaneous Provisions)*, Cm8563, February 2013

[61] Personal communication from the Electoral Office of Northern Ireland

[62] Government response to the consultation Improving Electoral Registration Procedures in Northern Ireland, November 2009

[63] *Report on the Northern Ireland Assembly election on 5 May 2011*, Electoral Commission, October 2011

Duty to take necessary steps

Section 9A of the *Representation of the People Act 1983* requires an Electoral Registration Officer in Great Britain to 'take all steps that are necessary for the purpose of complying with his duty to maintain the registers.' At present this requirement does not extend to Northern Ireland but under Section 10ZB of the RPA 1983 the Chief Electoral Officer has to secure "so far as reasonably practical" these three registration objectives:

> (a) That every person who is entitled to be registered in a register is registered in it,
>
> (b) That no person who is not entitled to be registered in a register is registered in it, and
>
> (c) That none of the required information (name, address, date of birth, signature, national insurance number) relating to any person registered in a register is false.

Section 9A was added to the RPA 1983 by the *Electoral Administration Act 2006* following concern about the increased level of under-registration. This had been highlighted in the Electoral Commission's report, *Understanding electoral registration: the extent and nature of non-registration in Britain,* published in 2005.[64] Section 9A sets out a list of the steps an ERO must take to identify people eligible for registration as electors:

> (a) Sending more than once to any address the form to be used for the canvass under section 10 below;
>
> (b) Making on one or more occasions house to house inquiries under subsection (5) of that section;
>
> (c) Making contact by such other means as the registration officer thinks appropriate with persons who do not have an entry in a register;
>
> (d) Inspecting any records held by any person which he is permitted to inspect under or by virtue of any enactment or rule of law;
>
> (e) Providing training to persons under his direction or control in connection with the carrying out of the duty.

One of the Commission's recommendations to address the problems was that the

> The UK Government should introduce legislation to amend the framework for the conduct of the canvass in Northern Ireland to allow more effective canvass activity by the Chief Electoral Officer in future. Legislation should include provisions to align the framework for Northern Ireland more closely with that which will apply in Great Britain, in particular to:
>
> Extend to the Chief Electoral Officer the current duty under section 9A of the Act for Electoral Registration Officers in Great Britain to take specific steps, both during and outside of the canvass, to maintain the register, including by identifying and inviting potential electors to apply to be registered.[65]

Clause 18 of the Bill extends this duty to take necessary steps to the Chief Electoral Officer for Northern Ireland in relation to all three registration objectives in Section 10ZB of the RPA

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64 *Understanding electoral registration: the extent and nature of non-registration in Britain*, Electoral Commission, 2005

65 *Continuous electoral registration in Northern Ireland,* Electoral Commission, November 2012, p61

1983, including ensuring that none of the required information relating to any person registered is false. This requirement does not apply to EROs in Great Britain.

Performance standards for the Chief Electoral Officer

EROS in Great Britain are appointed by local authorities and the performance standards are set by the Electoral Commission under the provisions of the *Political Parties, Elections and Referendums Act 2000* as amended by the *Electoral Administration Act 2006.* The provisions do not extend to Northern Ireland. The Commission first published performance standards for EROs in July 2008 and reports annually on their performance against these standards. The most recent report was published in May 2013.[66]

In October 2011 the Electoral Commission published its statutory report on the 2011 Northern Ireland Assembly elections.[67] Following the report, which recommended that the statutory framework of performance standards that applies in the rest of the UK should be extended to Northern Ireland, the Commission agreed a performance standards pilot framework on electoral registration with the Chief Electoral Officer.

The Electoral Commission made the same recommendation in its 2012 report, *Continuous electoral registration in Northern Ireland*. The Commission noted that the Chief Electoral Officer is "the only electoral registration and returning officer whose performance against in dependently-set standards is not reported publicly to electors."

The Commission published a report in March 2013 on the progress of the recommendations it had made in 2011 and this gave further details of the performance standards pilot which had been agreed:

> The standards provide a framework within which the Chief Electoral Officer can report on the detail of the work he carries out to meet his statutory registration objectives. The Chief Electoral Officer will provide documentary evidence in April 2013 which we will use to measure how the Commission's performance standards have been met.[68]

Clause 19 of the Bill enables the Secretary of State, who appoints the Chief Electoral Officer, to make provision for setting performance standards and for assessing or reporting the extent to which such standards have been met.

6.4 Data sharing

The Electoral Registration and Administration Act 2013 made provision for the introduction of a new system of individual electoral registration (IER) in Great Britain. The Act gave powers to the Secretary of State to make regulations to authorise the disclosure of information that would assist a registration officer to verify the information provided by an individual wishing to be registered; to check existing entries on the register or to help identify the names and addresses of eligible people who are not registered. Clause 20 of the Bill repeals the existing powers that the Chief Electoral Officer has to require information from public authorities and extends the provisions in Section 53(8) of the Representation of the People Act 1983 as amended by the Electoral Registration and Administration Act 2013 so that they apply in Northern Ireland as well as Great Britain.

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[66] *Electoral registration in Great Britain: report of performance of Electoral Registration Officers in 2012*, Electoral Commission, May 2013

[67] *Report on the Northern Ireland Assembly election on 5 May 2011*, Electoral Commission, October 2011

[68] *Northern Ireland Assembly elections 2011: progress on our recommendations*, Electoral Commission, March 2013

6.5 Local government boundaries

Local government boundaries in Northern Ireland are a transferred matter but local government elections are an excepted matter. Therefore the local government boundaries are set by the Northern Ireland Assembly, following recommendations by the Local Government Boundaries Commissioner, and the electoral areas for each of the districts are set by order of the Secretary of State for Northern Ireland.

Currently there are 26 local government districts. The *Local Government (Boundaries) Act (Northern Ireland) 2008* made provision for

- the establishment of 11 local government districts
- the division of these districts into wards
- the appointment of a Local Government Boundaries Commissioner to recommend the names of these districts and wards and the number of wards in each district.

The Local Government Boundaries Commissioner commenced this work on 1 July 2008 and submitted his final recommendations to the Northern Ireland Department of the Environment on 22 June 2009.[69] The *Local Government (Boundaries) Order (Northern Ireland) 2012* gave effect to the recommendations, giving the names of the new local government districts and listing the wards included in each of the new districts.[70]

The Secretary of State for Northern Ireland appointed Richard Mackenzie as the District Electoral Areas Commissioner for Northern Ireland on 21 January 2013. The District Electoral Areas Commissioner is responsible for making recommendations for the grouping together of wards in each of the eleven new local government districts into District Electoral Areas and published his provisional recommendations in May 2013.[71]

Clause 12 of the Bill moves this responsibility for the division of local government areas into electoral areas from the excepted to the reserved category by amending Schedules 2 and 3 to the *Northern Ireland Act 1998*. This will enable the Northern Ireland Assembly to legislate on them with the consent of the Secretary of State. The *Explanatory Notes* to the Bill make clear that this change will also enable the Secretary of State to devolve these matters by making an Order in Council under Section 4 of the *Northern Ireland Act 1998.*[72]

7 Miscellaneous amendments to Northern Ireland law

7.1 Statutory duty to designate public authorities

The Bill contains a provision identical to that in the draft Bill.

Draft bill

Clause 11 of the draft Bill was designed to amend the Secretary of State's power to designate public authorities as being subject to the statutory duty to promote equality, contained in section 75 of the *Northern Ireland Act 1998*. Section 75 places a duty on public authorities to "have due regard to the need to promote equality of opportunity". It is similar in effect to the public sector equality duty contained in section 149 of the *Equality Act 2010*.

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69 Final recommendations of the Local Government Boundaries Commissioner, June 2009

70 *Local Government (Boundaries) Order (Northern Ireland) 2012* and Explanatory Memorandum

71 *Local government District Electoral Areas for Northern Ireland: provisional recommendations,* District Electoral Areas Commissioner, May 2013

72 Explanatory Notes, para 66

The Secretary of State may by order designate authorities as being subject to the duty. However, designation must be in respect of all of the authority's functions, without exception. Clause 11 would allow for partial designation. Partial designation may be appropriate where it is considered that certain of an authority's functions should be subject to the duty, whilst others should not. The clause would enable designation in a manner similar to that provided for in the *Equality Act 2010*. For example, under the *Equality Act* the British Broadcasting Corporation is subject to the equality duty except "in respect of functions relating to the provision of a content service", as it was felt that statutory intervention in the BBC's content services was undesirable.[73]

Northern Ireland Affairs Committee report

The Committee heard evidence from the Committee on Administration of Justice, which was concerned that the new power to partially designate might be used to relax the obligations of a public sector authority under section 75. The Committee recommended that:

- the powers in the bill be redrafted to make clear that an authority subject to full designation could not be subject to partial designation;
- the Government outline the limited purposes for which the power would be used.

The Bill

The wording is identical to the draft Bill. The *Explanatory Notes* point out that **Clause 22** does not alter the position of any persons who have already been designated for the purpose of section 75.

7.2 Rules of court

Clause 21 and the Schedule to the Bill make provision for certain rules of court relating to excepted matters. There was an identical clause in the draft Bill. The Northern Ireland Affairs Select Committee did not report specifically on this technical clause.

The *Explanatory Notes* indicate that due to an oversight in the *Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010* the parliamentary procedure to be followed for all court rules is currently the negative resolution procedure in the Northern Ireland Assembly. The Explanatory Notes say that it should have provided that rules dealing with an excepted matter (for example national security and counter-terrorism) are subject to the negative resolution procedure in the Westminster Parliament. Accordingly, Paragraphs 1 and 2 of the Schedule rectify that error, by providing that rules dealing with an excepted matter are subject to the negative resolution procedure in the Westminster Parliament.

The Schedule also makes provision to harmonise rules making procedures for certain other courts, including county courts, magistrates' courts and inquests.

7.3 Regulation of biometric data

The *Protection of Freedoms Act 2012* allowed the Secretary of State to bring forward an order to regulate the retention use and destruction of biometric data for excepted and reserved matters such as terrorism or national security, if the Assembly legislated in respect of a devolved matter. The Assembly has not yet introduced the relevant legislation, so the 2012 Act needs to be amended as it refers to legislation brought forward in 2011 or 2012. **Clause 24** of the bill would update Schedule 1, Part 7 of the *Protection of Freedoms Act 2012* to ensure that the Secretary of State can make the relevant order whenever the

[73] *Equality Act 2010*, Schedule 19, Part 1, as amended by the *Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011 SI No.1060*

Assembly legislates. The Committee received evidence from the Police Service of Northern Ireland to the effect that the provisions would bring Northern Ireland into line with the rest of the UK. The Committee expected that when the Assembly chose to legislate, it would subject to scrutiny on human rights, privacy and adequate safeguards.[74] An identical clause appeared in the draft Bill. The Select Committee was in general approval of the approach but noted:

> We expect that the decision to legislate in the Assembly will no doubt be subject to scrutiny in terms of human rights, privacy and adequate safeguards, and that process of scrutiny should be undertaken carefully.[75]

7.4 Arms length bodies etc

A number of bodies are transferred in the Bill from the excepted category to the reserved powers of the Assembly, so it can legislate in this area with the consent of the Secretary of State. The change will enable the matters to be devolved to the Assembly through an Order in Council at Westminster following a cross community vote in the Assembly.

The affected areas are appointments to the Civil Service Commissioners for Northern Ireland and certain provisions relating to the Northern Ireland Human Rights Commission (NIHRC). The *Explanatory Notes* point out that these **clauses 10 and 11** put these bodies into the same category as the Equality Commission for Northern Ireland. A separate **clause 25** makes the Civil Service Commissioner for Northern Ireland a disqualifying office, so that the holder cannot be a Member of the Assembly.

The Northern Ireland Affairs Select Committee commented briefly on these provisions, as they were under consideration for possible inclusion in the Bill.

> 167. We note that the Government has not yet consulted on the proposed devolution of responsibilities for arms-length bodies. The NIHRC is just one body potentially affected by this proposal. It is a unique institution, with its origins in the Belfast (Good Friday) Agreement. We recommend that the Government consult on the devolution of responsibility for arms-length bodies before making any changes to arrangements relating to the NIHRC. We therefore request that the Government consult widely on this issue before bringing forth draft provisions for inclusion in the substantive Bill.
>
> 168. We recognise the importance of the NIHRC's independence and accountability. We note that it has full participation rights at the UN Human Rights Council. The Government must ensure that any proposal that affects responsibility for NIHRC must not put at risk its accreditation and compliance with the Paris Principles.
>
> 169. In order to maintain the independence of the NIHRC, Professor O'Flaherty emphasised that responsibilities should be devolved to the Northern Ireland Assembly, as opposed to the Executive:
>
> If provision were put in the Bill whereby devolution may be anticipated, we would like to propose that the nature of the devolution be explicitly indicated as one whereby the commission would be accountable not to a Ministry or Department of government in the Executive but directly to the Assembly. That is the model that operates, apparently successfully, in Scotland, where the Scottish Human Rights Commission is answerable not to the Scottish Executive in the first instance but to the Scottish Parliament. In

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[74] Northern Ireland Affairs Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13 para 117

[75] Northern Ireland Affairs Committee *Draft Northern Ireland (Miscellaneous Provisions) Bill* HC 1003 2012-13, para 117

> making that point, we observe that recent good international practice focuses on the need for a close nexus between the parliamentary body, in our case the Assembly, and the national human rights commission. The Belgrade principles[158], drawn up by experts from many European countries, including the United Kingdom, and adopted in 2012, set out that emerging good practice.
>
> 170. We advise this approach in the event that the Government does decide to devolve responsibility for arms-length bodies: we recommend that those responsibilities be devolved to the Northern Ireland Assembly. This would be consistent with good international practice, as set out in the Belgrade Principles. We further recommend that, if responsibility for the NIHRC is devolved to the NI Assembly, that the NIHRC should still be able to retain responsibility for the scrutiny of non-devolved matters such as national security and terrorism. The NIHRC provides valuable scrutiny of policy and protects human rights, and no proposal should inhibit its effectiveness.[76]

The *Explanatory Notes* to the Bill do not comment on these observations.

[76] Ibid, paras 167-170