

**COMMITTEE FOR FINANCE AND PERSONNEL**

**Report on the  
Presumption of  
Death Bill (NIA 23/07)**

**Together with the Minutes of Proceedings of the Committee  
relating to the Report, written submissions,  
memoranda and the Minutes of Evidence**

Ordered by The Committee for Finance and Personnel to be printed 14 January 2009  
Report: 2/08/09R (Committee for Finance and Personnel)

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**Committee for Finance and Personnel  
Membership and Powers**

**Powers**

The Committee for Finance and Personnel is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, Section 29 of the Northern Ireland Act 1998 and under Assembly Standing Order 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department of Finance and Personnel and has a role in the initiation of legislation.

The Committee has the power to;

- consider and advise on Departmental budgets and annual plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee Stage of primary legislation;
- call for persons and papers;
- initiate inquiries and make reports; and
- consider and advise on matters brought to the Committee by the Minister of Finance and Personnel.

**Membership**

The Committee has eleven members, including a Chairperson and Deputy Chairperson, with a quorum of five members.

The membership of the Committee since its establishment on 9 May 2007 has been as follows:

Mr Mitchel McLaughlin (Chairperson)  
Mr Simon Hamilton (Deputy Chairperson)  
Dr Stephen Farry  
Mr Fra McCann  
Ms Jennifer McCann  
Mr David McNarry\*\*  
Mr Adrian McQuillan  
Mr Declan O'Loan  
Mr Ian Paisley Jnr\*  
Ms Dawn Purvis  
Mr Peter Weir

\* Mr Ian Paisley Jnr replaced Mr Mervyn Storey on the Committee on 30 June 2008

\*\* Mr David McNarry replaced Mr Roy Beggs on 29 September 2008

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Presumption of Death Bill (23/07/08)

## **List of Abbreviations and Acronyms used in the Report**

BASW British Association of Social Workers

DALO Departmental Assembly Liaison Officer

DFP Department of Finance and Personnel

DWP Department for Work and Pensions

E&W England and Wales

ECHR European Convention of Human Rights

EU European Union

GMB Union British Trade Union (originally General Municipal Boilermakers)

HMRC Her Majesty's Revenue and Customs

ICLVR Independent Commission for the Location of Victims' Remains

ICTU Irish Congress of Trade Unions

MLA Member of the Legislative Assembly

MP Member of Parliament

NI Northern Ireland

NICEM Northern Ireland Council for Ethnic Minorities

NIO Northern Ireland Office

NIPSA Northern Ireland Public Servants Alliance

OFMDFM Office of the First Minister and deputy First Minister

PNMB Police National Mission Persons Bureau

PSNI Police Service of Northern Ireland

QUB Queen's University Belfast

SI Statutory Instrument

UK United Kingdom

US United States [of America]

## **Executive Summary**

The Presumption of Death Bill is designed to provide a legal framework to help to address the needs of the families of people from Northern Ireland who go missing. This includes the immediate concerns of the families of "the disappeared", some of which have sought a change in the law to allow the deaths of the disappeared to be registered in the absence of their physical remains. In addition, the Bill will assist the families of a much wider group of missing persons in sorting out the affairs and administering the estate of the person who is now presumed dead. The main provision in the proposed legislation is the creation of a new right to apply to the High Court for a declaration that a person may be presumed dead on the basis that there is evidence that the missing person is thought to have died or has not been known to be alive for a period of more than 7 years.

The Bill, which was introduced to the Assembly by the Minister of Finance and Personnel on 1 July 2008, comprises 20 clauses and 3 schedules. Following its Second Stage in the Assembly on 15 September 2008, the Bill was referred to the Committee for Finance and Personnel for Committee Stage. As part of its consideration of the Bill, the Committee issued a call for evidence and received written submissions and held oral hearings with key stakeholders, in particular, the WAVE Trauma Centre, representing some of the families of the disappeared, and the Northern Ireland Human Rights Commission.

As part of its scrutiny, the Committee sought responses from the Department of Finance and Personnel to each of the concerns and proposals raised by the witnesses and to queries which the Committee itself raised. The Department provided a series of written responses in addition to further oral briefings, which clarified and addressed a number of the issues to the satisfaction of

the Committee. The evidence presented to the Committee and the responses provided by the Department are included in the appendices to this report.

This report reflects the outcome of the Committee Stage deliberations. It includes a range of key conclusions and recommendations, including details of important amendments agreed with the Department, and which the Committee believes will enhance the Bill and help to address issues raised in the evidence, including concerns raised by the family representatives of some of the disappeared.

## **Key Conclusions and Recommendations**

1. The Committee recognises that, in general terms, the changes which the Bill will introduce will be welcomed by the public. More particularly, the Committee considers that the Bill will assist in meeting the needs of the families of people who go missing, including the families of "the disappeared". (Paragraph 12)
2. The Committee welcomes the Department's willingness to consider an amendment to clause 1 to provide for an additional and third jurisdictional rule, which would give the High Court jurisdiction to hear cases in which the applicant is a close relative of a victim of violence within the meaning of the Northern Ireland (Location of Victims' Remains) Act 1999. Such provision would help to address concerns regarding some of the disappeared potentially falling outside the scope of the jurisdictional rules as drafted and the Committee, therefore, calls on the Minister to table the appropriate amendment for Consideration Stage. (Paragraph 15)
3. The Committee will wish to be apprised of the outcome of the ongoing review of the legal regime applying to cohabitating couples in England and Wales, in terms of any future implications which this could have for the jurisdictional rules in the presumption of death legislation in Northern Ireland. (Paragraph 16)
4. The Committee recommends that the rule which requires that the missing person has not been known to be alive for a period of at least 7 years, as specified in clauses 1 and 2, should be periodically reviewed in light of legislative developments internationally on this matter. (Paragraph 21)
5. Whilst recognising that the court procedures for considering applications for declarations of presumed death will necessitate a degree of formality, the Committee believes that the application process should be made as streamlined and user-friendly as possible to avoid causing any further emotional trauma to the families of missing persons, including the families of the disappeared. (Paragraph 23)
6. The Committee welcomes the Department's proposed amendments to clauses 6 and 7, which will clarify the treatment of annuities and other periodical payments and which will reduce the number of instances when insurance may be required under the legislation. (Paragraph 27)
7. In light of concerns raised in the evidence regarding the potential need for privacy of proceedings, the Committee welcomes the discretionary power in clause 8 for the High Court to direct that proceedings under the legislation be held in private. The Committee is generally content with the clarification and assurances which the Department has provided regarding the flexibility which exists within the provisions in clause 8 to ensure that issues in relation to privacy, notification and sensitive information can be handled by the High Court appropriately on a case-by-case basis. (Paragraph 32)

8. Whilst the Committee considered carefully the case for including a statutory duty of disclosure on third parties holding information pertinent to the application before the court, it concluded that, on balance, the Department's proposed approach of giving the High Court a discretionary power to order such disclosure is appropriate in the circumstances. (Paragraph 37)

9. The Committee welcomes the commitment given by the Department to work with the families of the disappeared to identify other avenues of funding or assistance to help defray the costs associated with pursuing applications for declarations of presumed death, in circumstances where the families are not eligible for legal aid. (Paragraph 39)

10. The Committee is content with the Department's proposal to table amendments to clause 16 to replace the definition of insurer as currently drafted. (Paragraph 40)

11. The Committee is content that the Department may table an amendment to clause 19 to provide for the rule-making power in clause 9(1) to come into operation one month after the Act receives Royal Assent, which will allow rules of court to be made quickly. (Paragraph 41)

12. The Committee welcomes the Department's agreement to table an amendment to paragraph 4(2) of Schedule 1, which will change the Registrar General's discretionary power to annotate an entry in the Register of Presumed Deaths to a statutory duty in cases where he becomes aware that a missing person's death has been registered outside Northern Ireland. The Committee believes that this could help to allay some of the concerns raised in the evidence, regarding the need to facilitate the updating of the records subsequent to the recovery of remains and the issuing of a death certificate. (Paragraph 43)

## **Introduction**

### **Background**

1. The Presumption of Death Bill was introduced to the Assembly by the Minister of Finance and Personnel on 1 July 2008 and received its Second Reading on 15 September 2008, when it was subsequently referred to the Committee for Finance and Personnel for Committee Stage. The Bill has 20 clauses and 3 Schedules. The provisions in each clause are explained in the Explanatory and Financial Memorandum.<sup>[1]</sup>

2. The purpose of the Bill is to provide a legal framework to address the needs of the families of people from Northern Ireland (NI) who go missing. It is intended both to help address the immediate concerns of the families of "the disappeared" and to assist the families of a much wider group of missing persons from NI in sorting out the affairs and administering the estate of the person who is now presumed dead.

### **The Committee's Approach**

3. The Committee received a pre-introductory briefing on the Bill from the Department of Finance and Personnel (DFP) on 12 September 2007. In addition, the Committee received a subsequent briefing from DFP officials on 21 May 2008, prior to the introduction of the Bill to the Assembly. This briefing included information on the outcome of the Department's public consultation conducted between 23 January 2008 and 15 April 2008.

4. A public notice was placed in the main provincial newspapers on 18 September 2008, following commencement of Committee Stage, inviting written evidence on the provisions in the

Bill. The Committee also notified a number of key stakeholders who had responded to the Department's earlier consultations.

5. In response to its call for evidence, the Committee received written submissions from the following organisations:

- Lisburn City Council;
- WAVE Trauma Centre; and
- Northern Ireland Human Rights Commission (NIHRC)

6. On 12 November 2008, the Committee took oral evidence from the Chief Executive Officer of the WAVE Trauma Centre and family representatives of the disappeared.

7. Given the important issues and concerns raised in the evidence, the Committee sought and gained Assembly approval to extend the Committee Stage until 16 January 2009, to allow for these matters to be discussed fully with DFP and for the Committee to reach a considered position on the Bill. In light of the importance of the Bill, the Committee also decided to give priority to this legislation over other business in its heavy work programme.

8. The Committee made a detailed analysis of the issues arising from evidence and sought responses from DFP to each of the concerns raised by witnesses and to additional queries which the Committee itself raised. The Department provided a series of follow up written responses in addition to oral briefing and the Committee was generally satisfied with DFP's efforts to address the issues where possible.

9. The Committee carried out clause-by-clause scrutiny of the Bill on 10 December 2008. At its meeting on 14 January 2009, the Committee agreed that its report on the Bill would be printed.

10. The Minutes of Proceedings relating to the Committee's deliberations on the Bill are included at Appendix 1. Copies of the Official Reports of the oral evidence sessions are at Appendix 2 and the written submissions which the Committee received are at Appendix 3. Follow up memoranda and papers, including the written responses from DFP to the queries and proposed amendments raised by witnesses and the Committee are at Appendix 4. An acknowledgement letter to the Committee from a representative of the families of the disappeared is at Appendix 5. Finally, Appendix 6 includes a research paper provided by the Assembly Research and Library Services to assist the Committee's deliberations.

## **Consideration of the Provisions in the Bill**

11. During its clause-by-clause scrutiny of the Bill, the Committee considered a number of proposed amendments from DFP, several of which aim to address concerns which the Committee had raised with the Department arising from the evidence presented during Committee Stage. The Committee agreed all of the clauses, subject to the proposed amendments agreed with DFP. The Committee also agreed Schedule 1, which makes provision for a Register of Presumed Deaths, subject to an amendment agreed with the Department, and schedules 2 and 3, which provide for consequential amendments and repeals respectively. In addition, the Committee agreed a new clause, proposed by DFP, which will make provision for disclosure of information to the High Court.

**12. The Committee recognises that, in general terms, the changes which the Bill will introduce will be welcomed by the public. More particularly, the Committee considers that the Bill will assist in meeting the needs of**



## **the families of people who go missing, including the families of “the disappeared”.**

13. The Committee’s detailed consideration of the evidence on the provisions in the Bill, together with its formal clause-by-clause scrutiny, is detailed in the Official Reports at Appendix 2. However, the following section highlights the key issues upon which the Committee has raised concerns, drawn conclusions or made recommendations, based on the evidence presented during Committee Stage. The issues are identified below against the relevant clauses of the Bill, with consideration being limited only to those clauses which attracted substantive comment in the evidence.

### **Clause 1 – Declarations of presumed death**

14. Whilst the Committee broadly welcomes the provisions in clause 1, in the evidence from NIHRC and the WAVE Trauma Centre, concerns were expressed about the scope of the jurisdictional rules requiring domicile or habitual residence in NI. The Committee raised these issues with DFP, including the concern that some of the disappeared could fall outside the scope of the jurisdictional rules as drafted. In response, DFP officials agreed to put a recommendation to the Minister on an additional and third jurisdictional rule. Under the proposal, the High Court would have jurisdiction to hear cases in which the applicant is a close relative of a victim of violence within the meaning of the Northern Ireland (Location of Victims’ Remains) Act 1999. This additional jurisdictional rule would, in effect, apply to the disappeared, who would have a specific entitlement and jurisdiction under that provision.

**15. The Committee welcomes the Department’s willingness to consider an amendment to clause 1 to provide for an additional and third jurisdictional rule, which would give the High Court jurisdiction to hear cases in which the applicant is a close relative of a victim of violence within the meaning of the Northern Ireland (Location of Victims’ Remains) Act 1999. Such provision would help to address concerns regarding some of the disappeared potentially falling outside the scope of the jurisdictional rules as drafted and the Committee, therefore, calls on the Minister to table the appropriate amendment for Consideration Stage.**

16. In its evidence, NIHRC also pointed out that it will be important to ensure that the jurisdictional rules do not disadvantage a cohabitant of a missing person in the determination of an application. The Committee raised this issue with DFP and, in its response, the Department explained that clause 1 does not operate to prevent a person who was living with the missing person at the time of his/her disappearance from making an application to the High Court, provided the missing person falls within the scope of the domicile or habitual residence rules and provided the court considers the applicant to have a sufficient interest in the determination of the application. The Department also advised that the legal regime that applies to cohabiting couples is under review in England and Wales and could potentially result in more wide-ranging legislative reform in this area. DFP therefore wishes to await the outcome of this review before considering whether any future amendments will be necessary to the Act in this regard. The Committee will wish to be apprised of the outcome of the ongoing review of the legal regime applying to cohabiting couples in England and Wales, in terms of any future implications which this could have for the jurisdictional rules in the presumption of death legislation in NI.

17. During the oral evidence from DFP officials, the Committee sought clarification of the “sufficient interest” test which is used in clauses 1(3) and 5(2). In particular, the Committee queried how the courts interpret the term, how an applicant might be able to predict if he or she

would be regarded as having “sufficient interest” in any application, and whether there would be merit in defining the term on the face of the Bill. The Department agreed to re-examine the use of the test in family law cases and in other statutory contexts. In follow up, DFP provided the Committee with a number of illustrative examples of the use of the test in family law and other settings. The Committee consequently accepts the Department’s advice that “sufficient interest” requires no further clarification as the courts are familiar with the term and are used to exercising discretion in an appropriate manner.

18. The Committee raised a further issue as to whether the Independent Commission for the Location of Victims’ Remains (ICLVR) would be able to make applications for declarations of presumed death or variation orders under the Bill on behalf of the relatives of the disappeared. The Committee also questioned whether, in the event that the Commission were able to make applications, the Bill should specify that the ICLVR is deemed to “have sufficient interest to make an application”. In reply, DFP referred to the statutory objective and functions of the ICLVR and concluded that the Commission would arguably be exceeding its powers if it were to make an application to the High Court in NI under the Bill. DFP also pointed out that the remit of the ICLVR is established by Treaty between the UK and Irish governments and any changes to its remit or functions is not a matter on which the Assembly can legislate. In addition, DFP had been informed by the Northern Ireland Office (NIO) that the ICLVR has not been resourced to make such applications.

19. DFP also explained that any mention of the ICLVR on the face of the Bill might give rise to an unwarranted inference that the Commission would at some stage make an application, which would be both unfair to the Commission and might lead to false hope amongst some of the families as to the ICLVR’s likely future actions. Moreover, the Department also understood that the Commission would not wish to take the lead in initiating applications under the new legislation in respect of the disappeared. In view of this, the Committee accepts the DFP advice that it would not be prudent to make any reference to the ICLVR as a potential applicant under the Bill.

20. During the evidence sessions with DFP officials, the Committee also raised issues in respect to the 7 years absence requirement. In particular, the Committee questioned whether 7 years is too long a period to require a person to have been missing, what period of time applies in other countries and whether the court should have discretion to apply different periods of time for different types of cases. In response, the Department undertook comparative research in other jurisdictions and this confirmed that, as yet, there is no universally accepted period of absence which would give rise to a presumption of death, nor is there consensus across the common law internationally that 7 years is too long a period and that a shorter period should be adopted. The Department therefore advised that the 7 year time period is appropriate for the time being and that the Bill provides for the power to amend the time period if necessary. DFP also concluded that the High Court should not have a discretion to disapply the 7 year rule and that evidence has not been found to suggest that the existence of a definite time period results in any particular injustice. The Department did, however, give a commitment to monitor the legislative developments which are taking place elsewhere on this issue.

**21. The Committee recommends that the rule which requires that the missing person has not been known to be alive for a period of at least 7 years, as specified in clauses 1 and 2, should be periodically reviewed in light of legislative developments internationally on this matter.**

22. In its evidence to the Committee, the WAVE Trauma Centre highlighted concern that the process for obtaining a declaration of presumed death could prove too difficult for the families of the disappeared. In its response DFP emphasised that the new court rules will endeavour to

make the process as straightforward as possible. In this regard, the Department pointed out that, for example, where the application is uncontested it is proposed that the rules of court will allow the case to be heard by a Judge of the High Court in Chambers rather than in open court. Also, in many cases the court will be able to make its determination on the basis of the applicant's written affidavit evidence rather than requiring the applicant to give oral evidence to the court. DFP did, however, point out that the High Court proceedings require a degree of formality to maintain the integrity of the court process.

23. Whilst recognising that the court procedures for considering applications for declarations of presumed death will necessitate a degree of formality, the Committee believes that the application process should be made as streamlined and user-friendly as possible to avoid causing any further emotional trauma to the families of missing persons, including the families of the disappeared.

## **Clause 6 – Effect on property rights of variation order**

## **Clause 7 – Insurance against claims**

24. The Department has indicated to the Committee that it intends to table amendments to clauses 6 and 7 to ensure that the obligations to repay capital sums or to take out insurance in respect of repayment of those sums does not extend to capital sums paid out by insurers in the form of annuities or other periodical payments. This would bring the insurance provisions into line with the associated Scottish legislation.

25. In its evidence, NIHRC had called for clarification to be obtained from the insurance industry on the likely costs of premiums associated with the requirement for certain persons, including trustees or the recipient of a missing person's life insurance money, to take out insurance to cover the cost of returning the insurance money should it be subsequently established that the missing person is still alive. In its response, the Department indicated that the insurance industry was unable to provide concrete information on likely premium rates to be paid in those cases where either the legislation or an insurer imposes an obligation on a person to take out insurance to cover the possibility that a missing person may not be dead. However, it is envisaged that the premiums are likely to be comparable to that payable in, for example, cases where missing beneficiary insurance is taken out, which typically incur a premium of 1% to 2% of the insured value (plus insurance premium tax).

26. DFP further advised that the clarification of the treatment of annuities will reduce the instances when insurance may be required. In addition, the Department pointed out that the court retains the power to disapply the requirement in certain circumstances, so it is not always the case that there will be a requirement for insurance.

**27. The Committee welcomes the Department's proposed amendments to clauses 6 and 7, which will clarify the treatment of annuities and other periodical payments and which will reduce the number of instances when insurance may be required under the legislation.**

## **Clause 8 – Supplementary provisions as to declarations, etc.**

28. NIHRC highlighted concerns in relation to the privacy of proceedings, as in some cases the relatives of a missing person may not wish the personal details surrounding the disappearance of their loved one to be publicly scrutinised, or may not wish to be made aware of sensitive information surrounding their disappearance. In response to this, DFP explained that the

underlying rule applying in proceedings under the new legislation is that proceedings should be held in open court, with only such reporting restrictions as the court considers necessary. In this regard, it was pointed out that the making of a declaration, or indeed the variation or revocation of a declaration, may have direct implications for others, aside from family members seeking the declaration, for example creditors of the missing person or others entitled under the missing person's will or intestacy. Moreover, DFP sees a legitimate public interest in the circumstances which will lead to the High Court presuming a missing person to be dead, in the absence of any physical remains.

29. In response to the concerns regarding the handling of sensitive information, the Department indicated that it is inherent in the process of applying for a declaration that information relating to the date and time when the missing person was last known to be alive or the person's general state of mind or personal circumstances will emerge. However, the Department stated that the High Court is experienced in handling sensitive cases in a range of areas and judges will apply these skills to the new legislation, balancing the wishes of various family members either for privacy or not to receive distressing information against the need for cases to be dealt with in an open and transparent manner.

30. In terms of both the handling of sensitive information and the privacy of proceedings, the Department also explained that, under clause 8(5), it will be possible, at the discretion of the High Court, for proceedings under the legislation to be heard in private. DFP advised that, by allowing the court to hear all or part of any proceedings in private, the Bill gives the court the maximum flexibility to decide, on a case-by-case basis, how best to conduct the particular case before it. It was also noted that the High Court has power, under the common law and statute, to impose reporting restrictions on proceedings, and there is guidance available to judges on this subject.

31. In its evidence, NIHRC also raised queries regarding the notification process, including the possible need to address particular concerns of the families of the disappeared, especially if public notification is required. In follow up, DFP has clarified that clause 8 includes the necessary provision to allow rules of court to prescribe who is to receive automatic notification of proceedings in respect of a missing person, as well as giving the High Court the power to dispense with the requirement to place advertisements in the local media.

**32. In light of concerns raised in the evidence regarding the potential need for privacy of proceedings, the Committee welcomes the discretionary power in clause 8 for the High Court to direct that proceedings under the legislation be held in private. The Committee is generally content with the clarification and assurances which the Department has provided regarding the flexibility which exists within the provisions in clause 8 to ensure that issues in relation to privacy, notification and sensitive information can be handled by the High Court appropriately on a case-by-case basis.**

## **Clause 9 – Provisions relating to the Attorney General**

33. The Department has notified the Committee that, whilst it does not propose to amend this clause, it is possible, through an amendment to the commencement provisions in clause 19, that the rule-making power in clause 9(1) will come into force one month after the Act receives Royal Assent, which will allow rules of court to be made quickly. The Committee is content with this arrangement.

## **New Clause – Disclosure of Information**

34. An important theme in the written and oral evidence received by the Committee was the need for robust provision in the Bill to ensure that the High Court can obtain the information necessary to dispose of applications before it. Concerns were raised by the WAVE Trauma Centre and NIHRC in this regard and the Committee itself deliberated on this issue on a number of occasions.

35. DFP notified the Committee of a proposal to insert a new disclosure of information clause after clause 10. Whilst the Department provided a draft clause for members' consideration (Appendix 4), this had not yet been signed off by all interested parties and discussions were still ongoing with Revenue and Customs and the NIO. The Committee noted that DFP's proposed clause will provide a discretionary power for the High Court to order someone who is not a party to the proceedings to disclose information to the court, which would enable it to dispose of the application before it. In addition, an updated version of the draft clause includes a new subsection providing that before the High Court makes an order for disclosure it shall serve notice of its intention on any person likely to be affected by the order. DFP is currently awaiting responses from UK departments before finalising the new clause, which will be added to the Bill by way of an amendment tabled by the Minister for Consideration Stage.

36. Whilst the Committee broadly welcomed the proposed new clause it deliberated over the case for including a duty to disclose information, similar to that which is contained in section 9 of the Presumption of Death (Scotland) Act 1977. DFP cautioned that such a duty could result in the provision of large quantities of information to the court and that this may place an unnecessary burden both on the providers of the information and on the court in its consideration of that information. In addition, the Committee noted that the Department considered that a targeted, discretionary power for the High Court would be preferable, given that the duty of disclosure in Scotland has not produced information to the Scottish courts.

**37. Whilst the Committee considered carefully the case for including a statutory duty of disclosure on third parties holding information pertinent to the application before the court, it concluded that, on balance, the Department's proposed approach of giving the High Court a discretionary power to order such disclosure is appropriate in the circumstances.**

## **Clause 11 – Costs**

38. Related to this clause, both the WAVE Trauma Centre and NIHRC raised concerns over the cost of undertaking proceedings in pursuance of declarations of presumed death. The evidence from the WAVE Trauma Centre also indicated that the majority of families of the disappeared would not be entitled to legal aid. After raising these issues with DFP, the Committee was advised that the Department is sympathetic to the concerns of the families that if they are not eligible for legal aid they may incur significant costs in making an application. In this regard, whilst DFP does not believe that the Bill is itself the place to resolve this issue, it has given a commitment to work with the families to see what other avenues of funding or assistance may be available.

**39. The Committee welcomes the commitment given by the Department to work with the families of the disappeared to identify other avenues of funding or assistance to help defray the costs associated with pursuing applications for declarations of presumed death, in circumstances where the families are not eligible for legal aid.**

## **Clause 16 – Interpretation**

40. The Department advised the Committee that it is making progress with replacing the definition of insurer in clause 16(2) and 16(3) of the Bill with a simpler definition that is not tied to the regulatory framework.

**The Committee is content with the Department’s proposal to table amendments to clause 16 to replace the definition of insurer as currently drafted.**

## **Clause 19 – Commencement**

**41. As described above at clause 9, the Committee is content that the Department may table an amendment to clause 19 to provide for the rule-making power in clause 9(1) to come into operation one month after the Act receives Royal Assent, which will allow rules of court to be made quickly.**

## **Schedule 1 – Register of Presumed Deaths**

42. In its evidence, the WAVE Trauma Centre called for consideration to be given as to how a death may be re-registered in circumstances where the body of one of the disappeared is located (whether it is in NI, Republic of Ireland or France) and the death has already been included in the Register of Presumed Deaths. In light of this concern, the Committee asked DFP to reconsider the provision in paragraph 4(2) of Schedule 1, regarding the marking or annotation of an entry in the Register. In particular, the Committee proposed that the discretionary power of the Registrar General to annotate an entry be amended to a duty in cases where he becomes aware that a missing person’s death has been registered outside NI. In response, DFP has agreed to table the necessary amendment for Consideration Stage, in line with the Committee’s proposal.

**43. The Committee welcomes the Department’s agreement to table an amendment to paragraph 4(2) of Schedule 1, which will change the Registrar General’s discretionary power to annotate an entry in the Register of Presumed Deaths to a statutory duty in cases where he becomes aware that a missing person’s death has been registered outside NI. The Committee believes that this could help to allay some of the concerns raised in the evidence, regarding the need to facilitate the updating of the records subsequent to the recovery of remains and the issuing of a death certificate.**

[1] [http://archive.niassembly.gov.uk/legislation/primary/2007/niabill23\\_07efm.htm](http://archive.niassembly.gov.uk/legislation/primary/2007/niabill23_07efm.htm)

## **Appendix 1**

### **Minutes of Proceedings**

## **Wednesday, 12 September 2007**

### **Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Roy Beggs MLA  
Dr Stephen Farry MLA  
Simon Hamilton MLA  
Fra McCann MLA  
Jennifer McCann MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Vivien Ireland (Assistant Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Mary Thompson (Clerical Officer)

Apologies:

Mervyn Storey MLA (Deputy Chairperson)

The meeting commenced at 10.07 am in open session.

#### **5. DFP Briefing on forthcoming Presumption of Death Bill**

The Committee was briefed by Neil Lambe and Clare Irvine, Principal Legal Officers from the Departmental Solicitor's Office, on the forthcoming Presumption of Death Bill.

Dr Farry joined the meeting at 11.04am.

Agreed: that the Departmental Solicitor's Office will follow up on a number of issues raised by Committee members.

## **Wednesday, 21 May 2008**

### **Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Roy Beggs MLA  
Dr Stephen Farry MLA  
Simon Hamilton MLA  
Jennifer McCann MLA  
Adrian McQuillan MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)

Vivien Ireland (Assistant Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies: Mervyn Storey MLA (Deputy Chairperson)  
Fra McCann MLA  
Declan O'Loan MLA  
Dawn Purvis MLA

The meeting commenced at 10.06 am in open session.

## **6. Presumption of Death Bill – Consultation Report: Evidence from DFP**

The Committee took evidence from the following DFP officials: Oswyn Paulin, Departmental Solicitor and Head of the Government Legal Service; and Neil Lambe, Principal Legal Officer, Civil Law Reform Division, Departmental Solicitor's Office. The session was recorded by Hansard.

The Committee noted that the Executive will be considering a revised Bill in June and that a further briefing for the Committee was therefore scheduled before summer recess, prior to the Bill being introduced to the Assembly.

Mr McQuillan joined the meeting at 12.27 pm.

## **Wednesday, 10 September 2008 Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Roy Beggs MLA  
Dr Stephen Farry MLA  
Fra McCann MLA  
Jennifer McCann MLA  
Adrian McQuillan MLA  
Ian Paisley Jnr MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)  
Dr Robert Barry (Assembly Research)

Apologies: Declan O'Loan MLA

The meeting commenced at 10.03 am in open session.

## **6. Assembly Research Briefing on the Presumption of Death Bill**



The Committee was briefed by Assembly Research on the forthcoming Presumption of Death Bill, which will reach Committee Stage following Second Stage in the Assembly, currently scheduled for 15 September 2008.

Members were briefed by the Assembly's Bill Office on the procedure for a plenary debate on the Second Stage of a Bill.

Agreed: an initial timetable for the Committee Stage of the Bill.

Agreed: a notice for publication in the press, drawing attention to the Committee Stage of the Bill and seeking submissions by 15 October 2008.

Agreed: that the list of stakeholders identified by Assembly Research will be contacted directly to inform them of the Committee's consultation on the Bill.

## **10. Committee Work Programme**

Members considered the draft Committee work programme from September 2008.

Members noted that submissions had been sought over the summer on the Civil Registration Bill and that, in addition to the Budget Inquiry and various other policy issues which the Committee needed to scrutinise, the Committee Stage of the Presumption of Death Bill was due to commence next week. In addition, the committee had lost the services of one of its assistant clerks for several weeks to cover a vacancy in the Procedures Committee.

Members noted that DFP officials had advised that the Presumption of Death Bill was a priority and that there was no immediate urgency with the Civil Registration Bill.

Agreed: that priority will be given to the Presumption of Death Bill.

## **Wednesday, 17 September 2008 Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Roy Beggs MLA  
Dr Stephen Farry MLA  
Fra McCann MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA  
Ian Paisley Jnr MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies: Jennifer McCann MLA

The meeting commenced at 10.01 am in open session.

## **6. Evidence from DFP on Presumption of Death Bill**

Members noted that a public notice will be published in relevant newspapers on 18th September, seeking submissions on the Bill by 15th October 2008 and that staff had contacted directly those organisations which had responded to DFP's previous consultation.

Agreed: that written submissions received will be forwarded to DFP for consideration and response.

Ms Purvis left the meeting at 11.30 am.

The Committee was briefed by Oswyn Paulin, Departmental Solicitor and Head of the Government Legal Service, DFP and Neil Lambe, Principal Legal Officer, Civil Law Reform Division, Departmental Solicitor's Office, DFP

Agreed: that officials will attend next week's meeting to complete the Committee's initial consideration of the Bill and will provide clarification on issues raised during this week's briefing.

## **Wednesday, 24 September 2008 Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Roy Beggs MLA  
Dr Stephen Farry MLA  
Fra McCann MLA  
Jennifer McCann MLA  
Declan O'Loan MLA  
Ian Paisley Jnr MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies: Adrian McQuillan MLA

The meeting commenced at 10.02 am in open session.

### **Presumption of Death Bill Committee Stage: Evidence from DFP**

4. The Committee took evidence from Oswyn Paulin, Departmental Solicitor and Head of the Government Legal Service and Neil Lambe, Principal Legal Officer, Civil Law Reform Division, Departmental Solicitor, DFP. The session was recorded by Hansard.

Agreed: that DFP officials will provide written clarification to issues raised during the evidence session.

Members noted that the closing date for written submissions on the Bill was 15 October and that the Committee will continue its scrutiny of the Bill after that date.

## **Wednesday, 15 October 2008**

### **Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Dr Stephen Farry MLA  
Fra McCann MLA  
Jennifer McCann MLA  
David McNarry MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)  
Dr Robert Barry (Assembly Research)

Apologies:

Ian Paisley Jnr MLA  
Peter Weir MLA

The meeting commenced at 10.08 am in open session.

#### **8. Committee Work Programme**

Members considered motions to extend the committee stages of both the Presumption of Death and Civil Registration Bills and noted that DFP was content with the proposed extensions.

Agreed: that a motion will be laid in the Business Office, seeking to extend the Committee Stage of the Presumption of Death Bill until 16 January 2009.

## **Wednesday, 22 October 2008**

### **Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Fra McCann MLA  
David McNarry MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA

Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies:

Dr Stephen Farry MLA  
Jennifer McCann MLA

The meeting commenced at 10.05 am in open session.

## **6. Presumption of Death Bill Committee Stage: Scheduling of Evidence Sessions**

Committee members considered written submissions received in response to the Committee's public consultation on the draft Presumption of Death Bill and agreed that representatives from the WAVE Trauma Centre should be invited to give evidence on the scope and provisions of the Bill after Halloween Recess.

Members noted a proposed new clause from DFP relating to disclosure of information.

## **Wednesday, 5 November 2008 Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Dr Stephen Farry MLA  
Fra McCann MLA  
David McNarry MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA  
Ian Paisley Jnr MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)  
Apologies: Jennifer McCann MLA

The meeting commenced at 10.03 am in open session.

## **7. Correspondence**

The Committee noted the following correspondence:

- DFP: Response to submissions received by the Committee in relation to the Presumption of Death Bill;

Agreed: that the relevant extracts of the DFP response will be sent to those organisations which made the written submissions for their consideration;

## **Wednesday, 12 November 2008**

### **Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Dr Stephen Farry MLA  
Fra McCann MLA  
Jennifer McCann MLA  
David McNarry MLA  
Declan O'Loan MLA  
Ian Paisley Jnr MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Vivien Ireland (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies: None.

The meeting commenced at 10.03 am in open session.

#### **4. Presumption of Death Bill Committee Stage: Evidence from WAVE Trauma Centre**

The Committee took evidence from Sandra Peake, Chief Executive Officer, WAVE Trauma Centre and the following family representatives of 'the disappeared': Anne Morgan, Patsy McAteer and Kieran Megraw. The session was recorded by Hansard.

Mr McNarry left the meeting at 10.45 am.

Mr Weir left the meeting at 10.46 am.

Mr Weir returned to the meeting at 10.55 am

Agreed: that a copy of the Hansard transcript of the evidence session will be issued to DFP for a response to the issues and suggestions raised both by the witnesses and by members. The DFP response will be copied to the WAVE Trauma Centre for information and the Committee will follow up on the DFP response when it takes evidence from departmental officials, which is presently scheduled for 26 November.

Mr Weir left the meeting at 11.04 am.

Mr Paisley Jnr joined the meeting at 11.05 am.

## **Wednesday, 26 November 2008**

### **Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Dr Stephen Farry MLA  
Jennifer McCann MLA  
David McNarry MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Vivien Ireland (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)

Apologies: Fra McCann MLA  
Ian Paisley Jnr MLA

The meeting commenced at 10.10 am in open session.

## **9. Correspondence**

The Committee noted the following correspondence:

- Northern Ireland Human Rights Commission: Response to DFP paper 28 October on issues relating to the Presumption of Death Bill;

## **Wednesday, 3 December 2008**

### **Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Dr Stephen Farry MLA  
Fra McCann MLA  
Jennifer McCann MLA  
David McNarry MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA  
Ian Paisley Jnr MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)

Colin Jones (Assistant Assembly Clerk)  
Vivien Ireland (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies: Simon Hamilton MLA (Deputy Chairperson)

The meeting commenced at 10.10 am in open session.

## **5. Presumption of Death Bill Committee Stage: Consideration of Issues Arising from Evidence: Evidence from DFP**

The Committee took evidence from Neil Lambe, Principal Legal Officer, Civil Law Reform Division, Departmental Solicitor's Office, DFP and Oswyn Paulin, Departmental Solicitor and Head of Government Legal Service, DFP. The session was recorded by Hansard.

Mr McQuillan left the meeting at 12.04 pm.

Agreed: that the DFP officials will provide a written response to issues identified during the session which require further clarification, by the morning of 8 December 2008.

## **Wednesday, 10 December 2008 Room 152, Parliament Buildings**

Present: Mitchel McLaughlin MLA (Chairperson)  
Dr Stephen Farry MLA  
Fra McCann MLA  
Jennifer McCann MLA  
David McNarry MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA  
Ian Paisley Jnr MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance: Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Vivien Ireland (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies: Simon Hamilton MLA (Deputy Chairperson)

The meeting commenced at 10.04 am in open session.

## **5. Presumption of Death Bill Committee Stage: Cause-by-Clause Scrutiny: Evidence from DFP**

The following DFP officials provided advice to the Committee during this session: Oswyn Paulin, Departmental Solicitor and Head of Government Legal Service and Neil Lambe, Principal Legal

Officer, Civil Law Reform Division, Departmental Solicitor's Office. The session was recorded by Hansard.

The Committee undertook its formal clause-by-clause scrutiny of the Presumption of Death Bill as follows:

#### Clause 1 – Declarations of presumed death

The DFP officials clarified the position in relation to putting a recommendation to the Minister for an amendment which would provide for a third jurisdictional rule in clause 1. This would provide the High Court with jurisdiction to hear cases in which the applicant is a close relative of a victim of violence within the meaning of the Northern Ireland (Location of Victims' Remains) Act 1999. The amendment would address the issue, which arose in the evidence to the Committee, of allowing the disappeared to have a specific entitlement and jurisdiction under the Bill.

Question: That the Committee is content with the amendment as proposed by DFP, put and agreed to.

Question: That the Committee is content with clause 1, subject to the amendment agreed with the Department, put and agreed to.

#### Clause 2 – Making of declaration of presumed death

#### Clause 3 – Effect of declaration of presumed death

#### Clause 4 – Powers of the High Court

#### Clause 5 – Variation orders

Question: That the Committee is content with clauses 2 to 5, put and agreed to.

#### Clause 6 – Effect on property rights of variation order

#### Clause 7 – Insurance against claims

The Department had indicated that it intends to table amendments to clauses 6 and 7 to ensure that the obligations to repay capital sums or to take out insurance in respect of repayment of those sums does not extend to capital sums paid out by insurers in the form of annuities or other periodical payments. This would bring the insurance provisions into line with the associated Scottish legislation.

DFP had also indicated that the clarification of the treatment of annuities will reduce the instances when insurance may be required. In addition, DFP emphasised that the court retains the power to disapply the requirement in certain circumstances, so it is not always the case that there will be a requirement for insurance.

Question: That the Committee is content with clauses 6 and 7, subject to the Department's proposed amendments, put and agreed to.

#### Clause 8 – Supplementary provisions as to declarations, etc.

#### Clause 9 – Provisions relating to the Attorney General



Clause 10 – Right to intervene

Question: That the Committee is content with clauses 8 to 10, put and agreed to.

New Clause – Disclosure of Information

The Committee noted that DFP proposes to insert a new disclosure of information clause after clause 10, but that the draft provided by the Department had not yet been signed off by all interested parties. DFP's proposed clause would provide a discretionary power for the High Court to order someone who is not a party to the proceedings to disclose information to the Court, which would enable it to dispose of the application before it. Mr O'Loan indicated that he will wish to bring forward proposals for a further amendment to the Bill, aimed at providing for a duty of disclosure on persons holding information pertinent to the application before the Court.

Dr Farry left the meeting at 11.18 am.

Question: That the Committee is content with the approach being proposed by DFP for a new clause to be added on "Disclosure of information", put and agreed to.

Agreed: that, at the Committee's meeting on 7 January 2009, Mr O'Loan will put forward proposals for additional provision in respect of the disclosure of information.

Agreed: that DFP will update the Committee of any developments on the new disclosure of information clause that take place over Christmas recess.

Clause 11 – Costs

Clause 12 – Power to amend certain time periods

Clause 13 – Repeal of certain statutory provisions relating to presumption of death

Clause 14 – Register of Presumed Deaths

Clause 15 – Orders and regulations

Question: That the Committee is content with clauses 11 to 15, put and agreed to.

Clause 16 – Interpretation

The Department had advised that it is currently making progress with replacing the definition of insurer in clause 16(2) and 16(3) with a simpler definition that is not tied to the regulatory framework.

Question: That the Committee is content with clause 16, subject to the Department's proposed amendments, put and agreed to.

Clause 17 – Supplementary provision

Clause 18 – Amendments and repeals

Question: That the Committee is content with clauses 17 to 18, put and agreed to.

#### Clause 19 – Commencement

The Department advised the Committee of a proposed amendment to this clause, relating to the commencement provisions for clause 9.

Question: That the Committee is content with clause 19, subject to the Department's proposed amendment, put and agreed to.

#### Clause 20 – Short title

Question: That the Committee is content with clause 20, put and agreed to.

Ms McCann left the meeting at 11.34 am.

Mr Weir left the meeting at 11.35 am.

Dr Farry returned to the meeting at 11.36 am.

#### Schedule 1 – Register of Presumed Deaths

On the basis of concerns raised in the evidence, the Committee had asked DFP to reconsider the provision in 4(2) regarding the correction of the Register. In particular, it was proposed that the discretionary power of the Registrar General to annotate an entry be amended to a duty in cases where he becomes aware that a missing person's death has been registered outside Northern Ireland. DFP had agreed to table an amendment to the Bill, in line with the Committee's proposal.

Mr Weir returned to the meeting at 11.38 am.

Question: That the Committee is content with Schedule 1, subject to the amendment agreed with the Department, put and agreed to.

#### Schedule 2 – Consequential Amendments

#### Schedule 3 – Repeals

Question: That the Committee is content with schedules 2 and 3, put and agreed to.

Members were advised that a draft report will be prepared for the Committee's consideration on 7 January 2009 and that the Committee will be required to report to the Assembly by 16 January 2009 in accordance with the extended timetable for Committee Stage of the Bill.

## **Wednesday, 7 January 2009 Room 152, Parliament Buildings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Dr Stephen Farry MLA  
Fra McCann MLA  
Jennifer McCann MLA  
Declan O'Loan MLA

Ian Paisley Jnr MLA  
Dawn Purvis MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Vivien Ireland (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies: David McNarry MLA  
Adrian McQuillan MLA  
Peter Weir MLA

The meeting commenced at 10.01 am in open session.

## **6. Presumption of Death Bill Committee Stage: Consideration of Draft Report**

Mr Paisley left the meeting at 10.13 am.

Members considered the first draft of the Committee Report on the Committee Stage of the Presumption of Death Bill.

Agreed: that the report as drafted will be included on the agenda for next week's meeting for formal consideration.

# **Wednesday, 14 January 2009 Senate Chamber, Parliament Buildings**

## **Unapproved Minutes of Proceedings**

Present:

Mitchel McLaughlin MLA (Chairperson)  
Simon Hamilton MLA (Deputy Chairperson)  
Dr Stephen Farry MLA  
Fra McCann MLA  
Jennifer McCann MLA  
Adrian McQuillan MLA  
Declan O'Loan MLA  
Ian Paisley Jnr MLA  
Dawn Purvis MLA  
Peter Weir MLA

In Attendance:

Shane McAteer (Assembly Clerk)  
Colin Jones (Assistant Assembly Clerk)  
Vivien Ireland (Assistant Assembly Clerk)  
Paula Sandford (Clerical Supervisor)  
Chris McCreery (Clerical Officer)

Apologies: None.

The meeting commenced at 10.06 am in open session.

## **7. Presumption of Death Bill Committee Stage: Consideration of Draft Report**

Members considered the Committee's draft report on a paragraph-by-paragraph basis, as follows:

Agreed: that paragraphs 1-7 stand part of the Report, subject to a minor amendment.

Agreed: that paragraphs 8-10 stand part of the Report.

Agreed: that paragraphs 11-16 stand part of the Report.

Agreed: that paragraphs 17-21 stand part of the Report.

Agreed: that paragraphs 22-23 stand part of the Report.

Agreed: that paragraphs 24-28 stand part of the Report.

Agreed: that paragraphs 29-33 stand part of the Report.

Agreed: that paragraphs 34-35 stand part of the Report.

Agreed: that paragraphs 36-37 stand part of the Report.

Agreed: that paragraphs 38-42 stand part of the Report.

Agreed: that paragraph 43 stands part of the Report, subject to a minor amendment.

Agreed: that the draft Executive Summary stands part of the report.

Agreed: that the appendices stand part of the Report.

Agreed: that the Report (as amended) be the Third Report of the Committee for Finance and Personnel to the Assembly for session 2008/09.

Agreed: that the Report be printed.

Mr Hamilton left the meeting at 10.56 am.

Mr Hamilton returned to the meeting at 11.01 am.

Members noted that a typescript copy of the Report will issue to DFP by the end of the week, in line with normal protocol. The Report will be published next week and copies issued to all MLAs.

Agreed: that the relevant extract from the draft minutes of today's proceedings will be checked by the Chairperson and included in the Committee's Report as 'unapproved' minutes of proceedings.

## Appendix 2

### Minutes of Evidence

**21 May 2008**

Members present for all or part of the proceedings:

Mr Mitchel McLaughlin (Chairperson)

Mr Roy Beggs

Dr Stephen Farry

Mr Simon Hamilton

Ms Jennifer McCann

Mr Adrian McQuillan

Mr Peter Weir

Witnesses:

Mr Neil Lambe     Departmental Solicitor's Office

Mr Oswyn Paulin   Government Legal Service

1. The Chairperson (Mr McLaughlin): The Committee welcomes Mr Oswyn Paulin, the departmental solicitor and the head of the Government Legal Service, and Mr Neil Lambe, the principal legal officer in the civil law reform division of the Departmental Solicitor's Office, to discuss the draft presumption of death Bill.

2. The Committee was briefed on 12 September 2007 on the Department of Finance and Personnel's proposal to introduce legislation to address legal issues surrounding missing persons in Northern Ireland, with particular reference to obtaining death certificates. The issues raised by members at that meeting have been addressed in the Department's paper. The Department has since undertaken a consultation on the draft Bill, which ended in mid-April. Today's briefing is to update members on the outcome of the consultation before the Bill is introduced to the Assembly. Our information is that the Bill will be introduced just before the summer recess, with the Committee Stage due in late September 2008.

3. Paragraph 54 of the report on the draft presumption of death Bill states:

"Officials are currently considering a number of changes to the draft Bill to reflect the comments received during the consultation process."

4. I invite the officials to make their presentation, which will detail the progress on the changes being considered. As the Department is seeking legal advice, it may be helpful to consider a further briefing before the Bill is introduced to the Assembly.

5. Mr Oswyn Paulin (Government Legal Service): The Department published the draft presumption of death Bill for consultation on 23 January 2008, and the consultation period ran for 12 weeks to 15 April. Seven written responses were received, and the views expressed are summarised in the consultation report that has been provided to the Committee. A further response has been received from the Association of British Insurers.

6. The response rate was poor. However, that is not surprising, given that the Bill is technical in nature and has an immediate effect on a very small number of people who are directly affected by the issues that arise when a person goes missing.

7. During the consultation, officials met several of the families of the disappeared to discuss their concerns. The document that has been provided to the Committee summarises the response to the January consultation, including the views of some of the families of the disappeared. It also highlights the attention that the subject of missing persons is receiving from the Council of Europe and the Law Reform Commission of Ireland.

8. Officials have been considering a small number of changes to the draft Bill that take the views of consultees into account and would effect other minor changes. The changes that the Department wants to make have yet to be approved by the Executive. The main changes involve: giving close relatives of the missing person greater standing to have an application made by them considered by the High Court; conferral on the Department of the power to alter the time periods referred to in clauses 1, 2 and 5; and giving the High Court a greater degree of discretion in its ability to make variation Orders.

9. Officials are continuing their discussions with colleagues on the feasibility of including a new disclosure of information provision. We are also working with the Association of British Insurers to consider the insurance provisions in clause 7 of the draft Bill. We are due to meet a representative of the insurance industry next week.

10. A revised Bill will be considered by the Executive Committee in June. Subject to their approval, we aim to introduce that Bill in the Assembly just before the summer recess. Officials will give evidence to the Committee again towards the end of June, and a pre-introduction briefing, a copy of the Bill and the explanatory and financial memorandum will be provided to members.

11. Mr Weir: At first sight, your list of consultees seems extraordinarily long. Given that you received only a handful of responses, is that the usual list of consultees, or was it lengthened?

12. Mr Neil Lambe (Departmental Solicitor's Office): The majority of those consultees are either on the Department of Finance and Personnel's equality list — and, therefore, must receive a copy of all departmental publications — or on the Office of the First Minister and deputy First Minister's list of organisations that must receive a copy of any draft Bill that is published for consultation. There is also a core list of consultees that comprises individuals and organisations that the civil law reform division routinely includes in its consultations — for example, individual solicitors or solicitors' associations

13. Mr Weir: Is it fair to conclude that the limited number of respondents suggests that, although specific changes will have to be refined, consultees did not seem perturbed by the general contents of the draft Bill?

14. Mr Lambe: That is a very charitable conclusion to draw. There was little to criticise in the draft Bill, and those who commented on details did not say that it is on the wrong track.

15. It gives me confidence that we have modelled the draft Bill on equivalent Scottish legislation, which has been operating for some 30 years. It is likely, therefore, that there are no fundamental problems with the draft Bill.

16. The Chairperson: As with the consultees, the Committee does not have a detailed response for you at the moment. As your work progresses, and before the Bill is introduced to the Assembly, there might be some value in your providing the Committee with a quick update,

because we will have to give our views to the Department on the draft Bill's development. We will consider that and write to you accordingly.

## 17 September 2008

Members present for all or part of the proceedings:

Mr Mitchel McLaughlin (Chairperson)  
Mr Simon Hamilton (Deputy Chairperson)  
Mr Roy Beggs  
Dr Stephen Farry  
Mr Fra McCann  
Ms Jennifer McCann  
Mr Adrian McQuillan  
Mr Declan O'Loan  
Mr Ian Paisley Jnr  
Ms Dawn Purvis  
Mr Peter Weir

Witnesses:

Neil Lambe  
Oswyn Paulin     Department of Finance and Personnel

17. The Chairperson of the Committee for Finance and Personnel (Mr McLaughlin): This is the start of the Committee Stage of the Presumption of Death Bill, to which the Committee last week agreed to give priority over the Civil Registration Bill. Also, as agreed last week, a notice drawing attention to the Bill's Committee Stage and seeking submissions by 15 October will appear in tomorrow's newspapers. Organisations which responded to the Committee for Finance and Personnel's consultation on the Bill will be contacted directly by Committee staff.

18. Does the Committee agree that written responses received may be forwarded to the Department of Finance and Personnel for consideration and response, which is the normal process?

Members indicated assent.

19. I refer members to the briefing paper from the Department and the secretariat paper, which are among the papers provided. I remind members that this session is being covered by Hansard, so all mobile phones must be switched off.

20. I welcome Oswyn Paulin, departmental solicitor and head of the Government Legal Service for the Department, and Neil Lambe, principal legal officer with the civil law reform division of the Department. I invite them to make their presentation. In order to give the Committee an opportunity to comment or ask questions, I suggest that they deal with the Bill on a clause-by-clause basis. Is that OK?

21. Mr Oswyn Paulin (Department of Finance and Personnel): First, may I say that it is gratifying for the Department that the need for, and the principles enshrined in the Bill, have been universally welcomed by Members? It is also gratifying that the Assembly agreed the Second Stage of the Presumption of Death Bill on Monday. This is the first Bill for which the civil law reform division of DFP has responsibility to have reached Committee stage since the restoration of devolution last year.

22. Several detailed issues were raised by Members during the debate on Monday, and I hope that today, and during the coming weeks, we can address those issues together. I also hope that the Committee will arrive at consensus on those issues — for example technical issues relating to court procedures and the rules of evidence. We are eager to provide the Committee with as much assistance as possible during this stage of the Bill's progress through the Assembly.

23. In the briefing papers provided to the Committee in May and June 2008, the Department highlighted some issues that were raised during the public consultation. Furthermore, we described the changes made to the Bill to accommodate those issues before its introduction: for example, giving greater recognition to close relatives of missing person in the application process, and allowing the High Court to dispense with the need for the placing of advertisements in the local media. However, we noted that there were two outstanding issues — insurance and disclosure — which required further consideration.

24. With respect to insurance, the Minister indicated on Monday that the Department has reconsidered the provisions relating to insurance and capital sums. We have decided to follow exactly the Presumption of Death (Scotland) Act 1977 in the treatment of those matters. We consulted the insurance industry on our proposed amendments and they were content. A proposed simpler definition of an insurer for inclusion in clause 16 of the Bill is still with colleagues in the Treasury for comment. However, I expect that issue to be resolved very shortly.

25. As far as disclosure is concerned, members will recall that the Department first raised the issue in the consultation document. Consultees were invited to express views on whether the Bill should include disclosure provisions, and those who responded favoured such a provision. Disclosure is always a difficult issue, and we have given much thought to how such a provision should be framed. We are continuing to work with colleagues across UK Departments and Departments here to secure the necessary agreements for a new provision in the Bill. That new provision will allow the High Court to order a third party — a person, group or body not involved in the case before the court — to disclose relevant information. However, Government Departments and other agencies that hold sensitive personal data have been understandably cautious about the terms and scope of the High Court power compelling them to disclose otherwise protected information. I will share with the Committee a draft of that provision as soon as agreements have been secured.

26. This Bill is unusual, because of the number of its provisions that concern reserved matters. The consequence of that is that those provisions — dealing for example with the powers of the court — require the consent of the Secretary of State. As the Minister said in his speech to the Assembly on Monday, that consent has been obtained for the Bill in its present form. It will be the responsibility of officials to ensure that any further changes in the provisions of the Bill dealing with reserved matters also have the consent of the Secretary of State.

27. Now that the Bill has reached Committee Stage, we are very much in the Committee's hands and are happy to provide members with any assistance that we can. I understand that the Committee wants us to proceed through —

28. The Chairperson: Yes. Will you go through the Bill on a clause-by-clause basis? I will invite the Committee to comment as we proceed.

29. Mr Paulin: Clause 1 sets out the alternate grounds on which the High Court can make a declaration that a missing person may be presumed dead.

30. The missing person must be thought to have died or have not been known to be alive for a period of at least seven years. Under clause 1, any person may make an application to the High



Court, although the court must refuse to hear an application if it considers that the applicant — other than an applicant who is the spouse, civil partner or close relative of the missing person — does not have a sufficient interest in the determination of the application.

31. Subsection (2) sets out the jurisdictional rules that must be met in order for the High Court to be able to hear the application: either the missing person must have been domiciled or habitually resident in Northern Ireland or, where the applicant is a spouse or civil partner of the missing person, the applicant is domiciled or habitually resident in Northern Ireland.

32. I will move on now to domicile and habitual residence, if the Committee wishes.

33. Ms Purvis: May we ask questions now, or should we wait until all the clauses have been covered?

34. Mr Paulin: We are still on clause 1.

35. The Chairperson: We will wait until clause 1 has been finished with before taking questions.

36. Mr Paulin: I will now turn to domicile and habitual residence. There is nothing particularly exceptional about the jurisdictional rules in clause 1, which are based on jurisdictional rules that apply when a person seeks dissolution of a marriage or civil partnership based on the presumed death of the spouse or partner. The Committee can look, for example, at article 49(4) of the Matrimonial Causes (Northern Ireland) Order 1978.

37. The term “domicile” has a particular meaning in law: it describes the relationship that a person has with a particular country. Every person has a personal law, which is a law that attaches to each of us individually and which determines our capacity to do things wherever in the world we may be. An individual’s personal law will be determined by the person’s domicile. The term “habitual residence” is another legal term that is used as a determining factor in connecting a person with a particular legal jurisdiction.

38. Finally, I want to mention close relatives. Because not every missing person will be married or will be in a civil partnership, clause 1(3) provides that the High Court cannot refuse to hear an application for a declaration of presumed death from certain close relatives of a missing person. That is a more liberal approach than originally existed.

39. I am happy to take any questions on clause 1.

40. Ms Purvis: Has the Department considered the Eastern Health and Social Services Board’s point that some of the disappeared may not have been domiciled in Northern Ireland and so may therefore fall outside the legislation?

41. Mr Neil Lambe (Department of Finance and Personnel): We met some of the families of the disappeared when the legislation was being drafted and they raised that as a potential issue. One of the disappeared, in particular, was not resident in Northern Ireland at the time of his disappearance. The fact that he was outside the jurisdiction at the time is very unlikely to mean that he was no longer legally domiciled or habitually resident in Northern Ireland. Although it is ultimately for the High Court, on receipt of an application, to make the determination as to whether it has jurisdiction in a particular case, we would be fairly confident that the disappeared would satisfy the domiciled or habitual residence requirements.

42. Ms Purvis: Clause 1(2)(b) suggests that only the spouse or civil partner of a missing person needs to be domiciled or habitually resident in Northern Ireland. What is the purpose of that provision?

43. Mr Lambe: That jurisdictional rule emerges from the existing jurisdictional rules that must be met if an existing spouse or civil partner seeks dissolution of a marriage or civil partnership in Northern Ireland on the basis of the absence and presumed death of the spouse or civil partner. Thus, it is an existing jurisdictional rule that already applies to comparable High Court proceedings.

44. Ms Purvis: Will you give the Committee an example?

45. Mr Lambe: Under the Matrimonial Causes (Northern Ireland) Order 1978, were a husband to walk out in untoward circumstances and for no reason, and eight years later his spouse decides that it is most likely that her husband is dead because his family has not heard from him; to obtain a divorce in Northern Ireland, she must satisfy the High Court that she lives here; that her husband has been missing for more than seven years, and that she satisfies either the domicile or a habitual residence test. Establishing either domicile or habitual residence in Northern Ireland justifies the High Court in Northern Ireland, as opposed to the High Court in England and Wales, in having jurisdiction to decide the case.

46. Mr Paulin: That also applies in divorce cases. In the ordinary course of events, we are not a forum to which people come to get divorces; they generally have to have a connection with Northern Ireland, which is usually on the basis of domicile or habitual residence.

47. Ms Purvis: Given that that provision applies to a spouse or a civil partner — and not everyone is married or has a civil partner — does that same provision apply to a close relative?

48. Mr Lambe: No. In the application process under the legislation, spouses and civil partners are given a privileged position over all other possible applicants because, unlike any other possible applicant, they remain in a legal contract with the missing person until the marriage is formally dissolved or the civil partnership ended. Therefore, such a person is not free to marry another person or enter into a civil partnership.

49. It is true that not every missing person will have been married or have been in a civil partnership. We are not putting close relatives in the same position as spouses or civil partners, but we are distinguishing them from other possible applications; for example, a bank that is owed money by the missing person. The High Court cannot refuse to hear the application on the basis that the close relative does not have an interest in the outcome of the application, but a close relative who is applying will have to satisfy the court that the missing person was domiciled or habitually resident in Northern Ireland.

50. Ms Purvis: Is it wise to give a spouse or civil partner privilege? Hypothetically, a woman could have separated from her spouse and be living with another person as a cohabitee for many years, but that spouse will still have privilege under the Bill.

51. Mr Lambe: Even if there had been a family breakdown and the separated spouse was living with another person, that separated spouse still remains in a legally-binding relationship with the missing person, and is, in our view, in a different position from a cohabitant no matter how long the cohabitation has lasted. A cohabitant will be able to apply under the legislation, and it is most likely that the High Court will, following clause 1, say that the cohabitant has a sufficient interest in the outcome of the case and, therefore, will hear the case and make whatever determination is appropriate on the affidavit evidence supplied.

52. Ms Purvis: On what basis will the court determine that sufficient interest exists?

53. Mr Lambe: That is a matter for the court.

54. The Department's role is not to advise the High Court on whether particular connecting factors satisfy the sufficient interest threshold — that is the court's job when it receives an applicant's evidence affidavit. For example, consider a case in which a missing person's neighbour, who has no interest in the missing person's property, will not benefit from his or her estate and is not a relative, just wants clarification. On receipt of an officious bystander's application, the court would be entitled to rule whether he or she had sufficient interest in the case's outcome to warrant the desired determination. In such circumstances, if family members had not thought fit to apply, of what interest would it be for someone down the street to go to the High Court? The sufficient interest criterion will allow the court a measure of discretion when deciding which cases it will allow to come to court.

55. Ms Purvis: Should there not be guidelines setting out what constitutes sufficient interest?

56. Mr Paulin: The courts are used to dealing with a concept such as sufficient interest, and we feel that they would readily be able to sort that out. If the Department starts listing criteria that constitute sufficient interest, where would that end? One tends to think of relatives and people who have been adversely affected by someone's disappearance as having sufficient interest; however, someone who is owed a substantial sum of money by a disappeared person might not come so readily to mind, and, in order to recover that money, such a person might wish to go through the procedure. If we attempt to work out such parameters in advance, we may not consider every possibility that might arise. I am confident that the courts will use such powers properly.

57. Mr Paisley Jnr: Further to Ms Purvis's point about sufficient interest; as legislators, we should provide the courts and the public with a clear understanding of what the legislation that we make actually means. Although I appreciate the fact that the Department does not wish to draw up a list because it could not be exhaustive, it should be clear about what is meant by a person — a friend, a parent or, as has been said, a debtor — having sufficient interest. It would be useful for the Committee to understand how the courts will interpret that clause. Although now is not the time, perhaps the officials could provide the Committee with some case studies of how the courts might interpret it.

58. I wish to explore the matter raised in clause 1(1)(b):

"has not been known to be alive for a period of at least 7 years,"

59. How did the Department arrive at that period of time?

60. Mr Paulin: That has been the standard to date in similar provisions. The Department is repealing some provisions, such as the matrimonial causes provision, which enables people to bring a marriage to an end in such circumstances. Seven years comes from the period in the law of evidence that applies to presumption of death.

61. Five years is sufficient in cases of desertion. If a person leaves their spouse without cause for five years then the marriage can be brought to an end — that is in the situation in which the person is living, or not, as the case may be. A longer period, seven years, is the period used to establish the presumption of death as far as the rules of evidence are concerned. The Department has picked the timescale of seven years because of a common-law rule that is reflected in statutes. That is also reflected in the Scottish Act.

62. Mr Paisley Jnr: I was about to ask if that is reflected in other, similar legislation.

63. Mr Lambe: We noted in the consultation paper in January 2008 that some states in the United States have some statutory intervention, or procedures, for establishing death, and that they adopt different periods of time — some as low as three years, others four, and others five. I do not know the particular reasons why those state legislatures have adopted those time periods. A number of Canadian jurisdictions use the standard seven-year period. In Scotland the period used is seven years, and in common-law jurisdictions like ours, that have limited statutory intervention in this field at the moment, the courts rely on the rule of evidence that posits the seven-year rule.

64. In fixing the time limit in this Bill to seven years, we followed the Scottish model, but the seven-year rule is known colloquially among the public. If one were to ask about someone who had been missing for seven years people would say that that person could be presumed dead after that period of time. I would explain that it is not quite so straight forward, but I would know what they are getting at. At least there is an element of familiarity in these very early days of a new piece of legislation and a new statutory jurisdiction.

65. Mr Paisley Jnr: It is really a convention, then. Has any thought has been given to how it might affect someone who has to invoke this legislation if they are 65, and they realise that nothing can be done until they are 72? Some people may think that that is too long to wait.

66. Mr Weir: The spouse in the back garden?

67. Mr Paisley Jnr: I do not think that that is funny.

68. Mr Paulin: There are two situations: first, there is the situation in which the person is thought to have died. In such a case, there may be evidence that the person has died; for example, they may have been abducted, such as in the case of the disappeared, or some event may have occurred, and although death cannot be established, there is reasonable belief that the person has died. The seven-year timescale would also apply if there is no other reason to believe that someone has died other than that they have not been heard of.

69. We have not given a lot of thought to the age of the spouse. In taking that line, it may introduce a form of shifting scale, and that would become quite difficult in legislative terms, and I think that it is quite difficult to justify.

70. The Chairperson: There was some limited discussion on Monday, when the Minister was before the Assembly, that the period of seven years may be too long generally although not in specific cases.

71. Mr Paulin: There is power within the Bill, as drafted, for the Minister to change the period of time, and I think that that would be subject to an affirmative resolution.

72. The Chairperson: The Minister did address the matter in those terms.

73. Mr Paisley Jnr: I am also thinking of a spouse of pensionable age, or perhaps a perceived victim who is a child, and another family member having to wait seven years before they can achieve closure. There are issues there that could be looked at on either scale. I know that it would cause a legal headache, and I am sure that you, as a legal draftsman, would think it would very difficult to include such a condition, but I wonder if any thought has been given to those issues.

74. Mr Paulin: We can reflect upon that further.

75. Mr Lambe: There are two issues. The first is whether seven years, as a default, is too long. During consultation, some people thought that that was too long and others thought that we were right to follow established conventions. It is an issue that is exercising the Council of Europe working party. The preliminary discussions that I had with colleagues in the Law Reform Commission of Ireland revealed that they favoured a five-year period. However, much will depend on what the Council of Europe decides at international level.

76. The second issue is what might be an appropriate time period in individual cases. If we were to insert into the Bill a provision that sets the default position as seven years but states that the High Court can dispense with that in particular cases, potential applicants might not know where they stand because the rule is not fixed. The situation could depend on what discretion the High Court would be prepared to exercise on the particular day that the application comes before it.

77. Mr Paisley Jnr: In such a case, I prefer that we — as legislators — are clear about why we are setting timeframes rather than leaving that to a court to determine. It is not that I distrust a court; I think that we must be clear when we are making the law.

78. Mr Weir: I will pick up on the points that Ian and Dawn raised. You said that during the consultation people thought that the seven-year period, or a shorter period, was sufficient. Did anybody suggest that seven years was an insufficient period of time?

79. Mr Lambe: No: not to my knowledge.

80. Mr Weir: In one regard, the debate is about whether the period should be seven years or five years, although I agree that a fixed timeframe should be included so that people have a degree of certainty.

81. Dawn made a point about sufficient interest. Does Scottish legislation contain a similar reference? Has case law been built up about what sufficient interest is?

82. Mr Paulin: There is very little case law in Scotland.

83. Mr Lambe: I have not been able to find any reported cases on the Scottish Act, primarily because cases are only reported that raise issues of the law. In Scotland, declarations of presumed death operate at the Sheriff Court level, and people make applications for a bare declaration of presumed death. No issues of law are involved — it is an application of the principles of the legislation to the facts of the case. People obtain a declaration and nobody is any the wiser for it.

84. Mr Paulin: The Scottish legislation states that:

“any person having an interest may raise an action of declarator of the death of that person”.

85. The person concerned does not even have to have a sufficient interest.

86. Mr Lambe: The term “sufficient interest” derives from pre-existing Northern Ireland legislation on High Court declaratory proceedings. If the High Court is petitioned for a declaration of parentage, it has the power and discretion to refuse to hear that application if the applicant does not have sufficient interest in the outcome.

87. I expect the court to use the sufficient interest threshold primarily as a means of preventing nuisance and vexatious applications to it by officious bystanders, whoever they may be. There could be an application from a family member — perhaps an aunt or an uncle; depending on the family structure of that missing person. I doubt that the High Court would tell such an applicant that they do not have a sufficient interest.

88. Mr Weir: It has been made clear that we want people to have a degree of certainty about timeframes, and that we do not want variations from case to case. Also, I appreciate that the High Court should have flexibility in interpreting the sufficient interest test. However, I am concerned that we are abrogating the matter by leaving it to the High Court to determine. I understand the argument that the danger in having a tight definition of sufficient interest means that some categories will be included and unforeseen categories will not. However, people will want to know what category they fall into and whether they will have the opportunity to meet the sufficient interest test from a financial relationship perspective or whatever.

89. Surely, it would be possible to have a list of what sufficient interest means, along with a catch-all final line. That would give the High Court some flexibility and guide it in the same way as a tightly-controlled definition of close relative. It would provide people with a degree of clarity. There are a lot of good definitions in the system, but we seem to have left the interpretation of sufficient interest entirely to the High Court. If we do not produce a framework, people will be confused about whether they qualify as having sufficient interest.

90. Mr Paulin: Would it be helpful if — as one of your colleagues suggested — we produced authorities to show how the court has interpreted sufficient interest? That might allay your concerns.

91. Mr Weir: That could also support my suggestion. If there are several of examples of sufficient interest having been interpreted in a particular way, why can those not be put down as a clear legislative qualification for sufficient interest? The legislation could include a final provision that would give the High Court some discretion where an application that does not fall into one of those categories. Such legislation would not be unique. It would at least give the High Court some guidance on what should be counted as sufficient interest, rather than the current apparently blank-cheque process.

92. Mr Paulin: We need to consider what we are trying to do. Do we want to restrict the number of people who can apply, or —

93. Mr Weir: We want to restrict the number of people who can apply. However, we also want to send a signal to people who do not fall into the category of being a spouse or close relative. People will be left in the dark somewhat if the decision is left to the High Court and no guidance is provided about what constitutes sufficient interest. If people were given examples of what constitutes sufficient interest, it may affect the number of applications. We should do our best to provide some clarity.

94. Mr Paulin: The matter is similar to the situation in judicial review of whether someone has locus standi; I am not sure what the corresponding English phrase is. It means that there is sufficient interest in the issue that is being challenged to bring proceedings. Locus standi is almost a dead letter in judicial review now, and almost anyone can bring any proceedings.

95. Mr Weir: Consequently, if locus standi in judicial review cases is a dead letter, surely it would be helpful to provide guidance for determining what constitutes sufficient interest. As things stand, does it not place a wide interpretation on the High Court on whether one person or another fulfils the sufficient interest test? It would be helpful to provide the court with guidance on the issue.

96. Mr Lambe: We will have to further consider what might be interpreted as sufficient interest, but I will leave the Committee with the thought that any person can make an application under clause 1. The applicant, prior to making the application, does not have to decide whether he or she has an interest, because the legislation does not require them to do so. The sufficient interest threshold comes in after the application has been lodged with the High Court. The High Court can acknowledge the application, but it can refuse to hear the application if it considers that the applicant does not have sufficient interest in the outcome of the case. Therefore, the case will not go to a hearing.

97. Mr Weir: With respect, it does not preclude anyone from applying. However, if someone wishes to take a legal case, they would have to consider what threshold they have to reach to have their case heard. The deterrent would be the sufficient interest test. We should be considering something with more clarity, which would allow the High Court to have some flexibility.

98. The Chairperson: I have no particular expertise on the issue, but it relates to whether the prescriptive approach is helpful to all concerned, including the applicants, or whether, in the light of experience of case law, development over time would be a wider approach that would allow people to know whether they qualify, to seek advice and then decide to give instructions to a solicitor to pursue the issue.

99. We have strayed well into clause 2, so we will move on. We may not complete this discussion today, but we will work for as long as possible. I suggest a cut-off point of 12.15 pm may give a focus to people.

100. Mr Beggs: In case law, what is the definition of not having sufficient interest?

101. Mr Paulin: We will come back to you on that.

102. Mr Beggs: There is no need for a debate about it now.

103. Mention was made about whether someone would be presumed dead after seven years or five years under European law. How does that influence the thinking about whether it should be five years or seven years in the Bill?

104. Mr Lambe: It is simply an indicator of whether there is emerging international consensus that the conventional time frame of seven years is too long.

105. Mr Paulin: It is the Council of Europe, not the European Union. The Council of Europe is a much larger organisation than the European Union.

106. Mr Beggs: Are there any directives on the issue?

107. Mr Paulin: No.

108. Mr O'Loan: The seven-year issue is significant, but it is not the only test.

109. I would appreciate it if officials would provide the Committee with evidence that has been gathered internationally to show whether the seven-year test has resulted in any difficulties. In Monday's debate I referred to anecdotal evidence relating to the 2004 tsunami. On reflection, I am not sure why there were problems, but nevertheless, I have heard that some difficulties were exposed.

110. Mr Paulin: The twin towers may be another example.

111. Mr O'Loan: Yes, that was another example that I had thought of.

112. Mr Paulin: Clause 2 makes further provision in relation to declarations of presumed death. It provides that when the High Court makes a declaration of presumed death it must find either that: the missing person has died at a specified time and date or at the end of a specified period in cases where the evidence leads the court to conclude that the missing person has died; or, where the missing person has not been known to be alive for a period of at least seven years, that the missing person died at the end of the day occurring seven years after the date on which the missing person was last known to be alive. Is that reasonably clear?

113. The Chairperson: Yes.

114. Mr Paulin: Under clause 12, the Department of Finance and Personnel will have the power to vary the requirement that a person must not have been known to be alive for a period of seven years if, for example, an international consensus is reached that a five-year period is sufficiently long to justify a court making a determination of presumed death. In that instance, the Department would be able to make that change through a statutory rule subject to affirmative resolution, rather than the change having to be made via primary legislation. That is based on the assumption that the Assembly will agree on the seven-year period, rather than changing it to a five-, six- or eight-year period.

115. Clause 2(4) of the Bill is taken from the Scottish Act. It provides that when other courts or tribunals are asked to find that a person may be considered to be dead, such courts or tribunals should apply the criteria in subsection (1) and fix a date and time of presumed death in relation to the missing person. There may be proceedings in other courts that are quite unrelated to the Act and no proceedings that are under the Act — I cannot immediately think of an example, but if it were to occur we would ask the courts to follow the same procedure.

116. Mr Beggs: I do not understand fully how that situation would arise.

117. Mr Paulin: An example relating to property would be in the case of a lease for lives, where there is some sort of land arrangement involving a person and the last life is a person whose whereabouts are not known; who is believed to have died, but that belief is not based on any evidence. A lease for lives is a form of abeyance of property in which a lease is given to person X as long as persons A, B and C are alive. It used to be the case that person A was someone such as the Queen — someone totally unconnected with the property, and usually someone who is well known so that their death would be known publicly. However, sometimes it can happen that no one knows whether the person is alive or dead and, in those circumstances, the rules in clause 2(4) would apply and therefore the court, in deciding in such circumstances that a person had died, would have to apply the provision that relates to the time at which they had died as set out in the Act.

118. Mr Beggs: Am I right to interpret the subsection to mean that the High Court simply makes a judgment about whether it deems a person to be dead whereas a court or tribunal must deal with any incidental issues?

119. Mr Lambe: No, as I understand it, subsection (4) applies where no application is made under the Bill. A close relative is not required to apply for a declaration of presumption of death. However, a situation could arise — at which the Bill may not be specifically directed — where the decision as to whether a person is dead or alive becomes a crucial fact. If it is found that someone is dead a court must determine when that person died.



120. The Chairperson: Is there a common test that must be satisfied even if it cuts across a number of different legal processes?

121. Mr Paulin: Yes, a common test must be used even if the case relates to different legislation or no legislation at all.

122. Mr Lambe: Under the common-law rule of evidence, if a person has been missing for seven years they may be presumed to be dead. Over the past 150 years, during the formulation of that rule, never once was it said that the time and date of death must be fixed as part of that judicial pronouncement in civil proceedings.

123. The intention of subsection (4) is to get other courts, which hear contentious disputes between individuals where the issue of presumption of death arises, to follow the form of the new legislation and to fix the time and date of any deaths that they — as a matter of evidence as opposed to a matter of law — presume to have occurred.

124. Mr Paulin: It allows for consistency in approach.

125. Clause 3 provides for the general effect of a declaration of presumed death under clause 1. In essence, the declaration of presumed death shall be conclusive for all purposes and against all persons. It will have the same effect in law as if the missing person had died and their death is recorded by the Registrar General for Northern Ireland in the usual manner.

126. A declaration of presumed death will automatically end any marriage or civil partnership to which the missing person was a party. Revocation of a declaration will not revive any marriage or civil partnership that has been ended by this operation. The clause makes it clear that once a declaration is made the marriage or civil partnership is ended for good.

127. A party to the proceedings will have six weeks from the date of the court's judgment to lodge an appeal with the Court of Appeal. In other words, if I were to apply for a declaration of presumed death and the court rejected it, I would have six weeks within which to lodge an appeal. Similarly, if I were to apply for a declaration to which someone were opposed they would have the same route of appeal if the decision went against them.

128. Once court procedures are complete, a family member may provide proof that the missing person has been declared dead by lodging a certified copy of the entry in the register of presumed deaths. Paragraph 6 of schedule 1 explains that a certified copy of an entry in the register of presumed deaths in relation to a person is to be received, without further or other proof, as evidence of a person's death.

129. Mr Hamilton: It is almost stating the obvious to say that if a married person were to be presumed dead under the Bill that their marriage would be over. It has been said that in such cases the marriage or civil partnership would be deemed over forever. I have re-read the clause, and it is not clear that that is the case.

130. In circumstances where a married person comes back from the dead, so to speak, like the man in the canoe, is the marriage still effectively over?

131. Mr Paulin: In other words, can it be revived?

132. Mr Hamilton: Obviously, one could go down to City Hall and get remarried. However, what is the legal status of the marriage?

133. Mr Lambe: When a marriage is ended in law, which is what clause 3 says occurs; there is no common-law doctrine of which I am aware for the revival of the marriage. In law, the missing person is dead and, therefore, death has ended the marriage. What we are trying to do, as far as possible, is to ensure that the consequences of a declaration of presumed death in law are exactly the same as those of the end of a marriage when a person has died.

134. In clause 3, we are trying to make it clear that that would be the case if the person were found to be still alive at the time when the declaration was made. How could it be otherwise? To allow for the possibility of the revival of the marriage if the declaration is subsequently revoked would put the surviving spouse in an awkward position — would he or she be free to remarry if the legislation were to allow for the possibility of a future revival of the first marriage? That is why, when we raised the issue, during consultation, on whether the declaration should have the effect of automatically ending a person's marriage or civil partnership, people said that it should. However, the prime reason for doing that is because certainty is needed for the surviving spouse. Whether he or she is the applicant in any particular case or not, the individual needs to know whether he or she is still lawfully married following the declaration.

135. Mr Hamilton: It was almost getting into the realms of soap opera there.

136. The Chairperson: I noticed that no one declared an interest. [Laughter.]

137. Mr Paulin: Clause 4 deals with the ancillary powers of the High Court, which may be exercised only if it makes a declaration of presumed death. There are three powers. One is to determine the domicile of the missing person — we have already discussed domicile. Determining whether the missing person is domiciled in Northern Ireland or elsewhere is a key issue if the missing person has an estate that requires administration under succession law. Domicile is an important issue in law of succession and the administration of estates. The court also has the power to determine on questions relating to the interest of any person in the missing person's property. For example, an applicant may wish the High Court to determine that the applicant and the missing person hold property together as tenants in common, rather than as joint tenants.

138. The other ancillary power is to make such order as it considers reasonable as to any rights to or in property acquired as a result of the making of a declaration of presumed death. Upon the making of a declaration of presumed death, the property of the missing person devolves or passes to others in accordance with the rules of law governing succession and the administration of estates. However, there may be particular circumstances in which the court might consider it appropriate to make an order that relates to a small estate, thus avoiding the need for further proceedings in the High Court, especially when there is no will. For example, the court may decide when making a declaration of presumed death to order that the estate be divided between the surviving siblings of the missing person — his or her brothers and sisters.

139. Subsection (2) provides that an order under clause 4(1)(b) may direct that the value of any rights to, or in property acquired, as the result of the making of a declaration of presumed death are irrecoverable. For example, the court may order that the value of any painting or car, for example, or the proceeds from the sale of the painting or car, are not recoverable under a property variation order made under clause 6(2). Property variation orders can be made when it is found that a person for whom a declaration of presumed death was made is, in fact, still alive.

140. I am happy to answer any questions.

141. Mr Weir: I want to make sure that there is no drafting gap. I appreciate that we have dealt with the domicile issue and that determining the domicile of a missing person at the time of death could be difficult. The question of domicile also arises in the situation of a spouse or civil

partner and whether they are domiciled or habitually resident at the time of application. Should the High Court not have the power to determine domicile? I presume that there could be cases in which there are grey areas around whether the applicant, being a spouse, is domiciled or not. I wonder why that is not included. I would have thought that that could be easily determined. Why is that not one of the issues to be determined by the High Court?

142. Mr Lambe: As a jurisdictional rule, on the issue of the domicile of a missing person or an applicant spouse, the court does not need to have power under clause 1 of the Bill to make an order saying that it is satisfied that an applicant is domiciled, and, therefore, has the jurisdiction to hear the case. The resolution of any issues on whether the jurisdictional rules are satisfied will be dealt with during the course of the application. There is no need for the High Court to make an order saying that the applicant satisfies the jurisdictional rules of the case. The difference, when we come to clause 4, and the ancillary power of the court to make a determination about the domicile of the missing person, is where the consequences of making that determination will not be for the proceedings before the High Court at that time, but will have effect, perhaps, in subsequent succession or administration proceedings.

143. Mr Weir: There is an essential difference between process and outcome.

144. Mr Lambe: Yes. In order for any case to come before the judge in the High Court, there will have been a determination, however implicit, in allowing the case to get that far, and that the jurisdictional rules that have been set out have been met.

145. Mr Weir: OK.

146. The Chairperson: Are there any other questions?

147. Mr Beggs: I have a question about the sequence of the clauses of the Bill. Clause 4 gives the High Court the power to determine the domicile of a missing person and deals with issues such as interests in property. Why are those powers not specified in a preceding clause? If a person were not domiciled, would the judgement not be made that it was not for that particular court to deal with? Should that determination not be made at an earlier stage? Where property is concerned, are such decisions not made on the basis that the person concerned may have made a will, rather than determining whether or not it is related to an interest that a person may have in a case?

148. Mr Lambe: The ancillary powers will only be exercisable if the High Court has made a declaration that the missing person is presumed dead. That is why, in the structure of the Bill, those powers come after the court makes its pronouncement that, having been satisfied that the jurisdictional rules have been met and satisfied by the evidence presented by the applicant, it is right to proceed; and, if all of those conditions have been met, whether other orders are required to be made. That is when the court would consider those issues.

149. The Chairperson: Clause 4(1)(b) deals with the powers of the High Court to make orders about property rights as a result of a direction. What distinction will there be between the exercise of that power and the existing law governing succession to the estates of deceased persons?

150. Mr Paulin: My understanding is that it will follow the existing succession law, so that if a person dies intestate without a will, the normal laws of intestate succession will apply. Similarly, if there is a will, it will be administered by the court in exceptional circumstances.

151. Where the estate is substantial, it will be normal, even though there has been a declaration of presumed death, for the person to apply in the normal way for probate.

152. The Chairperson: Where there is a will...

153. Mr Hamilton: ...there is a way. [Laughter.]

154. Mr Paulin: Similarly with intestacy — if there is a substantial estate.

155. Mr Lambe: The provision is there, primarily, to allow the High Court to deal with the substance of what is before it, in declaring someone to be presumed dead, and also allow the judge to deal with other minor miscellaneous matters that might arise. The alternative is to have the High Court say that it cannot deal with such matters under this legislation, obliging the plaintiff to commence a separate set of proceedings in the High Court. We hope that one judge would be able to resolve minor issues, obviating the need for further proceedings.

156. The Chairperson: During the consultation, the Northern Bank was particularly concerned that the Bill does not give the High Court the option to grant ancillary orders to those who may have an interest in the estate or assets of persons declared dead.

157. Mr Lambe: I am not sure what the Northern Bank had in mind by way of its reference to ancillary orders. I thought that it was querying whether, as the Northern Bank, it would have the right to apply and use this jurisdiction if a large sum of money was owed to it. As a corporate person, it is able to apply to have a debtor presumed dead, provided the court does not then exercise its discretion and declare that it did not have a sufficient interest in the outcome. It probably would decide that a creditor did have sufficient interest.

158. On the other hand, if the Northern Bank understood the phrase “not being able to avail of further ancillary orders under this legislation” to mean that it would be unable to get an order for possession of property, that is so. It would have to initiate — in our view, quite properly — a separate set of proceedings, which it will only be able to do because it has previously established the presumed death of the missing person.

159. This Bill is not a one-stop shop for the resolution of all possible legal issues that might arise in connection with the affairs of a missing person. Other legal avenues exist for resolving those disputes. One of the aims of the Bill is to leave in place and not disturb the existing procedures and working practices.

160. The Chairperson: Therefore, the Bill does not set aside any existing legal mechanisms or recourse for creditors.

161. Mr Lambe: Exactly. The legal routes to acquire possession of a property will still be available to creditors.

162. The Chairperson: It does not fall to the High Court, under this Bill, to make any determinations in respect of disputes or creditors' claims.

163. Mr Lambe: That is correct. Existing debt-recovery processes are unaffected. However, if, to obtain an order to initiate any debt recovery process, the Northern Bank, or any financial institution, has to establish the death of the missing person, such a financial institution can apply, in the same way as a family member, under this proposed legislation.

164. The Chairperson: Might it be possible for you to deal with clauses 5 and 6 together?

165. Mr Paulin: Yes. Clause 5 provides the High Court with the power, on application, both to vary and revoke a declaration of presumed death made under clause 1. Whereas any person

may apply for a variation order, subsection (2) provides that the court must refuse to hear the application if it considers that the applicant does not have a sufficient interest — we hear that phrase again — in the determination of the application. There are no special rules for spouses, civil partners or close relatives in determining who can apply for a variation order, or how the court should deal with these applications. Given that a declaration of presumed death has already been made in respect of the missing person, there is no need for rules that privilege one type of applicant over another.

166. All applicants will have to satisfy the court that they have sufficient interest in the application for a variation order.

167. Clause 5(4) is not required to deal with the court's powers in clause 4(1)(b) to make orders in relation to the missing person's property etc, because the limited property varying powers of the court are dealt with separately in clause 6.

168. Clause 6 sets out the general rule that a variation order under clause 5 is to have no effect on property rights acquired as a result of the making of a declaration under clause 1.

169. Although, clause 6(2) allows the High Court to make a further order in relation to any rights to or in any property acquired as a result of the making of a declaration of presumed death, clause 6(5) makes clear that, other than in exceptional circumstances, no order under clause 6(2) can be made unless the application for a variation order was made within five years of the making of the declaration of presumed death.

170. Clause 6(3) further limits the scope of any order that may be made under clause 6(2) by providing that no such order shall cause income generated during the period from the making of the declaration to the making of the variation order to be returned to the missing person, or otherwise redistributed to a person who is entitled to it in consequence of the variation order.

171. Clause 6(4) sets out the considerations that the High Court must take into account in deciding whether to make an order under clause 6(2).

172. Clause 6(6) provides protection to a bona fide purchaser for value of any property acquired from a person who is entitled to it on foot of the declaration under clause 6(1).

173. Clause 6(7) deals with the trustee's liability for a breach of trust and makes it clear that the trustee is under the same duty of care in relation to the property of the missing person as if he or she were administering the estate of the person who had died and in respect of whom a grant of probate or administration had been obtained.

174. Under clause 12, the Department of Finance and Personnel (DFP) has the power to amend clause 6 to vary the five-year period, or the seven-year period. In the future, an international consensus may develop that five years is too long a period of uncertainty for those who may have acquired an interest in property as a result of the making of the declaration of presumed death. In that case, DFP will be able to substitute a shorter period of, for example three years, by order. That would be subject to an affirmative resolution of the Assembly.

175. Mr Hamilton: My question sounds fairly simple. Clause 5(1) states:

"A declaration under section 1 may ... be varied or revoked by an Order".

176. Will officials cite a practical example of where a declaration would be amended in any way other than its being revoked?

177. Mr Paulin: That could happen when evidence, which was previously not known to the Department, arises that a person died on a particular date. The subsequent discovery that a person died on a particular date could have consequences for property, tax and so forth. Is that a good example?

178. Mr Lambe: Yes. Over the past 100 years, the common-law presumption of death was applied in some case law. By adopting one date of presumed death, one set of relatives would inherit under the person's will whereas, had a different date of death been fixed, a different set of relatives would have inherited. That would result in their going back and forth to the courts in the search for evidence in, for example, late nineteenth century Ohio, to ascertain when the person was last known to be alive. Therefore, the date of presumed death is significant, and in clause 2, for example, the Department stresses that a person could not simply presume a person to be dead — it must be known from what point in time that presumption dates.

179. Mr Hamilton: Does that apply when there is a greater certitude of death?

180. Mr Lambe: Yes, it applies when further evidence comes to light.

181. Mr Paulin: That one example readily springs to mind but there may well be others.

182. Mr O'Loan: I have a question as a lay person. Clause 5(1) states that an application for a variation order can be made at any time. I expect that a person who has been presumed dead may turn up 50 years later. Clause 3(a) states:

“no appeal is brought against a declaration under section1 within the time allowed for appeal”.

183. I cannot see another reference to the time allowed for appeal.

184. Mr Paulin: Clause 3(a) refers to the appeal against the declaration of presumed death. So, if I were to apply for declaration of presumed death and succeed, and someone else who was interested in the case had fought it by saying that the person had not died but was still alive and had not been heard from, they could argue that the court was wrong and they could appeal. That would happen at the declaration stage.

185. The variation stage is different. It is a new, fresh application and asks for presumably new evidence to be brought on which the application could be based.

186. Mr Lambe: The reference in clause 3(a) to the time limit in which to appeal essentially makes the point that the effect of the declaration would not occur until the window during which an appeal on a decision from the High Court may be lodged to the Court of Appeal. Although the High Court may decide today that “X” may be presumed to be dead, that judgement would not take effect until six weeks later. That is because six weeks is the timeframe in which an appeal against that decision could be lodged.

187. Mr O'Loan: Where is that timeframe specified? Is that a general thing and how quickly —

188. Mr Lambe: The six-week period is the general period in which orders of the High Court can be appealed to the Court of Appeal as set out in the rules of court.

189. Mr O'Loan: Can the applicant appeal? You talked about a third party appealing.

190. Mr Paulin: Yes, the applicant can appeal. They would only need to appeal —

191. Mr O'Loan: Is that obvious? It does not seem to say that anywhere.
192. Mr Paulin: They would only need to appeal if they —
193. Mr O'Loan: Yes, if it had gone against the way that they had wanted.
194. Mr Paulin: Yes. Either party can appeal.
195. Mr Lambe: It does not need to be said. You are given the right of appeal. It does not need to be specified.
196. The Chairperson: There is a right of appeal?
197. Mr Paulin: Yes, there is a general right of appeal.
198. The Chairperson: OK. I suggest that is sufficient for today. The decision of the Committee in relation to the progress that has been made is whether members want to continue this by correspondence, or whether we should invite you back to complete this particular session.
199. Mr Beggs: I have a question regarding this particular clause.
200. The Chairperson: Sorry. Excuse me.
201. Mr Beggs: In relation to clause 6(5), I do not understand why there is a five-year limit and yet the bill states:
- “The High Court must not, except where it considers that there are exceptional circumstances”.
202. Exceptional circumstances would mean that there is no time limit. Therefore, why is there a time limit, but yet there is no time limit?
203. Mr Lambe: The purpose of the five-year limit, given that it is not always going to be binding on the High Court, is quite directional toward the High Court. It states that you should work on the presumption that you do not make an order more than five years after the initial order. However, if you are satisfied that exceptional circumstances exist, you may depart from the five-year principle.
204. The way that it is raised means that “the High Court cannot do this unless” rather than “the High Court can if it wants to”. It is a difference in emphasis perhaps, but we would not expect the High Court to say lightly that there were exceptional circumstances and that, therefore, they could disregard the clear intention of the legislation, which is that a five-year rule applies.
205. Members will recall that the discretion regarding exceptional circumstance was not in the draft Bill that we published for consultation, but a number of respondents suggested that it was too rigid and did not give the High Court any flexibility in that regard. Therefore, we agreed to give a limited measure of flexibility — our interpretation as to whether it is limited or not might differ.
206. Mr Beggs: I assume that exceptional circumstances would be, for instance, when there is a body, and a date could be established. However, obviously that would apply —
207. Mr Paulin: Or a person returns.

208. Mr Beggs: Obviously. Those would be exceptional circumstances, so why then do you require a time limit? What would constitute non-exceptional circumstances that could be allowed to be applied in a five-year period?

209. Mr Paulin: The person returning is the exceptional circumstance. More definite information on when the person died may not be an exceptional circumstance, but that may depend on the consequences of that if it makes a major difference to people. For instance, if it is known that someone died on 3 January 1972, but that makes no difference, then that would not be exceptional circumstances. However, if it is known that someone died on a specific day, which means that X gets an estate of £1 million instead of Y, then that might be an exceptional circumstance.

210. Mr Beggs: I understand the terminology about exceptional circumstances, but not why there is a five-year limit. What is happening in the five-year limit that is not governed by exceptional circumstances?

211. Mr Lambe: Clause 6 is not an easy clause to understand. There are three elements to it with regard to whether a missing person who was mistakenly presumed to be dead can get their property back.

212. Clause 6(1) sets out the basic rule: it does not matter if you come back within two years — you do not get your property back. The basic rule is that a variation order, whether it is varying the time or a revocation order, has no effect on the initial distribution of that person's property which was made on foot of the declaration of presumed death. The assumption should, therefore, be that property is not returned.

213. If the court is minded to return the property, it can do so only if the application for a variation order is made within a five-year time span. Even then, it is still governed by the basic rule that one should not be making an order returning the property to the individual. If, however, someone comes back seven years later, the two earlier presumptions should apply: no return at all on foot of a revocation order; and you are also outside the five-year window of opportunity for the return of property, which the legislation states. However, we are recognising that, in an individual case, there might be exceptional circumstances in which it would be harsh and unfair to apply those two presumptions. The court therefore has exceptional discretion — it is an accumulative set of barriers.

214. Mr Paulin: Almost like a shifting back and forwards.

215. Mr Lambe: I am afraid that it is not straightforward.

216. The Chairperson: Does the Committee wish to continue this discussion at another sitting?

217. Mr O'Loan: There are two other issues about which I want to talk.

218. The Chairperson: Today?

219. Mr O'Loan: No, but they do need to be discussed. One is the issue of disclosure. Mr Paulin earlier referred consideration being given to inserting a clause to allow the court to order disclosure. There needs to be a much stronger clause. There is a duty on any person who has awareness of the proceedings and who has any relevant information to bring that to the court.

220. The Chairperson: May I suggest that the Committee slots that brief section in next week?



221. Mr O'Loan: The other issue that might be useful to consider is the statement in the explanatory and financial memorandum that the legislation is deemed to be compatible with the Human Rights Act 1998. What discussion has there been, or is proposed, with the Northern Ireland Human Rights Commission on that matter, including the issue of disclosure?

222. The Chairperson: OK. If other issues occur to members, we can flag them up and a note will be sent to give Members the opportunity to reflect on them.

223. I thank the witnesses for their submission and Hansard for its work this morning.

## 24 September 2008

Members present for all or part of the proceedings:

Mr Mitchel McLaughlin (Chairperson)

Mr Simon Hamilton (Deputy Chairperson)

Mr Roy Beggs

Dr Stephen Farry

Mr Fra McCann

Ms Jennifer McCann

Mr Declan O'Loan

Mr Ian Paisley Jnr

Ms Dawn Purvis

Mr Peter Weir

Witnesses:

Mr Oswyn Paulin  
Mr Neil Lambe     Department of Finance and Personnel

224. The Chairperson (Mr McLaughlin): We are joined once again by Oswyn Paulin and Neil Lambe. Considerable progress was made last week, but there were time constraints, so we appreciate that you have rejoined the Committee this week. Perhaps, Mr Paulin would provide a brief reprise of the progress that was made last week, and we will continue from there and complete the process. The Committee has been scrutinising the Bill on a clause-by-clause basis and has reached clause 6.

225. Mr Oswyn Paulin (Department of Finance and Personnel): I had the impression that we had finished clause 6 last week.

226. The Chairperson: I cannot remember; you have caught me out, Oswyn. I am sure that members will correct you if you are wrong, however, as no one is indicating, I will assume that your recollection is more accurate than mine.

227. Mr Paulin: I am happy to continue with clause 6 or clause 7, but I think that clause 6 was dealt with last week.

228. I will say a few brief words about each clause, and then give Members the opportunity to ask questions, to which Mr Lambe and I will attempt to reply. If there are points raised that we cannot answer at this stage, we will come back to the Committee at a later stage.

229. With your permission, Mr Chairperson, I will begin with clause 7, which deals with insurance matters. It is modelled on, but is not exactly the same as, the insurance provisions in the

Presumption of Death (Scotland) Act 1977, which was referred to at the previous Committee meeting and by the Minister during the Second Stage debate. The Minister indicated that the Department has decided to propose amendments to clause 7 and to clause 6(4)(b), so that provision for the treatment of capital sums for insurance purposes will be the same here as provided for in the Scottish Act.

230. Mr Weir: What discussions has the Department had with representatives of the insurance profession here? How do they see things with regard to costing, or even with regard to how the Bill will work in practice?

231. Mr Neil Lambe (Department of Finance and Personnel): We had a meeting with the Association of British Insurers and discussed whether we were right to treat annuities and other periodical payments as capital sums, or whether we should follow the Scottish model and exclude them from the treatment of capital sums. The association thought that it would be better for its members if we followed the Scottish model, which has not presented them with any problems.

232. Given that the legislation in Scotland is rarely used, most insurers do not encounter it in practice. The type of insurance that we are talking about — trustee or beneficiary indemnity insurance — is a fairly niche market, but it is a service that is offered by all of the large insurance companies.

233. Mr Weir: From the practical perspective, did you receive any indication from the insurers as to whether they felt that a standard rate should apply across all cases; or should the rate vary according to the circumstances of each case?

234. Mr Lambe: We did not have detailed discussions about what rate would be used to fix particular premiums, but I imagine that the premium would have to relate in some way, for example, to the amount of life insurance moneys that are being paid out, or to the value of the missing person's property at the date on which he or she is presumed to be dead.

235. As with all insurance products, the premium payable would relate to the value of the property or life insurance capital sum that is in issue. It would be very specific.

236. Mr Paulin: Clause 8 provides for the rules of the Supreme Court. Among other things, it makes supplementary provision in relation to applications for declarations of presumed death and variation orders. The rules will prescribe the forms to be used in court and will detail those persons who should receive notice of applications made under the Bill.

237. Clause 9 deals with the Attorney General for Northern Ireland, who will receive notice of all applications for declarations of presumed death and of applications for a variation order under the Bill. The clause also states that the Attorney General may intervene in any proceedings in relation to presumed death before the High Court to argue any case that he or she thinks should be fully argued.

238. Clause 10 deals with the circumstances in which a person may intervene in any proceedings for a declaration of presumed death under clause 1 or a variation order under clause 5. Unless the person wishing to intervene is the spouse, civil partner or a close relative of the missing person, he or she will have to obtain leave of the High Court.

239. Mr Weir: Are there any circumstances in which somebody who does not fall into those categories can intervene — for example, where somebody alleges, or gives evidence, that the person in question is not actually dead? Is that an example of when an intervention could be made that is outside the criteria?

240. Mr Paulin: Yes.

241. Mr Weir: Is that the thinking behind the provision; that it could be someone other than the spouse or close relative?

242. Mr Paulin: Yes — and an intervention could be made by the person who is presumed dead.

243. Mr Weir: One assumes that that would have a fair chance of stopping the proceedings.

244. Mr Paulin: They might want to come back and say that they are still alive.

245. Mr Lambe: It is likely to be used only when someone wishes to contradict the affidavit evidence of the applicant and seeks to prevent the court exercising its jurisdiction to declare the missing person to be presumed dead.

246. Mr Paulin: Or again, as it applies in variation orders, which is what I was thinking of.

247. Clause 11 deals with costs. Those are the costs between parties and not, as we would normally understand in public administration, the costs to the Exchequer. The clause confers on the High Court a broad power to make such order as to who shall pay the costs of proceedings as it considers just. Costs may be ordered to be paid using the property of the missing person.

248. Clause 12 allows the Department of Finance and Personnel to increase or decrease the length of time a person must have not been known to be alive before the High Court may make a declaration under clause 1. We had an earlier discussion about that. Under clause 12, the Department may increase or decrease the five-year limitation period in relation to property variation orders made by the court under clause 6(2).

249. Clause 13 provides that the existing statutory provisions that permit the High Court to dissolve a marriage or a civil partnership on the grounds of the presumed death of a spouse or civil partner shall cease to exist.

250. The Chairperson: The Committee had some discussion on that issue.

251. Mr Paulin: Clause 14 should be taken with schedule 1 of the Bill, which sets out the provisions in relation to the register of presumed deaths. It was the register and the registration that provided the initial impetus for the legislation, although it is now much wider than that. Clause 14 and schedule 1 provide for the Registrar General for Northern Ireland to establish and maintain a register of presumed deaths. The provisions deal with the making of entries in the new register and the amendment, cancellation, correction and re-registration of entries. The powers available to the Registrar General in relation to entries in the new register are similar to his powers in relation to entries in the register of deaths under the Births and Deaths Registration (Northern Ireland) Order 1976.

252. Clause 15 deals with Assembly subordinate legislation and procedures applicable to the making of orders and regulations in the draft Bill.

253. Clause 16 is the interpretation clause, which defines certain words or phrases used in the Bill. As noted in earlier briefing provided to the Committee, we had hoped to replace the definition of "insurer" with something that might be simpler and more readily understood to the non-lawyer and, possibly, to lawyers.

254. Clause 17 allows the Department of Finance and Personnel to make transitional, saving, supplementary, incidental and consequential provisions and savings in connection with the Bill.

255. Clause 18 should be taken with schedules 2 and 3, which deal with amendments and repeals of legislation. The clause should be read along with clause 13, which I referred to earlier and which deals with the repeal of existing matrimonial and civil partnership legislation, and the dissolution of a marriage or civil partnership.

256. Clause 19 is the commencement clause. Some clauses in the Bill — or sections in the Act, as it will be — will commence immediately the Bill receives Royal Assent and the Department will decide when other sections of the Act commence.

257. Clause 20 relates to the short title.

258. The Chairperson: Thank you. Do members have any comments?

259. Mr Hamilton: I have comments on general issues that were perhaps not covered. There was some discussion during the Second Stage debate about the disclosure of information by third parties. The Minister suggested that he was going to look at that issue again. Will you tell the Committee what is being looked at?

260. Mr Paulin: I believe that Mr O'Loan raised the issue of disclosure at the previous Committee meeting. Just to recap: in the draft Bill, the Department did not incorporate the provision that is in the Scottish Act, but we raised the issue of whether there should be disclosure provision and what form that should take. The consultation process produced a number of responses saying that there should be disclosure provision.

261. Drafting a disclosure provision has been tricky, and the Department decided to proceed with the Bill and amend it as it goes through the Assembly. We are making progress with a draft disclosure provision, which will be presented to the Committee as soon as it is in a presentable form.

262. The Chairperson: Will the Committee have sight of it in good time before it goes to the Assembly?

263. Mr Paulin: Absolutely: we hope to have it by later next month.

264. Mr Lambe: I hope to have all the necessary agreements across government to the disclosure provision by the middle of October.

265. Mr Paulin: Due to the fact that the disclosure provision will relate to the powers of the court, clearly the agreement of the Secretary of State for Northern Ireland is required because this is a reserved matter.

266. Mr Beggs: You indicated that disclosure requirements exist with regard to the Scottish provision. Why was that provision not just lifted across if it works properly there? Is there not a working model elsewhere that is acceptable?

267. Mr Paulin: We are not entirely clear that it is a working model in the sense that it works. Research has, I believe, indicated that it is not a provision that has had any effect — it has not been useful. The Department is looking at a provision that will be useful and practical, and which will involve the court having the power to order disclosure.

268. Mr O'Loan: I expressed concern last week about this issue. I am not reassured by what I am hearing today or by what the Minister said in the Assembly. The most, it seems, that is being indicated is to give the court the right to ask for information if it feels that a person or organisation has such information.

269. This Bill originated particularly from the issue of the disappeared, to which it would be generally applicable. However, when one considers the disappeared, it is highly desirable that a clear duty and obligation is imposed on any person or organisation that has information relating to a case in progress to bring that information before the court. I am thinking, in particular, of the police, the security forces and the security services. There should be a proactive clause in the Bill.

270. Ms Purvis: If the court issued an order for disclosure of information, and someone did not disclose that information, would they be in breach of the court order?

271. Mr Paulin: Clearly, they would. First; the court would issue an order, if required and necessary, and it could issue it on the application of any of the parties to the proceedings. That is the normal position with regard to disclosure in court proceedings — that the court has the power to order disclosure. However, that is done generally not by the court of its own volition but by application by various parties. If there is a failure to disclose in accordance with a court order, that is a serious matter and, ultimately, can lead to contempt proceedings against the person who has failed to disclose.

272. The Chairperson: How does that relate to the broad argument that was presented by Mr O'Loan?

273. Mr Paulin: We must consider the purpose of the legislation: it is not to have a general, wide-ranging inquiry into the circumstances of someone's disappearance; it is to establish whether that person is dead or still alive. In the vast bulk of cases it will be clear, beyond doubt, that the person is dead. Therefore, the proportionality of placing a duty on people to disclose all relevant information on a person's death must be examined: is it proportionate to place a duty on people to disclose a lot of information when it is clearly beyond doubt that the person is dead? It is important to consider that issue before imposing upon a wide range of bodies and individuals a duty to disclose information.

274. Dr Farry: Does the clause put a general duty on unidentified organisations and the wider population, or is the intention to name specific organisations, particularly Government bodies?

275. Mr Paulin: It would be better for the court to have a wide-ranging power. It would be unfortunate if the provision were restricted to Government organisations and a case arose in which a judge felt that he or she would like to order disclosure against an individual or private company but could not do so because the provision was clearly restricted to Government. It should, therefore, be wide.

276. Dr Farry: In a sense, therefore, other Government agencies have been consulted about the matter, but there is not a formal requirement to get agreement from different agencies before it can be introduced into our legislation.

277. Mr Paulin: The agreement of the Secretary of State is required, because the matter falls into the reserved field and may even be excepted.

278. Dr Farry: That leads me to my next question. Leaving aside the issue of the disappeared; if someone is not dead, it is likely that they will not be in Northern Ireland — he or she will have moved elsewhere in these islands, to Europe or further afield. How will the measure work, given

that it will apply only in the narrow jurisdiction of Northern Ireland? Will it apply to, for example, HM Revenue and Customs, a UK-wide agency, which I would have thought would be one of the first organisations that you would contact about, for example, whether any tax is being paid, and so on? How does the Bill relate to agencies that operate UK wide? Other European Union countries may hold also relevant information. How does the law relate to those jurisdictions? If there were suspicion, for example, that someone was living in the south of France or Spain, could the Bill's powers be extended in order to obtain information from either the French or Spanish authorities?

279. Mr Lambe: As regards a Government agency such as HMRC; that UK-wide Government body would be bound by the order for disclosure because it would have been made by the High Court. If the order is directed to the agency, it will carry out a trawl of its records based on information that is provided by the court. It would then reveal to the court that its data-recording system shows that the last transaction was made in that person's name on a particular date. That information will support and complement the affidavit evidence, or will contradict it; in which case the court is faced with conflicting evidence. That procedure would be followed by all Government agencies named in the disclosure order.

280. It is likely that the High Court would not find it helpful to make a disclosure order in relation to an individual or an organisation that is based outside the United Kingdom, because it would not have any enforcement powers over that order.

281. Mr Paulin: There are complex arrangements for co-operation between courts in the European Union. I have forgotten the exact phrase that is used, but the 1968 Brussels Convention, for example, provides courts with the means to seek the assistance of other courts. Co-operation is possible through that provision. However, the reach of the Assembly is limited in those matters, and I am not sure whether the courts have any greater jurisdiction or powers. I will come back to you on that.

282. Dr Farry: I appreciate that.

283. Mr O'Loan: I am not reassured by anything that I have heard. The police service or the security forces may have knowledge of an individual for whom an application for a presumption of death is going through the court, be aware that that action is taking place, but be under no obligation to inform the court of the information that they have. They can sit on their hands and do nothing. That is not a proper situation.

284. I do not foresee any difficulty with proportionality if the obligation is put in such a way that requires organisations, for instance, to provide relevant information that is pertinent to the matter that is before the courts, which is whether or not a person is dead.

285. The Chairperson: Is the issue whether the question should be examined under the aegis of this Bill, because there are all sorts of procedures and investigations in relation to the death of an individual? Is the court trying to establish whether any evidence has been found over a prescribed period of seven years, for instance, that an individual is alive? It is not a question of whether the person is dead; the question is whether any organisation or individual holds evidence that the person was alive in the past seven years. Is that not the pertinent question?

286. Mr Paulin: That is the pertinent question. Another aspect of the Bill relates to the parties to the case — the families who are trying to establish whether a person is dead. If they think that they need disclosure from the police, for instance, they will have the power to go to the court, and the court will have the power to order disclosure where necessary.

287. Mr O'Loan: There are two tests by which the court judges on the matter: first, it judges whether there is any evidence concerning whether the person has died; and, secondly, whether the person has been seen in the past seven years. An individual or a public body may well have evidence of whether the person has been seen, and they ought to be under a duty to bring that information before the court.

288. The Chairperson: I am not taking issue with the Bill; I am merely trying to find a way through this. Last week, the officials set out in some detail the parameters of this discussion. You mentioned a specific group of people who have disappeared, and as a result of their disappearance it is difficult to point to practical conclusive evidence that they are dead. They have disappeared. They could have disappeared because they wanted to, and they may have wished to change their personality and identity, for instance. Do we pursue both lines? Do we argue that the court should have the ability to pursue both questions? Do we seek evidence from agencies, for instance, that the individual has died or is known to be alive over a prescribed period? That would be regarded as the test as to whether a certificate of presumed death could be issued.

289. Mr Paulin: There are circumstances where it will not be difficult to establish that someone is dead, even though no body has been recovered. If, for example, a person has been abducted from their home and has not been seen since, there is a reasonable presumption that that person is dead.

290. Is it proportionate to say that if a court receives that information and is minded to make an order, but to quell any doubts everyone who has information must produce it to that court? That could mean that the court would have to consider a vast amount of documentation. What would that achieve if it is universally accepted that the person is no longer alive?

291. I suggest that the way forward is for the Department to produce a draft clause for the Committee to consider.

292. The Chairperson: Mr O'Loan, what do you think about the Department producing a draft clause, which the Committee can then examine?

293. Mr O'Loan: I have made my points.

294. The Chairperson: I know, but we do need to make a decision.

295. Mr O'Loan: My argument to the Committee is that we should support a proactive clause that places a duty —

296. Mr Hamilton: Perhaps the Committee should proceed on the basis of what has been suggested by Mr Paulin?

297. The Chairperson: Yes. The Committee will take Mr Paulin's advice. Mr Paulin, can you come back with a draft clause? Following that no doubt, we will rehearse the discussion again. Are there any other questions arising from the Bill?

298. Mr O'Loan: There is the other issue that I raised regarding human rights compliance. The explanatory and financial memorandum for the Bill contains a statement that:

"The provisions of the Bill are considered compatible with the Human Rights Act 1998."

299. By whose authority is that statement being made? Who is deemed to say that that is so? Has there been any consultation with the Human Rights Commission, in particular on the requirement to disclose any information?

300. Mr Paulin: The consultation paper was sent to the Human Rights Commission, but I do not believe that it made any comment.

301. Mr Lambe: The Commission did not respond.

302. Mr Paulin: As far as the Bill's compatibility with the Human Rights Act is concerned, the Departmental Solicitor's Office is satisfied that it complies with the European Convention on Human Rights.

303. Mr O'Loan: I am sorry, I could not hear you. Who is satisfied?

304. Mr Paulin: The Departmental Solicitor's Office. I — as Departmental Solicitor — am satisfied that the Bill is compliant with the Human Rights Act.

305. Mr Lambe: Paragraph 69 of the consultation paper included a human rights assessment of the draft Bill. It explains which articles of the convention the Department believed were potentially engaged by what was being proposed. The conclusion reached was that the Bill would be human rights compliant.

306. The Department sought views and there was a specific consultation question on that specific issue. That question asked whether respondents agreed with the Department's opinion that the provisions of the draft Bill comply with the convention. The respondents who addressed that particular question agreed with the Department's assessment.

307. Dr Farry: Under British law and legal tradition it is — in theory — possible for someone to live their lives totally disengaged from the state. That situation differs slightly different from the European tradition of law. Therefore, presumably someone could decide that they want to disappear from the life that they have led, lead a different life and break off all forms of contact.

308. Could that person then subsequently make an argument that they have been declared dead by the court and that their rights to personal integrity — or whatever the term is under the convention — have been breached? You may suggest that that is not an absolute right and that there are various limitations that must be balanced.

309. In essence, my question probably leaves off from what Mr O'Loan was arguing. How does the Bill ensure compliance with the convention in extreme circumstances such as those I have outlined? How is that process reconciled?

310. Mr Lambe: In an ordinary missing person case, a person is reported missing to the police and the family do not know what happened to them. The police then carry out their investigations according to the established missing person protocols.

311. They may locate the missing person, who is alive and well and has simply decided that they have had enough of their family and that they want to break contact. A balance must be found to take account of that person's right to go missing and for his or her whereabouts not to be relayed back to the family. The police have an obligation to investigate all reports of missing persons, but, if they find that the missing person is alive and well — and they are satisfied that no crime or other illegality has been committed — they will ask the missing person if they want their family to be informed of where they are.



312. If the person does not wish the family to know that, their right, under article 8 of the convention, trumps the right of the family to be told details of where the person is located. In the case of a child, the parents would be told, but the right to privacy of a missing adult trumps the right of the family to have that information.

313. Dr Farry: The family's right to have that information is not clearly defined in a way that is equivalent to the missing person's right of privacy. If there is no information about whether a person is alive or not, and that person is declared dead after seven years but returns after 10 years, does the state have any liability for breach of their right of personal integrity for having declared that person dead? What measures can be taken to safeguard against that, given the need to balance other rights in the convention?

314. Mr Paulin: I am not sure what right a person would have in such a situation. A development of the right to privacy and respect for private life, which is covered by article 8 of the European Convention on Human Rights, might be that one has the right to be regarded to be alive when one is alive. It is possible to discuss extraordinary scenarios in which people do the most peculiar things. Those scenarios can be accommodated as much as possible, but limits are eventually reached. A person who had deliberately disappeared, not contacted anyone and been declared dead, having done nothing to make known the fact that they were alive, would find that a court would be happy to declare them alive but would be less likely to grant them any particular remedy —

315. Dr Farry: I suppose the court's response would be that no damage had been caused to the person by the declaration of death. As long as the court vacated that declaration as quickly as possible, the person could not claim any damage on the part of the state arising from the declaration.

316. Mr Paulin: It might be considered defamatory to say that a person is dead when they are alive, but the position would be understandable.

317. Dr Farry: Such a person might have no reputation to defame.

318. Mr Lambe: We took into account the fact that the state has an interest in knowing whether its citizens are alive or dead. In addition to respect for private life, an argument might arise from the convention in relation to the property rights of the missing person. If the missing person were presumed to be dead, their property would transfer as if they were dead. Clause 6 of the Bill relates to property variation orders, and it allows some scope for property to be returned to the missing person. It properly balances the interests of the family left behind, the interests of the state, and the interests of the missing person who may subsequently turn out not to be dead.

319. Mr O'Loan: Useful background information has been given on compliance with human rights legislation, and I will give consideration to that.

320. The Chairperson: The Committee's deadline for receipt of submissions is 15 October, so we may hear from agencies.

321. I presume that you are satisfied that the Independent Commission for the Location of Victims' Remains received and considered the correspondence and entered a nil return.

322. There was an issue around the proposal from Wave about the disappeared, regarding whether the Commission would assist the families and the court in making a declaration. Has the Department considered that proposal from Wave?

323. Mr Paulin: We gave it some thought and wondered whether the disclosure provisions may assist with that. Beyond that, was there an issue with another aspect of it?

324. The Chairperson: There may have been an issue in relation to assisting the families to engage with the process if that involved legal costs.

325. Mr Paulin: My understanding is that the Commission is either in the reserved or excepted fields, so that would be outside the powers of the Assembly. If the powers and duties of the Commission were to be amended, that would be the responsibility of the Northern Ireland Office.

326. Mr Lambe: The Independent Commission for the Location of Victims' Remains was established by treaty, therefore there are specific issues about obliging it to fulfil a function, and we are unable to impose any statutory obligation on it. That is not to say that in taking an application to the High Court, the Commission would not, if it felt that it wanted to, assist the families in the production of their affidavit evidence. Similarly, the families may include in their affidavit evidence reference to findings or determinations already publicly made by the Commission in relation to a specific, named member of the disappeared.

327. The Chairperson: Your interpretation is probably correct but, nonetheless, the issue has been brought to our attention. Therefore, does that imply that there should have been at least a follow-through meeting, even if all that involves is mapping out where the respective jurisdictions begin and end and deal with questions such as whether you have met the Commission or talked to Wave about their proposal, and whether people have a consensual understanding of where responsibility lies?

328. Mr Paulin: We have had a discussion with Wave, we have not met the Commission.

329. Mr Lambe: I have been in contact with the Commission's family liaison officer and have kept him fully informed of the project as it has progressed, because he provided the initial point of contact to the families of the disappeared, and helped to arrange our meeting with them.

330. I have not raised with him formally the question of whether he or the Commissioners would consider themselves to have any formal role in assisting the families in that way. The difficulty is that the Independent Commission for the Location of Victims' Remains has a very specific statutory remit and that does not extend to providing financial assistance — that is a matter that we could discuss with our colleagues in the Northern Ireland Office.

331. The Chairperson: Depending on the time available for consultation, the Committee may or may not have a further evidence session on that matter. Again, I thank you both for your expert assistance.

## **12 November 2008**

Members present for all or part of the proceedings:

Mr Mitchel McLaughlin (Chairperson)

Mr Simon Hamilton (Deputy Chairperson)

Dr Stephen Farry

Mr Fra McCann

Ms Jennifer McCann

Mr David McNarry

Mr Declan O'Loan

Mr Ian Paisley Jnr

Ms Dawn Purvis  
Mr Peter Weir

Witnesses:

Mrs Patsy McAteer  
Mr Kieran Megraw  
Mrs Anne Morgan  
Ms Sandra Peake

WAVE Trauma Centre

332. The Chairperson (Mr McLaughlin): The WAVE Trauma Centre has provided the Committee with a written submission on the Presumption of Death Bill. Members have also been provided with copies of the DFP response to that submission, which was forwarded to the Committee after last week's meeting. Some issues may arise from that response.

333. I welcome Ms Sandra Peake, chief executive officer of the WAVE Trauma Centre, who is accompanied by Mrs Anne Morgan, Mrs Patsy McAteer and Mr Kieran Megraw. I invite you to make your initial comments.

334. Ms Sandra Peake (WAVE Trauma Centre): Good morning. We are pleased to be here today, and we are grateful for the opportunity to speak to the Committee about the Presumption of Death Bill.

335. Although all the families of the disappeared have known for some time that the proposed legislation was being prepared, not all of them wanted to engage in the process. That was not because they felt that the process was unimportant; it was because they felt that such legislation could close the door on substantial forensic work before it was completed. Although, at this stage, those families have decided not to engage in the consultation, they may wish to examine the proposed legislation further down the road.

336. Anne Morgan will say more about the opinions of the families. Nevertheless, they want the process to be as easy and as straightforward as possible, given all that they have been through already.

337. Mrs Anne Morgan (WAVE Trauma Centre): Thank you for having us. Taking into consideration the views of the families of the disappeared, I believe that the proposed legislation should be straightforward, and should encompass the emotional considerations that have been expressed. When the time comes for us to obtain death certificates, they should be made available to us in a clear and accessible manner.

338. We put it to the legal experts who were preparing the Presumption of Death Bill that the families of the disappeared are different. We were bereaved as a result of the Troubles in the North of Ireland, but we are a specific group, and we feel that we should be treated as such. Our loved ones disappeared — as far as we are concerned, they are not missing. People might find a quandary in that.

339. The legislation should, by whatever means, make the process as easy as possible for us. My family has suffered for 23 years without success. The search for my brother, Seamus, began in France in the summer of this year, but his body was not found.

340. Our family has a different outlook on the issue. The legislation applies to those who have lived in Northern Ireland, but, because Seamus lived in France, we face an extra problem. Our concerns were raised when the Presumption of Death Bill was first drafted, because it stated that

the deceased had to be domiciled in Northern Ireland for a year before their death, and Seamus was not. My family has lived through 23 years of uncertainty, and I feel that if things are made difficult, I will not come forward to request a death certificate.

341. Our solicitors have told us that we would have to obtain affidavits to prove that although Seamus was not living here, he was planning to return. It is unbelievable that we should have to contemplate affidavits in order to obtain a death certificate. I know that there is a need for the Bill to be placed on the legislative books because there is currently no legislation to deal with the issue, but I feel that the process should be made much easier for the families of the disappeared. There should be provision for those families to receive a death certificate without all of those complications.

342. I really do not see why the families of the disappeared should have to prove that their loved ones are disappeared — it is awful to even hear the word “disappeared”, because it reminds us that no body has been found. Those deaths were due to the Troubles, and I believe that society has a responsibility to look after us.

343. Mr Kieran Megraw (WAVE Trauma Centre): All the families of the disappeared, apart from Anne’s, have been told that the bodies are in the Republic of Ireland, so they would have been taken from the North — we are not sure whether they were killed in the North or the South. Does that mean that they will have to be registered in the South as well as the North? We do not want to be involved in the process in the South if the bodies are found there, only to have to go through the entire process again up here.

344. My family went to the courts, and the NIO informed us about the procedure that had to be followed. However, in the end, that procedure could not be completed, and the NIO had to telephone our solicitor to find out about the process. We got as far as the magistrate’s court, but a death certificate could not be issued. We would like the process of certification to involve no complications whatsoever.

345. The Bill mentions the need for an application to be uncontested — we do not want to apply for death certificates as a group only to have someone contesting some of the information. The Independent Commission for the Location of Victims’ Remains is a Government body, and it has all the relevant details and information, so the process should be straightforward.

346. Legal aid has also been mentioned, but it should be noted that, as all of the parents of the disappeared are now deceased, it will be the siblings who make the application for the certificate. The Bill makes reference to where the deceased was resident when they were killed. All of the disappeared, apart from Seamus Wright, were living in the North, so hopefully that would be straightforward. On the issue of the disclosure of information, if other Government bodies or sections of the security forces are aware of information, we believe that it should be made available.

347. Mrs Patsy McAteer (WAVE Trauma Centre): I want to reiterate what Anne has said. A lot of time has passed for the families of the disappeared. We were all young when this situation began, and even I am getting older.

348. I would like to think that I will see the day when Seamus’s remains are returned to us. My father was not alive when Seamus disappeared, but my mother was. She watched and waited at the window for him to return. However, she died without getting to see him again. I would like to think that this process will be made as easy as possible for us, because we are not fit for any more hassle — we have had enough.

349. Mr O'Loan: Thank you for addressing the Committee today; I am sure that it was not easy for you. You are conferring a considerable benefit on the Committee, and on society as a whole, in dealing with this very difficult issue. I am very conscious of the huge ordeal that you have gone through over many years, and I am aware that the re-enactment of that ordeal in public is not an easy thing. From your submission, I am also aware that there are families who, for very good reasons, do not want to engage in this process. You made that clear, and we must be very conscious of their sensitivities.

350. I take on board Patsy's point that the process ought to be made as easy as possible for the families involved. I also take on board Anne's point about the fact that Seamus lived in France at the time of his disappearance. The circumstances surrounding each case are individual, but the particular circumstances surrounding Seamus's case are unique. The people who create the legislation must consider ease of process where such complications exist.

351. Your submission states:

"that in the event that one of the disappeared is located and their death has been registered on the Register for Presumption of Deaths, consideration needs to be given to how their death may be re-registered."

352. As I understand it, a process is in place that allows that to be done if someone is discovered to be alive after a presumption of death certificate has been awarded. I know these are sensitive areas in which we are treading, but are there some among the families of the disappeared who have hopes that their loved ones will be found alive?

353. Mrs Morgan: No.

354. Mr O'Loan: I am not clear about the meaning of that part of the submission.

355. Mrs Morgan: If we get the body back, we want consideration to be given to the re-registering of the death.

356. Ms Peake: It is about the process for registering deaths, and whether, as explained, bodies found in the South would still remain on the register of presumed deaths or whether they would be re-registered as having been found in those circumstances.

357. Mrs Morgan: Say, for example, the body that was found yesterday is that of Danny McIlhone, which I hope it is. If he had been placed on the register for deaths, his death must be re-registered, and the family provided with a death certificate. That is a process that that family would have to examine.

358. Mr O'Loan: I understand. Officials have told the Committee that there is a process for that. We will give further thought to that matter. You spoke about the important issue of disclosure of information, and said that there ought to be a duty on anyone or any organisation that has information about the disappeared to bring it before the courts.

359. I take it, therefore, that you are not content with indications that the Department will present a draft clause to the Committee that would allow the court to demand information from someone if it so chooses.

360. We are discussing a broader duty of disclosure that will mean that there is an immediate duty on anyone who has information — and who is aware that the case is going through the court — to come forward. Do you agree that that is what is required?

361. Ms Peake: That is correct. Anyone who has information relating to an issue that is before the court should be called on to provide evidence. That would make things easier for us.

362. Mr O'Loan: You said that any information held by the Independent Commission for the Location of Victims' Remains should be made available. As I understand it, people who provide information to that body are offered a degree of protection. We will have to consider whether that information can be passed to the court.

363. Ms Peake: If the Independent Commission for the Location of Victims' Remains has information to suggest that a person is dead, it should provide it. That is preferable to families having to find the proof and evidence that a person is dead. Families were concerned about information coming under a duty of disclosure, but the absence of any mandate for it to be provided to the independent commission. The families want the independent commission to work as fully as possible.

364. Mr O'Loan: It seems that the commission could hand over information that was not privileged or hand over relevant information, without declaring the source, in certain cases. Do you agree with that?

365. Ms Peake: I agree with that — providing that nothing is done to compromise the independent commission and its ultimate aim.

366. Mr O'Loan: I agree with that.

367. Mr Weir: I add my thanks to you for attending, and for your evidence. I appreciate that the majority of cases that are dealt with by the independent commission happened a long time ago, but not all, including, for example, the Lisa Dorrian case. Is the list of cases being dealt with set in stone, or can it be added to? Of course, it is hoped that there will not be any need to add cases.

368. The legislation deals with two different areas: first, the specific cases, which, in your case, are the disappeared; and secondly, the more general cases in which people go missing. Would the cases that are dealt with by the independent commission be ring-fenced if the legislation were amended to mention them specifically? Would such an amendment to the legislation mean that those cases could not be switched between the two areas covered by the legislation? If amendments or provisions were made for your cases, could they be defined sufficiently by way of the connection with the independent commission? Could it be catered for under that route?

369. Ms Peake: The independent commission examines all cases up to 1998; that does not include the cases of Lisa Dorrian or Gareth O'Connor, who was subsequently found. They would not be included in the cases covered by the independent commission.

370. Mr Weir: I am considering what routes can be taken, as part of the provisions. You referred to the domicile rule and queried whether a clause could be inserted that would allow for a rule to be waived in cases where there was a supporting letter from the independent commissioner, for instance.

371. It is most likely that the bodies — with one exception — are in the Republic of Ireland. Has your group had discussions with the Irish Government with regard to what registration procedures would be followed if any of the bodies were discovered in the Republic?

372. Ms Peake: We have talked to families whose loved ones have been discovered in the Republic of Ireland and who have experienced the process. We know what mechanisms are available.

373. Mr Weir: I appreciate that the matter is outside WAVE's remit. However, the Committee could, perhaps, ask the Department of Finance and Personnel whether it has consulted with the Republic of Ireland. The legislation is partly designed to minimise procedural difficulties and trauma for families, albeit to a small degree, given the deep hurt involved.

374. Mr Hamilton: Thank you for giving evidence to the Committee. As Declan said, I am sure that it is difficult, especially given this week's unfolding events in Wicklow, which bring the situation to the forefront of our minds.

375. The Bill's intention is to provide some closure for families. It is apparent from your evidence that obtaining closure is a severe problem. The loss of anyone in the Troubles is difficult, but it is particularly difficult for those who have been unable to bury their loved ones. I understand your pain.

376. Your responses to Declan and Peter touched on the jurisdictional problems. Seamus's case seems to pose a problem that the legislation might be unable to remedy easily. Your submission, and some of your comments, mentioned costs. In response, the Department said that legal aid could be available in cases that are taken to the High Court. Does that, in any way, ease concerns about cost or are you still concerned about the potential cost of a difficult and lengthy process that could involve registering and re-registering?

377. Mr Megraw: That probably does not ease concerns. As Anne said, we want, if possible, all the families to attend in the same day or two days. Some people might receive legal aid, and others might not. I am unsure how it will operate. However, we have already been through the process. It would be better if the Government handled the situation.

378. Mrs Morgan: There are only nine families, and, therefore, the Assembly could cover the costs in order to allow the process to proceed as easily as possible. As Kieran said, the majority of us would not receive legal aid anyway because we are siblings of our loved ones. The families should not have to pay.

379. Mr Hamilton: I take on board your point — the process of registering a death that you should not have had to register in the first place could, potentially, be a costly exercise.

380. Mrs Morgan: It is an emotive issue for the families of the disappeared. It is even emotive for me to attend this Committee meeting. It is too much to expect the families to initiate the process and go to solicitors' offices, and so on. I appreciate that it is important to include the disappeared in the legislation. However, the legislation must make the process easier for the families.

381. The situation would be completely different if the legislation simply referred to the disappeared as "the missing". If that were the case, we would not be here. We are a defined group, and because we are accepted as that defined group, we should not have to prove our legitimacy to the courts. The cost is an issue that the families will shun, because that is just another hurdle that they must overcome. Having to prove something, and then pay for it, can be very daunting in the legal world. Perhaps the Assembly could take care of the cost that would allow the families of the disappeared to receive the death certificates.

382. Mr Hamilton: I do not know how that issue could be resolved, but it is certainly a point that we will consider during our discussions with the Department. The very technical nature of this Bill does not match up to the raw, human side of things.

383. You raised concerns about the possible re-registration in the event of a body eventually being found. The Department pointed out that a cancellation of a registration in the presumed death register can only be done by going through the legal process again. However, the Department also provided a further explanation that suggests that all of the families of the disappeared would fit within the scope of the jurisdictional rules that are set out in the Bill. The Registrar General could make a note in the register of presumed deaths to the effect that the previous entry had been suspended. Does that help that situation in any way, or does it still present difficulties?

384. Mr Megraw: Who would have to make that application to the Registrar General? The legal process must be gone through again. If that could be done without having to go back through the legal process, then it might be helpful.

385. Ms Purvis: Thank you very much for attending and for giving evidence today. The Department claimed that a reason for introducing the Bill was to help the families, but — having listened to your evidence, and having studied the Bill's clauses — it seems that it will not help you in any practical sense. I tried to use the issues that you raised to evaluate whether there is some way that we can help to meet your specific needs.

386. Part of the Bill explains that people need to be domiciled in Northern Ireland or habitually resident in the preceding year. If the term "preceding year" were removed, and it was left as "habitually resident" in Northern Ireland, would that go some way towards helping your case?

387. Mrs Morgan: It would.

388. Ms Purvis: That is good. You already talked about the issue of legal aid. If a clause were included that suggested that the costs would be waived for the families involved — whom we would have to name — that could be a way of dealing with the costs that are involved.

389. Simon talked about the registration of deaths. The Department stated that the Registrar General will be able to make a note on the register of presumed deaths to explain that the entry has been superseded by the register of deaths. However, that only relates to a body found in Northern Ireland. Obviously, if the body is found in the Republic of Ireland, the death has to be registered in the Republic of Ireland.

390. Clause 5 of the Bill states that the entry in the register of presumed deaths can be cancelled only by the authority of the High Court. For ease of access, would it help the families if the Registrar General were to make the application to the High Court to have an entry cancelled, rather than the families having to go through that process again, if the body were to be found and registered in the Republic? That would mean that the families would not have to go through that process. The death will have been registered in the Republic of Ireland and, therefore, it will not need to be registered in the North. Would that help?

391. Mrs McAteer: I think that that would help. One has to be on income support to receive legal aid.

392. Ms Purvis: Some families may be working and not receiving income support, and they would not qualify for legal aid. As the Bill stands at the moment, is there anything else that would address your specific needs?



393. Ms Peake: The cost issue is important, as that is part of recognition and acknowledgement, and there is also the forensic process, which may run in parallel. Any help would be useful. One suggestion might be whether, within the Assembly, a special-measures mechanism could be established in respect of the memorial fund to assist families. As Mr Megraw said, very few parents are left, and the siblings will have to make the application. Any help for the families would be welcome.

394. The Chairperson: I am sure that it was difficult, but this has been a very interesting and helpful session. The Department is interested in this discussion and has been observing today's proceedings. As the meeting has been recorded by Hansard, does the Committee agree to forward the Hansard report to the Department in order to help convey the points that have been raised?

Members indicated assent.

395. On behalf of the Committee, I express our appreciation to the witnesses for attending today's meeting. I know that it has been difficult.

396. Dr Farry: Chairman, may I ask a question?

397. The Chairperson: I almost closed you out, Stephen.

398. Dr Farry: Coming before the Committee must have been an ordeal, and another hurdle to overcome in order to get the legislation right.

399. Clause 1 states that a person with a connection to the victim must make the application and, if that the person is deemed not to have a sufficient relationship, the High Court may refuse to take the matter forward. In the case of all of the disappeared, is someone still around who would be sufficiently close to make an application? Is there a case in any of the eight or nine victims' families where there is not such a person to take the matter forward?

400. Ms Peake: There are close family members, either brothers or sisters.

401. Dr Farry: What we are doing is different from other jurisdictions, bearing in mind that there is such a specific category in relation to the disappeared. It must also be borne in mind that the Commission has been set up through a treaty between the British and Irish Governments.

402. Do you agree that there is case for a provision in the legislation or, perhaps, in its explanatory notes, that defines the Independent Commission for the Location of Victims' Remains as a party that can take forward an application, rather than the families?

403. Mr Megraw: That is possible.

404. Mrs Morgan: That might help the situation.

405. Dr Farry: It is one exemption that could be made.

406. In respect of cases that occurred after 1998, particularly that of Lisa Dorrian — a case with which Peter and I are familiar, as representatives for North Down — and given the commission's current cut-off date of April 1998, which is considered to be a watershed because of the events that have happened since then, has there been any movement towards trying to extend the commission's remit? Are WAVE and the families happy for that to be brought about in order to

take into account cases that have occurred since 1998? Are those families comfortable for their loved ones' cases to come under the remit of the disappeared?

407. Ms Peake: Certainly, from a family's perspective, that would be important. However, the commission was established by special legislation that was passed by both Governments. We have been informed that that is, therefore, not possible. It is a legislative matter. The commission has been clear with us about its remit, the span of its work, and the time within which it must carry out its work in locations.

408. Dr Farry: That problem must, therefore, be sorted out by the two jurisdictions. The families would have no objection to that?

409. Mrs Morgan: The families have no objection. We met Lisa Dorrian's family and offered them our support because their situation is similar to ours, although theirs is more recent and appears to have involved the LVF. Although their situation is totally different, Lisa has still disappeared. As far as we are concerned, she has disappeared, regardless of the commission's remit. As Sandra said, Lisa is not included in its remit because she had not disappeared by 1998.

410. Dr Farry: In your presentation, you stated that, given that it is unlikely that there will be a dispute about what has happened, you seek assurance that matters will be dealt with in chambers as opposed to having to go through the full rigours of an opening hearing in court. Can you expand on that?

411. Mrs Morgan: We mentioned that matters may be dealt with in chambers. Apart from Kieran, the families are not sure what that means. Kieran has been in court before to try to obtain his brother's death certificate, which he was unable to do. If matters were dealt with in chambers, which are private, that would help the situation. The critical issue for us is the process that must occur before matters reach chambers. When we spoke to Neil Lamb —

412. Dr Farry: He is behind you.

413. The Chairperson: He is paying close attention.

414. Mrs Morgan: He is my shadow. Neil explained the judicial process whereby we would have to obtain affidavits of various forms in order to justify our cases. After we spoke to Neil, I was still of the opinion that progress could be made to make the process easier. I understand that, under the legal remit, it must be done that way. However, the families need sensitivity to be shown with regard to their ability to acquire affidavits. A process must be put in place that cushions and supports us so that we are not caused any more trauma than that with which we live at present. That is what we seek.

415. The Chairperson: The Executive are trying to establish a process that is free from inconsistency and ambiguity. That brings with it the price of having to engage with the system and step through the legal and judicial process. However, the aim is to provide a sense of closure and a definitive outcome, which requires engagement with the process — you and Kieran must know well how difficult that can be. People want the outcome to be accessible, cost free and transparent. Those are guiding principles, but there are some unavoidable processes that must be gone through to give you the answers that you need.

416. Mrs Morgan: The Bill makes reference to people's insurance policies. However, when our Seamus disappeared, we received no insurance payout or property. The families of the disappeared are coming from a purely humane angle, not a financial one.

417. The Chairperson: That is a given.

418. Mrs Morgan: There could be a financial aspect for the families of missing persons, which is fine. For example, a mother who has a missing husband.

419. We belong to the disappeared group, and the Northern Ireland Assembly has accepted that our relatives are disappeared, rather than missing. The preamble to the Presumption of Death Bill acknowledges our group, but there should be further clarification that we exist as a defined group.

420. The Chairperson: The Committee has agreed to send the Hansard report of the meeting to the Department, and we will discuss this subject on 26 November 2008 when we consider the evidence that has been gathered. Thank you for coming to the meeting.

### **3 December 2008**

Members present for all or part of the proceedings:

Mr Mitchel McLaughlin (Chairperson)

Dr Stephen Farry

Mr Fra McCann

Ms Jennifer McCann

Mr Adrian McQuillan

Mr Declan O'Loan

Mr Ian Paisley Jnr

Ms Dawn Purvis

Mr Peter Weir

Witnesses:

Mr Neil Lambe  
Mr Oswyn Paulin     Department of Finance and Personnel

421. The Chairperson (Mr McLaughlin): The purpose of the session is to recap on the issues arising from the Committee Stage of evidence and the Department's depositions. The intention is to identify any residual issues that require clarification or resolution between now and the formal clause-by-clause consideration of the Bill, which is scheduled for next week's meeting. Officials from the Department of Finance and Personnel (DFP) will summarise, and outline the Department's position on, each issue, after which members will respond. We will go through the issues one by one.

422. Neil Lambe is a principal legal officer in the civil law reform division of the Departmental Solicitor's Office, and Oswyn Paulin is the departmental solicitor and head of the Government Legal Service. I welcome you back to the Committee; we are old friends by this stage.

423. As Hansard is recording the session, mobile telephones must be completely switched off. I invite Neil or Oswyn to take the Committee through the issues. Members may wish to ask questions or have further discussion on particular issues.

424. Mr Oswyn Paulin (Department of Finance and Personnel): I hope to dispense with any introductory comments and, if the Committee is content, I will move straight to the consideration of the issues arising from the evidence sessions. As we go through the table of issues drawn up by the Committee, I will also mention, as appropriate, those clauses to which the Department

intends to propose amendments. It is, therefore, a question of going through the Bill clause by clause following the table, but also introducing items on which the Department has proposals.

425. The Chairperson: That is satisfactory.

426. Mr Paulin: The first of several issues relating to clause 1 is jurisdictional. Concern has been expressed about the scope of the rules relating to domiciled and habitual residents. The Department is considering recommending to the Minister an additional third jurisdictional rule. Under our proposal, the High Court would have jurisdiction to hear cases in which the applicant is a close relative of a victim of violence within the meaning of the Northern Ireland (Location of Victims' Remains) Act 1999. That, in effect, applies to the disappeared, who would have a specific entitlement and jurisdiction under that provision. An amendment along those lines would mean that the amendment suggested by Ms Purvis would not be necessary. That is an attempt to deal with the first three items on the Committee's list.

427. Ms Purvis: Will you explain that again?

428. Mr Paulin: Our proposed suggestion to the Minister is that there should be a third basis for jurisdiction whereby the High Court would have jurisdiction to hear cases where the applicant is a close relative of a victim of violence within the meaning of the Northern Ireland (Location of Victims' Remains) Act 1999, which implemented the agreement between the two Governments.

429. The next point relates to cohabitants, which was raised by the Human Rights Commission. For reasons that the Department has previously explained, we do not consider that the amended jurisdictional rules should address the issue of cohabitants. The legal regime that applies to cohabiting couples is under review in England and Wales, and the Department is monitoring developments there. We do not want to do something that is peculiar to this piece of legislation, because, if a general proposal for change is introduced, we may have to change that along with a lot of other pieces of legislation. It would be better to look and see what comes out of that review, and then to look at the issue again. The Act could then be amended if necessary, but there may be a recommendation for no change.

430. The Committee raised the next issue, which relates to sufficient interest. We have discussed the matter previously. The Committee asked how the courts interpret sufficient interest. DFP's response of 3 October provided examples of how the courts have interpreted that phrase in other contexts, principally in nullity applications. As the Committee may know, nullity applies to the dissolution of a marriage on the basis that it is invalid. Ordinarily, people who are parties to the purported marriage would be the normal parties, but those cases gave all sorts of examples of people who were not parties to the marriage who could apply for it to be annulled. However, they must have some interest in the outcome, and those cases give examples of how sufficient interest has been examined by the court. We gave other examples from judicial review. Therefore, it is our view that the courts are familiar with the formula. It is a term that has a wide meaning, but, nonetheless, it greatly limits those applicants who can apply. It gives the courts a fair degree of discretion, but they are well used to exercising that discretion in an appropriate manner.

431. Dr Farry: Given the comments that we heard earlier about the special recognition of the category of the disappeared, I wish to make a relevant point. Is it possible to write into the Bill to treat the Independent Commission for the Location of Victims' Remains as a body with sufficient interest to take a case, given that some of the relatives of the disappeared have a certain reluctance to go through that process? Is it possible for the commission to be recognised as a body with sufficient interest to initiate those proceedings? I presume that the Act would not necessarily need to be amended, because you are not actually granting a duty on the commission, but rather simply enabling it to do that in this piece of legislation?

432. Mr Paulin: That is an interesting question. First, would the commission have sufficient interest to bring proceedings? Secondly, if it does not have sufficient interest, how do we change the legislation? Do we have the power to change the legislation to enable it to do so, and how would it be done?

433. Dr Farry: It is, obviously, more difficult if one has to go back and amend the 1999 legislation in two different jurisdictions, but would it be possible to grant the commission that standing in this Bill?

434. Mr Neil Lambe (Department of Finance and Personnel): The difficulty that we might encounter is that the Bill could say that the independent commission is to be regarded as having sufficient interest to make an application under clause 1, but unless the function of the commission as established under the Northern Ireland (Location of Victims' Remains) Act 1999 allows it to make applications to the court, then whatever we do in this Bill might not then enable the commission to make an application. What the commission can and cannot do is prescribed by its governing statute.

435. Mr Weir: I understand that. None of us has the governing statute to hand. I wonder if it is possible to find out whether the commission would have that power. To return to Stephen Farry's comment, there is absolutely no point in clearing that hurdle if we immediately run into a brick wall because the commission does not have the necessary power. Could the Committee be sent some information on that?

436. The Chairperson: It would be helpful to get a quick turnaround on that information, and on any other information that we might request, because the Committee must prepare for next Wednesday's meeting. Members would like to get a response by Monday in order to be able to prepare for that meeting.

437. Mr Paulin: We could give an off-the-cuff response now if we had the legislation in front of us, but it would be better if we wrote to the Committee.

438. The Chairperson: Working to Monday would be best. The response would then be authoritative, and one on which the Committee could depend for the clause-by-clause scrutiny on Wednesday. Is that OK?

439. Mr Paulin: We are happy to do that.

440. The Chairperson: Thank you.

441. Mr Paulin: The next question is whether the period of seven years, which is mentioned in clause 1, is too long. Again, I think that we discussed that earlier. The Department believes that the periods of time set out in the Bill are appropriate at this stage. The Bill provides for a power to amend those time periods, which is set out in clause 12. That provides the Department with the necessary flexibility to respond to changes of opinion at domestic and international level.

442. Mr O'Loan: Does that mean that further primary legislation would not be required in order to alter the seven-year period?

443. Mr Paulin: No, it would not.

444. The Chairperson: The power to amend is built into the Bill.

445. Dr Farry: Richey Edwards, the guitarist from the Manic Street Preachers who disappeared seven years ago, was presumed dead only last week. It was fairly obvious that he was gone, but the family had to wait that seven-year period.

446. Mr Paulin: Sorry, who?

447. Dr Farry: Richey Edwards, the guitarist from the Manic Street Preachers.

448. Mr Paulin: Oh, yes. Well, under this legislation, I believe, the family might have been able to declare him presumed dead a bit earlier.

449. Mr Lambe: In all those cases, it depends on when the family wishes to pursue the issue and make an application to a court.

450. The Chairperson: That was an interesting insight into Stephen's back catalogue. [Laughter.]

451. Mr Paulin: There is a vacancy. [Laughter.]

452. The next issue was the application process. I think it was WAVE that raised that issue. The Bill and the new court rules will endeavour to make the application process as straightforward as possible. However, all High Court proceedings necessarily involve a degree of formality in order to maintain the integrity of the court process. Dr Farry and the families raised questions as to the role that the Independent Commission for the Location of Victims' Remains may choose to play. We discussed that matter already, and we will get back to the Committee on that. That is what I intended to say about the application process, but I am happy to answer any questions.

453. Mr O'Loan: Are costs addressed anywhere? What level of costs might be involved in a straightforward case, if there is such a thing?

454. Mr Paulin: The amount that solicitors charge would be very much up to individual solicitors. First, the question is whether they would charge.

455. Solicitors and barristers will work for nothing when there is a particularly deserving case and where there is no obvious method of funding.

456. However, we cannot say what the cost would be because we do not know the amount of time involved or what rates would be charged. It is up to individual practitioners in private practices to decide what rates they charge.

457. There are no issues arising in respect of clauses 2 to 5. Clauses 6 and 7 deal with capital sums and annuities, and in our briefing to the Committee on 12 September, we indicated that we intend to table amendments to both clauses to ensure that the obligations to repay capital sums, or take out insurance in respect of the repayment of those sums, does not extend to capital sums paid out by insurers in the form of annuities or other periodical payments. That would bring the insurance provisions into line with the corresponding Scottish legislation.

458. Ms Purvis: I think that the representatives from Wave Trauma Centre raised the issue of making a variation to the register — would that come in under variation orders?

459. Mr Paulin: We were going to deal with that matter later, as it relates to the registration process.

460. The Chairperson: OK; we can come back to that.

461. Mr Paulin: We move to clause 7 and insurance costs. In an earlier briefing paper, the Department indicated that the insurance industry was unable to provide details of likely premium rates to be paid in cases where the Bill, or an insurer, imposes an obligation on a person to take out insurance to cover the possibility that the missing person may not be dead. The clarification of the treatment of annuities will reduce the instances when insurance may be required. It is important to bear in mind that the court retains the power to disapply the requirement in certain circumstances, so it is not always the case that there will be a requirement for insurance.

462. Clause 8 deals with supplementary provisions in court rules. The Human Rights Commission had some concerns about the advertising of notices of intention to make an application and other issues regarding who would receive notice of the making of an application under the Bill. Clause 8 makes the necessary provision to allow rules of court to prescribe who is to receive automatic notification of proceedings in respect of a missing person, as well as giving the High Court the power to dispense with the requirement to place advertisements in the local media.

463. Therefore, the High Court would have the power to decide whether there is a requirement for advertising in particular cases. That is the general formula in existing statutory provision in relation to declarations on family matters. Analogous litigation includes the provision for advertising but also allows the courts to have discretion about whether it is needed in particular cases.

464. Clause 9 relates to rules of court and the Attorney General. We do not propose to amend clause 9, but it is possible that through clause 19, which is the commencement clause, the rule-making power in clause 9(1) will come into force one month after the Bill receives Royal Assent. That will allow rules of court to be made quickly.

465. There are no issues arising in clause 10, and cost of proceedings has been dealt with in earlier discussions. There are no issues arising in clauses 12 to 15.

466. We indicated earlier that we were considering replacing the definition of “insurer” in clause 16(2) and 16(3) of the Bill with a simpler definition that is not tied to the regulatory framework, and we are making progress on that. There are no issues arising in clauses 17 and 18 and I have referred already to a possible change to clause 19, which deals with commencement provisions.

467. That leads us to clause 20, and I understand that there are no issues arising around that.

468. Schedule 1 is concerned with the regulation provisions. Previous briefing papers, which DFP provided to the Committee, addressed several issues concerning the registration powers that are available to the Registrar General under the Births and Deaths Registration (Northern Ireland) Order 1976 and under this Bill. The evidence made it clear that the Registrar General for Northern Ireland has limited powers when death occurs, or is registered, outside Northern Ireland. His primary responsibility relates to Northern Ireland. The Department sees no need to alter the existing civil registration framework to provide for registration in Northern Ireland of vital events — which is the phraseology for births and deaths — that are recorded by the registration authorities of other countries.

469. In our view it would not be appropriate for the Bill to require the Registrar General to apply to the High Court for a variation order when the remains of a missing person are found and registered outside Northern Ireland.

470. Ms Purvis: Who would apply for that variation order?

471. Mr Paulin: We are talking about the situation in which a person is registered as presumed dead in Northern Ireland, and then their body is found outside Northern Ireland. The question is;

should a variation be made to the register of presumed deaths? My understanding is that rather than a variation of the register, it should be noted on the register that that has occurred.

472. Ms Purvis: How would that be done?

473. Mr Paulin: That would be done by the registrar if the information comes to him. If, for example, someone writes to him, he would make the necessary enquiries.

474. Ms Purvis: An organisation such as the Independent Commission for the Location of Victims' Remains could write to the Registrar General if it had reason to believe that a body had been located and registered dead in, for example, the Republic of Ireland. The Registrar General could then make a note in the register of presumed deaths.

475. Mr Lambe: In schedule 1 to the Bill, the Registrar General is given the power to annotate the register. That power is not specified or limited: the schedule states that the Registrar General "may" annotate the register; it is entirely up to the Registrar General.

476. The Chairperson: It is interesting that the word "may" is used, and that it is not a requirement that a note be attached to the entry.

477. Ms Purvis: Being conscious of the needs of the families, I wonder whether a note, rather than the cancellation of the register, is sufficient. The families have expressed concern that they do not want their relatives to be classed as missing; they want them to be classed as disappeared.

478. Mr Lambe: When a body is located, whether in the Republic of Ireland, or in France, as in the case of Anne Morgan's brother, the death would be registered there, and a death certificate from those jurisdictions would be available to the families.

479. Ms Purvis: I understand that.

480. Mr Lambe: The purpose is simply for the Registrar General to annotate the entry in the register of presumed deaths — to make it clear that the entry has been superseded by the recording of the death by a registration service in another jurisdiction.

481. Ms Purvis: I take your point, Chairman, on the use of the word "may".

482. The Chairperson: From the evidence we have heard, it seems to me that families prefer that the annotation should follow the locating of the remains in another jurisdiction and the issuing of a death certificate. Otherwise, the existing entry would remain.

483. The families are looking for assurance that on notification that a death certificate has been issued, albeit from another jurisdiction, the Registrar General would automatically attach a note and the record would be corrected. That was a particularly important issue to the families.

484. Mr Lambe: It is likely that the Registrar General would do that when it is brought to his attention. If the Bill were to state that the Registrar General "must" make a note, it would be necessary to specify the triggers for that requirement. For example, should the Bill specify that it must be brought to his attention by the coronial authorities in the Republic of Ireland or by the independent commission? This is an occasion on which, if information comes to light, the Registrar General will exercise his discretion to annotate the register, and I have cleared, with the Registrar General, my understanding of how he would view the matter.



485. Dr Farry: I, too, am concerned about the difference between the words “may” and “shall”, and I appreciate the difficulties that you have outlined. At some point, the Committee will consider a civil registration Bill. Could the issue be included in that legislation if the Committee flags it up now?

486. Mr Lambe: Certainly, it would be a more appropriate forum in which to discuss the matter — within the general constraints in which civil registration procedures operate.

487. Dr Farry: That might be a way to solve this particular problem.

488. The Chairperson: I am not entirely convinced that doing so would satisfy the representation that we heard. The trigger should be as simple as possible. Some families may wish to follow the matter through to its ultimate conclusion, whereas others might not. Is it not straightforward to define the trigger as the production of a death certificate and use the word “shall” with reference to the Registrar General’s duty? The families who decide to follow through would produce a death certificate as evidence, which the Registrar General would accept as the basis for annotating the record.

489. Mr Paulin: In other words, are you suggesting wording such as: on the production of a death certificate, or analogous document, from any jurisdiction in the world, an entry in the register of presumed deaths shall be cancelled by the Registrar General? We would like to reflect on that, because it may be — although I suspect that it is not the case — that registers of death in other jurisdictions include presumed deaths. That might produce the odd situation whereby a person could be presumed dead in two different jurisdictions. I am unsure as to whether one presumption could be used to cancel an entry in another jurisdiction.

490. The Chairperson: Oswyn; your example goes to the furthest extreme of what I was suggesting. I am reflecting the views of the delegation to the best of my ability. It seemed to me that it was important for some of the families to resolve the issue subsequent to the recovery of the remains and the issuing of a death certificate. I got the impression that an annotation to the record would be sufficient. I might be misrepresenting the views of the families, but I believe that that would alleviate their concerns.

491. Mr Paulin: I assume that annotation of the record would mean that no certificate of presumed death would be issued thereafter. In other words, the Registrar General would, if asked for a certificate —

492. The Chairperson: A cancellation —

493. Mr Paulin: Well, he would refuse to issue a certificate on the basis that the annotation indicated that the presumption of death, on which the entry was made, was no longer sound.

494. Mr Lambe: Or that a certificate would be issued with the annotation marked on it.

495. The Chairperson: We probably cannot resolve the issue today. Will you consider the matter and return to the Committee?

496. Mr Paulin: We are happy to do so.

497. Dr Farry: The annotation process, as it stands, does not apply exclusively to the disappeared: it applies in any situation where a person is recorded as presumed dead in Northern Ireland and when his or her body is subsequently located overseas.

498. Mr Paulin: Also, the provision was sufficiently wide to include other issues that would arise, subsequent to the presumption of death being made, which show that there was an error in the entry.

499. No issues arose concerning schedules 2 and 3.

500. There are other issues that do not fall so neatly into the existing provisions. One of those was the inclusion of a separate category for the disappeared, which was requested by various organisations, including the Wave Trauma Centre. It was included in the list of issues that the Committee sent to the Department. We have attempted to address the issue in the proposed amendment earlier in the Bill as regards who may apply, giving particular status to applications falling into the category of "the disappeared".

501. Dr Farry mentioned recent cases; for example, the Lisa Dorrian case. We think that it would be a matter for the Parliaments of the UK and the Republic of Ireland to legislate to include the cases of people who went missing after April 1998 in the remit of the Independent Commission for the Location of Victims' Remains.

502. Dr Farry: I accept that that is where the responsibility lies. Am I right to presume that the Dorrian family falls under the general scope of the Bill?

503. Mr Paulin: Yes.

504. The next issue that the Committee raised was on disclosure of information and disclosure powers. The briefing papers provided by the Department explain the purpose of providing the High Court with the power to order someone who is not a party to the proceedings to disclose information to the court. Such a power should only be used when necessary, so that the High Court is able to dispose of the application before it. It is not designed to enable the court to hold an investigation into the circumstances surrounding the disappearance of a missing person, especially in cases where there is clear evidence that the missing person is dead. For example, we do not expect the High Court to consider it necessary to order disclosure where the application concerned one of the disappeared.

505. We consider that a discretionary power is preferable to the imposition of a general duty of disclosure on any person with information about the circumstances surrounding the disappearance of a missing person. A duty of disclosure could result in the provision of large quantities of information to the court, which could in no way assist it in making a decision on an application. Our view is that that would place an unnecessary burden on those providing the information and an unnecessary burden on the court in considering that information.

506. Mr O'Loan: I have raised this issue on several occasions. Would you provide, in writing, the response that you have just given, because it is not included as a departmental comment? Why is there such resistance to including what is such an obvious provision? The Bill has been heavily modelled on Scottish legislation, which — as the Committee has observed — contains this requirement, and it does not seem to cause any undue burden in Scotland.

507. Mr Lambe: When looking at the Scottish legislation, I made enquiries of colleagues in the Scottish courts administration and the Scottish General Register Office to discover what information they had about the operation of their 1977 Act. They informed me that no information had ever been disclosed as a result of the duty of disclosure that is imposed by the Scottish Act. It seemed to be a redundant provision in the Scottish Act. We began to consider what form of disclosure provision might work better and might lead to disclosure of evidence or information in certain circumstances.

508. The consultation paper, which was published in January 2008, explained that there is a duty under the Scottish Act but that it does not seem to produce anything, because people are not aware that an application has been made to the Scottish courts. Therefore, we sought views on whether it would be better to give the High Court, when it is seized of a case before it, the power to make an order for disclosure in certain circumstances. The responses, albeit limited, to the consultation paper were that giving the High Court a power to order disclosure was preferable to imposing what amounts to a general duty on all of the world to come forward with information.

509. Mr O'Loan: I wish to make a correction to that. My recollection is that there were a significant number of responses to the consultation. The judiciary, above all, said that there ought to be a duty of disclosure. I am open to being corrected on that.

510. Mr Paulin: That is what we are saying. During the consultation process, we raised issue of disclosure and invited responses on it. There were a number of responses on that point saying that there should be —

511. Mr O'Loan: An open duty to disclose —

512. Mr Paulin: No, the judiciary's response was fairly brief.

513. Mr Lambe: I correct myself; Mr O'Loan is right.

514. The Chairperson: Do you have the paperwork to confirm that?

515. Mr O'Loan: Neil is confirming that I am right.

516. Mr Lambe: I am confusing the situation with my subsequent thoughts on the issue. The consultation did propose a duty to disclose, but, subsequently, when considering the issue, it appeared to us that a targeted, discretionary power in the High Court would be preferable, given the fact that the Scottish duty of disclosure has not produced information to the Scottish courts.

517. Mr O'Loan: I think that it will be for the Committee to reflect on what is eventually offered. Obviously, we will bear in mind the point that has just been raised about the opinions that came out of the consultation, including those of the judiciary. Northern Ireland's particular circumstances relating to the issue of the disappeared create a situation that is distinct here.

518. For a court to proactively request information would require some foreknowledge or awareness someone exists who might have information. However, if there were a duty to disclose, the onus would be placed on bodies, such as the police or security services, which would be aware that proceedings were going through the courts and that they had information which they would be under a duty to disclose. The families of the disappeared have asked for that; I asked for that, and I think that that is the better approach. The duty of disclosure should be made available: that would allow us to see whether the same outcome would happen here as in Scotland.

519. Mr Paisley Jnr: Are the witnesses saying that the effect of the duty of disclosure in Scotland has been nil?

520. Mr Lambe: Colleagues in Scottish courts could not recall information being provided to the court on foot of a general duty of disclosure that is contained in the Scottish Act.

521. Mr O'Loan: I am saying that, because of the particular circumstance in relation to the disappeared, and the long history of investigation, there could well be —

522. Mr Paisley Jnr: I understand that point. However, I am interested in how effective legislation will be. If it is effective and it draws something, so be it; however, if it is a principle, that is a different matter. Has the effect in Scotland been nil?

523. The Chairperson: In addition to both the broad proposition that Declan makes and the point made by Ian, are people concerned about cutting across the remit and ability of the independent commission to do its work?

524. Mr Paulin: There is that. Furthermore, what is the function of the High Court in dealing with those cases? Is it to hold an inquiry into a number of deaths, or is it to provide a means by which deaths may be registered and the legal consequences of death being allowed to ensue, with respect to dissolution of —

525. The Chairperson: As opposed, for example, to criminal proceedings.

526. Mr Paulin: That is another matter entirely. As the Committee knows, those are reserved matters and are not for the Northern Ireland Assembly.

527. The Chairperson: For the time being — at any rate.

528. Mr Paulin: We have approached this on the basis that the court, where necessary, should have the power to order disclosure rather than hold a free-ranging inquiry.

529. The Chairperson: Declan, do you want to make a particular proposal or suggestion?

530. Mr O'Loan: I will express my view when the time comes — that is not what we are doing at the moment: we are just receiving evidence.

531. The Chairperson: I ask the witnesses to reflect on this discussion and share any additional considerations with the Committee by Monday.

532. Mr O'Loan: I will make it absolutely clear when we are presenting our views on this: I want the Committee to present the view that it will be seeking a proactive clause.

533. Dr Farry: From what sample size is the conclusion being drawn that the Scottish approach is redundant? How many cases have been presented in Scotland under the Act? The legislation does not seem to have been used frequently, and I am concerned lest the conclusions being drawn are premature.

534. Mr Lambe: In the past couple of years, there have been roughly five declarations of presumed death issued per year. Going back further, into the 1980s, just after the Scottish Act was brought into force, there were perhaps only two declarations issued per year. In the past couple of years, the average has been five.

535. Dr Farry: I am cautious about making general assumptions and drawing conclusions from such a small number.

536. Mr Weir: Against that, it has been the practice in Scotland for roughly 30 years. I appreciate the differences between Scotland and Northern Ireland, but, over that period, the annual

average in Scotland has varied from two to five, which makes a total of roughly 100 cases. Is that assumption reasonable?

537. Mr Paulin: We turn to the issue of the disclosure power reaching outside the United Kingdom. In a previous briefing paper, the Department explained the territorial limits on the jurisdiction of the courts in Northern Ireland to enforce orders abroad. Mechanisms exist that allow for taking evidence abroad, but those largely depend on information being disclosed on a voluntary, rather than compulsory, basis.

538. The Human Rights Commission raised the issue of privacy of proceedings. The Department's written briefings for the Committee explain that the manner in which the High Court conducts cases is largely a matter for the courts. The courts in Northern Ireland are experienced in handling sensitive information and in conducting proceedings in a manner which attempts to minimise distress to applicants and others involved in a case. The court will carefully balance competing arguments in favour of privacy against the general rule that proceedings should be conducted in open court and in a transparent manner.

539. By allowing the court to hear all or part of any proceedings in private, the Bill gives the court the maximum flexibility to decide, on a case-by-case basis, how best to conduct the particular case before it.

540. Mr O'Loan: On the issue of disclosure, will the answer that was given be provided in writing?

541. The Chairperson: Yes.

542. Mr Paulin: The Bill has now been covered, subject to whether the Committee has any other questions.

543. The Chairperson: Are Members agreed that the matter has been covered?

Members indicated assent.

544. The Chairperson: I thank Neil and Oswyn for their assistance: they will come back to us on a couple of issues. A quick turnaround would be most appreciated, as we will attempt to proceed to clause-by-clause scrutiny of the Bill at next week's meeting. Thank you.

## **10 December 2008**

Members present for all or part of the proceedings:

Mr Mitchel McLaughlin (Chairperson)

Dr Stephen Farry

Mr Fra McCann

Ms Jennifer McCann

Mr Declan O'Loan

Mr Ian Paisley Jnr

Ms Dawn Purvis

Mr Peter Weir

Witnesses:

Mr Neil Lambe    Department of Finance  
Mr Oswyn Paulin   and Personnel

545. The Chairperson (Mr McLaughlin): The next item on the agenda is the Committee's clause-by-clause scrutiny of the Presumption of Death Bill. We will again hear evidence from Oswyn Paulin, the departmental solicitor and head of the Government Legal Service, and Neil Lambe, principal legal officer in the civil law reform division of the Departmental Solicitor's Office. I note that they arrived early. I refer members to the Department's response to the issues that were raised at last week's meeting and the secretariat briefing paper.

546. The public gallery is quite full. Hansard is recording this session, and I remind everyone that all mobiles telephones must be switched off completely to avoid any interference with the sound.

547. The best approach might be if, on a clause-by-clause basis, I ask the Committee Clerk to talk to the secretariat paper. I ask members to consider each clause in conjunction with the related explanatory paragraphs in the secretariat paper. As we consider each clause we will ask whether any further clarification is required from Oswyn or Neil, and then I will put the question on a clause-by-clause basis. The Committee Clerk will now say a few words about the secretariat paper.

548. The Committee Clerk: The paper summarises briefly, clause by clause, the key issues that arose from the evidence sessions. There are a number of potential amendments against some of the clauses. The DFP officials are here, and members may wish to get any clarity that they require at this point. This is the last formal occasion to consider the Bill. The Committee report must be drafted after this session, and that draft will then be considered on 7 January 2009. It must be agreed by 14 January and laid before the Assembly by 16 January at the latest.

549. The paper briefly summarises the key issues arising in relation to each clause. It is not definitive; the table of issues that members received last week was a much more detailed document and covered all the issues, but this is just a summary.

550. The Chairperson: I know that the Department has taken account of the discussion last week. Oswyn and Neil, have you any comments initially, or will we simply deal with each issue as we come to it?

551. Mr Oswyn Paulin (Department of Finance and Personnel): We have no introductory comments.

552. The Chairperson: We will proceed to discussing the Bill on a clause-by-clause basis, and members will have an opportunity to request any further clarification or to make a comment.

Clause 1 (Declarations of presumed death)

553. The Chairperson: Members should take a moment to read through that clause, along with the relevant explanatory section of the secretariat paper, and I will then ask whether there are any issues arising.

554. Ms Purvis: I would like clarification that the additional third jurisdictional rule will be included in the clause, as we discussed last week.

555. Mr Neil Lambe (Department of Finance and Personnel): Yes; subject to the necessary consent of the Executive, we propose to table a third jurisdictional rule, which would become clause 1(2)(c).

556. The Chairperson: If there are no other indications, I will put the question.

557. Mr O'Loan: Are we agreeing the Committee's report now? What is the process here?

558. The Chairperson: We are discussing the Bill clause by clause; we are now dealing with clause 1. If you are not content that you have read the explanatory section on clause 1 you should take the time to do so. It is important that people understand.

559. Mr O'Loan: What are we doing differently, or extra, on 7 January?

560. The Committee Clerk: The report will simply reflect all of the issues that arose during the evidence sessions, the response of the Department to each issue, and the outcome of the clause-by-clause consideration. The report will be commentary on all of that, and will detail any proposed amendments.

561. Mr O'Loan: This meeting, here and now, is our key decision time as to the opinion that the Committee will offer on the Bill. Is that correct?

562. The Chairperson: Yes.

563. Mr O'Loan: Is it usual to do that in the presence of the departmental officials?

564. The Chairperson: I am assured that it is. The question did not occur to me prior to the meeting, but I am sure that it is usual. This is for clarification.

565. Mr O'Loan: Is the Committee in open session?

566. The Chairperson: Yes. The meeting is being recorded by Hansard.

567. Mr O'Loan: Is it usual to agree a report in open session?

568. The Committee Clerk: The evidence and proceedings on primary legislation should be covered in open session.

569. According to precedent, Committees' consideration of reports, such as inquiry reports, take place in closed session. The overriding rule is that Committees' consideration of Bills take place in open session.

570. The Chairperson: Several amendments have been accepted. We are reading down to point 13 on the briefing paper. Do members have any objections or points to raise?

571. Question, That the Committee is content with the clause, subject to the Committee being satisfied with the wording of the Department's proposed amendment, put and agreed to.

Clause 1, subject to the Committee being satisfied with the wording of the Department's proposed amendment, agreed to.

Clauses 2 to 5 agreed to.

Clause 6 (Effect on property rights of variation order)

572. The Chairperson: I will give members time to read the short paragraph on the proposed amendment in the briefing paper.

573. Question, That the Committee is content with the clause, subject to the Committee being satisfied with the wording of the Department's proposed amendment, put and agreed to.

Clause 6, subject to the Committee being satisfied with the wording of the Department's proposed amendment, agreed to.

Clause 7 (Insurance against claims)

574. The Chairperson: I will give members a moment to read the short paragraph on the proposed amendments in the briefing paper.

575. Question, That the Committee is content with the clause, subject to the Committee being satisfied with the wording of the Department's proposed amendment, put and agreed to.

Clause 7, subject to the Committee being satisfied with the wording of the Department's proposed amendment, agreed to.

Clauses 8 to 10 agreed to.

New Clause (Disclosure of information)

576. The Chairperson: A new clause on the disclosure of information must be inserted. I will give members a moment to read the briefing paper. I will also invite the officials to explain the clause, if that will help.

577. Dr Farry: The High Court will have the ability to order someone to disclose information. In the event that the person does not disclose that information, what is the recourse open to the court with regard to imposing a penalty? If a criminal penalty is to be imposed, do we need permission from the Secretary of State to create such a penalty?

578. Given that we are only a devolved Assembly, can this legislation bind bodies and institutions that are not part of the Northern Ireland devolved settlement?

579. Mr Paisley Jnr: On the back of the previous question, would that be a civil penalty or a criminal penalty?

580. Mr Paulin: My understanding is that it would follow the rules that apply in third-party disclosure in general, so it would be a contempt of court and it would proceed through the court, presumably at the instance of the Attorney General.

581. Dr Farry: There is no new offence being created then. It is simply a wider interpretation of the existing issue of criminal contempt of court.

582. Mr Paulin: There are two types of contempt of court — civil and criminal.

583. Dr Farry: Will this be civil or criminal contempt?

584. Mr Paulin: I assume that it would be civil contempt.



585. Mr Lambe: It is likely to be civil contempt of court. We were content to rely on the general law on contempt, rather than to create a new criminal offence.

586. Dr Farry: Does the scope of any requirement to disclose that information simply apply to institutions that are under the control of the Northern Ireland devolved settlement, or can it apply to non-devolved bodies?

587. Mr Paulin: The intention is that it will apply to both sectors.

588. Dr Farry: Do we have the capacity to deliver this piece of devolved legislation?

589. Mr Paulin: There are two aspects to that. First, the High Court and its powers are not devolved, so the Secretary of State's consent is required in respect of that. Secondly, as the new clause was not in the original Bill that was laid before the Assembly, we will have to go back to the Secretary of State and get consent in relation to it. The consent would cover the devolved and non-devolved sectors with regard to holding the documents, in addition to the powers of the court. In both aspects, the Secretary of State's consent would be sought.

590. The Chairperson: Before I invite any further questions, it might be helpful if Neil wishes to elaborate further on the matter, especially given that this is a new clause, which arose from the discussions that we had last week. If you give us a broad outline, it might anticipate or inform some of members' questions.

591. Mr Lambe: We also made clear that subsection 6 of the new clause as it is currently drafted binds the Crown. That statement coupled with the Secretary of State's consent that we hope to obtain will mean that UK-wide Departments of State, for example, would be bound by any order of the High Court to disclose information to it.

592. Mr O'Loan: As I have said before, I am very concerned about the new clause. I am supportive that the High Court would have the right to order information to be given to it, but I have argued before and I will continue to argue for a much stronger clause that imposes a general duty on anyone who has knowledge about the possible death of someone to bring that to the court if they know that the court is looking at that matter.

593. I refer to the answer which the departmental officials gave last week, and which they have now given us in writing: The second paragraph, on this point, reads:

"The Department considers that discretionary power as preferable" —

594. I am sure that the word "as" is intended to be "is" —

"to the imposition of a general duty of disclosure on any person with information about the circumstances surrounding the disappearance of the missing person. A duty of disclosure could result in the provision of large quantities of information to the Court, which could in no way assist it making a decision on an application. That would place an unnecessary burden on those who provided information to the court as well as an unnecessary burden on the Court in its consideration of that information."

595. I find those statements very surprising. I am seeking a requirement of disclosure pertinent to the decision that the court is making, which is whether the person can be presumed to be dead, and not information about anything else. Therefore, it would only put a duty on persons who had particular information relating to that issue only to provide that to the court. It would not require handing over vast amounts of documentation.

596. The suggestion that there could be a considerable amount of information to be handed over is, in itself, a concession from the officials that such pertinent information could exist. I am not persuaded of the point of putting an undue burden on persons to hand over such information, or an undue burden on the court to consider it. It is clear that the burden would only be to hand over information to the court that is very directly pertinent.

597. The equivalent Scottish legislation carries a requirement to disclose, and the Committee has been told that that provision has not been used in Scotland. However, we have a very different situation here, as this piece of legislation relates, in particular, to the situation of the disappeared. Those deaths have been much examined, and there may well be information in the hands of the public authorities regarding those deaths. That is quite different to ordinary cases of people being missing in the Scottish situation. We know that the relatives of the disappeared want that clause to be present and that, during the original consultations on the Bill, the judiciary wanted it to be present. Therefore, I find it strange that the officials are arguing against that weight of opinion.

598. I make explicit my concerns when I see some elements of the official system are unwilling to disclose information, or are placing barriers in the way of the disclosure of such information. That makes me very worried. My instinct is to allow that information to come forward.

599. The Committee should support the inclusion of an extra clause to cover such a situation. Indeed, there may be a stronger clause that could be used in place of the existing one, but I am not a lawyer, and I cannot argue that. There must be a clause in the Bill that imposes a duty on those who have information about a missing person and whether that person should be presumed dead. There should be a duty on that person to bring that information in front of the court.

600. The Chairperson: I refer members, in particular, to paragraphs 12 to 14 of the DFP submission.

601. Dr Farry: Peter, as a lawyer, are you on strike today?

602. Mr Weir: As MLAs, we should be well used to supposedly not working, but still getting paid.

603. Dr Farry: Really? [Laughter.]

604. Mr Weir: That is the public perception.

605. I do have a certain level of sympathy for what Declan has said, but I also have some concerns. There could be one of two scenarios if such a provision were included in the legislation. First, if there is a duty to disclose information on a missing person that is entirely general in nature, there is a danger that a deluge of such information could be received by the court. Although, I appreciate that is not entirely what has been said, if such a duty were enforced that could lead to a flood of information much of which would be completely irrelevant.

606. Conversely, if there were an attempt made to define the type of information to that of a pertinent nature, that could also create problems, as people would need to define what was "very pertinent" as I believe Declan said. That could potentially lead to relevant information being held back because a person or organisation did not want to disclose it, or could lead them to make the excuse that they do not believe it to be particularly pertinent. Alternatively, that person or organisation could err on the side of caution and send all the information that they have.

607. I have greater sympathy for the general position that the court has complete power to seek any information that it feels is relevant. Although I appreciate that our position is different from Scotland, the Scottish experience does not suggest that a general duty of power is something that is particularly useful in that respect.

608. Furthermore, there is the specific issue of the disappeared. Will the officials tell the Committee whether any consideration will be given to some degree of special consideration for the disappeared, as they are a relatively tightly defined group? Such a provision would take on board Mr O'Loan's position, while retaining the general position of the power residing with the High Court.

609. Mr Paulin: It is worth returning to the purpose of the legislation, which is to enable people in certain circumstances to legally register a death. The purpose is not to investigate how that person came to disappear or die.

610. The difficulty in relation to the disappeared is that there seems to be absolutely no doubt that all those people in that category are dead. Therefore, little evidence is required to obtain an order from the court from which the legal consequences would flow. The efforts being made by relatives of the disappeared would not be helped by a disclosure order, which would merely add to the cost of their application.

611. One of the major expenses in litigation is disclosure. Large amounts of documents are frequently disclosed and not used. That involves a cost for the person who has the documents and for all the other parties who examine them because, if they are disclosed, everybody will look at them and take time in doing so. That is why the Department has sought a focused approach that gives the court the power to order disclosure, where it considers that necessary.

612. Mr Weir: Whatever effect disclosure would have on institutions, bodies or individuals in the UK, would it bind anyone in the Irish Republic? A lot of issues related to the disappeared were agreed between the British and Irish Governments. The location of the bodies means that the more relevant jurisdiction in respect of most of the disappeared is probably the Irish Republic.

613. Mr Paulin: The Department previously advised that it would work almost by consent from outside the jurisdiction. However, the Independent Commission on the Location of Victims' Remains is protected from legal proceedings and from disclosure; therefore, any documentation that it has will not be captured by this provision.

614. Mr Weir: I have some sympathy for Mr O'Loan's position, without agreeing with his conclusion. Would it better serve the purpose of this legislation if the duty to disclose information were associated with the powers and duties of the commission? Information would have to be gathered, and a broader level of disclosure is required in relation to the disappeared. That would require action by the British and Irish Governments, rather than this Bill.

615. Mr Paulin: The concern of the families is that there should be some proper investigation of how their relatives came to die. However, that would not be for the court in presumption of death proceedings. The court will only look at whether there is sufficient evidence that the person is dead.

616. In certain circumstances, where there is doubt, that might lead to an investigation into when a person was last seen alive. In regard to the disappeared, that is not the issue. I do not know if any other form of investigation continues into such deaths, or whether cases are closed when the bodies are recovered. I assume that inquests are held after bodies are found. That would be the proper forum in which to investigate the circumstances of those deaths, rather than an application for presumption of death.

617. Mr Paisley Jnr: Am I right to assume that this proposed insert is quite powerful, in that it gives the court the power to issue an instruction requiring any person to present and disclose information that he or she might have — even if that person is not party to the proceedings? Ultimately, that person could go to jail if he or she shows contempt for that order. That is quite a power, if it is used to its extreme.

618. Mr Paulin: Yes. One can also look at it as an intrusion on the people who hold documentation, and there can be consequences if the court's order is not complied with.

619. Mr Paisley Jnr: That power was not in the Bill originally. Members must realise that the Bill has that power of sanction as it progresses through the Assembly; it gives a different colour to what was available previously.

620. Mr Paulin: I agree.

621. The Chairperson: Mr O'Loan, are you satisfied that your comments be reflected in the Hansard report of the discussion? Or do you want to have the opportunity to register dissent?

622. Mr O'Loan: I will be registering my dissent at the draft statement of the Committee's view; I will be making a counter-proposal.

623. Mr Paisley Jnr: Can we agree to include the draft clause, with Mr O'Loan's agreement, and also look at his counter-proposal, which is very different?

624. Mr O'Loan: Counter-proposals usually are.

625. Mr Paisley Jnr: There is a chance that the person does not know that they have possession of certain material; they may be ignorant of the fact. The draft clause states that if the court discovers that an individual has relevant information, the court has the reins to bring a person or papers to them. However, your counter-proposal works the other way round; it puts the onus on the individual to present information to the court because they know that it is relevant. What happens if they do not know that it is relevant?

626. Mr O'Loan: My concern about the proposal as it is — and notice that we do not have the draft clause in front of us —

627. Mr Paisley Jnr: We do.

628. Mr O'Loan: It has not been signed off by all the interested parties, and discussions are still ongoing with Revenue and Customs and NIO, so it is not finalised. We know the broad thrust of it, so I am not quarrelling on that point. I am unhappy with it because it requires the court to have information or an instinct that a person or public body has further information before it can make any order. My counter-proposal would be to put a duty on an individual to present information if he or she knows that a court process is ongoing. Not being aware of that process would be an acceptable defence.

629. Mr Paisley Jnr: That is not a defence.

630. Mr Weir: Ignorance of the law is no defence.

631. Mr O'Loan: It is not ignorance of the law. You are lawyers; even I, as a non-lawyer, can see that you are not right. If the individual was unaware that the court was looking at a particular case, and did not reveal information for that reason, they would have a good defence. The

clause should require anyone who has information about the circumstances of a person's disappearance and on whether they should be presumed dead — and who is aware that the court is examining the issue — to bring that information to the court.

632. Mr Weir: If there is a duty to disclose and an individual withholds evidence — and is found to have done so at a later stage — he or she will be told that they should have made the disclosure. This would be a get-out clause; the person could say that they were not aware of what was happening, even if they were. It strikes me that you are almost insulating people on that basis.

633. Would it be fair to say that what you have in mind would be a potential addition to what is there? You do not want to rein back the role of the High Court. Is it possible to take this in two stages? I would have thought that there could have been general acceptance of the power of the High Court; the issue is whether a general duty to disclose should be added.

634. The Chairperson: Mr O'Loan has suggested that he wants to put forward a proposition. That will have to be technically and legally proofed, as the offer that we have already in front of us has. I do not know whether you are in a position to do that today, but we can consider the options. An amendment could be offered at Consideration Stage, if more time is needed. I am not sure whether you can present something to the Committee today for consideration. Although we are discussing the Bill on a clause-by-clause basis, this is a new clause on which further work is ongoing, so we could just remit this to our next discussion, and deal with it at that point.

635. Mr Paisley Jnr: There is a huge principle at stake. This piece of draft legislation is to determine the question that comes before a court of whether person X is dead. That is the purpose and thrust of the legislation, and the clause that is being proposed adds to it quite considerably in that any judge can call any person — any person — and consider whether they have information relevant to the determination of that question. That is a very powerful insertion. I cannot understand why anyone on this Committee would not want to see that power in the Bill. Even though they may want to see a different power in addition to that, I cannot understand why we cannot agree, today, to what is actually there in principle.

636. The Chairperson: I will take a reading from the Committee on that. I am trying to establish, in the first instance, whether Declan is in a position to put his counter-proposal before us. There is a subsequent opportunity to offer an amendment. I intend to come back to the Committee to decide whether we want to proceed on what is in front of us. That is a matter for us to decide, not for me. I am not calling it at this stage; I will be guided by the Committee. Declan needs to tell us whether he has something additional that he wants to put before us.

637. Mr O'Loan: If we had a wording to say that the Committee is content with the inclusion of a new clause on the disclosure of information which confers on the court the power to require the disclosure of information, and that, in addition, with particular reference to the disappeared, we would seek an additional clause to impose a duty on any person who had information relating to the court's decision on the presumption of death of that person to bring that to the court.

638. Mr Weir: Clearly, we have to take a formal position on the new clause that has been drafted. I appreciate that Declan is being put on the spot to draft on the hoof, but as regards approving a new potential clause, do we not need to have the exact form of words, as opposed to a general proposition? There is the opportunity for us in January to make known our general position as part of the report. Presumably there would be the opportunity for Declan to have a bit of time to formulate an exact form of words for the legislation. That is what we are looking for. I am loath for the Committee to effectively give a blank cheque to a particular form of legislation, on any subject, without its specific wording having been decided on.

639. Currently, we are in a position to look at, and potentially adopt, the new clause that is in front of us. However, that does not rule out the possibility of Declan coming back to the Committee with a counter-proposal. I think that some members would want to see the wording of that proposal, and test whether legally it is the right way to go forward. We need an exact form of words for a new clause, rather than a general proposition. In January, Declan will have an opportunity to bring that forward.

640. Mr Ian Paisley Jnr: Mr O'Loan is suggesting a completely new clause, not an addition to the draft new clause before us. The draft new clause confers a specific power on the court. Mr O'Loan is proposing a different clause, and, therefore, I think, that has to be a stand-alone clause. We should consider the new clause as it stands, and, if another new clause comes forward, we can consider that too.

641. Mr O'Loan: I worded it as an additional clause, and I am content with that. I said that I thought it provided for a stronger requirement and, therefore, might replace the original new clause. As I said, I am not a lawyer.

642. The Chairperson: I have deliberately flagged up the fact that there is an opportunity to reflect on this, and to prepare the additional clause for consideration. Are you content that the Committee can proceed with what is in front of us?

643. Mr O'Loan: The wording of the question requires some alteration. To say that the Committee is content with the approach being proposed by the Department suggests that it is entirely content, and that that new clause is the sole proposition.

644. Mr Weir: As I understand it, the Committee is restricted; we have to follow a formula. Agreeing to the question does not mean that Committee members' minds are closed. There is the opportunity for Declan to bring forward his own additional proposal.

645. Mr O'Loan: I will take guidance from the Chairman and the Committee Clerk. However, it seems to me that to agree to the question as worded would close down the discussion.

646. Mr Weir: I do not mean it that way. My understanding is, as when we look at other questions, the question is whether the Committee is content. Technically, that is how we have to proceed. It does not preclude an additional clause being brought forward at a later stage. Agreeing that we are content with one thing does not mean that we are content with everything.

647. The Chairperson: Agreeing that we are content with the clause that we are considering does not close down the possibility of a further clause being added. The question would be whether the Committee is content with the approach being proposed by DFP for a new clause to be added concerning disclosure of information. That deals with the subject matter in front of us, without precluding Mr O'Loan from coming back to us with an additional clause.

648. Mr O'Loan: I am content with that.

649. The Chairperson: That will be reflected in the Hansard report. Are you content that we proceed on that basis?

650. Mr O'Loan: Yes.

651. The Chairperson: I recognise that everybody, including some of the consultees, will be on holiday over the recess period; however, I ask that, if it is possible, the officials inform the

Committee of any updates in order to keep members as up to date as possible in their deliberations.

652. Question, That the Committee is content with the new clause, put and agreed to.

New clause agreed to.

Clauses 11 to 15 agreed to.

Clause 16 (Interpretation)

653. Question, That the Committee is content with the clause, subject to the Committee being satisfied with the wording of the Department's proposed amendments, put and agreed to.

Clause 16, subject to the Committee being content with the wording of the Department's proposed amendments, agreed to.

Clauses 17 and 18 agreed to.

Clause 19 (Commencement)

654. Question, That the Committee is content with the clause, subject to the Committee being satisfied with the wording of the Department's proposed amendment, put and agreed to.

Clause 19, subject to the Committee being content with the wording of the Department's proposed amendment, agreed to.

Clause 20 agreed to.

Schedule 1 (Register of Presumed Deaths)

655. Mr Lambe: We are working with the Office of the Legislative Counsel to establish the precise wording that will be used to require the Registrar General to annotate an entry when he becomes aware that an entry in an ordinary register of deaths has been recorded outside Northern Ireland.

656. The Chairperson: Dawn Purvis raised that issue. Are you content with that response, Dawn?

657. Ms Purvis: Yes, subject to the Department's proposed amendment.

658. Question, That the Committee is content with the schedule, subject to the Committee being satisfied with the wording of the Department's proposed amendment, put and agreed to.

Schedule 1, subject to the Committee being content with the wording of the Department's proposed amendment, agreed to.

Schedules 2 and 3 agreed to.

659. The Chairperson: The next step in the process is for a draft report to be prepared for the Committee's consideration on 7 January 2009. In addition to reflecting the outcome of today's clause-by-clause consideration, that draft report will include a commentary on the various issues that arose. The Committee is required to report to the Assembly by 16 January 2009 at the latest, in accordance with the extended timetable for the Committee Stage of the Bill. Mr Paulin

and Mr Lambe, can you confirm that the Department's amendments which the Committee has signed off on will be tabled by the Minister at the Consideration Stage of the Bill?

660. Mr Lambe: Yes. They will have to be taken through the formal Executive clearing process.

661. The Chairperson: That is the most effective and efficient system, because you have the legal wherewithal.

662. Mr Lambe: It is intended that, after the Committee has submitted the report and we have considered it, we will move quickly to the tabling of amendments for Consideration Stage.

663. The Chairperson: Thank you very much. It was a little complicated, but we got there in the end. The draft report will be available for members' consideration on 7 January 2009.

## **Appendix 3**

### **Written Submissions**

#### **Lisburn City Council Response on Presumption of Death Bill**



COMMITTEE FOR

12 OCT 2008

F & P



LISBURN  
CITY COUNCIL

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Our ref: DRB/RN  
Your ref:

24<sup>th</sup> September, 2008

Dear Mr McAteer

**Presumption of Death Bill**

I refer to your letter dated the 16<sup>th</sup> September, 2008 and can advise that the Council continues to support the provisions of the Presumption of Death Bill.

Yours sincerely

**D R BRIGGS**  
**Director of Corporate Services**

Mr Shane McAteer  
Committee Clerk  
Committee for Finance & Personnel  
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**Lisburn City Council**  
**Follow up Correspondence**

COMMITTEE FOR  
05 NOV 2008  
F & P



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**Our ref:** DRB/RN  
**Your ref:**

29<sup>th</sup> October, 2008

Dear Mr McAteer

**Presumption of Death Bill**

I refer to your letter dated the 16<sup>th</sup> September, 2008 on the above subject together with my interim response of the 24<sup>th</sup> September, 2008 in this regard.

I can advise that, at its Meeting held on the 28<sup>th</sup> October, 2008 the Council (as recommended by its Corporate Services Committee) agreed that the opportunity for Members of the Council to attend a future meeting of the Committee for Finance & Personnel to discuss the Council's views on the draft Bill would not be taken.

Yours sincerely

**D R BRIGGS**  
**Director of Corporate Services**

Mr Shane McAteer  
Committee Clerk  
Committee for Finance & Personnel  
Northern Ireland Assembly  
Committee Office  
Room 419  
Parliament Buildings  
BELFAST  
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Lisburn, a City for everyone

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## WAVE Trauma Centre

The proposals contained in the Presumption of Death Bill are broadly welcomed by some of the families of the disappeared, given the years in which neither the death of their loved ones or circumstances of their disappearance were recognised. The granting therefore of specific legislation which would facilitate those families who wish to obtain a death certificate is important at this time. However for others the process of working to obtain a death certificate is viewed as too difficult as it could be perceived as closing the process before substantive forensic and investigative work has been undertaken to locate their loved ones bodies. For this reason some family representatives while aware that the Presumption of Death Bill is under consideration have not engaged directly in this process.

In reviewing the Presumption of Death Bill a number of changes made in respect of the Consultation are noted for example in respect of the notification process through advertisement.

Concern has been voiced in relation to the process family representatives may have to go through, the verification of the death and what that might entail and also the cost associated with legal representation. Further in the event that one of the disappeared is located and their death has been registered on the Register for Presumption of Deaths, consideration needs to be given to how their death may be re registered. The families of the disappeared have faced a long difficult journey followed their loved ones abduction. At a moral and practical level therefore the families should be supported in very way possible to obtain a death certificate if they wish. This should include a mechanism for evidence to be provided from the Independent Commission for the Location of Victim's Remains (ICLVR) concerning their loved ones death and also assistance with the costs associated with having to obtain legal representation in respect of the Court Process.

The families would also ask that any information known to police, security forces or security services is made known and that the Bill includes provision which requires the above named government bodies to make this disclosure available to the Court. There should be a duty placed on all those with information pertaining to the 'disappeared' to make it available both to the Courts in the above process but also to the ICLVR who presently have an active forensic team working to locate the bodies of the 'disappeared'. While the latter body does not fall within the remit of the Committee of Finance and Personnel any information made available in a Court process in respect of Presumption of Death should also be made available to the ICLVR. The families over riding wish is to locate their loved ones bodies and allow them to rest in peace through Christian burial.

Family representatives would welcome the opportunity to attend the Committee Hearing on the Presumption of Death Bill and if permissible to submit oral evidence to the Committee In respect of the families of the disappeared.

Families of the Disappeared  
c/o WAVE Trauma Centre  
5 Chichester Park South  
Antrim Road  
Belfast  
BT15 5DW

## **Northern Ireland Human Rights Commission**

Chairperson  
Finance and Personnel Committee  
Room 419  
Parliament Buildings  
Belfast  
BT4 3XX

16 September 2008

Dear Mr McLaughlin

**Presumption of Death Bill**

The efforts to meet the needs of those who wish to register the death of a person whose body has not been found, by creating new legislation is acknowledged, and we welcome the opportunity to provide the following comments.

## **Families of the disappeared**

1. It is noted that the proposed legislation aims to address the cases of other missing persons who are presumed to have died as well as those of the families of the disappeared. However, there may be particular needs of the families of the disappeared that need to be addressed.
2. There have been some concerns raised in relation to the jurisdictional rules in that they apply only to people normally domiciled in Northern Ireland. The point has been made during the consultation process that the Independent Commission for the Location of Victims' Remains is an all- island body. As such, it does raise concerns that some of the disappeared within the remit of the Commission may fall outside the jurisdictional rules. Clarification is sought as to how such cases would be resolved.
3. As a general point that applies to all families of missing persons, it is important to ensure that the jurisdictional rules do not disadvantage a cohabitant of a missing person in the determination of an application.

## **Disclosure of sensitive material**

4. The process of establishing the grounds on which the High Court is able to make a declaration that a missing person may be presumed dead may raise issues in relation to Article 8 (right to respect for private and family life) and Article 10 (right to receive information) of the European Convention of Human Rights (ECHR).

a) There may be circumstances where one person with 'sufficient interest' does not wish an applicant, also with 'sufficient interest', to make an application for a declaration that a missing person is presumed to be dead. There may be occasions whereby a person does not wish the personal details surrounding a close relative's disappearance to be publicly scrutinized. Or, they may not wish to be made aware of sensitive information that may have contributed to the disappearance of a loved one. This may be counter-balanced by an entitlement of the applicant to know evidence that is relevant to the circumstances surrounding a 'disappeared' or missing person. This may be related to a desire to end a marriage or civil partnership and/or to determine questions relating to property rights. In such cases, it will be important to ensure that matters will be resolved in a procedure that is human rights compliant to all interested parties.

b) Where there is disclosure of sensitive information, an information-management procedure should be established.

c) Once an application is made to the High Court for a declaration, clarification is sought as to what procedure is adopted to ensure that others deemed to have sufficient interest in that application are notified of the application.

d) There may be particular concerns of the families of the disappeared in relation to a notification process, particularly if public notification is required, that need to be addressed.

## **Costs**

5. Insurance premiums: In relation to the requirement for certain persons (i.e. trustees; or where the missing person's life was insured) who may be required to take out insurance against

claims, it would be helpful if clarification is sought from the insurance industry on the likely costs of such premiums. In particular, there are concerns that premiums may be high where there is not conclusive evidence that a person is dead.

6. Legal Costs: Potential applicants should not be discouraged from making an application for a declaration because of concerns over legal costs. Every effort should be made to ensure that any person with an interest may access information and advice relating to the costs of undertaking the necessary proceedings. This should include information relating to the availability of Legal Aid in respect of taking proceedings under the new legislation.

We hope that these comments will help to inform discussions that take place as the Bill progresses through to its Committee Stage.

Yours sincerely

Monica McWilliams  
Chief Commissioner

## **Appendix 4**

### **Memoranda and Papers from Department of Finance and Personnel**

### **Draft Presumption of Death Bill**

#### **Briefing note for the Committee for Finance and Personnel**

##### **Summary**

Under the current law a person's death can only be registered if there is a body found in Northern Ireland or a coroner's certificate has been issued. Where a person is missing and presumed dead the current legislation (the Births and Deaths Registration (NI) Order 1976) does not permit that person to be registered as dead, no matter how compelling the evidence.

By establishing a new court procedure for declaring a missing person to be presumed dead the new legislation will provide the legal authority on which the Registrar General can rely in registering the presumed death of the missing person.

The introduction of new legislation allowing a court to issue a declaration of presumed death and requiring the registration of the presumed death by the Registrar General of Births and Deaths is a response to a specific request from some of the families of the disappeared in Northern Ireland.

Of perhaps more significance, however, is that the procedures created by the legislation will assist the families of a much wider group of missing persons from Northern Ireland in sorting out their affairs and administering the estate of the person who is now presumed dead.

## **Introduction**

1. For a number of years now it has become clear that despite best endeavours it may not be possible to recover the bodies of those known as "the disappeared". In recognition of this the families of some of these missing persons asked former direct rule Ministers whether something could be done which would enable the deaths of the disappeared to be registered and certificates issued to the families.

2. Officials within the Department of Finance and Personnel were asked to consider what options were available to Ministers to respond to the request of the families. On May 4th the Northern Ireland Office issued a Press Release stating that proposals for legislation had been developed and that it had been agreed this work would continue after restoration of devolution with a view to bringing forward legislation to the Assembly.

3. The proposals for new legislation in Northern Ireland will be modelled on existing provisions contained in the Presumption of Death (Scotland) Act 1977. The legislation is being drafted in such a way that it will apply to all missing persons who are believed to be dead and not only to the disappeared.

## **The disappeared**

4. As long as a person remains "missing presumed dead" and the body not recovered, the death cannot be registered. This is the situation in which the families of "the disappeared" in Northern Ireland find themselves. "The disappeared" is the name given to those individuals who were abducted by certain paramilitary organisations during "the Troubles". It is now widely accepted that the missing individuals are dead.

5. In 1999 the Governments of the United Kingdom and Ireland jointly established an Independent Commission for the Location of Victims' Remains (ICLVR) charged with locating the bodies. The remit of this body extends only to those who disappeared prior to the signing of the Belfast Agreement on 10 April 1998. According to figures released by the Northern Ireland Office fourteen people fall into the category of the disappeared. The bodies of 5 have been recovered (one as far back as 1984). The attempts by ICLVR to recover the bodies of the remaining 9 have so far been unsuccessful but the work of that organisation continues and the deployment of additional forensic services from 2006 may prove helpful.

## **Other missing persons**

6. Apart from the needs of the families of the disappeared, new legislation will also assist the families of other people who go missing. Several thousand people (over 5,000 in 2006/07) are reported missing to the PSNI each year in Northern Ireland. The vast majority of these are "children absent from care" or other young people who return home within a few days. There will always remain, however, a number who do not return for some reason. Some of these people will have died either at the time of their disappearance or sometime thereafter either as a result of self-harm, accident or foul play. Other missing persons may wish simply to break contact with family and friends.

7. PSNI records of missing persons do not routinely reveal whether the person reported missing has returned home. However, where a person has been reported as missing for more than 14 days local police forces across the UK must report those cases to the UK Police National Missing Persons Bureau in London (PNMB). PSNI records show that 36 cases have been referred to PNMB, 20 of these since 2003.

## **New legislative provision**

8. Work is proceeding in preparing a draft Presumption of Death Bill (Northern Ireland) 2007 which will enable courts in Northern Ireland to make a declaration that a person who is missing may be presumed dead. Upon application by an interested person the court will be able to make a declaration that a person is to be presumed dead on the basis that there is evidence that the missing person (a) is thought to have died (for example a person disappears on a time-limited expedition) or (b) has not been known to be alive for a period of more than 7 years.

9. Any person with an interest may apply to the court for a declaration: a child who is a beneficiary of the missing person's will; a spouse or civil partner wishing to have official confirmation that the person can be presumed dead so he or she can enter into a new marriage or civil partnership; or a creditor wishing to recover a debt owed to him by the missing person.

10. The courts will have power to vary or revoke the declaration on application by a party interested and deal with any property issues which may arise in consequence of making the declaration.

11. A declaration of presumed death shall have the same effect in law as death itself. A declaration will bring to an end any marriage or civil partnership to which the missing person was a party. Any life insurance policies will have to be paid out to the missing person's estate or other direct beneficiaries of the policy. The missing person's property can be distributed in accordance with provisions for the administration of the estate of deceased persons. The spouse or civil partner of the missing person will become entitled to a survivor's pension or other social security benefits.

12. Upon the making of a declaration of presumed death the Registrar General of births and deaths shall enter the details in a new Register of Presumed Deaths which he must establish and maintain in accordance with the draft Bill. A certificate of presumed death will be available and it will have the like effect as a death certificate issued under the Births and Deaths Registration (Northern Ireland) Order 1976.

## **Next steps**

13. The draft Bill will be published for consultation later in 2007 with a view to legislation being introduced into the Assembly in late spring 2008. The Committee will have an opportunity to comment on the draft Bill at the close of the public consultation period. The draft Bill will be accompanied by a short Consultation Paper seeking views from a wide range of individuals and organisation on a number of specific issues.

Prepared by:

**Civil Law Reform Division  
Departmental Solicitor's Office  
DFP**

7th September 2007

## **Draft Presumption of Death Bill**

FROM: NORMAN IRWIN (DALO)

DATE: 9TH MAY 2008

## **Summary**

Business Area: Civil law Reform Division, Departmental Solicitor's Office

Issue: Report on public consultation on the draft Presumption of Death Bill (Northern land) 2008

Restrictions: None

Action Required: The Committee to note the Consultation Report (attached) and respond to the Department as appropriate

## **Background**

Officials briefed the Committee on 27th September 2007 on a DFP proposal to bring forward new legislation to address the legal issues surrounding missing persons in Northern Ireland with particular reference to the obtaining of death certificates. DFP published a Consultation Paper on a draft Presumption of death Bill on 23rd January 2008. The closing date for responses was 15th April 2008. The Department received 7 written responses to the Consultation Paper. During the consultation period officials met with representatives of the families of the disappeared.

## **Key Issues**

The attached Consultation Report summarises both the written responses to the Consultation Paper and the views communicated to officials orally. The responses were all supportive of the decision to introduce new legislation, addressing the needs of the families of those people who have gone missing. The comments summarised in the attached Report concern points of detail, many of them technical.

The attached Report notes (paragraphs 43 to 44) that respondents supported the inclusion in the Bill of a new power for the High Court to order third persons to disclose information to it for the purpose of deciding the case before it.

## **Next Steps**

Officials are considering the changes which may be made to the Bill prior to its introduction in the Assembly.

Memoranda and Papers from DFP



# **Presumption of Death Bill Report on Consultation**



## **Introduction**

1. On 23rd January 2008 the Department of Finance and Personnel ("the Department") published a Consultation Paper ("the Paper") on a draft Presumption of Death Bill (Northern Ireland) 2008. The draft Bill is designed to provide a comprehensive legal framework addressing the wider needs of the families of people from Northern Ireland who go missing. It is both intended to help address the immediate concerns of the families of the disappeared and also be a useful piece of law reform.
2. The Bill has two primary client groups.

### **(1) The disappeared**

At the time of writing there remain nine individuals who were abducted and murdered during the Troubles whose remains have still not been located, despite the ongoing efforts of the Independent Commission for the Location of Victims' Remains (ICLVR). The families of some of the disappeared had expressed concerns that there was no facility within Northern Ireland law to allow the deaths of their family member to be registered by the Registrar General and death certificates made available to the families.

### **(2) Other missing persons**

Several thousand persons are reported missing each year in Northern Ireland, the largest group of them young people absent from care. While the vast majority of all missing persons return home within 72 hours, there will always remain some people who are reported missing and who never return home and from whom nothing more is heard or known. From the circumstances of the disappearance it may often be inferred that the person has died at their own hand or in some freak accident – the personal belongings found near a cliff edge or onboard a ferry etc. For others it will likely be the passage of time itself which points to a conclusion that the missing person is dead.

## **Consultation**

3. The consultation on the draft Bill ran from 23rd January to 15th April 2008. Over 600 copies of the paper were distributed to a wide range of organisations and individuals including political parties, MLAs and MPs, local councils, faith groups and churches and local and voluntary groups as well as interested individuals. A full list of those who received the Paper from the Department is included in Part 2 of Appendix A to this report. The Victims' Unit of OFMDFM also circulated copies of the Paper on the Department's behalf to victims' groups in Northern Ireland. A reminder letter was issued on 26th March 2008 to selected non-respondents encouraging responses by 15th April 2008.

4. Publication of the Paper was accompanied by the issue of a Press Release and the placing of public notices in the Belfast Telegraph, Newsletter and Irish News. The Paper was also placed on the Department's website.

5. During the course of the consultation period officials met with several of the families of the disappeared (20th March 2008) to discuss their concerns. The meeting was organised by WAVE and the Department is very grateful for that organisation's assistance in providing a forum for the views of the families to be heard. While all the families were invited to participate in the meeting, some viewed the idea of discussing how to obtain death certificates too difficult and declined the invitation.

6. The Department is grateful to those who took the time to meet with officials or who responded in writing.

## **Response**

7. Seven written responses were received during the consultation period. A List of those who responded is contained in Part 1 of Appendix A to this report.

## **Consultation Paper**

8. Section 1 of the Paper set out the background to the project and explained those aspects of current law which deal with presumed deaths in specific circumstances and highlighted the gaps in existing legal provision. The Department identified a number of options for reform but concluded that what was needed was a new comprehensive piece of legislation similar to the Presumption of Death (Scotland) Act 1977. The Paper therefore proceeded on the assumption that there would be new legislation in Northern Ireland addressing the issues which arise when a person goes missing.

9. The primary content of the new legislation is the creation of a new right to apply to the High Court for a declaration that a person may be presumed dead on the basis that there is evidence that the missing person (a) died during a particular period of time as a result of a particular event or (b) has not been known to be alive for a period of more than 7 years.

10. The consultation issues upon which the Department sought views concerned specific matters relating to the operation of the proposed new statutory High Court jurisdiction and issues surrounding human rights compliance and equality and regulatory impacts.

## **Recent Developments**

11. Since the Department assumed responsibility for this project several other organisations have begun work on projects dealing with the legal consequences of a person going missing.

### **(1) Council of Europe**

In 2007 the Committee of Experts on Family Law of the Council of Europe established a Working Party on Missing Persons. That Working Party prepared a preliminary study on "missing persons, presumption of death and commorientes following, in particular, terrorist attacks and natural disasters". The Committee of Experts considered the Working Party's initial report in November 2007. As part of its deliberations the Working Party has been examining the Convention relating to the establishment of death in certain cases of the International Commission on Civil Status signed at Athens on 14 September 1966. The UK is not a party to this Convention. It is envisaged that the Working Party will continue its deliberations during 2008 with a view to making a final report about the form of a new legal instrument which the Council of Europe may adopt. It is likely a new instrument will take the form of a recommendation rather than a new Convention.

## **(2) Law Reform Commission, Ireland**

The Law Reform Commission of Ireland published its Third Programme of Law Reform in December 2007. The Commission has identified "Civil Law Aspects of the Law of Missing Persons" as a new law reform project. It explains the project as follows:

"This project will examine the civil law aspects of missing persons, including the presumption of death, the issuing of a death certificate and the effect of a declaration of presumed death. The project will examine the effect on the civil status of those left behind (such as married status) and the succession and property rights of the missing person and those left behind."

Officials in the Department are in touch with colleagues in Dublin on matters of common interest regarding the law on missing persons.

### **Consultation Issues**

12. Since the Paper proceeded on the basis that the Executive was committed to introducing new legislation, the Department did not seek views on whether new legislation was necessary or desirable. Rather, the Paper set out to explain the key features of the proposed High Court jurisdiction and raised questions about specific elements of the process, in particular the jurisdictional rules, the powers of the court and the effect of a declaration. The Paper raised 10 specific consultation issues.

### **General comment**

13. All of those who responded considered that new legislation dealing with the problems associated with missing persons was to be welcomed or supported. In commenting generally on the draft Bill respondents acknowledged that legislative intervention can only go so far to ease the pain and anguish of the families and friends left behind when a person goes missing, whatever the circumstances of the disappearance. One respondent put the matter as follows:

"New legislation cannot cure or remove the psychological impact felt by the families but it can deal with the practical problems more effectively and sympathetically than the law does at present. In doing so, it may alleviate some of the pressures on the families."

(Church of Ireland)

### **Addressing the needs of the families of the disappeared**

14. As noted in paragraph 5 above, officials met with some of the families of the disappeared under the auspices of WAVE. The views of the families were also put to us in written responses from WAVE and Eastern Health & Social Services Board.

15. The families of the disappeared have welcomed the draft Bill in so far as it will assist in general terms the families of those who go missing. They consider, however, that it:

"does not meet the particular needs of the families of the 'Disappeared'".

Both orally and in writing that have indicated that given the unique and exceptional circumstances surrounding the disappearance of their loved ones the situation of the families of the disappeared is different from those of other families whose family member goes missing. The response from WAVE has raised the question of what role might be played by the Independent Commission for the Location of Victims' Remains in verifying the deaths of the disappeared. They

have also queried whether the deaths of the disappeared should be described as “presumed” given the admission of responsibility by certain organisations for their abduction and murder.

## **Legal aid**

16. One issue not discussed in the Paper but raised with the Department on consultation was the availability for legal aid (public legal funding) for proceedings under the new legislation. The response from WAVE also asked for consideration to be given to assisting the families with the cost of undertaking the necessary legal proceedings.

## **Issue 1 – applications to the High Court**

17. Paragraphs 30 to 35 of the Paper explained the circumstances in which a person may apply to the High Court for a declaration of presumed death in relation to a missing person and asked:

### **Do consultees agree with the formulation of the jurisdictional rules in Clause 1(2) of the draft Bill?**

18. As currently drafted the Bill allows any person with an interest to apply to the High Court for a declaration. However, the Bill provides that the High Court can only hear cases in relation to missing persons who were domiciled or habitually resident in Northern Ireland, except where the applicant is the spouse or civil partner of the missing person. In that case, it is sufficient for the applicant to have a connection to Northern Ireland by being domiciled or habitually resident here. Special provision is made for applications by the spouse or civil partner in Clause 1(3) in that such applicants will be deemed to have a sufficient interest in seeking the declaration under Clause 1(1).

19. In Annex B to the Paper the Department had explored in some detail the potential adverse equality implications of the jurisdictional rules which do not place cohabitants in the same privileged position as spouses or civil partners of the missing person. The Paper also noted that the draft Bill did not contain a jurisdictional rule analogous to that in section 230 Civil Partnership Act 2004 to the effect that a person who formed a civil partnership in Northern Ireland should have access to the High Court notwithstanding that person did not satisfy the domicile or habitual residence requirements.

## **Response**

20. The jurisdictional rules were broadly welcomed by the majority of respondents. However two respondents expressed some concerns. The Eastern Health & Social Services Board noted that the draft Bill applied only to people normally domiciled in Northern Ireland. Noting that the International Commission for the Location of Victims’ Remains is an all-island body, there is a suggestion that some of the disappeared within the remit of the Commission may not be domiciled in Northern Ireland and may fall outside the scope of the draft Bill.

21. A second respondent (Mr Alan Hewitt, retired former partner L’Estrange & Brett) queried the need for Clause 1(2)(b)(ii) which allows a spouse or civil partner of a non Northern Ireland domiciled missing person to apply to the High Court if that spouse or civil partner can establish domicile or habitual residence. He noted that in a given situation neither the missing person nor the applicant may have any real connection with Northern Ireland. However, if the applicant moves to Northern Ireland (say from England) he or she may apply to the High Court in Northern Ireland even though the marriage or civil partnership was formed in England and the missing person and the applicant were both domiciled in England at the time of the disappearance.

22. Only one respondent addressed the issues noted in paragraph 18 above and agreed that the draft Bill produced no unfair disadvantage for either cohabitants or non-domicile civil partners of a missing person.

23. In respect of the requirement to advertise the making of an application for a declaration under Clause 1 the WAVE response suggested that this additional burden should not be imposed on applications from the families of the disappeared.

## **Issue 2 – duration of disappearance (Clause 1)**

24. Paragraphs 38 to 40 of the Paper addressed the length of time which a person must be missing before the High Court will conclude that the person may be presumed dead (except in cases where evidence points to death at a particular time). The Paper noted that the common law requires a minimum absence of 7 years. The Department asked:

Do consultees agree the High Court should have power to make a declaration of presumed death where a person has not been known to be alive for a period of seven years or more?

### **Response**

25. Two respondents (Eastern Health & Social Services Board and WAVE) considered that the seven year period was too long. It was suggested that families affected by the disappearance of a loved one would consider a five year period as more appropriate.

26. Other respondents who commented considered the seven year period to be appropriate.

## **Issue 3 – effect of the declaration of presumed death (Clause 3)**

27. Paragraphs 42 to 44 of the Paper discussed the effect which a declaration of presumed death would have. The effect of a declaration is that the missing person is regarded in law as dead. Following the making of the declaration it is as if the missing person had died and his or her body found and the death registered in accordance with the general rules as set out in the Births and Deaths Registration (Northern Ireland) Order 1976.

28. The Department recognised that there may be additional sensitivities involved where the missing person was married or in a civil partnership and the spouse or civil partner is not the applicant and does not wish the marriage or civil partnership to be brought to an end. The Department's view was that it would not be right to seek to protect the status of the subsisting marriage or civil partnership. The Department asked:

Do consultees agree that a declaration of presumed death should be binding on all persons and for all purposes, including the dissolution of the missing person's marriage or civil partnership?

### **Response**

29. Apart from one respondent, all those who commented agreed that a declaration of presumed death should be binding on all persons and for all purposes. Although recognising that the making of a declaration may involve ending a person's marriage or civil partnership against their wishes respondents acknowledged the Department's explanation that it is undesirable for a person to be recognised as dead for some purposes but not others.

30. One respondent did not believe that a declaration should in every case be binding on all persons for all purposes (Mr Alan Hewitt, retired former partner, L'Estrange & Brett). A concern was raised about the provision in Clause 3(2) (that a declaration shall bind the Crown) to the extent that this might possibly prevent criminal or civil proceedings against a missing person who has gone missing to avoid criminal or tax problems. The same respondent also queried the availability of remedies in cases where an insurance fraud was being perpetrated if the 5 year rule applied automatically to prevent the High Court from making an order for restitution under Clause 6(2).

#### **Issue 4 – ancillary powers of the court (Clause 4)**

31. Paragraphs 48 to 51 of the Paper explained briefly the ancillary powers which the High Court might require in cases where it makes a declaration of presumed death. We would expect that in the majority of cases the applicant will seek only the declaration of presumed death and there will be no cause for the High Court to make further orders relating to property rights or determinations in relation to domicile or interests in the property of the missing person. If further action is required it is likely that this will relate to the administration of the estate of the missing person and in such a case the existing law governing succession to the estates of deceased persons will apply.

32. The Department asked:

Do consultees consider that the range of ancillary powers available to the High Court is appropriate?

#### **Response**

33. Those who responded generally agreed that the draft Bill contained sufficient ancillary powers to enable the High Court to deal with the cases which came before it. A concern was expressed by the Northern Bank Ltd that the draft Bill did not give the High Court "leave to grant ancillary orders to corporate entities, especially creditors, with an interest in the missing person's property" and sought clarification.

#### **Issue 5 – insurance (Clause 7)**

34. Recent press reports have highlighted the real but rare possibility that a person who has been declared to be dead will in fact still be alive. This could happen either through simple mistake where the person declared dead had simply wanted to break contact with his or her family and was unaware that the disappearance had resulted in court proceedings for a declaration of presumed death. Or, the declaration of presumed death may have been obtained by fraud.

35. Issues 5 and 6 in the Paper addressed two questions which may arise if the original declaration of presumed death was either granted by mistake and requires to be revoked or where new evidence has come to light as to the time of death of the missing person.

36. In paragraphs 52 to 54 of the Paper the Department explained the need for Clause 7 of the Bill which deals with insurance issues which arise following the making of a declaration of presumed death. Although modelled on section 6 of the Presumption of Death (Scotland) Act 1977, Clause 7 departed from the Scottish model in its treatment of insurance monies paid out on foot of a declaration. The Department asked:

Do consultees agree that the payment of insurance monies by way of annuity or periodical payment should be treated in the same way as payment of a capital lump sum?

## **Response**

37. While the inclusion in the draft Bill of a requirement on certain persons to take out insurance to cover subsequent claims was accepted in principle, two respondents expressed some reservations. One respondent questioned the reasons for departing from the insurance provisions in the Presumption of Death (Scotland) Act 1977 which exclude the obligation to repay capital sums paid by an insurer by way of an annuity and other periodical payment. It was suggested by the Church of Ireland that depending on the actual amount of any annuity or periodical payment the person in receipt of such a payment may find it difficult financially to raise the amount of any insurance premiums payable, as would be required by Clause 7(3).

38. The other issue raised with us was the general cost of taking out the insurance. It was suggested that unless there is conclusive evidence that the missing person was dead the premiums could be prohibitively expensive (Alan Hewitt, retired former partner L'Estrange & Brett). Further clarification of this issue with the insurance industry was suggested.

## **Issue 6 – effect on property rights of variation order (Clause 6)**

39. Paragraphs 55 to 59 of the Paper explained that the High Court would have power to vary or revoke a declaration of presumed death. The need to vary the terms of the declaration may arise because new evidence comes to light that the person may be presumed to have died at a time or date other than that specified in the declaration. The need to revoke the declaration will arise if the missing person turns out to be alive.

40. If the declaration has been revoked the question arises as to whether any property of the missing person or its value can be returned to him or her. Clause 6 sets out the circumstances in which the High Court can make an order for the return of property to the missing person following a revocation of the declaration. It also deals with cases where a new time of presumed death of the missing person (a variation of the declaration) might result in the property of the missing person being transferred to persons other than the original recipients. The Department asked:

Do consultees agree that a variation or revocation of a declaration of presumed death made more than five years after the date of the declaration should have no effect on the rights to or in property of others acquired as a result of the making of the declaration of presumed death in relation to the missing person?

## **Response**

41. This Issue in fact raises two separate issues: (a) should the High Court have power to make a property variation order under Clause 6(2) disturbing the original allocation of the missing person's property, and (b) should the High Court be precluded from making such an order if the application for a variation order is made more than 5 years after the date of the making of the declaration.

42. No respondent objected to the Court having power to make a property variation order. Several respondents, however, expressed strong reservations about the lack of flexibility which the 5 year rule imposes on the Court. Arguments were made that the Court should have some measure of discretion in deciding whether the 5 year rule should apply in a specific case. For example, the judiciary noted that the automatic application of a 5 year rule may not be

appropriate in the case of a child who is declared to be presumed dead. It was suggested that in exceptional cases such as this the Court should have the power to order that the 5 year period should not begin until the date of the child's 18th birthday had been reached. Another respondent also argued for greater judicial discretion

## **Issue 7 – disclosure of information relevant to the presumed death of missing persons**

43. Paragraphs 65 to 68 of the Paper discussed the desirability of including within the draft Bill some provision allowing disclosure of information from government departments which might assist the High Court is deciding whether or not to make the declaration of presumed death sought by the applicant. The purpose of such disclosure would be to ensure that government departments did not have information which might contradict the evidence presented to the Court by the applicant. The Department asked:

Do consultees consider that it would be useful to include provision requiring specified government bodies to disclose information which may be relevant to the question of whether a missing person may be presumed dead? If such a duty is placed on government departments should the information be disclosed directly to the Court?

### **Response**

44. Almost all the respondents who commented, including the judiciary, emphasised the need for some provision in the Bill which would enable all relevant information to be before the High Court to ensure the Court is fully informed when making an order for a declaration of death. A number agreed with the proposition that the information be disclosed directly to the Court by the holders of relevant information. As noted in paragraph 15 above, the families of the disappeared have suggested a role for the Independent Commission for the Location of Victims' Remains in assisting the High Court.

## **Issue 8 – human rights assessment**

45. Paragraphs 69 to 73 of the Paper explored whether any provisions of the Bill engaged any provisions of the European Convention on Human Rights and asked:

Do you agree with the Department's opinion that the provisions of the draft Bill are Convention compliant?

### **Response**

46. Three respondents commented on this question and agreed with the Department's view that the provisions of the draft Bill were Convention compliant.

## **Issue 9 – equality impact**

47. Paragraphs 74 to 77 of the Paper highlighted some of the equality issues which are raised by the draft Bill and which were explored in more detail in the Department's Equality Impact Screening at Annex B of the Paper. The Department had concluded that an Equality Impact Assessment was not required.

48. Equality considerations are largely confined to Clause 1 of the Bill which sets out the jurisdictional rules which must be satisfied before the High Court may hear an application for a



declaration of presumed death. The primary jurisdictional rule is that the missing person must have been domiciled in Northern Ireland on the date on which he or she was last known to be alive or habitually resident there throughout the period of one year ending with that date. This in itself raises no equality issues. Rather, Clause 1 makes special provision for applications by the spouse or civil partner of the missing person. In those cases it is the applicant's domicile or habitual residence which is important and in such cases the High Court can hear the case even though the missing person himself was neither domiciled nor habitually resident in Northern Ireland. As paragraph 77 of the Paper noted, this raises the question as to why other persons who lived/cohabited with the missing person before his or her disappearance should not be treated in the same way as spouses and civil partners.

49. The Department invited consultees:

to comment on the Department's Equality Impact Screening exercise at Annex B and its recommendation that a full Equality Impact Assessment of the provisions of the draft Bill is not required.

## **Response**

50. No respondent argued that the proposals in the draft Bill merited a full Equality Impact Assessment. Those who responded on the issues raised in Annex B commented that the proposals in relation to the jurisdictional rules in Clause 1 did not result in any adverse impact/unfair disadvantage on any of the groups identified in section 75 of the Northern Ireland Act 1998.

## **Issue 10 – regulatory impact**

51. The Department included as Annex C to the Paper a consideration of the regulatory impacts which may arise as a result of the draft Bill. The Department had concluded that the impacts on businesses, charities, social economy enterprises and the voluntary sector would be negligible, if any costs arose at all. The Department nevertheless invited consultees to:

comment on the consideration of regulatory impacts at Annex C.

## **Response**

52. No respondent argued that the proposals merited a Regulatory Impact Assessment.

## **Conclusion**

53. The Department regrets that so few organisations and individuals took the opportunity to comment on the draft Bill and the specific Consultation Issues. The Department acknowledges that the draft Bill is technical and not easy for a non-lawyer to understand. It is possible that some potential respondents may have found the technical detail of the bill to challenging. Other people, for example those whose family members or friends have gone missing, may have found the subject matter too emotionally difficult with which to engage.

54. Officials are currently considering a number of changes to the draft Bill to reflect the comments received during the consultation process. Any changes to the draft Presumption of Death Bill (Northern Ireland) 2008 prior to introduction into the Assembly will require the approval of the Executive.

## Questions Raised by Committee on 27th September 2007

55. Officials gave evidence to the Committee for Finance and Personnel on 27th September 2007. At that time the Committee raised several questions relating to the advertising of applications for declarations of presumed death and the role of missing persons' databases. Responses to the questions raised at that time are included in Appendix B to this Report.

## Appendix A

### Part 1

#### List of Respondents

- Church of Ireland (Church in Society, Social Justice and Theology (NI) Group)
- Eastern Health & Social Services Board
- Mr Alan Hewitt (Retired Solicitor, former partner L'Estrange & Brett)
- Lisburn City Council
- Lord Chief Justice's Office (on behalf of the judiciary)
- Northern Bank Ltd
- WAVE

### Part 2

#### List of Consultees

- NI Members of Parliament (MPs)
- Members of the Legislative Assembly (MLAs)
- Members of the European Parliament (MEPs)
- NI Lords and Commons Spokespersons (all parties)
- NI members of the House of Lords
- NI Political Parties
- District Councils
- Health and Social Services Trusts
- Health and Social Services Boards
- Health and Social Services Councils
- Education and Library Boards
- NI Solicitors' Associations
- ADAPT NI
- Action Mental Health
- Age Concern (NI)
- Alex Stewart Partnership Sols
- Alzheimer's Society

- Amalgamated Engineering & Electrical Union
- Amalgamated Transport & General Workers Union
- Anglo-Irish Bank
- AN t-Usal
- Cardinal Sean Brady (Archbishop of Armagh)
- The Most Rev Alan Harper (Archbishop of Armagh)
- Arts Council for Northern Ireland
- Association of Baha'i Women
- Association of Baptist Churches in Ireland
- Association of British Insurers
- Association of Local Authorities
- Association of Northern Ireland Colleges
- Baha'l Council for Northern Ireland
- Ballymena Strategy Partnership
- Ballymoney District Partnership
- Bank of Ireland
- Bar Council/Bar Library
- Barnardo's
- BASW
- Belfast Butterfly Club
- Belfast Local Strategy Partnership
- Belfast Hebrew Congregation
- Belfast Islamic Centre
- Belfast Lesbian, Gay, Bisexual
- Belfast Magistrates' Court
- Big Loterry Fund
- Blind Centre (NI)
- British Council (NI)
- British Deaf Association (NI)
- British Epilepsy Association
- Carafriend
- CARE for Northern Ireland
- Carers NI
- Catholic Bishops of NI
- Castlereagh Local Strategy Partnership
- Castlereagh Partnership for Peace & reconciliation
- Cedar Foundation

- Child Care NI
- Child Poverty Action Group
- Children in NI (CiNI)
- Children's Law Centre
- Chinese Chamber of Commerce
- Chinese Christian Church
- Chinese Lay Health Project
- Chinese Welfare Association
- Christian Institute
- Chrysalis Women's Centre
- Church of Ireland
- Church of Jesus Christ Latter Day Saints
- Civic Forum Secretariat
- Civil Service Commissioners
- Coalition on Sexual Orientation
- Coiste na-iarchimi
- Coleraine Borough Strategic Partnership
- Commissioner for Children & Young People NI
- Committee on the Administration of Justice
- Community Development & Health Network (NI)
- Community Foundation for Northern Ireland
- Community Relations Council
- Confederation of British Industry
- Contact Youth Counselling Services
- Cookstown Local Strategy Partnership
- Co-ordinator AMEN
- Co-ordinator Just Men
- Council for the Advancement of Communication with Deaf People
- Council of County Court Judges
- Craigavon District Partnership
- Craigavon Standing Conference on Women's Organisations
- Craigavon Traveller Supportive Committee
- Cruse Bereavement Care (NI)
- Democratic Dialogue
- Derry Local Strategy Partnership
- Derry Well Women
- Dial UK

- Disability Action
- Bryson House
- Down & Connor Family Ministry Commission
- Down District Partnership Board
- Down Syndrome Association
- E.P.O.C.H.
- East Belfast Community Development Agency
- Equality Commission for NI
- Equality Forum NI
- Executive Council of the Inn of Court of NI
- Falls Community Council
- Falls Women's Centre
- Families Need Fathers
- Family Mediation NI
- Family Planning Association
- Federation of Small Businesses
- Federation of Women's Institutes NI
- Fermanagh District Partnership
- Fermanagh Women's Network
- First Division Association
- First Trust Bank
- Foras na Gaeilge
- Foundry Regeneration Trust
- Foyle Friend
- Free Presbyterian Church of Ulster
- Gay & Lesbian Youth NI
- General Consumer Council for NI
- General Register Office (Scotland)
- General Register Office (E&W)
- Gingerbread NI
- GMB Union
- Help The Aged (NI)
- Housing Executive
- Housing Rights Service
- Human Rights Consortium
- Indian Community Centre
- Institute of Directors

- Institute of Professional Legal Studies (QUB)
- James Murland & Co Sols
- Johns Elliot Sols
- JMU Access Partnership
- JW Russell Sols
- King & Gowdy Sols
- Law Centre (NI)
- Law Society (NI)
- Larne Enterprise Development Co
- Law Commission (E&W)
- Law Commission (NI)
- Law Commission (Scotland)
- Law Reform Commission of Ireland
- Lesbian Line
- L'Estrange & Brett Sols
- Limavady District Partnership
- Lisburn Peace & Reconciliation Partnership
- Local Authority Chief Executives
- Local Government Staff Commission for NI
- Lord Chief Justice
- Lurgan Council for Voluntary Action
- Magherafelt Area Partnership
- Magherafelt Womens Group
- Magistrates Courts Association
- Mandarin Speakers Association
- MD Loughrey Solicitors
- Mediation Network NI
- MENCAP
- Men's Advisory Project
- Methodist Church in Ireland
- Mid Ulster International Cultural Group
- Mid-Ulster Women's Network
- Missing People (National Helpline)
- Multi-Cultural Resource Centre
- National Union of Students & Union of Students in Ireland
- Newry & Mourne Senior Citizen's Consortium
- Newry & Mourne Peace & reconciliation Partnership

- Newry & Mourne Women
- Newry & Mourne Senior Citizens Consortium
- Newtownabbey Local Strategy Partnership
- Newtownabbey Senior Citizens Forum
- Nexus Research Co-operative
- NI Association of Citizens Advice Bureau
- NI Association for Mental Health
- NI Chamber of Commerce & Industry
- NI Co-ownership Housing Association
- NI Committee ICTU
- NI Council for Voluntary Action
- NI Federation of Housing Associations
- NI Economic Research Centre
- NI Gay Rights Association
- NI Human Rights Commission
- NI Legal Services Commission
- NI Local Government Association
- NI Muslim Family Association (NIMFA)
- NI Ombudsman
- NI Pakistani Cultural Association
- NI Women's Aid Federation
- NI Women's European Platform
- NI Youth Forum
- NICEM
- NIPSA
- North/South Ministerial Council
- North West Forum of People with Disabilities
- Northern Bank
- Northern Ireland Bankers' Association
- Northern Ireland Court Service
- Northern Ireland Filipino Association
- Northern Ireland Islamic Centre
- NI Judicial Appointments Commission
- NIO
- Omagh District Partnership
- Omagh Women's Area Network
- Pakistani Community Association

- Parental Equality
- Parenting Forum NI
- Parents Advice Centre
- Playboard
- POBAL
- PPRP
- Presbyterian Church in Ireland
- Press for Change
- Probation Board for NI
- PSNI
- Queen's University Belfast
- Rainbow Project Belfast
- Reformed Presbyterian Church of Ireland
- RELATE
- Royal College of Nursing
- Royal National Institute for Deaf People (RNID)
- Russell Brothers Sols
- Rural Community Network (NI)
- Sai Pak Northwest
- Salvation Army
- Save The Children NI
- Scottish Justice Department
- Sense NI
- Shameem Athar AL-NUR
- Shelter (NI) Ltd
- Sikh Cultural Centre
- Simon Community
- South Tyrone Area Partnership
- South West Belfast Community Forum
- Sperrin Lakeland Senior Citizen's Consortium
- St Vincent de Paul Society
- Staff Commission for Education & Library Boards
- The Women's Centre
- Training for Women Network
- Travellers Movement (NI)
- Ulster Bank
- Ulster Farmers Union



- Ulster People's College
- Ulster Quaker Service Committee
- Ulster Scots Heritage Council
- ULTACH Trust
- Union of Construction, Allied Trades & Technicians (UCATT)
- UNISON
- University of Ulster
- Victim Support
- Voice of Young People in Care (VOYPIC)
- Wave Trauma Centre
- West Belfast Economic Forum
- Woman's Information Group
- Women's Forum NI
- Women's Information Group
- Women's Resource & Development Agency
- Women's Support Network
- Workers Education Association
- Youth Council for Northern Ireland
- YouthNet

## **Appendix B**

### **Follow Up Information to the Committee for Finance and Personnel Following Oral Briefing on 12 September 2007**

Members of the Committee requested further information on 3 issues arising from oral evidence given by officials on 12 September 2007

#### **1. Will applications for/declarations of presumed death be advertised?**

As part of the process of applying to the High Court for a declaration of presumed death in respect of a missing person (or a variation of the declaration) the applicant will be required by rules of court to advertise the applicant's intention to make the application. The purpose of advertising the making of the application is to place the public at large on notice of the applicant's intentions. The advertisement may serve to elicit information relating the whereabouts of the missing person. See Clause 8(3)(c) of the draft Bill.

It is not intended that advertisements will be placed in newspapers following the making of the declaration or any variation of it. The making of a variation order will be notified to certain persons; see Clause 5(4).

#### **2. Where will advertisements be published?**

Rules of court will provide for the detail as to where applicants shall advertise their intention to make an application for a declaration or a variation. The rules of court will allow the precise geographical spread of the advertisement to be tailored to the individual application. Not every application would need to be advertised nationally. The flexibility which the rules will provide will ensure that the costs associated with the application are proportionate to the circumstances relating to the disappearance of the missing person.

### **3. Would details of a missing person be removed from missing persons' databases following the making of a declaration of presumed death?**

The organisations responsible for missing persons' database will develop their own protocols or conventions in this matter. The draft Presumption of Death Bill itself does not deal with this issue. It is unlikely that a person's details would be removed automatically following the making of a declaration of presumed death. For example, PSNI database of missing persons includes details of persons who are believed to have been murdered. The making of a declaration by itself would not lead any individual's details to be removed from that database.

PSNI are currently revising internal guidance on the management of missing persons' cases.

## **Pre-introduction consideration of the Presumption of Death Bill 2008**

### **Presumption of Death Bill (Northern Ireland) 2008**

From: Norman Irwin (Dalo)

Date: 18th June 2008

#### **Summary**

Business Area: Civil Law Reform Division, Departmental Solicitor's Office

Issue: Pre-introduction consideration of the Presumption of Death Bill (Northern Ireland) 2008

Restrictions: Restricted – Papers embargoed until introduction of the Bill

Action Required: The Committee to note that the Presumption of Death Bill (Northern Ireland) 2008 is to be introduced in the Assembly on 1st July 2008

#### **Background**

Officials last briefed the Committee on 21st May 2008 on the response to the Department's Consultation Paper on the draft Presumption of Death Bill which was published in January. At an earlier briefing in September 2007 officials had explained to the Committee the background to the proposals and the Department's intention to consult on a draft Bill.

#### **Key Issues**

I attach for the Committee's consideration an advance copy of the Presumption of Death Bill and its accompanying Explanatory and Financial Memorandum. It is expected that the Bill will be

introduced in the Assembly on 1st July 2008 with 2nd Stage taking place on September 15th 2008 (subject to Business scheduling).

There are a number of changes which have been made to the Bill which was published in draft for consultation.

### **“Interest” vs “sufficient interest”**

As originally drafted the Bill required a person applying for a declaration of presumed death to have “an interest” in obtaining the declaration. In addition to the applicant showing “interest”, the High Court had to refuse to hear the application if it did not consider that the applicant has a “sufficient interest” in the determination of the application. This two-fold threshold test was considered unnecessarily complex and the Bill now relies solely on the Court’s discretion to refuse to hear the application if the Court is not satisfied that the “sufficient interest” threshold is met. The reference to an applicant having “an interest” in Clauses 1(1), 5(1) and 10(1) has been amended, with consequential amendments to those Clauses being made to reflect reliance on the “sufficient interest” threshold.

### **Making it easier for “close relatives” to apply**

The Bill has been amended at Clauses 1(3) and 10(2) to place close relatives in the same position as a spouse or civil partner in so far as it relates to the power of the High Court to refuse to hear an application. It is not, however, intended to alter the jurisdictional rules in Clause 1(2) which allow the High Court to hear a case only when the missing person or an applicant spouse or civil partner satisfy domicile or habitual residence requirements. “Close relative” is defined in Clauses 1(4) and 10(4).

### **Reducing the 7 year absence period**

There is a view emerging at the international level that to require a person to have been missing for a period of at least 7 years before relatives may apply for a declaration of presumed death is too long (apart from those cases where an application can be made earlier because the evidence points to death being likely or certain). Although the Bill as introduced retains the widely known 7 year period, the Department of Finance and Personnel may reduce (or increase) the 7 year period of absence. The Department may exercise this power by order subject to affirmative resolution.

### **Property variation orders**

(a) As originally drafted the High Court had no power under Clause 6 to order the return of property to the missing person or other redistribution of the missing person’s property if the application for a variation order has been made more than 5 years from the date of the making of the declaration. There was some concern expressed on consultation that the High Court should have more discretion in deciding the circumstances in which it shall make a property variation order under Clause 6(2). Clause 6(5) now provides that the Court may, where it considers there to be exceptional circumstances, make a property variation order more than 5 years after the date of the making of a declaration under Clause 1.

(b) There is some concern that 5 years is too long a period and that it gives too much weight to the interests of the missing person as against the interests of the family left behind. It is proposed to leave the 5 year rule on the face of the Bill, but give the Department power to reduce or increase the 5 year period by order subject to affirmative resolution.

## **Advertisements**

Clause 8(2)(c) has been revised to allow the High Court, in accordance with Rules of Court, to dispense with the need for advertisements to be placed in local media.

Insurance matters

Officials are in discussion with the insurance industry on the practicalities of Clause 7 of the Bill and this may result in amendments to bring the provision more closely into line with the Scottish provisions. We are also working with colleagues in Treasury to the definition of insurer in Clause 16 with a view to its simplification.

## **Next Steps**

During the course of the summer officials will continue work on two outstanding issues: (a) disclosure of information and (b) further refinement of the insurance provisions. The Department's conclusions will be brought to the Committee for consideration after the summer recess.

# **Committee Stage consideration of the Presumption of Death Bill following 2nd Stage on Monday 15 September 2008**

## **Presumption Of Death Bill (Northern Ireland) 2008**

From: Norman Irwin (Dalo)

Date: 12th September 2008

### **Summary**

Business Area: Civil Law Reform Division, Departmental Solicitor's Office

Issue: Committee Stage consideration of the Presumption of Death Bill (Northern Ireland) 2008 following 2nd Stage on Monday 15th September 2008.

Restrictions: None

Action Required: The Committee to note that work is ongoing on amendments to the Presumption of Death Bill (Northern Ireland) 2008

### **Background**

1. The Committee has previously received a Briefing Paper dated 18th June 2008 which highlighted the changes which had been made to the Bill following the public consultation on a draft Bill early in 2008. Paragraph 10 of that Briefing Paper indicated that officials would continue to work on two outstanding issues and report to the Committee after summer recess on progress. Those issues were (a) disclosure of information and (b) further refinement of the insurance provisions in Clauses 6 and 7 and 16.

## **Key Issues**

### **Disclosure of information**

2. The Bill does not yet contain measures relating to the disclosure of information relevant to the presumed death of a missing person by a 3rd party, for example a Government Department. The Consultation Paper published in January 2008 sought views on the desirability of including such a disclosure provision and respondents supported its inclusion. The purpose of such a disclosure provision would be to enable the High Court to receive such further information as it considers necessary to enable it to dispose of the case before it. For example, a missing person may have disappeared from Northern Ireland voluntarily and be living and working in another part of the UK. Information held by DWP or HMRC might contradict the applicant's affidavit evidence that the missing person ought to be presumed to be dead. This information cannot be disclosed by the relevant Government Departments without either statutory authority or as a result of an order of a court.

3. Under this new provision the High Court would have power to order a 3rd person to disclose information to the Court. This is slightly different to the disclosure provision in the Scottish Presumption of Death Act 1977 which does not give the court a power to order disclosure. Instead, the 1977 Act places a duty on 3rd persons to disclose relevant information if they become aware of the proceedings.

4. Work has continued over the summer with Legislative Counsel to draft a suitable and proportionate new provision. A draft provision was sent to a number of UK departments some weeks ago and officials await their comments. Given the confidentiality which attaches to personal information held by Government Departments and others it is necessary to obtain the agreement of UK Departments to any disclosure provision.

### **Insurance matters**

5. Officials have reconsidered the provisions in the Bill relating to insurance, principally the treatment of capital sums in Clauses 6 and 7 of the Bill and the definition of insurer in Clause 16.

#### **(a) Capital sums**

6. The provisions in the Bill relating to the repayment of capital sums differ in one small but important respect to the corresponding provisions in the Presumption of Death (Scotland) Act 1977. Under the Scottish Act payments of capital sums by way of annuity or other periodical payments are excluded from the scope of (a) the obligation on the courts to take into account the need to return capital sums to insurers when making a property variation order on foot of an order varying the original declarator of death; and (b) the right of insurers to require the recipient of capital insurance sums to take out indemnity insurance. Under the Assembly Bill no special provision is made in relation to annuities or other periodical payments which are treated as if they were capital sums. The purpose of the amendments would be to make sure that both pieces of legislation treat annuities and periodical payments in the same way.

7. These proposed amendments have been raised with the insurance industry who agreed that the Northern Ireland legislation should treat these payments and repayments in the same way as they are treated under the corresponding Scottish legislation. Making these minor amendments would also address concerns raised by one of the respondents to the Consultation Paper (Church and Society Group of the Church of Ireland).

#### **Definition of insurer (Clause 16)**

8. Clause 16(2) and (3) defines “insurer” for the purposes of Clauses 6 and 7 of the Bill. This definition is complex and relates the definition of “insurer” to the statutory framework for regulating the carrying on of the business of contracts of insurance established by the Financial Services and Markets Act 2000. Officials have been working with colleagues in Treasury in London and with Legislative Counsel to see if a simpler definition would not be more appropriate given that the policy of the Bill (as regards payments and repayments of sums of money which are triggered by the death of a person) is intended to capture “all payments/benefits payable upon a person’s death” and not merely life insurance policies. An amendment has been prepared and awaits comments from Treasury.

## **Next Steps**

9. Now that the Bill is in Committee Stage officials will keep Members informed of progress on possible Executive amendments to the Bill.

## **Committee Stage - follow up on request for further briefing on 17 and 24 September 2008**

FROM: NORMAN IRWIN (DALO)

DATE: 2nd OCTOBER 2008

## **Summary**

Business Area: Civil Law Reform Division, Departmental Solicitor’s Office

Issue: Committee Stage consideration of the Presumption of Death Bill (Northern Ireland) 2008 – Request for further briefing.

Restrictions: None

Action Required: The Committee to note the attached supplementary information

## **Background**

The Committee heard evidence from DFP officials on 17th and 24th September on the Presumption of Death Bill 2008. The Committee identified a number of issues on which it requested supplementary information by 3rd October 2008.

## **Key Issues**

The Committee has requested supplementary information on the following issues by 3rd October 2008:

- How do courts interpret the term “sufficient interest”?
- Is 7 years too long a period to require a person to have been missing? What is the international experience in these matters?
- Can the High Court in Northern Ireland order a person in another EU country to provide information to it?

The Annex to this Paper addresses these issues in detail.

## NEXT STEPS

The Committee has requested further information concerning a new draft disclosure of information provision by 17th October 2008. Work is progressing on that issue.

## Introduction

During the Committee Stage hearings on the Presumption of Death Bill held on 17th and 24th September 2008 the Committee for Finance and Personnel sought further information on 4 issues:

- How do courts interpret the term “sufficient interest”?
- Is 7 years too long a period to require a person to have been missing? What is the international experience in these matters?
- Can the High Court in Northern Ireland order a person in another EU country to provide information to it?
- Disclosure of information.

This paper addresses the first three issues noted above. A further paper and draft disclosure of information Clause will be sent to the Committee by 17th October 2008.

## Clause 1 – Declarations of presumed death

### Sufficient interest

Members of the Committee have asked for clarification of Clause 1(3), under which provision the High Court must refuse to hear an application for a declaration of presumed death from a person other than (a) the spouse or civil partner or (b) a close relative of the missing person if the Court considers that the applicant does not have a sufficient interest in the determination of the application. A similar formulation appears in Clause 5(2) of the Bill dealing with applications for variation orders.

The Committee has sought clarification of what is meant by “sufficient interest” and how an applicant might be able to predict if he or she would be regarded as having “sufficient interest” in any application.

The provisions in Clauses 1 and 5 of the Presumption of Death Bill are modelled on and designed to complement the existing jurisdiction of the High Court in declaratory matters in family law. The declaratory jurisdiction of the High Court in these matters extends to making declarations as to whether a person is or is not in a valid marriage or civil partnership, whether a marriage or civil partnership continues to subsist, whether a person is or is not a parent or a child of a named person and related declarations.

### Sufficient interest in family law cases

The modern origins of the declaratory jurisdiction in family matters lie in the 1984 Law Commission Report on Declarations in Family Matters. In considering who should be able to apply for such declarations the Law Commission decided that anyone should be able to apply provided they had a “sufficient interest” in the determination of the application. The Law

Commission did not attempt to define the term “sufficient interest”, noting that it “will be for the court to decide, in the light of the circumstances of the case, whether the applicant has a sufficient interest”. It noted further that “we think that the courts will not have difficulty in determining whether such a test has been satisfied”. The recommendations of the Law Commission were implemented in Northern Ireland in Part 5 of the Matrimonial and Family Proceedings (Northern Ireland) order 1989.

There are to our knowledge no modern reported cases where the lack of a definition or further statutory clarification of the “sufficient interest” test in declaratory proceedings in the family context has given rise to a difficulty. Court cases of this kind tend not to be reported in the Law Reports as they rarely give rise to discussion of new points of law. Rather, they are straightforward cases of applying settled legal rules to disputed facts.

The Law Commission in its 1984 Report made clear that the older nineteenth century case law on “sufficient interest” in the context of petitions for nullity is still relevant and will inform how courts will interpret “sufficient interest” in the wider statutory code for declarations in family matters. In these cases it was held that any person with a “slight pecuniary interest” could apply for a decree of nullity (*Faremouth v Watson* (1811)) and that anyone whose title to property would be affected (by whether a marriage was void or not) would have sufficient interest to apply to the courts (*Sherwood v Ray* (1837)). These cases are still authoritative today.

The following are some examples of the use of the “sufficient interest” test in family law settings.

- Article 31 of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 and section 181 of the Civil Partnership Act 2004. In relation to applications to the High Court for a declaration in relation to the marital or civil partnership status of a person, any person may apply but the Court must refuse to hear the application if the applicant does not have a sufficient interest in the determination of that application. “Sufficient interest” is not further defined. The test of “sufficient interest” does not apply to an applicant who is a party to the marriage.
- Article 31B of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989. Any person may apply to magistrate’s court, county court or the High Court for a declaration that a named person is or is not the parent of another named person. The court must refuse to hear such an application unless it considers that the applicant has a “sufficient personal interest” in the determination of the application. “Sufficient personal interest” is not further defined. This test does not apply to an applicant if he or she is the parent of a named person.

### **“Sufficient interest” in other statutory contexts**

The test of “sufficient interest” is also used as the threshold which an applicant must meet in obtaining leave to seek judicial review as set out in section 18(4) of the Judicature (Northern Ireland) Act 1978 and Order 53 of the Rules of the Supreme Court 1980. In such cases the question of “sufficient interest” arises first at the leave stage, but calls for proper determination during the substantive hearing of the application.

The case law on the application of the “sufficient interest” test in the context of judicial review suggests that the Court will refuse to grant leave in order to exclude those with no legitimate interest whatsoever in the proceedings and who can be described as “cranks, busybodies and mischief makers” (*Girvan J in In Re Ward’s Application for Judicial Review* [2006] approving the House of Lord’s in *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses* [1982]). The test of “sufficient interest” is not intended to deter applications



from a person who has a personal or direct interest in the matter, and any person with a close connection or association with the subject matter of the application will likely be regarded by the Courts as having satisfied the “sufficient interest” test.

The Trade Marks Act 1994 is another example of legislation using the undefined term “sufficient interest”. The 1994 Act deals amongst other things with the registration of registered trade marks. Under section 64(1) of the Act a person having a “sufficient interest” may apply to a court or the Comptroller-General of Patents, Designs and Trade Marks for the rectification of an error or omission in the register. The Act provides no gloss on what is meant by “sufficient interest”.

## **Conclusion**

It is the Department’s view that the phrase “sufficient interest” requires no further clarification. The Courts are well used to applying this test in a variety of contexts, but particularly in matters concerning the status of the individual. Any statutory gloss on the term would likely cast doubt on the existing judicial interpretation and application of it. Provided an applicant under the Presumption of Death Bill has a direct or personal interest in the application is sought and could not be categorised as “no more than a meddling busybody” it is likely that the Court would decide that the applicant satisfied the sufficient interest threshold.

## **7 years absence**

Clauses 1 and 2 provide that one of the grounds for seeking a declaration of presumed death is that the missing person has not been known to be alive for 7 years. The Committee has sought clarification on a number of related issues:

- Is 7 years the appropriate length of time to specify in the legislation?
- What period of time applies in other countries?
- Should the Court have discretion to apply different periods of time for different types of cases?

There is no authoritative comparative work available which describes the legal regimes for presuming a person to be dead across a range of countries. The information which the Department has discovered to date suggests the absence of any consensus as to how long a person should be missing before it is appropriate for national or state authorities to presume the person to be dead.

In the Department’s January 2008 Consultation Paper (paragraphs 38 to 40) consultees were invited to consider whether 7 years was the appropriate period to specify in the legislation. A number of respondents thought 7 years was too long – other respondents thought 7 years was the right length of time.

The Consultation Paper noted that some American States had adopted shorter period – 3 years under New York law; 4 years in Georgia and 5 years in Florida. Other States in the US such as Mississippi continue to adopt the 7 year period. Where there has been no statutory intervention by State Legislatures it is most likely that the common law 7 year rule will continue to apply. Canadian and US Federal legislation in the social security field provides for a minimum period of absence of 7 years. At the Provincial level in Canada a number of statutes do not appear to set out any minimum period of absence (for example Nova Scotia and the Yukon).

Across Europe there is no universally accepted period of absence which would give rise to a presumption of death. Research carried out for the Council of Europe Working Party on Missing Persons notes that in Germany the waiting period or period of absence is 10 years. In France there are various legal routes available to presuming a person dead in the absence of a body, depending on the circumstances of the case. The waiting times applicable in France can be as long as 20 years depending on the legal route pursued and the judicial remedy sought. In Spain the length of time which must pass before a missing person may be presumed dead will depend on whether "circumstances of mortal danger" existed at the time of the disappearance.

The most recent legislative interventions have occurred in Belgium and The Netherlands. New legislation in Belgium passed in May 2007 divides missing persons' proceedings into two stages; presumption of absence and declaration of absence. A declaration of absence can be made by a court either 5 years after the court has established a presumption of absence, or 7 years after the missing person was last heard of or known to be alive.

In The Netherlands, legislation passed in 2002 requires a 5 year waiting period where the death of a person who is missing is uncertain. If there is evidence that the missing person is probably dead given the circumstances of his or her disappearance then the waiting time is reduced to 1 year.

## **The response to exceptional events**

Mention was made during the Committee hearing to the way in which States deal with multiple deaths due to catastrophic events in cases where it may not be possible to locate or identify individual bodies.

### **9/11**

In the aftermath of the terrorist attacks in America in September 2001 a number of US State legislatures passed emergency measures amending or disapplying its law on presumed death. For example, the Virginia State legislature passed legislation in February 2002 to provide that individuals known to have been in that part of the Pentagon damaged in the attack by Flight 77 or known to have been on Flight 77 should be presumed to be dead if they (a) they had disappeared as a result of the attack, (b) had not been heard from in three months or more since the attack and whose body or remains had not been identified through scientific testing.

New Jersey also amended its legislation to provide that a resident or non-resident of New Jersey is presumed to be dead if exposed to a specific event certified as catastrophic by the Governor. The Governor certified the attacks of September 2001 as a catastrophic event leading to a loss of life. If a person's absence following such an event remains unexplained after diligent search and enquiry the person may be presumed dead.

## **Boxing Day Tsunami**

The registration of the death of a British citizen abroad is governed by the Registration of Overseas Births and Deaths Regulations 1982 (SI 1982/1123) made under the British Nationality Act 1981. The registration of the death of a British citizen abroad is the responsibility of the Foreign and Commonwealth Office and operates on a UK-wide basis. Under normal circumstances the death of a person will be registered by UK consular officials in the country where the death occurred if the death of the British national is registered by the local authorities. Local registration of the death would invariably require the presence of a body.

Without a body or other local registration certificate it would not normally be possible for the deaths of British citizens abroad to be recorded under the 1982 regulations. The families of such persons dying outside the UK would have had to rely on the application of the common law rules of presumption of death following 7 years absence if they wish to proceed to administer the estate of the missing person.

Given the circumstances surrounding the Boxing Day Tsunami the Foreign Secretary announced on 24 January 2005 that where British nationals are missing and no body has been found the Foreign and Commonwealth Office would register the death (under the 1982 regulations) and issue a death certificate based on evidence provided by the police and at the request of the family affected. Information provided by the police was to be based on (a) evidence that the person had travelled to the affected region of South East Asia, (b) evidence that the person was in the region when the Tsunami struck, (c) there being no evidence to suggest that the person has been alive since 26 December 2005, and (d) that there being no evidence to suggest that the person wanted to disappear.

## **Conclusion**

It is the Department's view that for the time being at least the legislation should require absence for a period of 7 years before the High Court should declare a missing person to be dead in cases where there is no more certain evidence of the person's death. There is as yet no consensus across the common law world that 7 years is too long period that a shorter period should be adopted. The Department will monitor the legislative developments which are taking place elsewhere.

The Department does not believe that the High Court should have a discretion to disapply the 7 year rule and there appears to be no evidence that the existence of a definite time period results in any particular injustice.

The Department has considered whether it would be useful to have different periods of absence applying to different types of case. Again, we believe that in the interests of creating a framework which is well known and readily understood by the public a clear set of rules applicable in all cases is the appropriate model to adopt.

## **Effect of High Court orders outside UK**

The Committee has asked for further information on the reach of orders of the High Court. In particular, the Committee has asked how information might be obtained from authorities or other persons outside the UK.

As a general rule the territorial scope of orders or judgments of the High Court is limited to Northern Ireland, save where there is in force some international convention giving rise to reciprocal agreements for recognising and enforcing judgments of one state in another. So far as civil proceedings are concerned the matter is largely governed by the Civil Jurisdiction and Judgments Act 1982 which does not apply to matters concerning the status of a person, matrimonial property and succession etc.

Apart from the absence of possible enforcement mechanisms, it would generally not be appropriate in civil proceedings for the courts in one jurisdiction to order the executive authorities of another sovereign state to disclose information. There is a presumption in law that a sovereign state is immune from proceedings in UK courts (section 1 of the State Immunity Act 1978). Likewise, a court in Northern Ireland would be unlikely to order a person or body resident

in France (for example) to disclose information to it given the likely absence of effective enforcement mechanisms.

Should the High Court believe that information or evidence from a person outside the UK would assist the Court in disposing of the case it may wish to consider making an order for the examination of that person on oath (evidence by deposition). This would involve a request from the Court to the judicial authorities of another country to permit an examiner appointed by the Court in Northern Ireland to take the evidence of the person in the country where he resides. In many cases the evidence would be taken by the British consul of the country concerned. This procedure is set out in Order 39 of the Rules of the Supreme Court 1980. If the person or body was unwilling to provide evidence in this way it is unlikely that the Court would be able to compel the person to do so given that no subpoena can be issued outside the UK in these circumstances.

In the context of proceedings under the new legislation the High Court will have to weigh up the need to obtain such information, or to discover if such information exists, against the possible difficulties in obtaining that information if the person or body is outside the UK. The Court's inability to obtain the information might give rise to sufficient doubt as to whether the applicant has proved to the satisfaction of the Court that the declaration should be granted.

2nd October 2008

## **Response to request for draft of proposed Disclosure of Information clause**

### **Presumption of Death Bill (Northern Ireland) 2008**

From: Norman Irwin (Dalo)

Date: 21st October 2008

#### **Summary**

Business Area: Civil Law Reform Division, Departmental Solicitor's Office

Issue: Committee Stage consideration of the Presumption of Death Bill (Northern Ireland) 2008 – Request for further briefing.

Restrictions: None

Action Required: The Committee to note the attached supplementary information

#### **Background**

The Committee heard evidence from DFP officials on 17th and 24th September on the Presumption of Death Bill 2008. Supplementary information on a number of issues was supplied to the Committee on 3rd October 2008. The Committee also asked for further information to be supplied to it by 17th October in respect of the proposed new Clause conferring on the High Court power to order a person who is not a party to the proceedings to disclose relevant information to it.

#### **Key Issues**

The attached Annex contains the latest version of a draft disclosure of information Clause. This version may yet undergo some further refinement and has not yet been finally agreed at official level with all relevant government departments. Nor have all relevant Northern Ireland and UK Ministers approved the Clause.

## **Next Steps**

As soon as this proposed Clause and other proposed amendments to the Bill have been agreed, the Department will submit them to the Committee for consideration.

## **ANNEX**

### **Introduction**

1. During the Committee Stage hearings on the Presumption of Death Bill held on 17th and 24th September 2008 the Committee for Finance and Personnel sought further information on 4 issues:

- How do courts interpret the term “sufficient interest”?
- Is 7 years too long a period to require a person to have been missing? What is the international experience in these matters?
- Can the High Court in Northern Ireland order a person in another EU country to provide information to it?
- Disclosure of information.

The first three issues noted above were addressed in a Paper presented to the Committee on 3rd October. This Paper addresses the issues arising out of the proposed draft disclosure of information Clause.

2. The following is the latest version of the proposed disclosure of information Clause. Once all necessary agreements have been obtained it is proposed that a draft Clause will be added to the Bill by way of amendment at Consideration Stage in the Assembly. The new Clause would appear after Clause 10 of the Bill.

### **Clause 10**

After clause 10 insert -

#### **‘Disclosure of information [j101]**

\*.— (1) Where the High Court is of the opinion that it is necessary for the purpose of disposing of proceedings under section 1 or section 5, the Court may, of its own motion or on the application of a party to the proceedings, make an order requiring any person who is not a party to the proceedings to disclose to the Court such information as the Court considers relevant to the determination of the question of whether a missing person is alive or dead as may be specified in the order.

(2) Nothing in subsection (1) shall impose a duty to disclose information —

(a) which is permitted or required by any rule of law to be withheld on grounds of public interest immunity;

(b) which any person would be entitled to refuse to provide on grounds of legal professional privilege;

(b) if the disclosure of that information might incriminate the person disclosing the information, or his or her spouse or civil partner, of an offence [(other than an offence under Article 10 of the Perjury (Northern Ireland) Order 1979 (NI 19))].

(3) Rules of court may make provision as to the practice and procedure to be followed in connection with proceedings relating to orders under this section.

(4) An application to discharge or vary an order under this section may be made by any person affected by the order.

(5) This section binds the Crown to the full extent authorised or permitted by the constitutional laws of Northern Ireland.'

3. The draft Clause follows closely the provision in section 9 of the Presumption of Death (Scotland) Act 1977. Under the Scottish legislation any person in possession of relevant information is under a duty to disclose it to the Court. The draft provision above is in the Department's view both a more targeted and a more proportionate measure aimed at the obtaining of information from persons who are not party to the proceedings only where this is necessary to enable the Court to determine the application.

4. The purpose of this new power to order a person who is not a party to the proceedings to disclose relevant information to the Court is to elicit information only where to do so is necessary to enable the High Court to dispose of the application before it – either an application under Clause 1 or Clause 5. In most cases the information contained in the applicant's affidavit evidence should be sufficient to enable the Court to decide either to make the declaration of presumed death or to refuse to make the declaration sought by the applicant.

5. It is not intended that the power to order disclosure should be used to enquire into the circumstances of a missing person's disappearance or the reasons why a person may have voluntarily decided to go missing. The Court does not need to make any determination on these issues in order to be able to make the declaration or order sought.

6. Subsection (1) makes clear that the High Court may make an order either of its own motion or if asked to do so by a party to the proceedings (who may or may not be the applicant). The Order may be made in respect of a person who is not a party to the proceedings. The High Court already has powers of discovery in relation to parties to the proceedings. The test for making an order under subsection (1) is that in the opinion of the Court it is necessary for the purpose of disposing of the case to order a person to disclose to it such information as the Court considers relevant to the question of whether the missing person is alive or dead.

7. Subsection (2) of the draft Clause sets out the exemptions which may be relied upon to withhold information from the Court. These are the same exemptions that apply in section 9 of the Scottish legislation, and are common exemptions in the context of disclosure of information.

8. Subsection (3) is a general rule making power which will enable the Supreme Court Rules Committee to make rules dealing with such issues as notice to a person against whom an order is to be made and the manner and form of disclosure to the Court.

9. Subsection (4) provides that a disclosure order may be varied or discharged.

10. Subsection (5) states that the Crown is bound by this section of the Bill.

Civil Law Reform Division

Departmental Solicitor's Office  
DFP

## **Response to WAVE Trauma Centre and NIHRC submissions**

### **Presumption of Death Bill (Northern Ireland) 2008**

From: Norman Irwin (Dalo)

Date: 28th October 2008

#### **Summary**

Business Area: Civil Law Reform Division, Departmental Solicitor's Office

Issue: Committee Stage consideration of the Presumption of Death Bill (Northern Ireland) 2008 – Request for DFP response to submissions to the Committee from the Families of the Disappeared and the Northern Ireland Human Rights Commission.

Restrictions: None

Action Required: The Committee to note the attached supplementary information

#### **Background**

The Committee has received written submissions on the Presumption of Death Bill from (a) the Families of the Disappeared and (b) the Northern Ireland Human Rights Commission. The attached Briefing Paper sets out the Department's observations on the issues raised.

#### **Next Steps**

The Department looks forward to providing the Committee with such further assistance as it may require.

**Annex**

### **Response of the Department of Finance and Personnel to Submissions From:**

- (A) The Families of the Disappeared
- (B) Northern Ireland Human Rights Commission

#### **Introduction**

The Department welcomes the opportunity to respond to the submissions which the Committee has received from the Families of the Disappeared and the Northern Ireland Human Rights Commission.

## **Families of the Disappeared**

The submission from the Families of the Disappeared raises a number of issues on which the Department would wish to comment.

### **(a) The court process**

The Department understands the apprehension with which some of the families may view the prospect of applying for and obtaining a declaration of presumed death in respect of their family member. Together with Northern Ireland Court Service (which is responsible for the court rules) we are endeavouring to make the process as straightforward as possible for the families of the disappeared, as well as other families. For example, where the application is uncontested it is proposed that the rules of court will allow the case to be heard by a Judge of the High Court in Chambers rather than in open court.

Not every case will necessarily involve the applicant having to give oral evidence to the Court. In many cases the Court will be able to make its determination on the basis of the applicant's written affidavit evidence. In relation to the Families of the Disappeared we understand that discussions have been held with the Independent Commission for the Location of Victims' Remains and the Northern Ireland Office to enable the Commission to provide a written statement in support of the applicant's evidence that the missing person ought to be presumed dead.

As proceedings under the Presumption of Death Bill are to be heard in the High Court legal aid will be available to any applicant who meets the legal aid eligibility criteria.

### **(b) Disclosure of information**

The Department notes the desire of the families for all information pertaining to the disappeared to be provided to the High Court and to the Independent Commission for the Location of Victims' Remains (ICLVR) during the course of proceedings under the new legislation. As the Department has pointed out previously it is not a function of the High Court in proceedings under the new legislation to carry out an investigation into the circumstances of the disappearance of a missing person. The function of the Court is to decide whether on the evidence presented it is satisfied there are grounds for making a declaration that the missing person may be presumed to be dead.

The specific disclosure provision which the Department intends to add to the Bill at Consideration Stage is designed to be used only where the Court believes that it is necessary to obtain the information in order to dispose of the application before it.

### **(c) Registration provisions**

The families ask about the possible re-registration of a missing person's death should his or her body be located. Once an entry has been made in the Register of Presumed Deaths it can only be cancelled on the authority of the High Court making a revocation order under Clause 5 of the Bill. Should the person's body be found in Northern Ireland the fact that the death is already registered in the Register of Presumed Deaths will not preclude a separate entry in the register of deaths under the Births and Deaths Registration (Northern Ireland) Order 1976. However, the



Registrar General will have the power to make a note in the entry in the Register of Presumed Deaths to the effect that the entry has been superseded.

## **Northern Ireland Human Rights Commission**

The Northern Ireland Human Rights Commission make a number of observations on the Bill under 3 broad headings of (a) jurisdictional rules, (b) disclosure of information and (c) costs.

### **(a) Jurisdictional rules**

#### **(i) Domicile**

There is a concern among some of the families of the disappeared that the requirement for the missing person to be domiciled or habitually resident in Northern Ireland may exclude their particular family member from the scope of the Bill. The question of whether an individual was domiciled in Northern Ireland on the date when he or she was last known to be alive or had been habitually resident there in the preceding year is a matter for the Court. The Department takes the view that on the information available to it that the Families of the disappeared will fall within the scope of the jurisdictional rules as set out in Clauses 1(2) of the Bill.

#### **(ii) Cohabitants**

The Commission make the point that the jurisdictional rules should not disadvantage a cohabitant of a missing person. The rules on who may apply to the High Court under Clause 1 of the Bill do not operate to prevent a person who was living with the missing person at the time of his or her disappearance from making an application to the Court, provided the missing person falls within the scope of the domicile or habitual residence rules and provided the Court considers the applicant to have a sufficient interest in the determination of the application.

### **(b) Handling of conflicting family demands for a declaration of presumed death**

The Department notes the comments made by the Human Rights Commission in respect of the possibly competing interests of family members in respect of applications to have a missing person declared by the High Court to be presumed dead. Not all family members may wish for an application to be successful as they may believe the missing person to be still alive. By allowing family members and others the right to intervene in proceedings under the Bill we are affording the High Court with the opportunity to take into account the views of all those with an interest in the outcome of the case before it comes to its conclusions.

In order to make this right to intervene a reality the rules of court will specify which persons are to receive notice of an intention to make an application. For example if the missing person is married the rules will require that the spouse is to be notified of any application by another person – for example the missing person's brother. The rules will also afford an opportunity for the Court to direct that certain other persons – for example an insurance company – are to receive notice of the application.

In addition to direct notice to named individuals the rules will deal with the circumstances in which public notices need or need not be placed in local media or other publicly accessible information sites.

### **(c) Handling of information**

Where under a disclosure order information is received by the High Court it will be a matter for that Court as to whether that information is to be further disclosed to the parties to the proceedings. In so far as information is obtained by the High Court in respect of a missing person who is alive it is our intention that the rules of court will prevent information about the present whereabouts of the missing person being revealed to the parties.

#### **(d) Costs**

The Commission raises a specific point about the insurance costs which may flow from a decision of the High Court to issue a declaration of presumed death. We have been unable to obtain concrete information from the insurance industry as to rate at which premiums may be set in respect of (i) trustee or (ii) life insurance indemnity insurance arising in respect of declarations. It is likely, however, that the premium payable would be comparable to that payable in similar situations. For example, in cases where missing beneficiary insurance is taken out (where a beneficiary under a will or intestacy cannot be traced but the administrators intend to distribute the estate) the premium payable is typically 1% to 2% of the insured value (plus insurance premium tax).

As noted above legal aid will be available to proceedings under the new Presumption of Death legislation to those who satisfy the eligibility criteria.

Civil Law Reform Division

Departmental Solicitor's Office  
DFP

## **Response to Oral Evidence Session on 12 November 2008**

### **Presumption of Death Bill (Northern Ireland) 2008**

From: Norman Irwin (Dalo)

Date: 26th November 2008

#### **Summary**

Business Area: Civil Law Reform Division, Departmental Solicitor's Office

Issue: Committee Stage consideration of the Presumption of Death Bill (Northern Ireland) 2008 – Request for DFP response to oral evidence given by the Families of the Disappeared.

Restrictions: None

Action Required: The Committee to note the attached supplementary information

#### **Background**

The Committee took oral evidence on the Presumption of Death Bill from the Families of the Disappeared on 12th November. The Committee had previously received written evidence from the Families and the Department has commented on that written evidence. The attached

Briefing Paper sets out the Department's observations on the issues raised by the Families during their oral evidence.

## **Next Steps**

The Department looks forward to providing the Committee with such further assistance as it may require.

Annex

## **Introduction**

The Department welcomes the opportunity to respond to the oral evidence given by the Families of the Disappeared on 12th November 2008. Department officials observed the evidence and are grateful to the Committee for sharing with it the Hansard recording of the evidence session.

## **Families of the Disappeared**

The submission from the Families of the Disappeared raises a number of issues on which the Department would wish to comment.

### **(A) Identifying the Disappeared as a separate category within the Bill**

The Families have on a number of occasions asked if the Bill could identify the Disappeared as a separate category of missing person, perhaps by reference to the statutory remit of the Independent Commission for the Location of Victims' Remains. The Department is looking again with Legislative Counsel at whether it might be possible to identify the Disappeared by reference to the terms of the Northern Ireland (Location of Victims' Remains) Act 1999. However, as the Committee will appreciate, the Department has attempted to produce a piece of legislation which is general in its application and which does not seek to identify specific groups of missing persons.

### **(B) Jurisdictional rules**

There is a concern among some of the Families of the disappeared that the requirement for the missing person to be domiciled or habitually resident in Northern Ireland may exclude their particular family member from the scope of the Bill. As the Department has noted previously the question of whether an individual was domiciled in Northern Ireland on the date when he or she was last known to be alive or had been habitually resident there in the preceding year is a matter for the Court. The Department takes the view that on the information available to it that the Families of the disappeared will fall within the scope of the jurisdictional rules as set out in Clauses 1(2) of the Bill.

It is perhaps worth noting that the term domicile is a technical legal term – domicile is the term used to describe the relationship which a person has with a particular country, usually the country of birth or nationality. A person could be described as domiciled in Northern Ireland even though he had been living outside Northern Ireland for a considerable period of time. The Department will however reconsider the way in which the jurisdictional rules in Clause 1(2) of the Bill have been formulated to see whether it can provide some reassurance to the Families.

### **(C) Registration provisions**

The families ask about the possible re-registration of a missing person's death should his or her body be located. As the Department indicated in its response to the written evidence provided by the Families, once an entry has been made in the Register of Presumed Deaths it can only be cancelled on the authority of the High Court making a revocation order under Clause 5 of the Bill. The Department also explained that should the person's body be found in Northern Ireland the fact that the death is already registered in the Register of Presumed Deaths will not preclude a separate entry in the register of deaths under the Births and Deaths Registration (Northern Ireland) Order 1976. However, the Registrar General will have the power to make a note in the entry in the Register of Presumed Deaths to the effect that the entry has been superseded. Where a body is found in Northern Ireland in these circumstances it is more than likely that the coroner's office would be involved under the Coroners Act (Northern Ireland) 1959.

### **Body located in the Republic of Ireland**

The situation is slightly different if the remains have been found in the Republic of Ireland. In that case the death of the person will be registered in the Republic's register of deaths under Part 5 of the Civil Registration Act 2004, following the involvement of the coroner's office in accordance with the terms of the Coroners Act 1962. There are no procedures which will allow the death of the "disappeared" person (or any other person from Northern Ireland who dies in the Republic) to be entered into the register of deaths in Northern Ireland given that the body was not found in this jurisdiction.

If the Registrar General in Northern Ireland becomes aware that a death has been registered in the Republic of Ireland he would be able to make a note in the entry in the Register of Presumed Deaths in respect of the same person. That note could state simply that the death of the person has been recorded outside Northern Ireland and no further certified copies of the entry in the Register of Presumed Deaths should be issued.

In these situations the Families may wish to apply to the High Court to have the original declaration of presumed death revoked and the entry in the Register of Presumed Deaths cancelled. However, the Families would be under no obligation to do so and indeed no practical advantage would result. During the evidence session it was suggested that perhaps the Registrar General could, in these circumstances, make the application for a variation order revoking the declaration of presumed death. The Department does not consider that this would be practicable given that the Registrar General would not be able to enter the details of the missing person in the Northern Ireland register of deaths.

### **UK registration of deaths of British citizens occurring abroad**

The Committee may wish to know that UK regulations made under the British Nationality Act 1981 make provision for the registration of the deaths of British citizens dying abroad at the nearest UK consulate. This is in addition to the local death registration requirements of the country where the death occurred. Such consular registration of the deaths of British citizens dying abroad is not a legal requirement but may offer some practical benefits to the family in sorting out the affairs of the deceased. This consular registration scheme does not however apply to deaths occurring in the Republic of Ireland and a number of other countries (for example South Africa or New Zealand) who operate a standard of death registration similar to that in place in the United Kingdom. The scheme does however extend to deaths occurring in France.

### **(D) The role of the Independent Commission for the Location of Victims' Remains**

The Department understands that the Families have had discussions with the Independent Commission for the Location of Victims' Remains and the Northern Ireland Office about the support and assistance which the Commission may be able to provide to the Families should they decide to make applications under the new Presumption of Death legislation. It has been suggested that the Commission may be able to provide a written statement in support of the Families' evidence that the missing person ought to be presumed dead.

As was noted during the evidence session the remit of the Independent Commission is established by Treaty between the Governments of the United Kingdom and Ireland. Any change to its remit or functions is not a matter on which the Assembly can legislate. Given the ongoing work of the Commission's forensic team in identifying possible sites where remains of the Disappeared may be located, the Department is anxious to ensure that nothing in the proposed new legislation could be seen to jeopardise the independence of the Commission, nor the privilege which its parent legislation affords information disclosed to it.

### **(E) Costs**

The Families have highlighted the likely expense of commencing proceedings in the High Court to obtain a declaration of presumed death under the new legislation. The Department has assured the Committee that legal aid will be available to proceedings under the new Presumption of Death legislation to those who satisfy the eligibility criteria. It has been suggested, however, that not all of the relatives who may make use of the legislation will be eligible for legal aid.

The Department is sympathetic to the concerns of the Families that if they are not eligible for legal aid they may incur significant costs in making an application under the new legislation. While the Department does not believe that the Bill is itself the place to resolve this issue it will work with the families to see what other avenues of funding or assistance may be available.

## **Response to Additional NIHRC Issues**

### **Presumption of Death Bill (Northern Ireland) 2008**

From: Norman Irwin (Dalo)

Date: 28 November 2008

#### **Summary**

Business Area: Civil Law Reform Division, Departmental Solicitor's Office

Issue: Committee Stage consideration of the Presumption of Death Bill (Northern Ireland) 2008 – Request for DFP response to supplementary submission to the Committee from the Northern Ireland Human Rights Commission.

Restrictions: None

Action Required: The Committee to note the attached supplementary information

#### **Background**

The Committee has received a further written submission on matters connected with the Presumption of Death Bill from the Northern Ireland Human Rights Commission. The attached Briefing Paper sets out the Department's observations on the issues raised.

## **Next Steps**

The Department looks forward to assisting the Committee with the remainder of Committee Stage consideration of the Bill. .

## **Annex**

### **Introduction**

The Department welcomes the opportunity to respond to the further written submission to the Committee from the Northern Ireland Human Rights Commission (Commission further letter dated 11th November). However, other than the matters addressed specifically in the Bill (see paragraph 2 below) the manner in which the High Court handles the conduct of the cases coming before it under this new legislation is largely a matter for the High Court itself, acting in accordance with the law and any procedural court rules which may be made by the Supreme Court Rules Committee under the Judicature (Northern Ireland) Act 1978.

### **Privacy of proceedings**

The Commission notes that in some cases the relatives of a missing person may not wish the personal details surrounding a loved one's disappearance to be publicly scrutinised. Under Clause 8(4) and (5) of the Bill it will be possible, at the discretion of the High Court, for proceedings under the Bill to be heard in private. The High Court also has power, under the common law and statute, to impose reporting restrictions on proceedings, and there is guidance available to judges on this subject. As a matter of general policy, however, the underlying rule applying in proceedings under the new legislation is that proceedings should be held in open court, with only such reporting restrictions as the Court considers necessary. There is in our view a legitimate public interest in the circumstances which will lead to the High Court presuming a missing person to be dead in the absence of any physical remains.

The making of a declaration of presumed death in relation to a missing person is not an issue which concerns only the family members seeking the declaration. The making of a declaration, or indeed the variation or revocation of a declaration, may have direct implications for others, for example creditors of the missing person or others entitled under the missing person's will or intestacy. The Court will have to balance inter alia the family members' Article 8 right to privacy with other Convention rights on a case-by-case basis. This balancing of competing rights is the role of the High Court in all sorts of cases, in fulfilment of its duties under (inter alia) the Human Rights Act 1998, and the Court will undertake the same role when dealing with presumption of death cases under the new legislation. Naturally there is a role for legal representatives or the family in drawing any concerns they have to the Court's attention, as they do in other areas.

### **Handling of sensitive information**

The Commission also raises the issue of relatives not wishing to be made aware of sensitive information surrounding a loved one's disappearance. It is inherent in the process of applying for a declaration of presumed death of a missing person that information relating to the date and time when the missing person was last known to be alive or the person's general state of mind or personal circumstances will emerge. The Bill is not intended to require the High Court to carry out an investigation of the circumstances of a person's disappearance: by this we mean the

reasons why a person has disappeared (there may be no reason readily discernible) or whether 3rd parties are implicated in the fact that a person has gone missing.

The High Court is experienced in handling sensitive cases in a range of areas and judges will apply these skills to the new presumption of death legislation, balancing the wishes of various family members either for privacy or not to receive distressing information against the need for cases to be dealt with in an open and transparent manner. In dealing with such cases, there is also a role for solicitors and counsel to take instructions from their clients, and in turn set out to the Court the parameters of any sensitivities relating to the possible disclosure of information.

### **Information disclosed to the High Court**

The Department has previously referred to some of the issues which may arise when information is disclosed to the High Court on foot of a disclosure of information order. Where the information disclosed to the Court confirms or does not contradict the evidence presented by the applicant (or any intervener) it would be unlikely that the Court would feel constrained in disclosing that information to the parties to the proceedings. Such disclosure could provide some comfort to an applicant in reassuring him or her that the application to have a missing loved one declared presumed dead has not been premature.

There may also, however, be circumstances when it would not be proper for onward disclosure of all the disclosed information to the parties to the proceedings. As the Department made clear in earlier evidence there may be circumstances in which a missing person who is still alive will have an interest in ensuring that their personal information (for example present address/occupation etc) is not divulged. It will be up to the parties to alert the court to situations of this type, and this is another circumstance in which the High Court may well have to balance the Article 8 rights of a person who wishes to protect his or her personal information against the desire of the family to receive information, in coming to a decision on onward disclosure.

## **Response to Supplementary Submission arising out of evidence given on 3 December 2008**



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Craigantlet Buildings  
Stormont  
BT4 3SX  
Tel No: 02890 529147  
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FROM: NORMAN IRWIN (DALO)

DATE: 9th DECEMBER 2008

### **Presumption of Death Bill (Northern Ireland) 2008**

## Summary

Business Area: Civil Law Reform Division, Departmental Solicitor's Office

Issue: Committee Stage consideration of the Presumption of Death Bill (Northern Ireland) 2008 – Request for DFP response to supplementary submission arising out of evidence given on 3rd December.

Restrictions: None

Action Required: The Committee to note the attached supplementary information

## Background

1. The Committee has requested a further written submission on matters arising out of the evidence given to the Committee by DFP officials on 3rd December 2008. The attached Briefing Paper addresses 3 issues: (a) the Independent Commission for the Location of Victims' Remains as an applicant under the Bill; (b) registration provisions; and (c) disclosure of information.

## Next Steps

3. The Department looks forward to assisting the Committee with the remainder of Committee Stage consideration of the Bill.

## Presumption of Death Bill Issues Requiring Further Clarification

1. Officials gave evidence to the Committee for Finance and Personnel on 3rd December. During that evidence Session officials addressed all the issues which had arisen during the previous evidence Sessions. A small number of issues were identified on which the Committee has asked for further information from the Department.

### **Could the Bill identify the Independent Commission for the Location of Victims' Remains as an applicant with sufficient interest?**

2. The Committee has asked whether the Independent Commission for the Location of Victims' Remains would be able to make an application for a declaration of presumed death or a variation order under the Bill. If the Commission were able to do so, the Committee has suggested that the Bill specify that the Independent Commission is deemed to "have sufficient interest to make an application".

3. The Independent Commission is an international organisation established by Treaty between the Governments of the UK and Ireland. Its establishment in domestic law is achieved through the Northern Ireland (Location of Victims' Remains) Act 1999 (there is similar domestic legislation in the Republic of Ireland). The long title to the UK Act provides that it is "An Act to make provision connected with Northern Ireland about locating the remains of persons killed before 10th April 1998 as a result of unlawful acts of violence committed on behalf of, or in connection with, proscribed organisations; and for connect purposes".



4. In considering whether the Independent Commission has power to make applications to the High Court it is necessary to examine the statutes under which it has been established and the functions ascribed to the Independent Commission under those statutes.

5. The Treaty establishing the Independent Commission in international law specifies in Article 3(1) that the objective of the Commission is to facilitate the location of the remains of victims of violence. Article 3(2) specifies that the Commission shall have " ... the following functions:

(a) to receive information relating to the location of remains of such victims;

(b) to disclose the above information for the purposes of facilitating the location of remains to which the information relates;

(c) to report on its activities to both Governments no later than one year its establishment and annually thereafter.

These functions relate to the objective of the Commission to facilitate the location of remains of victims of violence.

6. Although the Independent Commission has the legal capacity of a body corporate and can, in theory, enter into contracts and sue in its own name (although it has immunity from suit given its status as an international organisation – see SI 1999/1437), it is arguable that the Commission would be exceeding its powers if it were to make an application to the High Court in Northern Ireland under the Bill (with the attendant costs associated with such applications). The making of such an application could not easily be reconciled with the purpose of the 1999 Act which is "about locating the remains of persons killed before 10th April 1998. ".

7. Apart from these legal doubts about the power of the Independent Commission to embark on civil litigation, officials have been informed by NIO that the Commission has not been resourced to make such applications. The Department is also led to believe that the Commission would not wish to take the lead in initiating applications under the new legislation in respect of the disappeared. Any mention of the Independent Commission on the face of the Bill might give rise to an unwarranted inference that the Commission would at some stage make an application. This would be both unfair to the Commission and might lead to false hope amongst some of the families as to the Commission's likely future actions.

8. On balance, the Department does not believe that it would be sensible to make any reference to the Commission as a potential applicant under the Bill.

### **Could the Bill require the Registrar General to cancel/annotate an entry in the Register of Presumed Deaths where he receives notice that the death of the missing person has been registered by another registration authority outside Northern Ireland?**

9. Officials have explained to the Committee that since an entry in the Register of Presumed Deaths is made on foot of an order of the High Court, the entry can only be cancelled where the High Court has revoked the declaration of presumed death. We have further explained that under Schedule 1 to the Bill (paragraph 4(2)) the Registrar General has power to annotate an entry and this power could be used if the Registrar General becomes aware that the death of a missing person (whose presumed death has been recorded here) has been recorded/registered by registration authorities outside Northern Ireland (for example where the remains of one of the disappeared is located in the Republic of Ireland).

10. The Committee has asked officials to consider whether it may be possible to set out in the Bill that the Registrar General shall/must annotate the entry in the Register of Presumed Deaths where it is brought to his attention that the missing person's death has been registered by registration authorities outside Northern Ireland.

11. Officials have discussed the issue with the Registrar General, and we are agreed that the Bill could be amended to impose a duty on the Registrar General to annotate entries in certain circumstances. Although we will not be able to discuss the drafting of such an amendment with Legislative Counsel until early next week, it should be relatively straightforward to amend Schedule 1 to make clear that the Registrar General shall annotate an entry in the Register of Presumed Death if he becomes aware that the death of the missing person (in relation to whom an entry has been made in the Register of Presumed Deaths) has been recorded in any register kept or maintained outside Northern Ireland corresponding to the register of deaths maintained under the Births and Deaths Registration (Northern Ireland) Order 1976.

Proposed amendment conferring power on the High Court to order 3rd parties to disclose information to the Court

12. As requested by the Committee, the Department sets out for the record the statement it read to the Committee during the evidence Session on 3rd December 2008:

"The briefing papers provided by the Department explain the purpose of providing the High Court with the power to order someone who is not a party to the proceedings to disclose information to the Court. That should only be necessary so that the High Court is able to dispose of the application before it. The power is not designed to enable the Court to hold an investigation into the circumstances surrounding the disappearance of a missing person, especially in cases where there is clear evidence that the missing person is dead. For example, we would not expect the High Court to consider it necessary to order disclosure where the application concerned one of the disappeared.

The Department considers that discretionary power as preferable to the imposition of a general duty of disclosure on any person with information about the circumstances surrounding the disappearance of the missing person. A duty of disclosure could result in the provision of large quantities of information to the Court, which could in no way assist it making a decision on an application. That would place an unnecessary burden on those who provided information to the Court as well as an unnecessary burden on the Court in its consideration of that information"

13. Unfortunately the Department is not yet able to provide the Committee with a disclosure Clause which has been signed off by all interested parties. Discussions with Revenue and Customs and the Northern Ireland Office are continuing. However, the Department has made one minor addition to the Clause which was sent to the Committee in October. The Department has added a new subsection providing that before the High Court makes an order for disclosure it shall serve notice of its intention on any person likely to be affected by the order. For convenience the latest version of the Clause is attached below.

## **Clause 10**

After clause 10 insert—

'Disclosure of information [j101]

\*.—(1) Where the High Court is of the opinion that it is necessary for the purpose of disposing of proceedings under section 1 or section 5, the Court may, of its own motion or on the application

of a party to the proceedings, make an order requiring any person who is not a party to the proceedings to disclose to the Court such information as the Court considers relevant to the determination of the question of whether a missing person is alive or dead as may be specified in the order.

(2) Nothing in subsection (1) shall impose a duty to disclose information—

(a) which is permitted or required by any rule of law to be withheld on grounds of public interest immunity;

(b) which any person would be entitled to refuse to provide on grounds of legal professional privilege;

(c) if the disclosure of that information might incriminate the person disclosing the information, or his or her spouse or civil partner, of an offence.

[(3) Before making an order under subsection (1), the High Court must serve notice of its intention to make the order on any person who, in the opinion of the Court, is likely to be affected by the order.]

(4) The High Court may discharge or vary an order made by it under this section on an application made to the Court by any person affected by the order.

(5) Rules of court may make provision as to the practice and procedure to be followed in connection with proceedings relating to orders under this section.

(6) This section binds the Crown to the full extent authorised or permitted by the constitutional laws of Northern Ireland.'

14. The Department has one further point to make in connection with the disclosure power, which may assist the Committee. The reason why a disclosure provision is needed specifically for this Bill is that, unlike England & Wales, the High Court does not have available to it the power to order 3rd party discovery in civil proceedings generally. The 3rd party discovery power which is available to the High Court in Northern Ireland under section 32 of the Administration of Justice Act 1970 applies only in relation to proceedings in respect to personal injuries or death. By contrast, the High Court in England & Wales has power to order 3rd party disclosure in civil proceedings generally under section 34 of the Supreme Court Act 1981 and Part 31 of the Civil Procedure Rules. It is largely because Northern Ireland has not yet adopted the new Civil Procedure Rules model that the need for a specific 3rd party disclosure power arises in the context of the Presumption of Death Bill.

**CIVIL LAW REFORM DIVISION  
DEPARTMENTAL SOLICITOR'S OFFICE  
DFP**

## **Appendix 5**

### **Memoranda and Papers from Others**

# Letter from Anne Morgan

9, Castleown,  
Newry,  
Co. Down  
BT 34 1GE

COMMITTEE FOR

8 NOV 2008

F & P

15/11/08

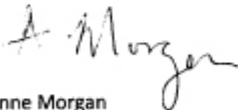
Dear Committee,

I would like to thank you for allowing us to give evidence to your committee on behalf of the families of The Disappeared with regard to The Presumption of Death Bill.

We appreciate that our appearance at the committee was crucial for you to see the human side to this Bill. We have concerns about certain issues but we are reassured by our visit to the meeting that these will be minded as the Bill progresses.

The Disappeared group is unique to Northern Ireland let this Bill also be Unique to the rest of Great Britain.

Yours gratefully



Anne Morgan

## NIHRC response to DFP

Mr Mitchel McLaughlin, MLA  
Chairperson  
Finance and Personnel Committee  
Room 419  
Parliament Buildings  
Belfast  
BT4 3XX

11 November 2008

Dear Mr McLaughlin

**Presumption of Death Bill**

Further to the letter from your Committee Clerk, Mr McAteer, dated 6 November 2008 and copy of Response of the Department of Finance and Personnel (DFP) to our submission, we would like to express our appreciation of the detailed feedback to the points that the Commission raised. However, we would like to take the opportunity to reiterate one of our concerns which relates to procedures for handling sensitive information.

The DFP response states that in relation to circumstances where "disclosure order information is received by the High Court it will be a matter for that Court as to whether that information is to be further disclosed to the parties to the proceedings" (at (c) Handling of information).

As previously stated in our response, there may be cases where a relative may not wish to have the personal details surrounding a loved one's disappearance to be publicly scrutinized or where they may not wish to be made aware of sensitive information surrounding a loved one's disappearance. Clarification is sought as to whether consideration has been given to what

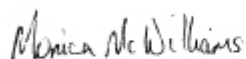
Chief Commissioner: Professor Monica McWilliams ■ Chief Executive: Peter O'Neill

procedure/guidance will inform the decision-making process adopted by the High Court in its deliberations as to what information is to be further disclosed to the parties of the proceedings?

We would, therefore, seek assurances that a robust information-management procedure will be in place where disclosure of sensitive information is under consideration. In such cases, it will be important to ensure that matters will be resolved in a procedure that is human rights compliant to all interested parties and that issues in relation to Article 8 (right to respect for private and family life) and Article 10 (right to receive information) of the European Convention of Human Rights are fully considered.

We wish you well in the progress of the Bill.

Yours sincerely



**Monica McWilliams**  
**Chief Commissioner**

## Appendix 6

# Northern Ireland Assembly Research Paper

Research and Library Services



Northern Ireland  
Assembly

23 July 2008

## **Presumption of Death Bill**

### **Research Paper prepared for the Committee for Finance & Personnel**

**Dr Robert Barry**

Following consultation between January and April 2008, the Presumption of Death Bill was introduced to the Northern Ireland Assembly on 1 July 2008.

The Bill is designed to provide a legal framework addressing the needs of the families of people from Northern Ireland who go missing. It is intended to help address the immediate concerns of the families of the disappeared and also to be a useful piece of law reform.

The primary content of the proposed new legislation is the creation of a new right to apply to the High Court for a declaration that a person may be presumed dead on the basis that there is evidence that the missing person (a) died during a particular period of time as a result of a particular event or (b) has not been known to be alive for a period of more than 7 years.

Library Research Papers are compiled for the benefit of Members of The Assembly and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public.

## **Presumption of Death Bill**

### **Summary**

Following consultation between January and April 2008, the Presumption of Death Bill was introduced to the Northern Ireland Assembly on 1 July 2008.

The Bill is designed to provide a legal framework addressing the needs of the families of people from Northern Ireland who go missing. It is intended to help address the immediate concerns of the families of the disappeared and also to be a useful piece of law reform.

The primary content of the proposed new legislation is the creation of a new right to apply to the High Court for a declaration that a person may be presumed dead on the basis that there is evidence that the missing person (a) died during a particular period of time as a result of a particular event or (b) has not been known to be alive for a period of more than 7 years.

While the response to the consultation was disappointing, the Department does appear to have taken on board most of the points raised by those who did respond. However, it appears that there may still be at least two important issues that have not yet been fully addressed i.e. the disclosure of information by government bodies (to help the Court make a decision on a declaration of presumed death), and the cost of taking out insurance (particularly where the insurance is taken out to cover the possible repayment of annuities or other periodical payments made by insurers).

Apart from these issues, the Bill appears to provide a useful legal framework for addressing the needs of the families of people from Northern Ireland who go missing.

# Presumption of Death Bill

## Introduction

Following consultation between January and April 2008, the Presumption of Death Bill was introduced to the Northern Ireland Assembly on 1 July 2008<sup>[1]</sup> to provide a legal framework for meeting the needs of the families of people from Northern Ireland who go missing.

In taking forward this work the Department for Finance & Personnel has modelled its Bill on the Presumption of Death (Scotland) Act 1977, which provides a comprehensive procedure for declaring that a missing person from Scotland may be declared to have died.

## Background

In recent years some of the families of "the disappeared" (those people abducted and killed by terrorist groups, during the course of the Troubles, whose bodies have never been found) have raised with Ministers their disappointment that their deaths cannot be registered in the absence of any physical remains. In response to calls for some change to the law to be made the Department began, in early 2007, an examination of the current legislative framework for death registration with a view to determining how best to provide a mechanism whereby the deaths of the disappeared in Northern Ireland could be registered and certificates of death provided for their families.<sup>[2]</sup>

In examining this issue it became clear that any new piece of legislation should aim to address not only the needs of the families of the disappeared for a death certificate, but also aim to provide a procedure whereby the cases of other missing persons who are presumed to have died could be addressed. There is a large number of persons reported missing to the PSNI every year, although the majority are found within a few days. Some missing persons will, however, not be traced so easily. Towards the end of 2007 there were some 68 people registered as missing with PSNI.

## Consultation

The Department conducted a public consultation on a draft Bill between 23 January and 15 April 2008.<sup>[3]</sup> Over 500 copies of the paper were distributed to a wide range of organisations and individuals including political parties, MLAs and MPs, local councils, faith groups and churches and local and voluntary groups as well as interested individuals. The Victims' Unit of OFMDFM also circulated copies of the Paper on the Department's behalf to victims' groups in Northern Ireland. A reminder letter was issued on 26 March 2008 to selected non-respondents encouraging responses by 15 April 2008.

Publication of the Paper was accompanied by the issue of a Press Release and the placing of public notices in the Belfast Telegraph, Newsletter and Irish News. The Paper was also placed on the Department's website.

During the course of the consultation period officials met with several of the families of the disappeared (on 20th March 2008) to discuss their concerns. While all the families were invited to participate in the meeting, some viewed the idea of discussing how to obtain death certificates too difficult and declined the invitation.

Only seven written responses were received during the consultation period (see list of respondents at Appendix A).



The consultation issues upon which the Department sought views concerned specific matters relating to the operation of the proposed new statutory High Court jurisdiction and issues surrounding human rights compliance and equality and regulatory impacts.

Since the Paper proceeded on the basis that the Executive was committed to introducing new legislation, the Department did not seek views on whether new legislation was necessary or desirable. Rather, the Paper set out to explain the key features of the proposed High Court jurisdiction and raised questions about specific elements of the process, in particular the jurisdictional rules, the powers of the court and the effect of a declaration.

All of those who responded considered that new legislation dealing with the problems associated with missing persons was to be welcomed or supported.<sup>[4]</sup> In commenting generally on the draft Bill respondents acknowledged that legislative intervention can only go so far to ease the pain and anguish of the families and friends left behind when a person goes missing, whatever the circumstances of the disappearance. One respondent put the matter as follows:

“New legislation cannot cure or remove the psychological impact felt by the families but it can deal with the practical problems more effectively and sympathetically than the law does at present. In doing so, it may alleviate some of the pressures on the families.” (Church of Ireland)

The families of the disappeared have welcomed the Bill in so far as it will assist in general terms the families of those who go missing. They consider, however, that it “does not meet the particular needs of the families of the ‘Disappeared’”. Both orally and in writing they have indicated that given the unique and exceptional circumstances surrounding the disappearance of their loved ones the situation of the families of the disappeared is different from those of other families whose family member goes missing. The response from WAVE Trauma Centre has raised the question of what role might be played by the Independent Commission for the Location of Victims’ Remains in verifying the deaths of the disappeared. They have also queried whether the deaths of the disappeared should be described as “presumed” given the admission of responsibility by certain organisations for their abduction and murder.

One issue not discussed in the Paper but raised with the Department on consultation was the availability of legal aid for proceedings under the new legislation. The response from WAVE also asked for consideration to be given to assisting the families with the cost of undertaking the necessary legal proceedings.

Paragraphs 65 to 68 of the Consultation Paper<sup>[5]</sup> discussed the desirability of including within the Bill some provision allowing disclosure of information from government departments which might assist the High Court in deciding whether or not to make the declaration of presumed death sought by the applicant. The purpose of such disclosure would be to ensure that government departments did not have information which might contradict the evidence presented to the Court by the applicant.

Section 9 of the Presumption of Death (Scotland) Act 1977 sets out a general duty on the world at large to disclose to the court any information relevant to the application for a declaration of presumed death.<sup>[6]</sup> Colleagues in Scotland cannot recall the provision being complied with, presumably because those who may have relevant information are unaware of the proceedings.

The Presumption of Death Bill (Northern Ireland) 2008 does not contain any provision dealing with the disclosure of information by government bodies or agencies or other persons which might be relevant to the question of whether a missing person may be presumed to be dead.

While the Department could see merit in making some provision which would require the disclosure by government departments of information relevant to an application for a declaration

or an application for a variation order it did not consider that the Scottish provision was a useful precedent to follow. The Department stated that if they were to consider further the question of disclosure of information they would wish to identify a more focused approach which deals only with information held by government departments or agencies which suggests that the missing person is in fact alive. The principal aim of a new provision would be to identify the government departments or agencies which might have relevant information and provide the legal authority for the disclosure of that information by them.

The purpose of obtaining such information is to build into the process a minimum safeguard to ensure that there is not information available which contradicts the application. The Department felt, however, that it would be very rare that the various government agencies would hold information which suggested that the missing person is still alive.

The Department asked: 'Do consultees consider that it would be useful to include provision requiring specified government bodies to disclose information which may be relevant to the question of whether a missing person may be presumed dead? If such a duty is placed on government departments should the information be disclosed directly to the Court?'

Almost all the respondents who commented, including the judiciary, emphasised the need for some provision in the Bill which would enable all relevant information to be before the High Court to ensure the Court is fully informed when making an order for a declaration of death. A number agreed with the proposition that the information be disclosed directly to the Court by the holders of relevant information. The families of the disappeared have suggested a role for the Independent Commission for the Location of Victims' Remains in assisting the High Court.

## **Purpose of the Bill**

The Bill is designed to provide a legal framework addressing the needs of the families of people from Northern Ireland who go missing. It is intended to help address the immediate concerns of the families of the disappeared and also to be a useful piece of law reform.

The Bill has two primary client groups:

### **(1) The disappeared**

At the time of the introduction of this Bill, there remain nine individuals who were abducted and murdered during the Troubles whose remains have still not been located, despite the ongoing efforts of the Independent Commission for the Location of Victims' Remains. The families of some of the disappeared had expressed concerns that there is no facility within Northern Ireland law to allow the deaths of their family member to be registered by the Registrar General and death certificates made available to the families.

### **(2) Other missing persons**

Several thousand persons are reported missing each year in Northern Ireland, the largest group of them young people absent from care. While the vast majority of all missing persons return home within 72 hours, there will always remain some people who are reported missing and who never return home and from whom nothing more is heard or known. From the circumstances of the disappearance it may often be inferred that the person has died at their own hand or in some freak accident – the personal belongings found near a cliff edge or onboard a ferry etc. For others it will likely be the passage of time itself which points to a conclusion that the missing person is dead.

## Overview of the Bill

The primary content of the proposed new legislation is the creation of a new right to apply to the High Court for a declaration that a person may be presumed dead on the basis that there is evidence that the missing person (a) died during a particular period of time as a result of a particular event or (b) has not been known to be alive for a period of more than 7 years.

## Content of the Bill

The Bill contains 20 Clauses and three Schedules as follows (the descriptions below are taken from the Explanatory and Financial Memorandum<sup>[7]</sup>, with references added where appropriate to the results of the consultation exercise):

### Clause 1: Declarations of presumed death

This Clause sets out the alternate grounds on which the High Court can make a declaration that a missing person may be presumed dead. The missing person must be thought to have died or have not been known to be alive for a period of at least 7 years. Under Clause 1 any person may make an application to the High Court, although the Court must refuse (under subsection (3)) to hear the application if it considers that the applicant (other than an applicant who is the spouse, civil partner or close relative of the missing person) does not have a sufficient interest in the determination of the application.

Subsection (2) sets out the jurisdictional rules which must be met in order for the High Court to be able to hear the application: either the missing person must have been domiciled or habitually resident in Northern Ireland or, where the applicant is the spouse or civil partner of the missing person, the applicant is domiciled or habitually resident in Northern Ireland.

With regard to the duration of disappearance, the Department asked: 'Do consultees agree the High Court should have power to make a declaration of presumed death where a person has not been known to be alive for a period of seven years or more?'

Two respondents (Eastern Health & Social Services Board and WAVE) considered that the seven year period was too long. It was suggested that families affected by the disappearance of a loved one would consider a five year period as more appropriate. Other respondents who commented considered the seven year period to be appropriate.

On the matter of applications to the High Court, the Department asked: 'Do consultees agree with the formulation of the jurisdictional rules in Clause 1(2) of the draft Bill?'

As currently drafted the Bill allows any person with an interest to apply to the High Court for a declaration. However, the Bill provides that the High Court can only hear cases in relation to missing persons who were domiciled or habitually resident in Northern Ireland, except where the applicant is the spouse or civil partner of the missing person. In that case, it is sufficient for the applicant to have a connection to Northern Ireland by being domiciled or habitually resident here. Special provision is made for applications by the spouse or civil partner in Clause 1(3) in that such applicants will be deemed to have a sufficient interest in seeking the declaration under Clause 1(1).

The jurisdictional rules were broadly welcomed by the majority of respondents. However two respondents expressed some concerns. The Eastern Health & Social Services Board noted that the draft Bill applied only to people normally domiciled in Northern Ireland. Noting that the International Commission for the Location of Victims' Remains is an all-island body, there is a

suggestion that some of the disappeared within the remit of the Commission may not be domiciled in Northern Ireland and may fall outside the scope of the draft Bill.

A second respondent (Mr Alan Hewitt, retired former partner L'Estrange & Brett) queried the need for Clause 1(2)(b)(ii) which allows a spouse or civil partner of a non Northern Ireland domiciled missing person to apply to the High Court if that spouse or civil partner can establish domicile or habitual residence. He noted that in a given situation neither the missing person nor the applicant may have any real connection with Northern Ireland. However, if the applicant moves to Northern Ireland (say from England) he or she may apply to the High Court in Northern Ireland even though the marriage or civil partnership was formed in England and the missing person and the applicant were both domiciled in England at the time of the disappearance.

## **Clause 2: Making of declaration of presumed death**

This Clause makes further provision in relation to declarations of presumed death. It provides that when the High Court makes a declaration of presumed death it must also find either that (a) the missing person has died at a specified time and date or at the end of a specified period in cases where the evidence leads the Court to conclude that the missing person has died, or (b) where the missing person has not been known to be alive for a period of at least 7 years that the missing person died at the end of the day occurring after the date on which the missing person was last known to be alive.

## **Clause 3: Effect of declaration of presumed death**

This Clause provides for the general effect of a declaration of presumed death under Clause 1. In essence, the declaration of presumed death shall be conclusive for all purposes and against all persons – it will have the same effect in law as if the missing person had died and his or her death recorded by the Registrar General for Northern Ireland in the usual manner.

The Department recognised that there may be additional sensitivities involved where the missing person was married or in a civil partnership and the spouse or civil partner is not the applicant and does not wish the marriage or civil partnership to be brought to an end. The Department's view was that it would not be right to seek to protect the status of the subsisting marriage or civil partnership. The Department asked: 'Do consultees agree that a declaration of presumed death should be binding on all persons and for all purposes, including the dissolution of the missing person's marriage or civil partnership?'

Apart from one respondent, all those who commented agreed that a declaration of presumed death should be binding on all persons and for all purposes. Although recognising that the making of a declaration may involve ending a person's marriage or civil partnership against their wishes respondents acknowledged the Department's explanation that it is undesirable for a person to be recognised as dead for some purposes but not others.

One respondent did not believe that a declaration should in every case be binding on all persons for all purposes (Mr Alan Hewitt, retired former partner, L'Estrange & Brett). A concern was raised about the provision in Clause 3(2) in the draft Bill (that a declaration shall bind the Crown) to the extent that this might possibly prevent criminal or civil proceedings against a missing person who has gone missing to avoid criminal or tax problems.

The Department has now removed Clause 3(2) from the Bill.

## **Clause 4: Powers of the High Court**

This Clause deals with the ancillary powers of the High Court which may only be exercised if it makes a declaration of presumed death. There are 3 powers: to determine the domicile of the missing person; to determine questions relating to the interest of any person in the missing person's property and to make such order as it considers reasonable as to any rights to or in property acquired as a result of the making of a declaration of presumed death.

Subsection (2) provides that an order under Clause 4(1)(b) may direct that the value of any rights to or in property acquired as a result of the making of a declaration of presumed death are irrecoverable.

The Department expects that in the majority of cases the applicant will seek only the declaration of presumed death and there will be no cause for the High Court to make further orders relating to property rights or determinations in relation to domicile or interests in the property of the missing person. If further action is required it is likely that this will relate to the administration of the estate of the missing person and in such a case the existing law governing succession to the estates of deceased persons will apply.

The Department asked: 'Do consultees consider that the range of ancillary powers available to the High Court is appropriate?'

Those who responded generally agreed that the draft Bill contained sufficient ancillary powers to enable the High Court to deal with the cases which came before it. A concern was expressed by the Northern Bank Ltd that the draft Bill did not give the High Court "leave to grant ancillary orders to corporate entities, especially creditors, with an interest in the missing person's property" and sought clarification.

### **Clause 5: Variation orders**

This Clause provides the High Court with the power, on application to it, both to vary and to revoke a declaration of presumed death made under Clause 1. Whilst any person may apply for a variation order, subsection (2) provides that the Court must refuse to hear the application if it considers that the applicant does not have a sufficient interest in the determination of the application.

### **Clause 6: Effect on property rights of variation order**

This Clause sets out the general rule that a variation order under Clause 5 is to have no effect on property rights acquired as a result of the making of a declaration under Clause 1. While subsection (2) allows the High Court to make a further order in relation to any rights to or in any property acquired as a result of the making of a declaration of presumed death, subsection (5) makes clear that, except in exceptional circumstances, no order under subsection (2) can be made unless the application for a variation order was made within 5 years of the making of the declaration of presumed death. Subsection (3) further limits the scope of any order which may be made under subsection (2) by providing that no such order shall cause income, generated during the period from the making of the declaration to the making of the variation order, to be returned to the missing person or otherwise redistributed to a person entitled to it in consequence of the variation order.

Subsection (4) sets out the considerations which the High Court must take into account in deciding whether to make an order under subsection (2). Subsection (6) provides protection to a bona fide purchaser for value of any property acquired from a person who was entitled to it on foot of a declaration under Clause 1. Subsection (7) deals with a trustee's liability for breach of trust.

The need to vary the terms of the declaration may arise because new evidence comes to light that the person may be presumed to have died at a time or date other than that specified in the declaration. The need to revoke the declaration will arise if the missing person turns out to be alive.

If the declaration has been revoked the question arises as to whether any property of the missing person or its value can be returned to him or her. Clause 6 sets out the circumstances in which the High Court can make an order for the return of property to the missing person following a revocation of the declaration. It also deals with cases where a new time of presumed death of the missing person (a variation of the declaration) might result in the property of the missing person being transferred to persons other than the original recipients.

The Department asked: 'Do consultees agree that a variation or revocation of a declaration of presumed death made more than five years after the date of the declaration should have no effect on the rights to or in property of others acquired as a result of the making of the declaration of presumed death in relation to the missing person?'

No respondent objected to the Court having power to make a property variation order. Several respondents, however, expressed strong reservations about the lack of flexibility which the 5 year rule imposes on the Court. Arguments were made that the Court should have some measure of discretion in deciding whether the 5 year rule should apply in a specific case. For example, the judiciary noted that the automatic application of a 5 year rule may not be appropriate in the case of a child who is declared to be presumed dead. It was suggested that in exceptional cases such as this the Court should have the power to order that the 5 year period should not begin until the date of the child's 18th birthday had been reached. Another respondent also argued for greater judicial discretion.

One respondent also queried the availability of remedies in cases where an insurance fraud was being perpetrated if the 5 year rule applied automatically to prevent the High Court from making an order for restitution under Clause 6(2).

The Department has since added the words 'except where it considers there are exceptional circumstances' to the draft version of Clause 6(5). This should give the Court some flexibility in relation to the 5 year rule.

## **Clause 7: Insurance against claims**

This Clause sets out two rules relating to insurance. First, subsection (1) provides that where following a declaration of presumed death a person becomes trustee of the property of the missing person, the trustee shall take out insurance to cover the cost of returning the property to the missing person if he turns out to be alive or to transferring property to another person in consequence of a variation order under Clause 6(2). Second, subsection (3) provides that where the missing person's life was insured, an insurer may require the person who receives the insurance money to take out insurance to cover the cost of returning the insurance money should the missing person turn out to be alive.

Recent press reports have highlighted the real but rare possibility that a person who has been declared to be dead will in fact still be alive. This could happen either through simple mistake where the person declared dead had simply wanted to break contact with his or her family and was unaware that the disappearance had resulted in court proceedings for a declaration of presumed death. Or, the declaration of presumed death may have been obtained by fraud.

Although modelled on section 6 of the Presumption of Death (Scotland) Act 1977, Clause 7 departed from the Scottish model in its treatment of insurance monies paid out on foot of a declaration.

The Department asked: 'Do consultees agree that the payment of insurance monies by way of annuity or periodical payment should be treated in the same way as payment of a capital lump sum?'

While the inclusion in the Bill of a requirement to take out insurance to cover subsequent claims was accepted in principle, two respondents expressed some reservations. One respondent questioned the reasons for departing from the insurance provisions in the Presumption of Death (Scotland) Act 1977 which exclude the obligation to repay capital sums paid by an insurer by way of an annuity and other periodical payment.<sup>[8]</sup> It was suggested by the Church of Ireland that depending on the actual amount of any annuity or periodical payment the person in receipt of such a payment may find it difficult financially to raise the amount of any insurance premiums payable, as would be required by Clause 7(3).

It was further suggested that unless there is conclusive evidence that the missing person was dead the premiums could be prohibitively expensive (Alan Hewitt, retired former partner L'Estrange & Brett). Further clarification of this issue with the insurance industry was suggested.

### **Clause 8: Supplementary provisions as to declarations, etc.**

This Clause provides that Rules of the Supreme Court shall make supplementary provision, inter alia, in relation to applications for declarations of presumed death and variation orders. The Rules will prescribe the forms to be used and detail those persons who should receive notice of applications made under the Bill.

### **Clause 9: Provisions relating to the Attorney General**

This Clause provides that the Attorney General for Northern Ireland shall receive notice of all applications for a declaration of presumed death and a variation order under the Bill. Subsection (3) provides that the Attorney General may intervene in any proceedings to argue before the High Court any question which he or she thinks should be fully argued.

### **Clause 10: Right to intervene**

This Clause sets out the circumstances in which any person may intervene in any proceedings for a declaration of presumed death under Clause 1 or a variation order under Clause 5. Subsection (2) provides that a person seeking to intervene (other than the spouse, civil partner or close relative of the missing person) shall have to obtain the leave of the High Court.

Subsection (3) provides that a person intervening may (a) argue before the High Court any question which the Court considers it necessary to have fully argued; (b) seek the making by the Court of an order or determination under Clause 4 (if intervening on an application under Clause 1); and (c) seek the making by the Court of a determination under Clause 5(4) or an order under Clause 6(2) (if intervening on an application under Clause 5).

### **Clause 11: Costs**

This Clause confers on the High Court a broad power to make such order as to who shall pay for the costs of proceedings as it considers just. Costs may be ordered to be paid using the property of the missing person.

## **Clause 12: Power to amend certain time periods**

This Clause allows the Department of Finance and Personnel to amend certain provisions in the Bill. First, the Department may increase or decrease the length of time a person must have not been known to be alive before the High Court may make a declaration under Clause 1. Second, the Department may increase or decrease the 5 year limitation period in relation to property variation orders made by the Court under Clause 6(2).

## **Clause 13: Repeal of certain statutory provisions relating to presumption of death**

This Clause provides that the existing statutory provisions permitting the High Court to dissolve a marriage or civil partnership on the ground of the presumed death of a spouse or civil partner (contained in the Matrimonial Causes (Northern Ireland) Order 1978 and the Civil Partnership Act 2004 respectively) shall cease to exist.

## **Clause 14: Register of Presumed Deaths**

This Clause, together with Schedule 1, provides for the Registrar General for Northern Ireland to establish and maintain a Register of Presumed Deaths. The powers of the Registrar General in relation to the new Register are set out in Schedule 1.

## **Clause 15: Orders and Regulations**

This Clause deals with the subordinate legislation procedure applicable to the making of orders and regulations under the Bill.

## **Clause 16: Interpretation**

This Clause defines certain words or phrases used in the Bill.

## **Clause 17: Supplementary provision**

This Clause allows the Department to make transitional, saving, supplementary, incidental and consequential provision in connection with the Bill.

## **Clause 18: Amendments and repeals**

This Clause, together with Schedules 2 and 3, deals with a small number of consequential amendments and repeals of legislation. They should be read alongside Clause 13.

## **Clause 19: Commencement**

This Clause provides that the substantive provisions shall come into force at a date to be determined by the Department. The commencement order will be made as soon as the necessary rules of court and registration regulations have been drafted.

## **Clause 20: Short title**

This Clause provides that the new legislation shall be known as the Presumption of Death Act (Northern Ireland) 2008.



## **Schedule 1: Register of Presumed Deaths**

This Schedule and Clause 14 provide for the Registrar General for Northern Ireland to establish and maintain a Register of Presumed Deaths. The powers of the Registrar General in relation to the new Register are set out in Schedule 1.

## **Schedule 2: Consequential amendments**

This Schedule deals with a small number of consequential amendments of legislation. This should be read alongside Clause 13.

## **Schedule 3: Repeals**

This Schedule deals with a small number of repeals of legislation. This should be read alongside Clause 13.

## **Costs and Options Considered**

The Bill will give rise to additional administrative costs in the Registrar General's office which can be accommodated within existing resources. Some additional cost to the legal aid budget is likely.

The following options and the Department's views on them are listed in the Explanatory Memorandum:

Four options were considered:

- i) Do nothing – doing nothing would have failed to meet the political imperative of legislating to enable the deaths of the disappeared to be registered and certificates issued to their families.
- ii) Amend the Births and Deaths Registration (Northern Ireland) Order 1976 to allow registration of a missing person's death after an investigation had concluded that the person is believed to be dead and provided the person had been missing for 7 years. This limited proposal was rejected as it would sit uneasily with the existing system of death registration in Northern Ireland in the 1976 Order which requires the presence of a dead body and the involvement of a medical practitioner or coroner.
- iii) Amend the Coroners Act (Northern Ireland) 1959 to allow a coroner to investigate the cases of missing persons where it is believed that the person was dead. This option was dismissed as, in the absence of a body, it was difficult to see how the coroner would be able to come to any determination as to how, when and where the missing person came by his or her death.
- iv) Introduce a new comprehensive piece of legislation, modelled on the Presumption of Death (Scotland) Act 1977, which would confer on the High Court in Northern Ireland the power to issue a declaration that a person who is missing may be presumed to have died (a) if there is evidence that the person is likely to have died, or (b) where the missing person has not been known to be alive for a period of at least 7 years. The Bill implements this fourth option.

## **Human Rights and Equality Impact Assessment**

The provisions of the Bill are considered by the Department to be compatible with the Human Rights Act 1998.

In the Consultation Paper, the Department asked: 'Do you agree with the Department's opinion that the provisions of the draft Bill are Convention compliant?'

Three respondents commented on this question and agreed with the Department's view that the provisions of the draft Bill were Convention compliant.

The Department also included its Equality Impact Screening as part of the public consultation. The screening exercise concluded that an Equality Impact Assessment was not required.

Equality considerations are largely confined to Clause 1 of the Bill which sets out the jurisdictional rules which must be satisfied before the High Court may hear an application for a declaration of presumed death. The primary jurisdictional rule is that the missing person must have been domiciled in Northern Ireland on the date on which he or she was last known to be alive or habitually resident there throughout the period of one year ending with that date. This in itself raises no equality issues. Rather, Clause 1 makes special provision for applications by the spouse or civil partner of the missing person. In those cases it is the applicant's domicile or habitual residence which is important and in such cases the High Court can hear the case even though the missing person himself was neither domiciled nor habitually resident in Northern Ireland. This raises the question as to why other persons who lived/cohabited with the missing person before his or her disappearance should not be treated in the same way as spouses and civil partners.

No respondent argued that the proposals in the draft Bill merited a full Equality Impact Assessment. Those who responded on the issues raised commented that the proposals in relation to the jurisdictional rules in Clause 1 did not result in any adverse impact/unfair disadvantage on any of the groups identified in section 75 of the Northern Ireland Act 1998.

## **Regulatory Impact Assessment**

The Department included its consideration of the potential regulatory impacts as part of the public consultation. It concluded that no Regulatory Impact Assessment was required.

The Department included, as an Annex to the Consultation Paper, a consideration of the regulatory impacts which may arise as a result of the draft Bill. The Department had concluded that the impacts on businesses, charities, social economy enterprises and the voluntary sector would be negligible, if any costs arose at all.

No respondent argued that the proposals merited a Regulatory Impact Assessment.

## **Conclusions**

While the response to the consultation was disappointing, the Department does appear to have taken on board most of the points raised by those who did respond. However, it appears that there may still be at least two important issues that have not yet been fully addressed i.e. the disclosure of information by government bodies (to help the Court make a decision on a declaration of presumed death), and the cost of taking out insurance (particularly where the insurance is taken out to cover the possible repayment of annuities or other periodical payments made by insurers).

The Presumption of Death (Scotland) Act 1977 contains a Clause which imposes a duty on any person (including the Secretary of State for Social Services) with information relating to the survival or death of the missing person to disclose that information. The Department for Finance & Personnel, however, did not consider this Clause to be useful.

Of the few who did respond to the consultation, almost all who commented, including the judiciary, emphasised the need for some provision in the Bill which would enable all relevant information to be before the High Court to ensure the Court is fully informed when making an order for a declaration of death. The families of the disappeared suggested a role for the Independent Commission for the Location of Victims' Remains in assisting the High Court.

It might provide a useful safeguard, if a cross-check of government records (particularly those relating to benefits, health or wider police records) was included somewhere in the process.

In relation to insurance, the Presumption of Death (Scotland) Act 1977 excluded the obligation to take out insurance to repay an insurer for any annuity or other periodical payment, where a declaration has been overturned. In this Bill, all insurance payments are treated the same i.e. the insurer may, before making a payment as a result of a declaration, require the beneficiary to take out an insurance policy to cover any future claim that the insurer may make as a result of a variation order being made. As pointed out by two of the respondents, the cost of these premiums could be prohibitive, or at the very least could substantially reduce any insurance benefits for the relatives of the missing persons.

Apart from these issues, the Bill appears to provide a useful legal framework for addressing the needs of the families of people from Northern Ireland who go missing.

## **Annex A: List of Respondents to the Consultation**

Church of Ireland (Church in Society, Social Justice and Theology (NI) Group)

Eastern Health & Social Services Board

Mr Alan Hewitt (Retired Solicitor, former partner L'Estrange & Brett)

Lisburn City Council

Lord Chief Justice's Office (on behalf of the judiciary)

Northern Bank Ltd

WAVE Trauma Centre

[1] [http://archive.niassembly.gov.uk/legislation/primary/2007/nia23\\_07.htm](http://archive.niassembly.gov.uk/legislation/primary/2007/nia23_07.htm)

[2] See Explanatory and Financial Memorandum - [http://archive.niassembly.gov.uk/legislation/primary/2007/niabill23\\_07efm.htm](http://archive.niassembly.gov.uk/legislation/primary/2007/niabill23_07efm.htm)

[3] [http://www.dfpni.gov.uk/presumption\\_of\\_death\\_bill.pdf](http://www.dfpni.gov.uk/presumption_of_death_bill.pdf)

[4] [http://www.dfpni.gov.uk/presumption\\_of\\_death\\_bill\\_-\\_consultation\\_report.pdf](http://www.dfpni.gov.uk/presumption_of_death_bill_-_consultation_report.pdf)

[5] [http://www.dfpni.gov.uk/presumption\\_of\\_death\\_bill.pdf](http://www.dfpni.gov.uk/presumption_of_death_bill.pdf)

[6]

<http://www.statutelaw.gov.uk/SearchResults.aspx?TYPE=QS&Title=&Year=1977&Number=&LegType=Act+%28UK+Public+General%29>

[7] [http://archive.niassembly.gov.uk/legislation/primary/2007/niabill23\\_07efm.htm](http://archive.niassembly.gov.uk/legislation/primary/2007/niabill23_07efm.htm)

[8]

<http://www.statutelaw.gov.uk/SearchResults.aspx?TYPE=QS&Title=&Year=1977&Number=&LegType=Act+%28UK+Public+General%29>