



Assembly and Executive Review Committee

**Review of the Initial Ministerial Provision in
relation to the Department of Justice and
recommendations relating to the arrangements
from 1 May 2012.**

Stakeholder Options Paper

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Background to the appointment of the current Minister of Justice

During the previous mandate (2007-2011) the Assembly and Executive Review Committee undertook an inquiry into the proposed devolution of policing and justice powers to the Assembly. During the inquiry, the Office of the First and deputy First Minister communicated to the Committee that it had agreed a way forward on the discharge of policing and justice functions. The letter, dated 18 November 2008, stated that: “The...arrangements would be subject to a sunset clause which would bring them to an end not later than May 2012”¹. In its subsequent report on the arrangements for the devolution of policing and justice powers, the Assembly and Executive Review Committee endorsed this position.

On 9 March 2010 the First Minister and deputy First Minister tabled a motion jointly for a resolution by the Assembly, under section 4(2A) of the Northern Ireland Act 1998 (“ the 1998 Act”) that certain policing and justice matters should cease to be reserved. The motion was passed with cross-community support².

The Department of Justice Act (Northern Ireland) 2010 (“the 2010 Act”) subsequently provided for the establishment of the Department of Justice and for the appointment of a Northern Ireland Minister to be in charge of that Department. The 1998 Act requires that, when a new Department is established, a determination of ministerial responsibilities must be made by the First Minister and deputy First Minister and approved by the Assembly. On 12 April 2010 a determination under Section 17 of the 1998 Act was made and approved by a resolution of the Assembly with cross-community support. Although the original determination was revoked the functions and status of the 10 existing Northern Ireland Ministers was unaffected by the

¹ Assembly and Executive Review Committee, *First Report on the Arrangements for the Devolution of Policing and Justice Matters* January 2009

² HC Deb NIA 9 March 2010 <http://www.niassembly.gov.uk/record/reports2009/100309.htm#a6>

new determination, with the Minister for Justice being added to their number.³

On the same day (12 April 2010), Mr David Ford of the Alliance Party was appointed Minister for Justice, in accordance with the procedures set out in Part 1A of Schedule 4A to the 1998 Act, and in Standing Order 44A, his nomination having been approved by a resolution of the Assembly endorsed by parallel consent. Following the Assembly elections in May 2011, Mr Ford was reappointed to the position of Justice Minister under the same process i.e. having been approved by a resolution of the Assembly and endorsed by a majority of the Members voting, including a majority of designated Nationalists and a majority of designated Unionists.

What may occur by 1 May 2012?

In its report on the arrangements for the devolution of policing and justice powers, the previous Assembly and Executive Review Committee made the following recommendations:

- Any Member elected as the Minister for Justice, up until May 2012, would require a majority of Assembly Members, present and voting, including a majority of designated nationalists and a majority of designated unionists. In circumstances where a vacancy was to occur, during this period, the vacancy would be filled in the same way.
- These arrangements would be subject to a sunset clause which would bring them to an end not later than May 2012.
- Following a period of operation, the arrangements would be reviewed.
- Permanent arrangements would be put in place by 1 May 2012, and there would be no fall back arrangements. This would require the political parties to agree a way forward, by this time.

Schedule 1, Part 3, paragraph 8(1) of the Northern Ireland Act 2009 (" the 2009 Act") makes provision for the dissolution of the first Northern Ireland Department established by an Act of the Assembly the purpose of which is to exercise functions consisting wholly or mainly of devolved policing and

³ As per paragraph 6 of Schedule 1 to the Northern Ireland Act 2009

justice functions. The Department of Justice meets this description and therefore dissolves on 1 May 2012 unless before that date, either-

- a) the Assembly resolves, with cross community support, that the Department is to continue operating from 1 May 2012, or
- b) a “second Act” of the Assembly provides that the Department is to continue operating from 1 May 2012

The Assembly and Executive Review Committee's Review of the Initial Ministerial Provision in relation to the Department of Justice.

On 10 October 2011, The Northern Ireland Assembly approved the following Motion:

“That, pursuant to Standing Order 59(4)(b), this Assembly refers to the Assembly and Executive Review Committee the matter of a review of the Initial Ministerial provision in relation to the Department of Justice and agrees that the Assembly and Executive Review Committee should make recommendations relating to the provision that should exist from 1 May 2012.”

The Committee subsequently agreed the Terms of Reference for this Review at its meeting on 11 October 2011 and agreed that this Stakeholder Options Paper be issued to all Political Parties, OFMdFM, Department of Justice and the corresponding Assembly Statutory Committees for these Departments.

The Terms of Reference for this Review are as follows:

- To review the Initial Ministerial provision in relation to the Department of Justice by seeking views from key stakeholders on the suitability and adequacy of the initial provision.
- To make recommendations relating to the arrangements from 1 May 2012 in relation to the Ministerial provision for the Department of Justice by consulting with key stakeholders on the options that are provided for in legislation.
- To complete the review and report to the Assembly w/c 21 November 2011.

The Committee is seeking the views of these key Stakeholders by Friday 28 October 2011 in order that it may report to the Assembly by 21 November 2011.

The tight timescales of the Review reflect the very challenging timetable that would exist should the Assembly agree that a 'second Act' must be in place before 1 May 2012

Stakeholder Options

This section details possible options that flow from the legislation that *could* be developed but may not necessarily be a practical or viable way forward.

The Initial Ministerial Provision - Explanation

The 2010 Act provides at section 2(1) that the Department of Justice is to be in the charge of a minister appointed by virtue of a nomination (a) made by one or more members of the Assembly; and (b) approved by a resolution of the Assembly passed with the support of – (i) a majority of the members voting on the motion for the resolution, (ii) a majority of the designated Nationalists voting and (iii) a majority of the designated Unionists voting. This is the model set out at section 21A(3A) of the 1998 Act, as inserted by the 2009 Act and referred to therein as the “initial ministerial provision”. The provision at section 2 (1) of the 2010 Act is therefore the initial ministerial provision.

This is the method by which the current Minister for Justice was appointed.

Broad Options

The options outlined below are usefully illustrated and explained in the Assembly ‘Research and Information Service’ Briefing Note at Annex A. This paper and the paper at Annex A should not be relied upon as legal advice.

The Department of Justice dissolves on 1 May 2012 unless, *before* 1 May 2012 –

- a) the Assembly resolves, with cross-community support, that the Department is to continue operating from 1 May 2012, or
- b) a second Act of the Assembly provides that the Department is to continue operating from 1 May 2012.

THE OPTIONS AVAILABLE TO THE ASSEMBLY ARE AS FOLLOWS:

OPTION A - Assembly resolves that the Department is to continue operating from 1 May 2012.

The Assembly may pass a resolution, with cross community support, that the first Department of Justice is to continue operating from 1 May 2012. Such a resolution would mean that the “initial ministerial provision” would continue as before as such a resolution will not and cannot, repeal the “initial ministerial provision”.

Should the Assembly resolve that the Department is to continue operating from 1 May 2012, the incumbent Minister for Justice would remain in post until such times as he ceases to hold office under the 1998 Act. The initial ministerial provision does not change.

OPTION B – Second Act under the Northern Ireland Act 2009 (before 1 May 2012)

Before 1 May 2012, a ‘second Act of the Assembly’ may provide that the first Department of Justice is to continue operating from 1 May 2012, under para 8(3) of Schedule 1 to the 2009 Act.

Several sub options are available to the Assembly, should it agree to pass a ‘second Act’.

Option 1

The ‘second Act’ may repeal the initial ministerial provision and replace it with a model from section 21A of the 1998 Act, except the model under section 21A (3A), that is to say it may not replace the initial ministerial provision with identical provision.

This means that the second Act may provide for the Department of Justice, with effect from a specified date, to be in the charge of:

- a) A Northern Ireland Minister appointed by virtue of a nomination by the First Minister and deputy First Minister acting jointly and approved by a resolution of the Assembly on a parallel consent basis (section 21A (3)); or

- b) Two Northern Ireland Ministers acting jointly (section 21A (4));
or
- c) A Minister and junior Minister and for the persons holding those offices to rotate at intervals (section 21A (5));or
- d) A Northern Ireland Minister elected by the Assembly and supported by a deputy Minister elected by the Assembly (Section 21A(5A)).

If the 'second Act' repeals the initial Ministerial Provision, a determination under section 17(1), which relates to Ministerial offices, would have to be made. That is, the First Minister and deputy First Minister would, with cross community support, determine the number of Ministerial offices and their functions. All Northern Ireland Ministers would lose office, including the Minister for Justice. Those offices would then be filled under section 18 of the 1998 Act (that is, the d'Hondt process) except the Minister of Justice who would then be appointed in line with the alternative provision set out under the selected model (a – d above).

Option 2

Alternatively a 'second Act' that repeals the "initial ministerial provision" may provide for the Department to be in the joint charge of the First Minister and deputy First Minister. A determination of Ministerial offices under section 17(1) must be made and section 18 (d'Hondt) will apply, save in respect of the Department of Justice, which will be in the charge of the FM and dFM.

Option 3

If the 'second Act' repeals the "initial ministerial provision" and none of the arrangements described under options 1 and 2 above are put in place, a determination of Ministerial offices under section 17(1), would have to be made. All Northern Ireland Ministers would lose office, including the Minister for Justice. Those offices would then be filled under section 18 of the 1998 Act (that is, the d'Hondt process).

Option 4

If the 'second Act' provides that the Department of Justice is to continue operating from 1 May 2012 but does not repeal the "initial ministerial provision", then the incumbent Minister for Justice would stay in post until such times as he ceases to hold office under the 1998 Act. The initial ministerial provision does not change.

An Act of the Assembly may, under section 21 of the 1998 Act, subsequently dissolve the Department of Justice operating under the second Act; indeed, an Act of the Assembly may dissolve any Northern Ireland department at any time in accordance with section 21.

NB *It is important to note that, in the view of the Assembly and Executive Review Committee, Option B carries with it a risk in terms of timings. In order to meet the 1 May 2012 deadline, the Bill would need to progress through the Assembly and achieve Royal Assent to a very challenging timetable.*

OPTION C – Resolution that the Department is to continue operating from 1 May 2012 with a Subsequent Act.

The Assembly may resolve that the Department of Justice is to continue operating from 1 May 2012 as stated in OPTION A above.

An Act of the Assembly may, under section 21 of the 1998 Act, subsequently dissolve a Department of Justice which is continuing in operation by virtue of a resolution made under paragraph 8(1)(a) of the 2009 Act.

An Act of the Assembly may also make provision for a new Department of Justice, under section 21 of the 1998 Act, and may make provision for the appointment of a Minister for Justice under section 21A of the 1998 Act, using one of the models under section 21A and Schedule 4A as per Option B above. In such a case the Assembly could also use the 'model' provided for in section 21A(3A) of the 1998 Act.

The subsequent Bill would have to comply with section 6 of the Northern Ireland Act 1998 in respect of legislative competence; the mechanisms for appointing ministers are generally speaking excepted matters.

OPTION D – Act Dissolving the Department of Justice pre 1 May 2012

Nothing in the Northern Ireland Act 2009 prevents the Northern Ireland Assembly from dissolving the first Department at any time.⁴ This means that an Act of the Assembly could dissolve the Department of Justice before May 2012.

OPTION E - Do Nothing

If no action is taken, the Department of Justice will dissolve on 1 May 2012. The Ministerial office will remain. The functions in relation to policing and justice will remain devolved.

⁴ Schdeule1, Part 3, paragraph 9 of the Northern Ireland Act 2009.

Guidelines for completion of Submissions

The Committee would ask that Stakeholders submit electronic responses using the enclosed pro-forma.

The pro-forma seeks the views of stakeholders:

- a. On the suitability/adequacy of the initial Ministerial provision and whether it should be continued through a resolution of the Assembly; and
- b. In relation to the arrangement from 1 May 2012 for Ministerial provision for the Department of Justice:
 - i. stakeholders' preferred option(s) ;
 - ii. reasons for this preference(s);
 - iii. options that would not be acceptable to stakeholders; and
 - iv. stakeholders' reasons for 'rejecting' options.

Stakeholders may wish to refer to the Northern Ireland Assembly Research and Information Service Briefing Note – 'Department of Justice Sunset Clause', which is enclosed at Annex a, to assist them when forming views on their preferred options.

Stakeholders are advised that the information contained in this Options Paper or the Briefing Note at Annex a, should not be relied upon as legal advice, or as a substitute for it.

Stakeholders should be aware that their written evidence will be discussed by the Committee in public session and made public by the Committee by publication of its Report or other means.

Stakeholders should also be aware that if they decide to publish their submissions, the publication would not be covered by Assembly privilege in relation to the law of defamation.



Assembly and Executive Review Committee

**Review of the Initial Ministerial Provision in relation to
the Department of Justice and recommendations relating to
the arrangements from 1 May 2012.**

Stakeholder proforma for Submissions

Deadline for submissions Friday 28 October 2011

Submissions should be made to the Committee Clerk as follows:

committee.assembly&executivereview@niassembly.gov.uk

OR

Room 375
Parliament Buildings
Stormont Estate
Ballymiscaw
Belfast BT4 3XX

Stakeholder

(Party/Department/Committee Name)

Submitted by

Contact Details:

Initial Ministerial Provision

The Committee would like you to express your view on the suitability and adequacy of the Initial Ministerial provision to inform its review of this provision.

(This box will expand as you type)

Broad Options

This section lists possible options that flow from the legislation that *could* be developed but may not necessarily be a practical or viable way forward.

The Assembly must have in place arrangements by 1 May 2012 if it wishes to ensure the continued operation of the Department for Justice. The options for the Assembly, as set out in the Committee's Options Paper, are listed below:

- A. Assembly resolves that the Department is to continue operating from May 2012.**
- B. Second Act under the Northern Ireland Act 2009 (before 1 May 2012)**
- C. Resolution that the Department is to continue operating from 1 May 2012 with a Subsequent Act.**
- D. Act Dissolving the Department pre 1 May 2012**
- E. Do Nothing**

Please set out your preferred option and unacceptable options using the box below.

NB If either Option B or C is your preferred option, then please **ALSO** complete the appropriate section entitled "Further Options for a 'second Act' under OPTION B or "Further Options for an Act subsequent upon a resolution as per Option C" overleaf.

(This box will expand as you type)

Further Options for a 'second Act' under OPTION B.

Please complete this section if you have indicated that your preferred option is B.

There are further options (Options 1 – 4 below) open to the Assembly, should it pursue Options B.

In addition, Option B1, has four sub options (a – d) in relation to the models that can be selected for Ministerial provision under that option.

OPTION B1 - A 'second Act' of the Assembly that repeals the initial Ministerial provision and replaces it with provision of the kind mentioned in section 21A of the Schedule 4A to the 1998 Act (save for 21A(3A))

Sub Options under OPTION B1

The Department of Justice, with effect from a specified date, can be in the charge of:

- a) A Northern Ireland Minister appointed by virtue of a nomination by the First Minister and Deputy First Minister acting jointly and approved by a resolution of the Assembly passed with the support of a majority of the Members voting, a majority of designated Nationalists voting and a majority of the designated Unionists voting as per section 21A(3) of the 1998 Act;or
- b) Two Ministers acting jointly as per section 21A(4) of the 1998 Act
- c) A Minister who is supported by a junior Minister and for the persons holding those offices to rotate at intervals to be determined by or under the Act as per 21A(5) of the 1998 Act.
- d) A Northern Ireland Minister who is elected by the Assembly who is supported by a junior Minister elected by the Assembly as per section 21A(5A) of the 1998 Act.

OPTION B2 - A 'second Act' of the Assembly that repeals the initial Ministerial provision and provides for the Department of Justice to be in the charge of the First Minister and deputy First Minister acting jointly with effect from the specified date.

OPTION B3 – A 'second Act' where the initial ministerial provision is repealed but no alternative arrangements are put in place and where the Minister for Justice would be appointed under the D'Hondt mechanism in line with the other Northern Ireland Ministers?

OPTION B4 - A 'second Act' that does not repeal the initial ministerial provision (i.e. the current arrangements stay in place but this achieved through an Act rather than a simple resolution)

Please set out your preferred option and unacceptable options using the box below.

If your preferred option is B1, please also set out your preferred sub option and unacceptable options.

(this text box will expand as you type)

Further Options for an Act subsequent upon a resolution as per OPTION C

Please complete this section if you have indicated that your preferred option is Option C.

There are further options (Options 1 – 2 below) open to the Assembly, should it pursue Options C.

In addition, Option C1, has five sub options (a – e) in relation to the models that can be selected for Ministerial provision under that option.

OPTION C1 - A subsequent Act of the Assembly that repeals the initial Ministerial provision and replaces it with provision of the kind mentioned in section 21A of and Schedule 4A to the 1998 Act.

The Department of Justice, with effect from a specified date, can be in the charge of:

- a) A Northern Ireland Minister appointed by virtue of a nomination by the First Minister and Deputy First Minister acting jointly and approved by a resolution of the Assembly passed with the support of a majority of the Members voting, a majority of designated Nationalists voting and a majority of the designated Unionists voting as per section 21A(3) of the 1998 Act;or
- b) Two Ministers acting jointly as per section 21A(4) of the 1998 Act
- c) A Minister who is supported by a junior Minister and for the persons holding those offices to rotate at intervals to be determined by or under the Act as per 21A(5) of the 1998 Act.
- d) A Northern Ireland Minister who is elected by the Assembly who is supported by a junior Minister elected by the Assembly as per section 21A(5A) of the 1998 Act.
- e) A Minister appointed as per the provision made at section 21A(3A) of the 1998 Act (ie appointed in the same way as under the Initial Ministerial provision).

OPTION C2 - A subsequent Act where the initial ministerial provision is repealed but no alternative arrangements are put in place and where the Minister for Justice would be appointed under the D'Hondt mechanism in line with the other Northern Ireland Ministers.

Please set out your preferred option (C1 or C2) and unacceptable options using the box below.

If your preferred option is C1, please also set out your preferred sub option and unacceptable options.

(This box will expand as you type)

Thank you for your submission

Deadline for submissions is Friday 28 October 2011

Submissions should be made to the Committee Clerk as follows:

committee.assembly&executivereview@niassembly.gov.uk

OR

Room 375
Parliament Buildings
Stormont Estate
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Belfast BT4 3XX

